Women's Bar Association of the State of New York

Professional Ethics Committee presents a:

Continuing Legal Education Program

Presenters: Natoya L. McGhie & Lesley E. Niebel

Natoya L. McGhie is the Principal Court Attorney for the Hon. Jane C. Tully, who presides over felony matters in Kings County Criminal Supreme Court, and custody and visitation cases in Kings County Family Court. Prior, Natoya worked as a Court Attorney in criminal court, where she assisted with the operations of Kings County Human Trafficking Intervention Court. She began her career as a trial attorney with the Criminal Defense Division of The Legal Aid Society.

Natoya is an active member of numerous bar associations. In 2020-2021, Natoya served as President of the Brooklyn Women's Bar Association. She is the founding chair of Mentorship and Young Lawyers Committees and remains an active member of the BWBA board. Natoya is a delegate to the Women's Bar Association of the State of New York and co-chairs the Committee on Professional Ethics, Discipline, and Practice. Natoya sits on the Executive Council of the Network of Bar Leaders. She serves on the Board of Directors of the Caribbean American Lawyers Association. She is a member of the Brooklyn Bar Association, and the Kings County Nathan R. Sobel American Inn of Court. She serves on the Equal Justice Committee for the Second Judicial District. Natoya also previously served on the Independent Judicial Election Qualification Commission for the Second and Thirteenth Judicial Districts.

Natoya was born in Saint Ann, Jamaica. She graduated *cum laude* from John Jay College of Criminal Justice in 2006 and earned a law degree from New York Law School in 2011.

Lesley E. Niebel is an associate at Faraci Lange, LLP. At Faraci Lange, Lesley focuses her practice on all aspects of personal injury litigation, including cases involving sexual abuse, medical malpractice, automobile negligence, construction accidents, and premises liability.

Lesley was born and raised in Fredonia, New York. She went to the State University of New York College at Geneseo where she obtained a bachelor's degree in English and Economics. Lesley then graduated from the Syracuse University College of Law with her Juris Doctor. Following law school, Lesley started at Faraci Lange and has spent her career with the firm. She is admitted to practice in state and federal court in New York and state court in Massachusetts.

Lesley is an active member of the legal community. As a member of the Monroe County Bar Association, Lesley serves as Vice-Chair of the Ethics Committee and on the Young Lawyers Section as its Chair (2021-2022), Treasurer (2020-2021), Secretary (2019-2020), co-chair of the community service committee (2018-2019), and co-chair of the nominations committee (2017-2018). In addition, Lesley serves as a Board Member for the JustCause Project of Monroe County, an Associate Board Member for the New York State Academy of Trial Lawyers, co-chair of the Committee on Professional Ethics, Discipline and Practice for the Women's Bar Association of the State of New York (2020-2022), and previously served as co-chair of the Women's Health Committee for the Greater Rochester Association for Women Attorneys (2020-2021). Formally, Lesley was part of the New York State Bar Association's Attorney Professionalism Committee and Professional Discipline Committee.

In her spare time, Lesley serves on the Board of Directors for the Rochester Spinal Association and writes articles related to legal topics, which have been published in the Journal of Legal Nurse Consulting, the Rochester Daily Record, and the Buffalo Law Journal.

RULE 1.7

CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the law-

yer's ability to exercise professional judgment on behalf of each client. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "differing interests," "informed consent" and "confirmed in writing," see Rules 1.0(f), (j) and (e), respectively.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of interest exists, *i.e.*, whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation, (iii) decide whether the representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is consentable under paragraph (b); and if so (iv) consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include all of the clients who may have differing interests under paragraph (a)(1) and any clients whose representation might be adversely affected under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). *See* Rule 1.10(e), which requires every law firm to create, implement and maintain a conflict-checking system.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). *See* Rule 1.16(b)(1). Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. *See* Rule 1.9; *see also* Comments [5], [29A].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is acquired by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer

must seek court approval where necessary and take steps to minimize harm to the clients. See Rules 1.16(d) and (e). The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* Rule 1.9(c).

Identifying Conflicts of Interest

[6] The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client's informed consent. For example, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is adverse is likely to feel betrayed and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken may reasonably fear that the lawyer will pursue that client's case less effectively out of deference to the other client, that is, that the lawyer's exercise of professional judgment on behalf of that client will be adversely affected by the lawyer's interest in retaining the current client. Similarly, a conflict may arise when a lawyer is required to cross-examine a client appearing as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Differing interests can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

[8] Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions

that each client might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be adversely affected by responsibilities to former clients under Rule 1.9, or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal-Interest Conflicts

[10] The lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. *See* Rule 5.7 on responsibilities regarding nonlegal services and Rule 1.8 pertaining to a number of personal-interest conflicts, including business transactions with clients.

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. Thus, a lawyer who has a significant intimate or close family relationship with another lawyer ordinarily

may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(j).

[12] A lawyer is prohibited from engaging in sexual relations with a client in domestic relations matters. In all other matters a lawyer's sexual relations with a client are circumscribed by the provisions of Rule 1.8(j).

Interest of Person Paying for Lawyer's Services

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's exercise of professional judgment on behalf of a client will be adversely affected by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. As paragraph (b) indicates, however, some conflicts are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client's consent nor provide representation on the basis of the client's consent. A client's consent to a nonconsentable conflict is ineffective. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, a representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 regarding competence and Rule 1.3 regarding diligence.

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, federal criminal statutes prohibit certain representations by a former government lawyer despite the informed consent of the former governmental client. In addition, there are some instances where conflicts are nonconsentable under decisional law.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to mediation (because mediation is not a proceeding before a "tribunal" as defined in Rule 1.0(w)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. *See* Rule 1.0(j). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved. *See* Comments [30] and [31] concerning the effect of common representation on confidentiality.

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one client refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In

some cases the alternative to common representation is that each party obtains separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests. Where the fact, validity or propriety of client consent is called into question, the lawyer has the burden of establishing that the client's consent was properly obtained in accordance with the Rule.

Client Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of (i) a document from the client, (ii) a document that the lawyer promptly transmits to the client confirming an oral informed consent, or (iii) a statement by the client made on the record of any proceeding before a tribunal, whether before, during or after a trial or hearing. *See* Rule 1.0(e) for the definition of "confirmed in writing." *See also* Rule 1.0(x) ("writing" includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. The Rule does not require that the information communicated to the client by the lawyer necessary to make the consent "informed" be in writing or in any particular form in all cases. *See* Rules 1.0(e) and (j). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing. *See* Comment [18].

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the conditions set forth in paragraph (b). The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the understanding necessary to make the consent "informed" and the waiver effective. *See* Rule 1.0(j). The lawyer should also disclose the measures that will be taken to protect the client should a conflict arise, including procedures such as screening that would be put in place. *See* Rule 1.0(t) for the definition of "screening." The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client. For example, if the client is unsophisticated about legal matters generally or about the particular type of matter at hand, the lawyer should provide more detailed information about both the nature of the anticipated conflict and the adverse consequences to the client that may ensue should the potential conflict become an actual one. In other instances, such as where the client is a child or an incapacitated or impaired person, it may be impossible to inform the client sufficiently, and the lawyer should not seek an advance waiver. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or advised by in-house or other counsel in giving consent. Thus, in some circumstances, even general and open-ended waivers by experienced users of legal services may be effective.

[22A] Even if a client has validly consented to waive future conflicts, however, the lawyer must reassess the propriety of the adverse concurrent representation under paragraph (b) when an actual conflict arises. If the actual conflict is materially different from the conflict that has been waived, the lawyer may not rely on the advance consent previously obtained. Even if the actual conflict is not materially different from the conflict the client has previously waived, the client's advance consent

cannot be effective if the particular circumstances that have created an actual conflict during the course of the representation would make the conflict nonconsentable under paragraph (b). *See* Comments [14]-[17] and [28] addressing nonconsentable conflicts.

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or 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.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of this risk include: (i) where the cases are pending, (ii) whether the issue is substantive or procedural, (iii) the temporal relationship between the matters, (iv) the significance of the issue to the immediate and long-term interests of the clients involved, and (v) the clients' reasonable expectations in retaining the lawyer. Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients' interests. If there is significant

risk of an adverse effect on the lawyer's professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1). Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraph (a)(1) arise in contexts other than litigation. For a discussion of such conflicts in transactional matters, see Comment [7]. Regarding paragraph (a)(2), relevant factors in determining whether there is a significant risk that the lawyer's professional judgment will be adversely affected include: (i) the importance of the matter to each client, (ii) the duration and intimacy of the lawyer's relationship with the client or clients involved, (iii) the functions being performed by the lawyer, (iv) the likelihood that significant disagreements will arise, (v) the likelihood that negotiations will be contentious, (vi) the likelihood that the matter will result in litigation, and (vii) the likelihood that the client will suffer prejudice from the conflict. The issue is often one of proximity (how close the situation is to open conflict) and degree (how serious the conflict will be if it does erupt). *See* Comments [8], [29] and [29A].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present at the outset or may arise during the representation. In order to avoid the development of a disqualifying conflict, the lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared (and regardless of whether it is shared, may not be privileged in a subsequent dispute between the parties) and that the lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other. *See* Comment [31].

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. Examples include helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, and arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis. For example, clients may wish to be represented by a single lawyer in helping to organize a business, working out a financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution of an estate or resolving a dispute between clients. The alternative to common representation can be that each party may have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation that might otherwise be avoided, or that some parties will have no lawyer at all. Given these and other relevant factors, clients may prefer common representation to separate representation or no representation. A lawyer should consult with each client concerning the implications of the common representation, including the advantages and the risks involved, and the effect on the attorney-client privilege, and obtain each client's informed consent, confirmed in writing, to the common representation.

[29A] Factors may be present that militate against a common representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, absent the informed consent of all clients, the lawyer will be forced

to withdraw from representing all of the clients if the common representation fails. *See* Rule 1.9(a). In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between or among commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, it is unlikely that the clients' interests can be adequately served by common representation. For example, a lawyer who has represented one of the clients for a long period or in multiple matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the commonly represented clients. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client

will not adversely affect representation involving a joint venture between the two clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitation on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client's affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client's overall mode of doing business, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances, the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

[34A] Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer's client.

[34B] Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer's ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer's corporate client.

Lawyer as Corporate Director

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

RULE 1.8

CURRENT CLIENTS: SPECIFIC CONFLICT OF INTEREST RULES

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not:

(1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative, or

individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:

(1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or

(2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred; 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.

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and

(3) the client's confidential information is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

(j) (1) A lawyer shall not:

(i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;

(ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm; or

(iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

(2) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.

(k) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer's investment on behalf of a client. For these reasons business transactions between a lawyer and client are not advisable. If a lawyer nevertheless elects to enter into a business transaction with a current client, the requirements of paragraph (a) must be met if the client and lawyer have differing interests in the transaction and the client expects the lawyer to exercise professional judgment therein for the bene-

fit of the client. This will ordinarily be the case even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, such as the sale of title insurance or investment services to existing clients of the lawyer's legal practice. *See* Rule 5.7. It also applies to lawyers purchasing property from estates they represent.

[2] Paragraphs (a)(1), (a)(2) and (a)(3) set out the conditions that a lawyer must satisfy under this Rule. Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated in writing to the client in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised in writing of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement and the existence of reasonably available alternatives, and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(j) for the definition of "informed consent."

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially adversely affected by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the client's expense. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction. A lawyer has a continuing duty to monitor the inherent conflicts of interest that arise out of the lawyer's business transaction with a client or because the lawyer has an ownership interest in property in which the client also has an interest. A lawyer is

also required to make such additional disclosures to the client as are necessary to obtain the client's informed consent to the continuation of the representation.

[3A] The self-interest of a lawyer resulting from a business transaction with a client may interfere with the lawyer's exercise of independent judgment on behalf of the client. If such interference will occur should a lawyer agree to represent a prospective client, the lawyer should decline the proffered employment. After accepting employment, a lawyer should not acquire property rights that would adversely affect the lawyer's professional judgment in representing the client. Even if the property interests of a lawyer do not presently interfere with the exercise of independent judgment, but the likelihood of interference can be reasonably foreseen by the lawyer, the lawyer should explain the situation to the client and should decline employment or withdraw unless the client gives informed consent to the continued representation, confirmed in writing. A lawyer should not seek to persuade a client to permit the lawyer to invest in an undertaking of the client nor make improper use of a professional relationship to influence the client to invest in an enterprise in which the lawyer is interested.

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

[4A] Rule 1.8(a) does not apply to business transactions with former clients, but the line between current and former clients is not always clear. A lawyer entering into a business transaction with a former client may not use information relating to the representation to the disadvantage of the former client unless the information has become generally known. *See* Rule 1.9(c).

[4B] The Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[4C] This Rule also does not apply to ordinary fee arrangements between client and lawyer reached at the inception of the client-lawyer relationship, which are governed by Rule 1.5. The requirements of the Rule ordinarily must be met, however, when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee. For example, the requirements of paragraph (a) must ordinarily be met if a lawyer agrees to take stock (or stock options) in the client in lieu of cash fees. Such an exchange creates a risk that the lawyer's judgment will be skewed in favor of closing a transaction to such an extent that the lawyer may fail to exercise professional judgment as to whether it is in the client's best interest for the transaction to close. This may occur where the client expects the lawyer to provide professional advice in structuring a securities-for-services exchange. If the lawyer is expected to play any role in advising the client regarding the securities-for-services exchange, especially if the client lacks sophistication, the requirements of fairness, full disclosure and written consent set forth in paragraph (a) must be met. When a lawyer represents a client in a transaction concerning literary property, Rule 1.8(d) does not prohibit the lawyer from agreeing that the lawyer's fee shall consist of a share of the ownership of the literary property or a share of the royalties or license fees from the property, but the lawyer must ordinarily comply with Rule 1.8(a).

[4D] An exchange of securities for legal services will also trigger the requirements of Rule 1.7 if the lawyer's ownership interest in the client would, or reasonably may, affect the lawyer's exercise of professional judgment on behalf of the client. For example, where a lawyer has agreed to accept securities in a client corporation as a fee for negotiating and documenting an equity investment, or for representing a client in connection with an initial public offering, there is a risk that the lawyer's judgment will be skewed in favor of closing the transaction to such an extent that the lawyer may fail to exercise professional judgment. (The lawyer's judgment may be skewed because unless the transaction closes, the securities will be worthless.) Unless a lawyer reasonably concludes that he or she will be able to provide competent, diligent and loyal representation to the client, the lawyer may not undertake or continue the representation, even with the client's consent. To determine whether a reasonable possibility of such an adverse effect on the representation exists, the lawyer should analyze the nature and relationship of the particular interest and the specific legal services to be rendered. Some salient factors may be (i) the size of the lawyer's investment in proportion to the holdings of other investors,

(ii) the potential value of the investment in relation to the lawyer's or law firm's earnings or other assets, and (iii) whether the investment is active or passive.

[4E] If the lawyer reasonably concludes that the lawyer's representation of the client will not be adversely affected by the agreement to accept client securities as a legal fee, the Rules permit the representation, but only if full disclosure is made to the client and the client's informed consent is obtained and confirmed in writing. *See* Rules 1.0(e) (defining "confirmed in writing"), 1.0(j) (defining "informed consent"), and 1.7.

[4F] A lawyer must also consider whether accepting securities in a client corporation as payment for legal services constitutes charging or collecting an unreasonable or excessive fee in violation of Rule 1.5. Determining whether a fee accepted in the form of securities is unreasonable or excessive requires a determination of the value of the securities at the time the agreement is reached and may require the lawyer to engage the services of an investment professional to appraise the value of the securities to be given. The lawyer and client can then make their own advised decisions as to whether the securities-for-fees exchange results in a reasonable fee.

[5] A lawyer's use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or a business associate of the lawyer, at the expense of a client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. But the rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits use of client information to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. Rules that permit or require use of client information to the disadvantage of the client include Rules 1.6, 1.9(c) and 3.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client if the transaction meets general standards of fairness. If a client offers the lawyer a gift, paragraph (c) does not prohibit the lawyer from accepting it, although

such a gift may be voidable by the client. Before accepting a gift offered by a client, a lawyer should urge the client to secure disinterested advice from an independent, competent person who is cognizant of all of the circumstances. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a gift be made to the lawyer or for the lawyer's benefit.

[6A] This Rule does not apply to success fees, bonuses and the like from clients for legal services. These are governed by Rule 1.5.

[7] If effectuation of a gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is related to the donee and a reasonable lawyer would conclude that the transaction is fair and reasonable, as set forth in paragraph (c).

[8] This Rule does not prohibit a lawyer or a partner or associate of the lawyer from being named as executor of the client's estate or named to another fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will adversely affect the lawyer's professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary or Media Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the subject matter of the representation creates a conflict between the interest of the client and the personal interests of the lawyer. The lawyer may be tempted to subordinate the interests of the client to the lawyer's own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from the client television, radio, motion picture, newspaper, magazine, book, or other literary or media rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of the literary or media rights to the prejudice of the client. To prevent this adverse impact on the representation, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the representation, even though the representation has previously ended. Likewise,

arrangements with third parties, such as book, newspaper or magazine publishers or television, radio or motion picture producers, pursuant to which the lawyer conveys whatever literary or media rights the lawyer may have, should not be entered into prior to the conclusion of all aspects of the matter giving rise to the representation.

[9A] Rule 1.8(d) does not prohibit a lawyer representing a client in a transaction concerning intellectual property from agreeing that the lawyer's fee shall consist of an ownership share in the property, if the arrangement conforms to paragraph (a) and Rule 1.5.

Financial Assistance

[9B] Paragraph (e) eliminates the former requirement that the client remain "ultimately liable" to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer's fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer's own account. However, like the former New York rule, paragraph (e) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's professional judgment and there is informed consent from the client. *See also* Rule 5.4(c), prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another.

[12] Sometimes it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest may exist if the lawyer will be involved in representing differing interests or if there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing. *See* Rules 1.0(e) (definition of "confirmed in writing"), 1.0(j) (definition of "informed consent"), and 1.0(x) (definition of "writing" or "written").

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consents. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement. Paragraph (g) is a corollary of both these Rules and provides that, before any settlement offer is made or accepted

on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement is accepted. *See also* Rule 1.0(j) (definition of "informed consent"). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are currently represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for the lawyer's own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and

maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil matters are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is often unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that if the sexual relationship leads to the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairing the lawyer's exercise of professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client evidentiary privilege. A client's sexual involvement with the client's lawyer, especially if the sexual relations create emotional involvement, will often render it unlikely that the client could rationally determine whether to consent to the conflict created by the sexual relations. If a client were to consent to the conflict created by the sexual relations without fully appreciating the nature and implications of that conflict, there is a significant risk of harm to client interests. Therefore, sexual relations between lawyers and their clients are dangerous and inadvisable. Out of respect for the desires of consenting adults, however, paragraph (j) does not flatly prohibit client-lawyer sexual relations in matters other than domestic relations matters. Even when sexual relations between a lawyer and client are permitted under paragraph (j), however, they may lead to incompetent

representation in violation of Rule 1.1. Because domestic relations clients are often emotionally vulnerable, domestic relations matters entail a heightened risk of exploitation of the client. Accordingly, lawyers are flatly prohibited from entering into sexual relations with domestic relations clients during the course of the representation even if the sexual relationship is consensual and even if prejudice to the client is not immediately apparent. For a definition of "sexual relations" for the purposes of this Rule, see Rule 1.0(u).

[17A] The prohibitions in paragraph (j)(1) apply to all lawyers in a firm who know of the representation, whether or not they are personally representing the client. The Rule prohibits any lawyer in the firm from exploiting the client-lawyer relationship by directly or indirectly requiring or demanding sexual relations as a condition of representation by the lawyer or the lawyer's firm. Paragraph (j)(1)(i) thus seeks to prevent a situation where a client may fear that a willingness or unwillingness to have sexual relations with a lawyer in the firm may have an impact on the representation, or even on the firm's willingness to represent or continue representing the client. The Rule also prohibits the use of coercion, undue influence or intimidation to obtain sexual relations with a person known to that lawyer to be a client or a prospective client of the firm. Paragraph (j)(1)(ii) thus seeks to prevent a lawyer from exploiting the professional relationship between the client and the lawyer's firm. Even if a lawyer does not know that the firm represents a person, the lawyer's use of coercion or intimidation to obtain sexual relations with that person might well violate other Rules or substantive law. Where the representation of the client involves a domestic relations matter, the restrictions stated in paragraphs (j)(1)(i) and (j)(1)(ii), and not the per se prohibition imposed by paragraph (j)(1)(iii), apply to lawyers in a firm who know of the representation but who are not personally representing the client. Nevertheless, because domestic relations matters may be volatile and may entail a heightened risk of exploitation of the client, the risk that a sexual relationship with a client of the firm may result in a violation of other Rules is likewise heightened, even if the sexual relations are not per se prohibited by paragraph (j).

[17B] A law firm's failure to educate lawyers about the restrictions on sexual relations—or a firm's failure to enforce those restrictions against lawyers who violate them—may constitute a violation of Rule 5.1, which obligates a law firm to make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

[18] Sexual relationships between spouses or those that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the sexual relationship and therefore constitute an impermissible conflict of interest. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) applies to sexual relations between a lawyer for the organization (whether inside counsel or outside counsel) and a constituent of the organization who supervises, directs or regularly consults with that lawyer or a lawyer in that lawyer's firm concerning the organization's legal matters.

Imputation of Prohibitions

[20] Where a lawyer who is not personally representing a client has sexual relations with a client of the firm in violation of paragraph (j), the other lawyers in the firm are not subject to discipline solely because those improper sexual relations occurred. There may be circumstances, however, where a violation of paragraph (j) by one lawyer in a firm gives rise to violations of other Rules by the other lawyers in the firm through imputation. For example, sexual relations between a lawyer and a client may give rise to a violation of Rule 1.7(a), and such a conflict under Rule 1.7 may be imputed to all other lawyers in the firm under Rule 1.10(a).

RULE 1.9

DUTIES TO FORMER CLIENTS

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

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with these Rules. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf

of a former client. So also, a lawyer who has prosecuted an accused person could not properly represent that person in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. *See* Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type, even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that

may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation. On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

[4] [Moved to Comment to Rule 1.10.]

[5] [Moved to Comment to Rule 1.10.]

[6] [Moved to Comment to Rule 1.10.]

[7] Independent of the prohibition against subsequent representation, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. *See* Rules 1.6, 1.9(c).

[8] Paragraph (c) generally extends the confidentiality protections of Rule 1.6 to a lawyer's former clients. Paragraph (c)(1) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Paragraph (c)(2) provides that a lawyer may not reveal information acquired in the course of representing a client except as these Rules would permit or require with respect to a current client. *See* Rules 1.6, 3.3.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraph (a). See also Rule 1.0(j) for the definition of "informed consent." With regard to the effectiveness of an advance waiver, see Rule 1.7, Comments [22]-[22A]. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RULE 1.10

IMPUTATION OF CONFLICTS OF INTEREST

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

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

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

(1) the firm agrees to represent a new client;

(2) the firm agrees to represent an existing client in a new matter;

(3) the firm hires or associates with another lawyer; or

(4) an additional party is named or appears in a pending matter.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

(h) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

Comment

Definition of "Firm"

[1] For purposes of these Rules, the term "firm" includes, but is not limited to, (i) a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law, and (ii) lawyers employed in a legal services organization, a government law office or the legal department of a corporation or other organization. See Rule 1.0(h). Whether two or more lawyers constitute a "firm" within this definition will depend on the specific facts. See Rule 1.0, Comments [2]-[4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer

with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

[3] [Reserved]

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. *See* Rules 1.0(t), 5.3.

Lawyers Moving Between Firms

[4A] The principles of imputed disqualification are modified when lawyers have been associated in a firm and then end their association. The nature of contemporary law practice and the organization of law firms have made the fiction that the law firm is the same as a single lawyer unrealistic in certain situations. In crafting a rule to govern imputed conflicts, there are several competing considerations. First, the former client must be reasonably assured that the client's confidentiality interests are not compromised. Second, the principles of imputed disqualification should not be so broadly cast as to preclude others from having reasonable choice of counsel. Third, the principles of imputed disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after leaving a firm. In this connection, it should be recognized that today most lawyers practice in firms, that many limit their practice to, or otherwise concentrate in, one area of law, and that many move from one association to another multiple times in their careers. If the principles of imputed disqualification were defined too strictly, the result would be undue curtailment of the opportunity of lawyers to move from one practice setting to another, of the opportunity of clients to choose counsel, and of the opportunity of firms to retain qualified lawyers. For these reasons, a functional analysis that focuses on preserving the former client's reasonable confidentiality interests is appropriate in balancing the competing interests.

[5] Paragraph (b) permits a law firm, under certain circumstances, to represent a client with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer repre-

sented the client. However, under Rule 1.7 the law firm may not represent a client with interests adverse to those of a current client of the firm. Moreover, the firm may not represent the client where the matter is the same or substantially related to a matter in which (i) the formerly associated lawyer represented the client, and (ii) the firm or any lawyer currently in the firm has information protected by Rule 1.6 and Rule 1.9(c) that is material to the matter.

[5A] In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter.

[5B] Rule 1.10(c) permits a law firm to represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or the firm with which the lawyer was previously associated, represented a client whose interests are materially adverse to that client, provided the newly associated lawyer did not acquire any confidential information of the previously represented client that is material to the current matter.

Client Consent

[6] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict cannot be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comments [22]-[22A]. For a definition of "informed consent," see Rule 1.0(j).

Former Government Lawyers

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b), not this Rule.

RULE 1.15

PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

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

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

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

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an

application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this

Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

Comment

[1] A lawyer should hold the funds and property of others using the care required of a professional fiduciary. Securities and other property should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts, including an account established pursuant to the "Interest on Lawyer Accounts" law where appropriate. *See* State Finance Law § 97-v(4)(a); Judiciary Law § 497(2); 21 N.Y.C.R.R. § 7000.10. Separate trust accounts may be warranted or required when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which portion of the funds belongs to the lawyer.

[3] Lawyers often receive funds from which the lawyer's fee will or may be paid. A lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed to the lawyer. However, a lawyer may not withhold the client's share of the funds to coerce the client into accepting the lawyer's claim for fees. While a lawyer may be entitled under applicable law to assert a retaining lien on funds in the lawyer's possession, a lawyer may not enforce such a lien by taking the lawyer's fee from funds that the lawyer holds in an attorney's trust account, escrow account or special account, except as may be provided in an applicable agreement or directed by court order. Furthermore, any disputed portion of the funds must be kept in or transferred into a trust

account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds is to be distributed promptly.

[4] Paragraph (c)(4) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

JOINT ORDER OF THE DEPARTMENTS OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION

The Judicial Departments of the Appellate Division of the New York State Supreme Court, pursuant to the authority vested in them, do hereby amend Part 1200, Rule 1.15 (Rules of Professional Conduct) and Part 1300 of Title 22 of the Official Compilation of the Codes, Rules, and Regulations of the State of New York, as follows, effective April 1, 2021 (deletions in strikethrough, additions underlined).

Rule 1.15: Preserving identity of funds and property of others; fiduciary responsibility; commingling and misappropriation of client funds or property; maintenance of bank accounts; record keeping; examination of records.

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

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

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check and overdraft reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained. No special account or trust account aforementioned may have overdraft protection.

****

Part 1300. Dishonored Check and Overdraft Reporting Rules for Attorney Special, Trust and Escrow Accounts

*****

Section 1300.1

Dishonored and overdraft check reports.

(a) Special bank accounts required by rule 1.15 of the Rules of Professional Conduct (22 NYCRR 1200.0) shall be maintained only in banking institutions which have agreed to provide dishonored check and overdraft reports in accordance with the provisions of this section.

(b) An agreement to provide dishonored check and overdraft reports shall be filed with the Lawyers' Fund for Client Protection, which shall maintain a central registry of all banking institutions which have been approved in accordance with this section, and the current status of each such agreement. The agreement shall apply to all branches of each banking institution that provides special bank accounts for attorneys engaged in the practice of law in this State, and shall not be cancelled by a banking institution except on 30 days' prior written notice to the Lawyers' Fund for Client Protection.

(c) A dishonored check and overdraft report by a banking institution shall be required whenever a properly payable instrument is presented against an attorney special, trust or escrow account which contains insufficient available funds, irrespective of whether the instrument is honored~~and the banking institution dishonors the instrument for that reason~~. A properly payable instrument means an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of the State of New York.

(d) A dishonored check and overdraft report shall be substantially in the form of the notice of dishonor which the banking institution customarily forwards to its customer, and may include a photocopy or a computer-generated duplicate of such notice. In the case of an instrument that is presented against insufficient funds, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

(e) Dishonored check and overdraft reports shall be mailed to the Lawyers' Fund for Client Protection, 119 Washington Avenue, Albany, NY 12210, within five banking days after the date of presentment against insufficient available funds.

(f) The Lawyers' Fund for Client Protection shall hold each dishonored check and overdraft report for 10 business days to enable the banking institution to withdraw a report provided by inadvertence or mistake; except that the curing of an insufficiency of

available funds by a lawyer or law firm by the deposit of additional funds shall not constitute reason for withdrawing a dishonored check and overdraft report.

(g) After holding the dishonored check and overdraft report for 10 business days, the Lawyers' Fund for Client Protection shall forward it to the attorney disciplinary committee for the judicial department or district having jurisdiction over the account holder, as indicated by the law office or other address on the report, for such inquiry and action that attorney disciplinary committee deems appropriate.

(h) Every lawyer admitted to the Bar of the State of New York shall be deemed to have consented to the dishonored check and overdraft reporting requirements of this section. Lawyers and law firms shall promptly notify their banking institutions of existing or new attorney special, trust, or escrow accounts for the purpose of facilitating the implementation and administration of the provisions of this section.

Hon. Rolando T. Acosta
Presiding Justice
First Judicial Department

Hon. Elizabeth Garry
Presiding Justice
Third Judicial Department

Hon. William F. Mastro
Presiding Justice
Second Judicial Department

Hon. Gerald J. Whalen
Presiding Justice
Fourth Judicial Department

Date: April 7, 2021

Judiciary § 1300.1. Dishonored and overdraft check reports.

New York Codes, Rules and Regulations

Title 22. JUDICIARY

Subtitle B. Courts

Chapter IV. Supreme Court

Subchapter E. All Departments

Part 1300. Dishonored Check Reporting Rules For Attorney Special, Trust And Escrow Accounts

Current through Register Vol. 43, No. 19, May 12, 2021

§ 1300.1. Dishonored and overdraft check reports

(a) Special bank accounts required by rule 1.15 of the Rules of Professional Conduct (22 NYCRR 1200.0) shall be maintained only in banking institutions which have agreed to provide dishonored check and overdraft reports in accordance with the provisions of this section.

(b) An agreement to provide dishonored check and overdraft reports shall be filed with the Lawyers' Fund for Client Protection, which shall maintain a central registry of all banking institutions which have been approved in accordance with this section, and the current status of each such agreement. The agreement shall apply to all branches of each banking institution that provides special bank accounts for attorneys engaged in the practice of law in this State, and shall not be cancelled by a banking institution except on 30 days' prior written notice to the Lawyers' Fund for Client Protection.

(c) A dishonored check and overdraft report by a banking institution shall be required whenever a properly payable instrument is presented against an attorney special, trust or escrow account which contains insufficient available funds, irrespective of whether the instrument is honored [and the banking institution dishonors the instrument for that reason]. A properly payable instrument means an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of the State of New York.

(d) A dishonored check and overdraft report shall be substantially in the form of the notice of dishonor which the banking institution customarily forwards to its customer, and may include a photocopy or a computer-generated duplicate of such notice. In the case of an instrument that is presented against insufficient funds, the report shall identify the financial

institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

(e) Dishonored check and overdraft reports shall be mailed to the Lawyers' Fund for Client Protection, 119 Washington Avenue, Albany, NY 12210, within five banking days after the date of presentment against insufficient available funds.

(f) The Lawyers' Fund for Client Protection shall hold each dishonored check and overdraft report for 10 business days to enable the banking institution to withdraw a report provided by inadvertence or mistake; except that the curing of an insufficiency of available funds by a lawyer or law firm by the deposit of additional funds shall not constitute reason for withdrawing a dishonored check and overdraft report.

(g) After holding the dishonored check and overdraft report for 10 business days, the Lawyers' Fund for Client Protection shall forward it to the attorney disciplinary committee for the judicial department or district having jurisdiction over the account holder, as indicated by the law office or other address on the report, for such inquiry and action that attorney disciplinary committee deems appropriate.

(h) Every lawyer admitted to the Bar of the State of New York shall be deemed to have consented to the dishonored check and overdraft reporting requirements of this section. Lawyers and law firms shall promptly notify their banking institutions of existing or new attorney special, trust, or escrow accounts for the purpose of facilitating the implementation and administration of the provisions of this section.

Cite as (Casemaker) N.Y. Comp. Codes R. & Regs. Tit. 22 § 1300.1

History. Amended New York State Register May 12, 2021/Volume XLIII, Issue 19, eff. 5/12/2021

RULE 1.18

DUTIES TO PROSPECTIVE CLIENTS

(a) Except as provided in Rule 1.18(e), a person who consults with a lawyer about 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 learned information from a prospective client shall not use or reveal that information, 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 is not a prospective client within the meaning of paragraph (a) if the person:

(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.

Comment

[1] Prospective clients, like current clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Prospective clients should therefore receive some, but not all, of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer

in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person 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, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client"—*see* Rule 1.18(e).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7 or Rule 1.9, then consent from all affected current or former clients must be obtained before accepting the representation. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected current and former clients and the prospective client.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(j) for the definition of "informed consent," and with regard to the effectiveness of an advance waiver see Rule 1.7, Comments [22]-[22A] and Rule 1.9, Comment [9]. If permitted by law and if the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Under paragraph (c), even in the absence of an agreement the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in that matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened, and written notice is promptly given to the prospective client. *See* Rule 1.10. Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified. Before proceeding under paragraph (d)(1) or paragraph (d)(2), however, a lawyer must be mindful of the requirement of paragraph (d)(3) that "a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter."

[7A] Paragraph (d)(2) sets out the basic procedural requirements that a law firm must satisfy to ensure that a personally disqualified lawyer is effectively screened from participation in the matter. This Rule requires that the firm promptly: (i) notify, as appropriate, lawyers and relevant nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client, and (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and others in the firm.

[7B] A firm seeking to avoid disqualification under this Rule should also consider its ability to implement, maintain, and monitor the screening procedures permitted by paragraph (d)(2) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will be effective to avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of infor-

mation with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. The size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, but it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (d)(2).

[7C] In order to prevent any other lawyer in the firm from acquiring confidential information about the matter from the disqualified lawyer, it is essential that notification be given and screening procedures implemented promptly. If any lawyer in the firm acquires confidential information about the matter from the disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the disqualified lawyer and other lawyers in the firm in a given matter.

[8] Notice under paragraph (d)(2), including a general description of the subject matter about which the lawyer was consulted and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, *see* Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

RULE 3.3

CONDUCT BEFORE A TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(w) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client has offered false evidence in a deposition.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law and may not vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or by evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein because litigation documents ordinarily present assertions by the client or by someone on the client's behalf and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be based on the lawyer's own knowledge, as in an affi-

davit or declaration by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. *See also* Rule 8.4(b), Comments [2]-[3].

Legal Argument

[4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. Paragraph (a)(2) requires an advocate to disclose directly adverse and controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.

Offering or Using False Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer or use evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false.

[6A] The duties stated in paragraphs (a) and (b)—including the prohibitions against offering and using false evidence—apply to all lawyers, including lawyers for plaintiffs and defendants in civil matters, and to both prosecutors and defense counsel in criminal cases. In criminal matters, therefore, Rule 3.3(a)(3) requires a prosecutor to refrain from

offering or using false evidence, and to take reasonable remedial measures to correct any false evidence that the government has already offered. For example, when a prosecutor comes to know that a prosecution witness has testified falsely, the prosecutor should either recall the witness to give truthful testimony or should inform the tribunal about the false evidence. At the sentencing stage, a prosecutor should correct any material errors in a presentence report. In addition, prosecutors are subject to special duties and prohibitions that are set out in Rule 3.8.

[7] If a criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may have the option of offering the testimony in a narrative form, though this option may require advance notice to the court or court approval. The lawyer's ethical duties under paragraphs (a) and (b) may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

[8] The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) prohibits a lawyer from offering or using evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes to be false. Offering such proof may impair the integrity of an adjudicatory proceeding. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of a criminal defense client where the lawyer reasonably believes, but does not know, that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the criminal defendant's decision to testify.

Remedial Measures

[10] A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another

witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as making a statement about the matter to the trier of fact, ordering a mistrial, taking other appropriate steps or doing nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. *See* Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. The client could therefore in effect coerce the lawyer into being a party to a fraud on the court.

Preserving Integrity of the Adjudicative Process

[12] Lawyers have a special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Accordingly, paragraph (b) requires a lawyer who represents a client in an adjudicative proceeding to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding. Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related

to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal.

[12A] A lawyer's duty to take reasonable remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

[13] Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. A lawyer should not engage in conduct that offends the dignity and decorum of proceedings or that is intended to disrupt the tribunal. While maintaining independence, a lawyer should be respectful and courteous in relations with a judge or hearing officer before whom the lawyer appears. In adversary proceedings, ill feeling may exist between clients, but such ill feeling should not influence a lawyer's conduct, attitude, and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the opposing position is expected to be presented by the adverse party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there may be no presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the opposing party, if absent, just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] A lawyer's compliance with the duty of candor imposed by this Rule does not automatically require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer, however, may

be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. *See also* Rule 1.16(c) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

RULE 5.5

UNAUTHORIZED PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.

(b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law in another jurisdiction by a lawyer through the lawyer's direct action, and paragraph (b) prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law.

[2] The definition of the "practice of law" is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3.

RULE 7.1

ADVERTISING

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

(1) contains statements or claims that are false, deceptive or misleading; or

(2) violates a Rule.

(b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

(1) legal and nonlegal education; degrees and other scholastic distinctions; dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law-related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;

(2) names of clients regularly represented, provided that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and

(4) legal fees for initial consultation; contingent fee rates in civil matters, when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement

clearly describing the scope of each advertised service, hourly rates, and fixed fees for specified legal and nonlegal services.

(c) An advertisement shall not:

(1) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

(2) include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;

(3) use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;

(4) be made to resemble legal documents.

(d) An advertisement that complies with paragraph (e) may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer's services with the services of other lawyers;

(3) testimonials or endorsements of clients, and of former clients; or

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in paragraph (d) provided:

(1) its dissemination does not violate paragraph (a);

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and

(3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome"; and

(4) in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing.

(f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize meta-tags or other hidden computer codes that, if displayed, would violate these Rules.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements shall appear on the home page.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(k) All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a

period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

(l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

(p) All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law § 488(3).

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(r) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

Comment

Advertising

[1] The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of competent legal counsel. Hence, important functions of the legal profession are to educate people to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

[2] The public's need to know about legal services can be fulfilled in part through advertising. People of limited means who have not made extensive use of legal services in many instances rely on advertising to find appropriate counsel. While a lawyer's reputation may attract some clients, lawyers may also make the public aware of their services by advertising to obtain work.

[3] Advertising by lawyers serves two principal purposes: first, it educates potential clients regarding their need for legal advice and assists them in obtaining a lawyer appropriate for those needs. Second, it enables lawyers to attract clients. To carry out these two purposes and because of the critical importance of legal services, it is of the utmost importance that lawyer advertising not be false, deceptive or misleading. Truthful statements that are misleading are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication, considered as a whole, not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific

conclusion about the lawyer or the lawyer's services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation. For example, a lawyer might truthfully state, "I have never lost a case," but that statement would be misleading if the lawyer settled virtually all cases that the lawyer handled. A communication to anyone that states or implies that the lawyer has the ability to influence improperly a court, court officer, governmental agency or government official is improper under Rule 8.4(e).

[4] To be effective, advertising must attract the attention of viewers, readers or recipients and convey its content in ways that will be understandable and helpful to them. Lawyers may therefore use advertising techniques intended to attract attention, such as music, sound effects, graphics and the like, so long as those techniques do not render the advertisement false, deceptive or misleading. Lawyer advertising may use actors or fictionalized events or scenes for this purpose, provided appropriate disclosure of their use is made. Some images or techniques, however, are highly likely to be misleading. So, for instance, legal advertising should not be made to resemble legal documents.

[5] The "Attorney Advertising" label serves to dispel any confusion or concern that might be created when nonlawyers receive letters or emails from lawyers. The label is not necessary for advertising in newspapers or on television, or similar communications that are self-evidently advertisements, such as billboards or press releases transmitted to news outlets, and as to which there is no risk of such confusion or concern. The ultimate purpose of the label is to inform readers where they might otherwise be confused.

[6] Not all communications made by lawyers about the lawyer or the law firm's services are advertising. Advertising by lawyers consists of communications made in any form about the lawyer or the law firm's services, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication. However, noncommercial communications motivated by a not-for-profit organization's interest in political expression and association are generally not considered advertising. Of course, all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law. By definition, communications to existing clients are excluded from the Rules governing advertising. A client who is a current client in any matter is an existing client for all purposes of these

Rules. (Whether a client is a current client for purposes of conflicts of interest and other issues may depend on other considerations. Generally, the term "current client" for purposes of the advertising exemption should be interpreted more broadly than it is for determining whether a client is a "current client" for purposes of a conflict of interest analysis.)

[7] Communications to former clients that are germane to the earlier representation are not considered to be advertising. Likewise, communications to other lawyers, including those made in bar association publications and other publications targeted primarily at lawyers, are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm. Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However, a newsletter, client alert, or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm's cases, personnel, clients or achievements) generally would be considered advertising. Communications, such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer's services, are not advertising. Accordingly, the special restrictions on advertising and solicitation would not apply to a lawyer's response to a prospective client who has asked the lawyer to outline the lawyer's qualifications to undertake a proposed retention or the terms of a potential retention.

[8] The circulation or distribution to prospective clients by a lawyer of an article or report published about the lawyer by a third party is advertising if the lawyer's primary purpose is to obtain retentions. In circulating or distributing such materials the lawyer should include information or disclaimers as necessary to dispel any misconceptions to which the article may give rise. For example, if a lawyer circulates an article discussing the lawyer's successes that is reasonably likely to create an expectation about the results the lawyer will achieve in future cases, a disclaimer is required by paragraph (e)(3). If the article contains misinformation about the lawyer's qualifications, any circulation of the article by the lawyer should make any necessary corrections or qualifications. This may be necessary even when the article included misinformation through no fault of the lawyer or because the article is out of date, so that material information that was true at the time is no longer true. Some communications by a law firm that may constitute marketing or branding are not necessarily advertisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts or the like with the law firm name, logo, and contact

information printed on them do not constitute "advertisements" within the definition of this Rule if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter.

Recognition of Legal Problems

[9] The legal professional should help the public to recognize legal problems because such problems may not be self-revealing and might not be timely noticed. Therefore, lawyers should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise. A lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients. Such a program might be considered to be advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm. A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for nonlawyers should caution them not to attempt to solve individual problems on the basis of the information contained therein.

[10] As members of their communities, lawyers may choose to sponsor or contribute to cultural, sporting, charitable or other events organized by not-for-profit organizations. If information about the lawyer or law firm disseminated in connection with such an event is limited to the identification of the lawyer or law firm, the lawyer's or law firm's contact information, a brief description of areas of practice, and the fact of sponsorship or contribution, the communication is not considered advertising.

Statements Creating Expectations, Characterizations of Quality, and Comparisons

[11] Lawyer advertising may include statements that are reasonably likely to create an expectation about results the lawyer can achieve, statements that compare the lawyer's services with the services of other lawyers, or statements describing or characterizing the quality of the lawyer's or law firm's services, only if they can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated and are accompanied by the following disclaimer: "Prior

results do not guarantee a similar outcome." Accordingly, if true and accompanied by the disclaimer, a lawyer or law firm could advertise "Our firm won 10 jury verdicts over $1,000,000 in the last five years," "We have more Patent Lawyers than any other firm in X County," or "I have been practicing in the area of divorce law for more than 10 years." Even true factual statements may be misleading if presented out of the context of additional information needed to properly understand and evaluate the statements. For example, a truthful statement by a lawyer that the lawyer's average jury verdict for a given year was $100,000 may be misleading if that average was based on a large number of very small verdicts and one $10,000,000 verdict. Likewise, advertising that truthfully recites judgment amounts would be misleading if the lawyer failed to disclose that the judgments described were overturned on appeal or were obtained by default.

[12] Descriptions of characteristics of the lawyer or law firm that are not comparative and do not involve results obtained are permissible even though they cannot be factually supported. Such statements are understood to be general descriptions and not claims about quality, and would not be likely to mislead potential clients. Accordingly, a law firm could advertise that it is "Hard-Working," "Dedicated," or "Compassionate" without the necessity to provide factual support for such subjective claims. On the other hand, descriptions of characteristics of the law firm that compare its services with those of other law firms and that are not susceptible of being factually supported could be misleading to potential clients. Accordingly, a lawyer may not advertise that the lawyer is the "Best," "Most Experienced," or "Hardest Working." Similarly, some claims that involve results obtained are not susceptible of being factually supported and could be misleading to potential clients. Accordingly, a law firm may not advertise that it will obtain "Big $$$," "Most Money," or "We Win Big."

Bona Fide Professional Ratings

[13] An advertisement may include information regarding bona fide professional ratings by referring to the rating service and how it has rated the lawyer, provided that the advertisement contains the "past results" disclaimer as required under paragraphs (d) and (e). However, a rating is not "bona fide" unless it is unbiased and nondiscriminatory. Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Fur-

ther, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group.

Meta-Tags

[14] Meta-tags are hidden computer software codes that direct certain Internet search engines to the web site of a lawyer or law firm. For example, if a lawyer places the meta-tag "NY personal injury specialist" on the lawyer's web site, then a person who enters the search term "personal injury specialist" into a search engine will be directed to that lawyer's web page. That particular meta-tag is prohibited because Rule 7.4(a) generally prohibits the use of the word "specialist." However, a lawyer may use an advertisement employing meta-tags or other hidden computer codes that, if displayed, would not violate a Rule.

Advertisements Referring to Fees and Advances

[15] All advertisements that contain information about the fees or expenses charged by the lawyer or law firm, including advertisements indicating that in the absence of a recovery no fee will be charged, must comply with the provisions of section 488(3) of the Judiciary Law. However, a lawyer or law firm that offers any of the fee and expense arrangements permitted by section 488(3) must not, either directly or in any advertisement, state or imply that the lawyer's or law firm's ability to advance or pay costs and expenses of litigation is unique or extraordinary when that is not the case. For example, if an advertisement promises that the lawyer or law firm will advance the costs and expenses of litigation contingent on the outcome of the matter, or promises that the lawyer or law firm will pay the costs and expenses of litigation for indigent clients, then the advertisement must not say that such arrangements are "unique in the area," "unlike other firms," available "only at our firm," "extraordinary," or words to that effect, unless that is actually the case. However, if the lawyer or law firm can objectively demonstrate that this arrangement is unique or extraordinary, then the lawyer or law firm may make such a claim in the advertisement.

Retention of Copies; Filing of Copies; Designation of Principal Office

[16] Where these Rules require that a lawyer retain a copy of an advertisement or file a copy of a solicitation or other information, that obligation may be satisfied by any of the following: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

[17] A law firm that has no office it considers its principal office may comply with paragraph (h) by listing one or more offices where a substantial amount of the law firm's work is performed.

RULE 7.3

SOLICITATION AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

(a) A lawyer shall not engage in solicitation:

(1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or

(2) by any form of communication if:

(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;

(ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;

(iii) the solicitation involves coercion, duress or harassment;

(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:

(1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:

(i) a copy of the solicitation;

(ii) a transcript of the audio portion of any radio or television solicitation; and

(iii) if the solicitation is in a language other than English, an accurate English-language translation.

(2) Such solicitation shall contain no reference to the fact of filing.

(3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.

(4) Solicitations filed pursuant to this subdivision shall be open to public inspection.

(5) The provisions of this paragraph shall not apply to:

(i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at persons affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

(iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).

(d) A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(f) Any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

Comment

Solicitation

[1] In addition to seeking clients through general advertising (either by public communications in the media or by private communications to potential clients who are neither current clients nor other lawyers), many lawyers attempt to attract clients through a specialized category of advertising called "solicitation." Not all advertisements are solicitations within the meaning of this Rule. All solicitations, however,

are advertisements with certain additional characteristics. By definition, a communication that is not an advertisement is not a solicitation. Solicitations are subject to all of the Rules governing advertising and are also subject to additional Rules, including filing a copy of the solicitation with the appropriate attorney disciplinary authority (including a transcript of the audio portion of any radio or television solicitation and, if the solicitation is in a language other than English, an accurate English language translation). These and other additional requirements will facilitate oversight by disciplinary authorities.

[2] A "solicitation" means any advertisement: (i) that is initiated by a lawyer or law firm (as opposed to a communication made in response to an inquiry initiated by a potential client), (ii) with a primary purpose of persuading recipients to retain the lawyer or law firm (as opposed to providing educational information about the law, *see* Rule 7.1, Comment [7]), (iii) that has as a significant motive for the lawyer to make money (as opposed to a public-interest lawyer offering pro bono services), and (iv) that is directed to or targeted at a specific recipient or group of recipients, or their family members or legal representatives. Any advertisement that meets all four of these criteria is a solicitation, and is governed not only by the Rules that govern all advertisements but also by special Rules governing solicitation.

Directed or Targeted

[3] An advertisement may be considered to be directed to or targeted at a specific recipient or recipients in two different ways. First, an advertisement is considered "directed to or targeted at" a specific recipient or recipients if it is made by in-person or telephone contact or by real-time or interactive computer-accessed communication or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages). Advertisements made by in-person or telephone contact or by real-time or interactive computer-accessed communication are prohibited unless the recipient is a close friend, relative, former client or current client. Advertisements addressed so that they will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages) are subject to various additional rules governing solicitation (including filing and public inspection) because otherwise they would not be readily subject to disciplinary oversight and review. Second, an advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of

people whose legal needs arise out of a specific incident to which the advertisement explicitly refers. The term "specific incident" is explained in Comment [5].

[4] Unless it falls within Comment [3], an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients. For example, an advertisement in a public medium is not directed to or targeted at "a specific recipient or group of recipients" simply because it is intended to attract potential clients with needs in a specified area of law. Thus, a lawyer could advertise in the local newspaper that the lawyer is available to assist homeowners in reducing property tax assessments. Likewise, an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine is geared toward inventors. Similarly, a lawyer could advertise on television or in a newspaper or web site to the general public that the lawyer practices in the area of personal injury or Workers' Compensation law. The fact that some recipients of such advertisements might actually be in need of specific legal services at the time of the communication does not transform such advertisements into solicitations.

Solicitations Relating To a Specific Incident Involving Potential Claims for Personal Injury or Wrongful Death

[5] Solicitations relating to a specific incident involving potential claims for personal injury or wrongful death are subject to a further restriction, in that they may not be disseminated until 30 days (or in some cases 15 days) after the date of the incident. This restriction applies even where the recipient is a close friend, relative, or former client, but not where the recipient is a current client. A "specific incident" is a particular identifiable event (or a sequence of related events occurring at approximately the same time and place) that causes harm to one or more people. Specific incidents include such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like.

[6] A solicitation that is intended to attract potential claims for personal injury or wrongful death arising from a common cause but at disparate times and places, does not relate to a specific incident and is not subject to the special 30-day (or 15-day) rule, even though it is addressed so that it will be delivered to specific recipients or their families or agents (as with letters, emails, express packages), or is made in a public medium such as newspapers, television, billboards, web sites or the like and makes reference to a specific person or group of people, *see* Comments [3]-[4].

For example, solicitations intended to be of interest only to potential claimants injured over a period of years by a defective medical device or medication do not relate to a specific incident and are not subject to the special 30-day (or 15-day) rule.

[7] An advertisement in the public media that makes no express reference to a specific incident does not become a solicitation subject to the 30-day (or 15-day) rule solely because a specific incident has occurred within the last 30 (or 15) days. Thus, a law firm that advertises on television or in newspapers that it can "help injured people explore their legal rights" is not violating the 30-day (or 15-day) rule by running or continuing to run its advertisements even though a mass disaster injured many people within hours or days before the advertisement appeared. Unless an advertisement in the public media explicitly refers to a specific incident, it is not a solicitation subject to the 30-day (or 15-day) blackout period. However, if a lawyer causes an advertisement to be delivered (whether by mail, email, express service, courier, or any other form of direct delivery) to a specific recipient (i) with knowledge that the addressee is either a person killed or injured in a specific incident or that person's family member or agent, and (ii) with the intent to communicate with that person because of that knowledge, then the advertisement is a solicitation subject to the 30-day (or 15-day) rule even if it makes no reference to a specific incident and even if it is part of a mass mailing.

Extraterritorial Application of Solicitation Rules

[8] All of the special solicitation rules, including the special 30-day (or 15-day) rule, apply to solicitations directed to recipients in New York State, whether made by a lawyer admitted in New York State or a lawyer admitted in any another jurisdiction. Solicitations by a lawyer admitted in New York State directed to or targeted at a recipient or recipients outside of New York State are not subject to the filing and related requirements set out in Rule 7.3(c). Whether such solicitations are subject to the special 30-day (or 15-day) rule depends on the application of Rule 8.5.

In-Person, Telephone and Real-Time or Interactive Computer-Accessed Communication

[9] Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion,

may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or in real-time or interactive computer-accessed communication. These same risks are also present in all other real-time or interactive electronic communications, whether by computer, phone or related electronic means—*see* Rule 1.0(c) (defining "computer-accessed communication")—and are regulated in the same manner. The prohibitions on in-person or telephone contact and the prohibitions on contact by real-time or interactive computer-accessed communication do not apply if the recipient is a close friend, relative, former or current client. Communications with these individuals do not pose the same dangers as solicitations to others. However, when the special 30-day (or 15-day) rule applies, it does so even where the recipient is a close friend, relative, or former client. Ordinarily, email communications and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communication. However, instant messaging ("IM"), chat rooms, and other similar types of conversational computer-accessed communications—whether sent or received via a desktop computer, a portable computer, a cell phone, or any similar electronic or wireless device, and whether sent directly or via social media—are considered to be real-time or interactive communication.

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 a 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 use 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.)

201 A.D.3d 135
Supreme Court, Appellate Division, Second Department, New York.

In the MATTER OF Michael Eran TALASSAZAN, an attorney and counselor at law.
(Attorney Registration No. 4895660)

2021–01126
|
December 15, 2021

APPLICATION pursuant to 22 NYCRR 1240.10 by Michael Eran Talassazan, who was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on January 26, 2011, to resign as an attorney and counselor-at-law.

Attorneys and Law Firms

Diana Maxfield Kearse, Brooklyn, NY (David W. Chandler of counsel), for Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts.

Michael Eran Talassazan, Albertson, NY, respondent pro se.

HECTOR D. LASALLE, P.J., WILLIAM F. MASTRO, REINALDO E. RIVERA, MARK C. DILLON, LINDA CHRISTOPHER, JJ.

OPINION & ORDER

PER CURIAM.

***374** The respondent, Michael Eran Talassazan, has submitted an affidavit sworn to on January 26, 2021, in support of his application to resign as an attorney and counselor-at-law (*see* 22 NYCRR 1240.10). The respondent acknowledges in his affidavit that he is currently the subject of an investigation by the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts, involving at least the following acts of professional misconduct: misappropriating client funds for his own use and benefit, including settlement funds and a real estate down payment which were entrusted to him as a fiduciary and incident to his practice of law; making cash withdrawals from his escrow account; submitting falsified escrow account bank statements and a falsified ledger of his escrow account activity to the Grievance Committee; and improperly labeling his escrow account checks. The respondent avers that he cannot successfully defend himself against the charges and allegations based upon the facts and circumstances of his professional conduct.

The respondent acknowledges that his resignation is freely and voluntarily tendered, without coercion or duress by anyone, with full awareness of the consequences, including that the Court's acceptance and approval shall result in the entry of an order of disbarment striking his name from the roll of attorneys and counselors-at-law.

As to the issue of restitution, the respondent attests that he repaid all of the misappropriated funds set forth in the Grievance Committee's petition, totaling $87,700. Notwithstanding the foregoing, the respondent acknowledges that his resignation is submitted subject to any future application that may be made by the Grievance Committee for an order, pursuant to Judiciary Law § 90(6–a), directing that he make restitution or reimburse the Lawyers' Fund for Client Protection, and that he consents

to the Court's continuing jurisdiction to make such an order.

The respondent also acknowledges and agrees that, pending the issuance of this order accepting his resignation, he will not undertake to represent any new clients or accept any retainers for future legal services to be rendered and that there will be no transactional activity in any fiduciary account to which he has access, other than for payment of funds held therein on behalf of clients or others entitled to receive them.

Lastly, the respondent acknowledges that in the event the Court accepts his resignation, the order resulting therefrom and the records and documents filed in relation to the aforementioned charges and allegations, including his affidavit, shall be deemed public records pursuant to Judiciary Law § 90(10).

The Grievance Committee recommends that the Court grant the respondent's application to resign.

Inasmuch as the respondent's application to resign complies with the requirements of 22 NYCRR 1240.10, the application ***375** is granted and, effective immediately, the respondent is disbarred and his name is stricken from the roll of attorneys and counselors-at-law.

ORDERED that the application of the respondent, Michael Eran Talassazan, to resign as an attorney and counselor-at-law is granted; and it is further,

ORDERED that pursuant to Judiciary Law § 90, effective immediately, the respondent, Michael Eran Talassazan, is disbarred and his name is stricken from the roll of attorneys and counselors-at-law; and it is further,

ORDERED that the respondent, Michael Eran Talassazan, shall comply with the rules governing the conduct of disbarred or suspended attorneys (*see* 22 NYCRR 1240.15); and it is further,

ORDERED that pursuant to Judiciary Law § 90, effective immediately, the respondent, Michael Eran Talassazan, shall desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

ORDERED that if the respondent, Michael Eran Talassazan, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 1240.15(f).

LASALLE, P.J., MASTRO, RIVERA, DILLON and CHRISTOPHER, JJ., concur.

All Citations

201 A.D.3d 135, 155 N.Y.S.3d 373 (Mem), 2021 N.Y. Slip Op. 07003

End of Document

New York Official Reports

153 A.D.3d 268, 60 N.Y.S.3d 621, 2017 N.Y. Slip Op. 06333

**1 In the Matter of LaTasha D. Crutcher, an Attorney, Respondent.
Grievance Committee of the Eighth Judicial District, Petitioner.

Supreme Court, Appellate Division, Fourth Department, New York
July 31, 2017

CITE TITLE AS: Matter of Crutcher

SUMMARY

Disciplinary proceedings instituted by the Grievance Committee of the Eighth Judicial District. Respondent was admitted to the bar on June 17, 2013, at a term of the Appellate Division of the Supreme Court in the Fourth Judicial Department.

HEADNOTE

Attorney and Client
Disciplinary Proceedings

Suspension

Respondent attorney, who was guilty of professional misconduct including making misrepresentations to prison officials to gain access to an inmate, failing to keep two clients reasonably informed about their matters, failing to cooperate in the investigation of the Grievance Committee, neglecting two client matters, and failing to refund to one client unearned legal fees (Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.3 [a], [b]; 1.4 [a] [3], [4]; 1.5 [d] [2], [5] [ii]; [e]; 1.15 [a], [b] [2]; [d] [1]; [e], [i]; 1.16 [e]; 8.4 [b]-[d], [h]; 22 NYCRR 1215.1, 1400.2), was suspended from the practice of law for a period of three years. Respondent failed to establish any compelling factors in mitigation; substantial aggravating factors included that respondent's misconduct involved a calculated course of deceitful conduct and abuse of her position as an attorney, and that she defaulted in responding to the supplemental petition, thereby evidencing a disregard for the outcome of the disciplinary proceeding.

RESEARCH REFERENCES

Am Jur 2d Attorneys at Law §§ 37, 54, 58, 61, 66, 68, 69, 107, 113.

Carmody-Wait 2d Officers of Court §§ 3:255, 3:278–3:281, 3:293, 3:325–3:327, 3:332, 3:336.

22 NYCRR 1200.0, rules 1.3 (a), (b); 1.4 (a) (3), (4); 1.5 (d) (2), (5) (ii); (e); 1.15 (a), (b) (2); (d) (1); (e); (i); 1.16 (e); 8.4 (b)-(d), (h); 1215.1, 1400.2.

NY Jur 2d Attorneys at Law §§ 381, 402, 405, 406, 449, 503, 511, 513–515, 518, 525, 529.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Discipline and Disciplinary Actions.

***269 FIND SIMILAR CASES ON THOMSON REUTERS WESTLAW**

Path: Home > Cases > New York State & Federal Cases > New York Official Reports

Query: suspended & fail! /3 cooperate & misrepresent! & neglect! & aggravat!

APPEARANCES OF COUNSEL

Roderick Quebral, *Principal Counsel*, *Eighth Judicial District Grievance Committee*, Buffalo, for petitioner.
LaTasha D. Crutcher, respondent pro se.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to the practice of law by this Court on June 17, 2013, and maintains an office in Buffalo. In September 2016, the Grievance Committee filed a petition alleging against respondent five charges of misconduct, including making misrepresentations to prison officials to gain access to an inmate, failing to keep two clients reasonably informed about their matters, and failing to cooperate in the investigation of the Grievance Committee. Respondent filed an answer denying certain material allegations of the petition, and this Court appointed a referee to conduct a hearing. Prior to the hearing, however, the parties entered into a stipulation resolving all factual issues concerning the charges of misconduct, and the Grievance Committee rested its case against respondent based upon the uncontested facts. Respondent thereafter offered testimony and certain documentary proof in mitigation of the charges. In April 2017, the Referee filed a report sustaining the charges and finding that respondent had failed to establish any substantial factors in mitigation. The Grievance Committee moves to confirm the report of the Referee and for a final order of discipline. Although respondent did not file papers in response to the motion, she appeared before this Court on the return date thereof and was heard in mitigation.

With respect to charge one, the Referee found that, in 2014, respondent was retained to represent a criminal defendant in an extradition proceeding, after which the client was extradited and imprisoned in Pennsylvania. The Referee found that, on May 9, 2016, respondent contacted a Pennsylvania prison official and engaged in dishonesty and deceit to gain access to the client. The Referee found that respondent told the prison official that the client's then current Pennsylvania criminal ***270** defense attorney had asked respondent to meet with the client to obtain a witness list, and that the Pennsylvania attorney was unable to meet personally with the client owing to a family emergency. The Referee found that, when the prison official expressed concern about a grievance complaint that had been previously filed against respondent based upon her alleged conduct during a prior visit to the prison, respondent told the prison official that the "New York State Bar Association" had cleared her of all wrongdoing in relation to the prior visit. The Referee found, however, that, on May 9, 2016, respondent was in possession of a letter from the New York grievance authorities indicating that the disciplinary investigation regarding her prior visit to the prison remained open. The Referee further found that, when the prison official continued to express reluctance to grant respondent access to the inmate, respondent falsely stated that she had filed a motion and obtained judicial permission to meet with the inmate. The Referee also found that, when the prison official subsequently contacted the client's Pennsylvania criminal defense attorney, he advised the prison official that, prior to May 9, 2016, he had rejected respondent's offer to serve as cocounsel in the Pennsylvania proceeding, had refused to support her application for pro hac vice admission in Pennsylvania, and had never requested that she visit the client in prison.

With respect to charges two and three, the Referee found that, in 2015, respondent failed to respond to inquiries from two clients and failed to take action on their matters. In relation to one of those matters, the Referee found that respondent had determined that the client had no legal remedy and ceased working on the matter without notifying the client. The Referee also found that, after the clients terminated respondent as counsel in their matters, she failed to comply with their requests for documentation from their legal files.

With respect to charge four, the Referee found that, from January through March 2016, respondent failed to label properly her attorney trust account, issued a trust account check that was returned for insufficient funds, initiated two trust account debit transfers that were denied for insufficient funds, transferred funds between her trust account and personal checking account using electronic transfers rather than issuing checks payable to a named payee, and failed to make, keep, and produce to the Grievance Committee required bookkeeping records concerning transactions related to her practice of law.

***271** With respect to charge five, the Referee found that, from October 2015 through May ****2** 2016, respondent failed to respond to several inquiries from the Grievance Committee regarding the allegations that gave rise to charges one through four.

With respect to matters in mitigation raised by respondent during the hearing, the Referee found that, although respondent testified that she suffered from certain mental health issues during the relevant time period, she failed to produce any documentation to corroborate that testimony other than a one-page billing summary from her treatment provider that was generated approximately three days before the hearing. The Referee also noted that respondent subsequently failed to produce additional corroborating documentation on that point, despite her statement to the Referee that such additional documentation was forthcoming. Accordingly, the Referee found that respondent failed to establish that mental health issues had contributed to the alleged misconduct.

We conclude that the findings of the Referee are supported by the record and, therefore, we grant the Grievance Committee's motion to confirm them.

In addition to the petition, respondent is the subject of a supplemental petition that was filed in March 2017, which alleges against her four charges of misconduct, including neglecting two client matters, failing to refund to one client unearned legal fees, and failing to cooperate in the investigation of the Grievance Committee. Respondent was personally served with the supplemental petition on March 3, 2017, but she thereafter failed to file an answer or to request from this Court more time to do so. In May 2017, the Grievance Committee filed with this Court a motion for an order, pursuant to 22 NYCRR 1020.8 (c), finding respondent in default and deeming admitted the material allegations of the supplemental petition. Respondent personally appeared before this Court on the return date of the motion, at which time she requested that the Court adjourn the appearance and extend the due date for the answer to allow her to retain counsel. Although the Court granted her requests, respondent thereafter failed to retain counsel or to file an answer to the supplemental petition. Accordingly, we grant the Grievance Committee's motion for an order finding respondent in default and deeming admitted the allegations in the supplemental petition.

With respect to charge one, respondent admits that, in March 2016, she accepted $500 to represent a client in a domestic relations***272** matter and thereafter failed to provide to the client a statement of client rights, periodic billing statements, or a written retainer agreement executed by respondent. Respondent also admits that she failed to appear at two scheduled court appearances in the matter, failed to respond to subsequent inquiries from the client, and failed to refund to the client unearned legal fees.

With respect to charge two, respondent admits that, in February 2015, she accepted more than $3,000 to represent a client in a criminal matter and thereafter failed to provide to the client an executed retainer agreement and failed to respond to subsequent inquiries from the client. Respondent further admits that, in March 2016, she agreed to represent the same client in a child custody matter and failed to respond to the custody petition filed against the client, which resulted in the court ruling against the client.

With respect to charge three, respondent admits that, in July 2016, she was charged with aggravated unlicensed operation of a motor vehicle for driving with a license that had been suspended based upon two outstanding scofflaw violations. Although the prosecutor agreed to allow respondent to resolve the matter by entering a plea of guilty to two parking infractions and

paying a fine, respondent admits that she has neither paid the fine nor resolved the underlying scofflaw violations.

With respect to charge four, respondent admits that, from July through September 2016, she failed to respond to written inquiries from the Grievance Committee, failed to appear for a scheduled interview with counsel for the Grievance Committee, and failed to produce certain documentation requested by the Grievance Committee.

Based upon the findings of the Referee on the petition and the admissions of respondent on the supplemental petition, we find respondent guilty of professional misconduct and conclude that she has violated the following Rules of Professional Conduct (22 NYCRR 1200.0):

rule 1.3 (a)—failing to act with reasonable diligence and promptness in representing a client;

rule 1.3 (b)—neglecting a legal matter entrusted to her;

rule 1.4 (a) (3)—failing to keep a client reasonably informed about the status of a matter;

rule 1.4 (a) (4)—failing to comply promptly with a client's reasonable requests for ****3** information;

***273** rule 1.5 (d) (2)—entering into an arrangement for, charging or collecting a fee prohibited by law or rule of court;

rule 1.5 (d) (5) (ii)—entering into an arrangement for, charging or collecting a fee in a domestic relations matter without a written retainer agreement signed by respondent and the client setting forth in plain language the nature of the relationship and the details of the fee arrangement;

rule 1.5 (e)—failing to provide a prospective client in a domestic relations matter with a statement of client's rights and responsibilities;

rule 1.15 (a)—commingling client funds with personal funds;

rule 1.15 (b) (2)—failing to identify her trust account as an "attorney special account," "attorney trust account," or "attorney escrow account";

rule 1.15 (d) (1)—failing to maintain for seven years required bookkeeping records, including records of all deposits and withdrawals from any bank account concerning or affecting her practice of law and records showing the source and amounts of all funds deposited into, or disbursed from, any such account;

rule 1.15 (e)—making withdrawals from a special account by a method other than either a check payable to a named payee or a bank transfer to a named payee upon the prior written approval of the party entitled to the proceeds;

rule 1.15 (i)—failing to make available to the Grievance Committee financial records required to be maintained;

rule 1.16 (e)—failing to refund promptly any part of a fee paid in advance that has not been earned;

rule 8.4 (b)—engaging in illegal conduct that adversely reflects on her fitness as a lawyer;

rule 8.4 (c)—engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;

rule 8.4 (d)—engaging in conduct that is prejudicial to the administration of justice; and

rule 8.4 (h)—engaging in conduct that adversely reflects on her fitness as a lawyer.

We additionally conclude that respondent has violated 22 NYCRR 1215.1 by failing to provide to a client, within a reasonable period of time, a letter of engagement setting forth an explanation of the scope of the legal services to be provided, as well as an explanation of the attorney's fees to be charged, expenses, and billing practices. We also conclude that

respondent ***274** has violated 22 NYCRR 1400.2 by failing to provide to a client in a domestic relations matter itemized billing statements at 60-day intervals.

We have considered, in determining an appropriate sanction, respondent's failure to establish any compelling factors in mitigation, as well as the substantial aggravating factors relevant to this matter, including that respondent's misconduct set forth in charge one of the petition involves a calculated course of deceitful conduct and her abuse of her position as an attorney. We have also considered that respondent defaulted in responding to the supplemental petition, thereby evidencing a disregard for the outcome of this proceeding (*see Matter of Tate*, 147 AD3d 35, 37 [2016]). Accordingly, we conclude that respondent should be suspended from the practice of law for a period of three years and until further order of this Court. In addition, in the event that respondent applies to this Court for reinstatement to the practice of law, she must in the application sufficiently explain the circumstances of her default on the supplemental petition.

Smith, J.P., Carni, DeJoseph, NeMoyer and Troutman, JJ., concur.

Order of suspension entered.

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1221 (03/31/2021)

Topic: Lawyer reaching out to former clients

Digest: A lawyer who has changed law firms may contact clients she represented for estate planning purposes at her previous firm, may inform or remind these former clients that she has joined a new firm, and may offer to review their estate planning. Such communications are not advertisements and therefore are not subject to the advertising provisions in Rule 7.1 or the solicitation provisions in Rule 7.3, but they are subject to the more general provisions in Rule 8.4(c) forbidding misrepresentation.

Rules: 1.0(a), 7.1, 7.3, 8.4(c)

FACTS

1. The inquirer formerly worked at a law firm as an attorney practicing in the elder law area. After notifying the firm that she would be leaving to join another firm, the inquirer sent notice of her impending departure to approximately 1,100 of her current and former clients, most of whom were elderly or disabled. That notice, approved by the firm she was leaving, included a "Client File Retention/Transfer Instruction" form, also approved by the firm, that provided the clients with three options: (1) remain at the inquirer's old firm; (2) follow the inquirer to the new firm and have the client file and unused client funds transferred to the new firm; or (3) request that the file and unused client funds be returned to the client.

2. Shortly after the inquirer's departure, a number of clients who she had been representing advised her that they wished to follow the inquirer to her new firm, and they provided the inquirer with the appropriately completed and signed Client File Retention/Transfer Instruction making that election. The inquirer also received word from dozens of other former clients who advised her that they, similarly, had elected to follow the inquirer to her new firm but had sent their completed and signed Client File Retention/Transfer Instruction to her former firm.

3. The inquirer states that despite her repeated requests over a period of several months, her former firm has not provided her with a list of the clients who have notified the former firm of their election to follow the inquirer to her new firm, and her former firm also has not forwarded their files or transferred their funds. The inquirer notes that many of her elderly or disabled former clients do not have the technical capability to locate her or her new law firm through an online search.

QUESTION

4. May the inquirer reach out and contact directly the clients she represented at her former firm to remind them that she has joined a new firm and to offer them the opportunity to review and update their estate plans?

OPINION

5. We note at the outset that this inquiry raises issues of contract and partnership law. Our opinion does not address those issues because they are questions of law and are, therefore, beyond the jurisdiction of this Committee. *See, e.g.*, N.Y. State 1134 ¶ 6 (2017). Furthermore, the Committee only addresses the conduct of an inquirer. Therefore, this opinion does not address the conduct of the lawyers in inquirer's former firm.

6. As a purely ethical matter, the inquirer may reach out and directly contact the clients she represented at her former firm to remind them that she has joined a new firm and to offer them the opportunity to review and update their estate plans. This communication would not violate the rules governing advertising and solicitation because it would be neither an "advertisement" nor a "solicitation" as those terms are defined in the Rules of Professional Conduct (the "Rules").

7. The term "advertisement" is defined in Rule 1.0(a) as follows:

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

8. Although Rule 1.0(a) excludes "existing clients" but not former clients, the Rules have been interpreted to exclude former clients as well in some circumstances. Rule 7.1, Cmt. [7] says: "Communications to former clients that are germane to the earlier representation are not considered to be advertising." *See also* N.Y. State 1129 ¶ 8 (2017); N.Y. State 848 ¶ 11 (2011); *see also* N.Y. County 748 (2015); N.Y. City Bar 2015-7 (2015); *see generally* Rule 7.1, Cmt. [6] ("Not all communications made by lawyers about the lawyer or the law firm's services are advertising.").

9. Nor would the inquirer's communication to her former clients be a "solicitation." Because "[a]ll solicitations… are advertisements with certain additional characteristics … [b]y definition, a communication that is not an advertisement is not a solicitation." Rule 7.3, Cmt. [1]. Therefore, communications by a lawyer to former clients that are germane to the lawyer's earlier representation of such former clients are not subject to the advertising provisions in Rule 7.1 or the solicitation provisions in Rule 7.3. *See* N.Y. State 1129 ¶ 18. In any event, even if Rule 7.3 applied, it expressly does not prohibit solicitations to a former client. *See* Rule 7.3(a) ("A lawyer shall not engage in solicitation: (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, *former client* or existing client") (emphasis added).

10. In N.Y. County 679 (1990), the Committee specifically addressed the word "germane," stating:

> [T]he word must be given its ordinary meaning of "closely related" or "relevant". *See* Random House Dictionary (Unabridged ed. 1967). We believe employment or advice may be closely related because it concerns the prior matter or because the subject matter or issues are the same.

11. The inquirer's communications to her former clients, of course, must be truthful. As Rule 8.4(c) states: "A lawyer or law firm shall not … engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *See also* Comment [6] to Rule 7.1 ("All communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law."); N.Y. State 1184 ¶ 11 (2020).

12. The inquirer's proposed communications, which are germane to her earlier representations of the former clients she seeks to contact, are therefore permissible, and are not governed by the rules governing advertising or solicitation, but are subject to the more general provisions of Rule 8.4(c).

CONCLUSION

13. A lawyer who has changed law firms may contact clients she represented for estate planning purposes at her previous firm, may inform or remind these former clients that she has joined a new firm, and may offer to review their estate planning. Such communications are not advertisements and therefore are not subject either to the advertising provisions in Rule 7.1 or to the solicitation provisions in Rule 7.3, but the communications are subject to the more general prohibition against "misrepresentation" in Rule 8.4(c).

(03-21)

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1227 (08/26/2021)

Topic: Advertising, solicitation, targeted email to prospective clients

Digest: Email communication from out-of-state law firm to a list of specific individuals in New York, seeking clients for future false advertising and products liability class actions, is both an advertisement and a solicitation under Rules 7.1 and 7.3 of the New York Rules of Professional Conduct.

Rules: 1.0(a), 7.1, 7.3

FACTS:

1. The inquirer is a partner in a California law firm. Although the firm does not have a New York office, one of its partners is admitted to practice in New York. The inquirer proposes to send out an "email blast" to individuals in New York, seeking potential named plaintiffs for future class action cases that the firm would like to commence alleging false advertising and products liability. The inquirer acquired the names and email addresses of these individuals from various lists, but the inquirer has no information about the individuals listed, including whether or not they have been harmed by the advertisements or products that the firm is investigating.

QUESTION:

2. Is the proposed email communication to potential clients a "solicitation" under Rule 7.3 of the New York Rules of Professional Conduct (the "Rules")?

OPINION:

3. This inquiry is governed principally by Rule 7.3, entitled "Solicitation and Recommendation of Professional Employment." There is a threshold issue, however, as to whether this committee has jurisdiction to interpret Rule 7.3 as applied to the proposed conduct of an attorney who is not admitted to practice in New York and who practices in a firm that does not maintain an office in New York. We believe we do have such jurisdiction, because paragraph (i) of Rule 7.3 provides:

> (i) The provisions of this Rule [7.3] shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

4. Accordingly, as New York specifically asserts disciplinary jurisdiction over out-of-state

lawyers like the inquirer who solicit retention by residents of New York State, we will proceed to answer the inquiry.

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

> (b) For purposes of this Rule [7.3], "solicitation" includes any advertisement *initiated* by or on behalf of a lawyer or law firm; that is directed to, or *targeted* at, a specific recipient or group of recipients or their family members or legal representatives, the *primary purpo*se of which is the retention of the lawyer or law firm, and a *significant motive* for which is pecuniary gain. It does *not* include a proposal or other writing prepared and delivered in response to a specific request. [Emphasis added.]

6. Comment [2] to Rule 7.3 elaborates on this definition by stating: "Any advertisement that meets all four of these criteria is a solicitation, and is governed not only by the Rules that govern all advertisements but also by special Rules governing solicitation."

7. Rule 1.0(a) defines "advertisement" as follows:

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

8. Since the emails will be sent "by or on behalf of" the inquirer's law firm, and since the "primary purpose" of the emails is to locate future clients willing to retain the inquirer's firm and to serve as named plaintiffs in future class action false advertising or product liability cases which the inquirer's firm will commence, the proposed email is an "advertisement" within the meaning of Rule 1.0(a).

9. The proposed email communication clearly satisfies three of the four additional criteria of Rule 7.3(b) for classification as a solicitation. First, the communication will be "initiated" by the lawyer or law firm (rather than responding to a "specific request" from a potential client). Second, the "primary purpose" of the email is to locate clients who will retain the firm for future class action matters involving false advertising and products liability claims. Third, a "significant motive" for the email is the firm's expectation of "pecuniary gain" via future legal fees if it is retained.

10. The only remaining requirement is that the email communication be "directed to, or targeted at, a specific recipient or group of recipients." Comment [3] to Rule 7.3 provides guidance on this question, explaining that an attorney advertisement is "directed to or targeted at" a specific recipient" if it is "addressed so that it will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages)." Such advertisements are deemed to be solicitations subject to more stringent rules, "because otherwise they would not be readily subject to disciplinary oversight and review." Rule 7.3, Comment [3].

11. This policy of subjecting solicitations to more stringent rules is the crux of the Rule. Newspaper, magazine, and billboard advertisements, like radio and television advertisements, are published or broadcast on "public media," which is accessible and reviewable for compliance purposes. For the most part, website and internet advertising share this characteristic of being accessible and reviewable. In contrast, private communications to individuals or groups of individuals, such as letters, emails, and direct-mail packages, are not as easily accessible to the public or the disciplinary authorities and cannot ordinarily be reviewed or monitored for compliance purposes.

12. The protection of the public from non-compliant lawyer advertising and solicitation is an important aspect of the work of attorney grievance committees. Without the ability to review targeted advertising, these committees could not confirm that such advertisements are not deceptive, false or misleading, and are otherwise in compliance with the Rules.

13. We have reached similar conclusions in prior opinions. In N.Y. State 1009 (2014), we concluded that email sent to a specific recipient is a mode of communication that is considered "targeted" at "specific recipients" within the meaning of Rule 7.3. In N.Y. State 1039 (2014), we concluded that email sent to subscribers to an attorney blog could be solicitations if the attorney obtained the email addresses through an opt-in box on the blog. In N.Y. State 1136 (2014), we found that written communications from a law firm inviting people to a law firm marketing event must comply with Rule 7.3 if the firm is seeking client retention. In contrast, in N.Y. State 1016 (2014), we found that an emailed advertisement sent to all members of internet message boards of which the attorney was a member was not a solicitation.

14. Here, in our view, the inquirer's emails constitute an "advertisement" that is "targeted at" "specific recipients" whose names are on a list of names and email addresses acquired by the firm. It does not matter that the firm has no further information about the recipients, that the recipient group is large, or that members of the group have not been chosen based on particular shared characteristics. The mailing is to a list of specific individuals, and that suffices to define it as a "solicitation" as defined by Rule 7.3(b).

CONCLUSION:

15. The proposed email communication to a list of individuals in New York, seeking clients for future false advertising or products liability class actions, is a solicitation under the Rule 7.3 of the New York Rules of Professional Conduct.

(13-21)

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

Committee on Professional Ethics

Opinion 1232 (11/09/2021)

Topic: Attorney advertising

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

Rules: 7.1, 7.2, 7.3

FACTS:

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

QUESTION:

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

OPINION:

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

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

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

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

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

> (b) For purposes of this Rule [7.3], "solicitation" includes any advertisement initiated by or on behalf of a lawyer or law firm; that is directed to, or targeted at, a specific recipient or group of

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

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

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

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

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

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

CONCLUSION:

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

(26-21)

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 □ PH 518.463.3200 □ www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1067 (7/27/15)

Topic: Prospective clients; confidentiality; duty to inform client of material developments

Digest: When a person consults with a lawyer in good faith about possible representation in a matter, the lawyer owes a duty of confidentiality pursuant to Rule 1.18(b) with respect to information the lawyer learns in the consultation, absent the prospective client's consent to disclosure or use. Whether the prospective client's identity, the fact of the consultation, and the subject matter of the consultation constitute confidential information turns on whether the information is protected by the attorney-client privilege, on whether disclosure likely would be embarrassing or detrimental to the prospective client, and on whether the prospective client has asked the lawyer not to disclose the information. Whether the consultation precludes or restricts the lawyer from undertaking representation of another client or continuing to represent another client depends on whether the matters are the same or substantially related and on whether the information the lawyer learned from the prospective client could be "significantly harmful" to the prospective client in the matter.

Rules: 1.4(a), 1.6(a), 1.9(c), and 1.18(a)-(d)

FACTS

1. Inquirer is a small law firm of three named partners X, Y and Z (the "Law Firm") practicing primarily in the fields of estate planning and administration, trusts and elder law, and related fields. Two partners in the firm, X and Y, have long represented a client ("Father") in a variety of matters, including a protracted and vigorously contested Article 81 proceeding brought by Father's adult child ("Child") over the guardianship of Father's wife. That litigation concluded in Father's favor. The firm continues to represent Father. Z, the third named partner in the Law Firm, took no part in the representation of Father in the guardianship proceeding and was not aware of it until the consultation that lies at the center of the inquiry.

2. Some six months after the guardianship proceeding concluded, Child sought a meeting with Z, ostensibly to discuss possible representation in connection with estate planning for Child. Z holds public seminars on elder law and estate planning from time to time and invites members of the audience to schedule a one-hour meeting with him to discuss individual concerns after the seminar. Child apparently was responding to such an invitation.

3. Z apparently did not check for conflicts before discussing the substance of Child's concerns, and Child did not mention until the end of the consultation that the Law Firm had represented Father in a guardianship proceeding in which Child was Father's adversary (*i.e.,* adverse to the Law Firm's client).

4. Without revealing any information beyond the fact that he had met with Child to discuss possible representation, Z then inquired of his partners whether there had been such a guardianship matter. X and Y confirmed that there had been such a matter involving heated and protracted litigation. The three attorneys agreed that, even if there were no conflict with undertaking planning for Child, they should not accept the representation, and they declined it.

QUESTION

5. Do the New York Rules of Professional Conduct (the "Rules") require the Law Firm to disclose to Father that his Child had sought to retain the Law Firm in connection with a matter unrelated to the Law Firm's representation of Father? Do the Rules permit such disclosure?

6. Under the Rule, does Z's consultation with Child preclude or restrict the Law Firm from continuing to represent Father?

7. Do the Rules require or permit the Law Firm to inform Child's lawyer in the guardianship proceeding ("W") that Child sought to retain the Law Firm for estate planning?

OPINION

Law Firm's Duties to a Prospective Client

8. Before addressing the Law Firm's obligations and authority with respect to Father and to Child's own lawyer (W), we must first examine the Law Firm's duties to Child, because Child's information is at the center of this inquiry. Unless Child was acting in bad faith when consulting Z concerning the possibility of representation (a possibility discussed below), Child became a "prospective client" of Z and his firm at the outset of that consultation, see Rule 1.18(a), and is thus entitled to some (albeit not all) of the protections that inure to clients in any client-attorney relationship. In particular, a prospective client benefits from the protection of confidential information, Rule 1.18(b), and protection against the lawyer representing another client with interests materially adverse to those of the 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 the prospective client in the matter, Rule 1.18(c).

9. Our discussion of the Law Firm's duties to Child as a prospective client is premised on the assumption that Child was acting in good faith when consulting Z. Had Child communicated information to Z "unilaterally . . . without any reasonable expectation that . . . [Z was] willing to discuss the possibility of forming a client-lawyer relationship; or . . . for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter," Child would not be deemed to be a prospective client and the Law Firm would not owe Child any duties that a lawyer owes to a prospective client. *See* Rule 1.18(e) (describing two categories of people who are not prospective clients).

10. Rule 1.18(a) defines a prospective client as one "who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter."

11. Rule 1.18(b) provides that a lawyer who engages in discussion about possible

representation 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," even if no client-lawyer relationship ensues. [Emphasis added.] Rule 1.9, in turn, provides in pertinent part that a lawyer shall not reveal any "confidential information" of a former client protected by Rule 1.6 except as allowed or required by the Rules with respect to a current client, but Rule 1.9(c) places no restriction upon the revelation or use of non-confidential or "generally known" information. In this regard, it is similar to Rule 1.6(a) (defining "confidential information" to exclude, among other things, "information that is generally known in the local community or in the trade, field or profession to which the information relates"). Thus, Rule 1.18(b) prohibits a lawyer from using or disclosing prospective client information only if the information is "confidential information" as defined in Rule 1.6, and even then only if the information was "learned in the consultation."

12. Under Rule 1.18(c), a lawyer may also be subject to *conflict of interest rules* with respect to a prospective 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) [stating conditions necessary for screening to be effective]. [Emphasis added.]

13. In the remainder of this opinion, we will first discuss the use of a prospective client's confidential information and then discuss whether the consultation with the prospective client creates a conflict of interest.

Identity of Client and Fact of Consultation as Confidential Information

14. In this inquiry, the identity of the prospective client (Child), the fact of Child's consultation with Z about representation, and the general subject matter of the consultation were all "learned [by Z] in the consultation." Are they pieces of confidential information of the prospective client? Applying the definition of "confidential information" in Rule 1.6, information protected by Rule 1.18(b) may be of three types: (i) information "protected by the client-attorney privilege"; (ii) information that is "likely to be embarrassing or detrimental to the [prospective] client if disclosed"; or (iii) "information that the [prospective] client has requested be kept confidential."

15. Whether information is protected by the attorney-client privilege is an issue of law on which we offer no opinion because issues of law are beyond our jurisdiction. For a general discussion of privilege in relation to the identity of a client, the fact of consultation and related matters, see American Law Institute, Restatement of the Law Third, *The Law Governing Lawyers,* §69, *comment g*, and Reporter's Note to *comment g.*

16. Whether use or disclosure of the information concerning the identity of a prospective

client, the fact of consultation, and the general subject matter of the consultation would be embarrassing or detrimental to the prospective client, and whether the prospective client has requested or been assured by the lawyer of confidentiality with respect to such information, are questions dependent upon the relevant facts and circumstances. We cannot answer such questions in a particular case. Each lawyer confronted with the issue of whether the identity of a prospective client, the fact of a consultation concerning possible representation, the general subject matter of the representation and like information is confidential will need to make his or her own judgment based on whether the relevant facts satisfy the criteria defining confidentiality.

17. However, if Z concludes that information about Child's identity, consultation with Z about possible representation, and the general subject matter of that consultation, fits under any of the rubrics of confidential information, then Z and, by extension, the other lawyers associated with the Law Firm, are duty bound under the Rules not to disclose such information in whole or in part. We are unable to conclude on the basis of the inquiry that any exception to the general rule of confidentiality contained in Rule 1.6 is applicable to the information at issue in this inquiry.[1]

Law Firm's Disclosure Obligations to its Existing Client

18. We turn now to whether the Law Firm has any disclosure obligations to its client, Father. If the information concerning Child's consultation is ***not*** confidential, the Law Firm may, at will, share that information with Father. Rule 1.6(a) – and the derivative Rules 1.9(c) and 1.18(b) – prohibit a lawyer from using or revealing only "confidential information" as defined in Rule 1.6(a). Those Rules do not govern information that is not confidential.

19. A more difficult question is what the Law Firm must do if any of the information disclosed by Child during the consultation ***is*** confidential information. If any of it is confidential information, then the inquirer must determine whether any of Child's confidential information would be material to the representation of Father in the matter in which the Firm represents or comes to represent Father. Rule 1.4(a)(1)(iii) obligates a lawyer to inform the client of "material developments in the matter." As the City Bar ethics committee stated in N.Y. City 2005-2 (2005), one client does not have any legitimate expectation that the lawyer will use confidential information of a second client for the benefit of the first client. However, if the information the lawyer has from the second client is so material to the matter in which the firm represents the first client that the lawyer cannot avoid using the information, then the firm will be faced with a

[1] Rule 1.6(a)(1) authorizes disclosure or use when the client has given informed consent. Some lawyers routinely ask prospective clients who are exploring the possibility of an engagement to agree to an advance waiver of any conflict that might result from the prospective client sharing confidential information. See Rule 1.7, Cmts. [22]-[22A] (discussing circumstances making it more or less likely that an advance conflict waiver will be deemed valid and effective). *See also* N.Y. City 2006-2 (2006) (discussing advance conflict waivers, imputation of conflicts and ethical screens under the former Code of Professional Responsibility); Rule 1.18, Cmt. [5] (lawyer may condition conversations with a prospective client on the person's informed consent (i) that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter and (ii) that the lawyer may subsequently use information received from the prospective client). Such an advance waiver apparently does not exist here – and even if it did, an advance waiver of conflicts of interest would not necessarily constitute advance consent to disclosure of confidential information to a conflicting client.

dilemma. Here, the firm would have an obligation of confidentiality to the Child under Rule 1.18 with respect to material information that the Law Firm is required under Rule 1.4 to disclose to Father.

20. If, as stated in the Inquiry, the matter upon which Child consulted Z is, in fact, unrelated to the representation of Father, then the information learned by Z in the consultation is unlikely to be material to matters within the scope of the Law Firm's representation of Father, and the Law Firm would have no obligation under the Rules to inform Father of Child's consultation and the representation of the Father would not be affected.

Law Firm's Disclosure Obligations to Prospective Client's Lawyer

21. With respect to Child's lawyer (W), the Law Firm has no duty of disclosure. Indeed, if disclosure would undermine Child's relationship with W, then the information would be confidential because disclosure would be detrimental or embarrassing to Child. If the information is confidential, Rule 1.18(b) prohibits the Law Firm from disclosing it to W without Child's informed consent.

Conflicts of Interest Between Prospective Client and Existing Client

22. As noted above, Rule 1.18(c) would apply if (i) the Firm represents or comes to represent the Father in a matter that is the same as, or substantially related to, the matter about which Child sought representation, (ii) the interests of Child in that matter are "materially adverse" to those of Father in the matter in which the Firm represents (or comes to represent) him, and (iii) the information Z obtained from Child in the consultation could be "significantly harmful" to Child in the matter. *See* N.Y. State 960 (2013) (discussing the meaning of "materially adverse," "substantially related" and "significantly harmful.")

23. Here, the Firm has represented Father in connection with a guardianship proceeding with respect to the Father's wife. The Child apparently sought representation in connection with the Child's own estate planning. Clearly the representations do not concern the same matter. The question is whether a reasonable lawyer would conclude that there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation [in this case, Z's consultation with Child] would materially advance the position of the client [in this case, Father] in the subsequent matter [in this case, the Firm's continuing representation of Father].

24. In N.Y. State 960 (2013), the inquirer had met with a prospective client who had recently purchased a home to discuss filing suit against the seller over substantial structural damage throughout the home, which required repairs by a contractor. Although the prospective client did not hire the lawyer, the contractor later sought to hire the lawyer to bring a lawsuit against the homeowner for the balance due for the repair work. We concluded that the facts presented did not enable us to determine whether any confidences received from the homeowner in the initial consultation were relevant to the contractor's claim for non-payment or to any potential counterclaim by the homeowner against the contractor. Here, since Child was consulting Z about estate planning, it seems less likely that Child would have imparted confidences relevant to

the Firm's representation of Father. However, the relevance of confidences imparted by Child are a factual question that is beyond the jurisdiction of this Committee and can only be made by Z.

25. If the interests of Child in any matters in which the Firm represents Father are materially adverse to those of Father, the question under Rule 1.18 is whether the information Z obtained from Child in the consultation could be "significantly harmful" to Child in the matter. We pointed out in N.Y. State 960 (2013) that, even if confidential information obtained by the lawyer in the consultation by the prospective client is somewhat harmful to the prospective client, the information does not disqualify the lawyer from representation against the prospective client. As Professor Simon notes:

> The "significantly harmful" qualification is a radical twist. Whereas a lawyer must not oppose a former actual client in a substantially related matter without obtaining the former client's informed consent, a lawyer may oppose a former prospective client in a substantially related matter without even seeking the former client's consent as long as the lawyer did not receive information from the prospective client that "could be significantly harmful to that person in the matter." Under Rule 1.9(a), we presume – almost irrebuttably – that a lawyer who formerly represented a client received information from the former client that "could be significantly harmful" to that person in any substantially related matter. Under Rule 1.18(c), we reject that presumption and turn it into a question, an "if" clause, a rebuttable presumption.

Simon's New York Rules of Professional Conduct Annotated 954 (2015 ed.). As in the case of whether the prospective client imparted relevant factual information, the degree of harmfulness of such information is a factual question beyond the jurisdiction of this Committee.

CONCLUSION

26. When a person consults with a lawyer in good faith about possible representation in a matter, the lawyer owes a duty of confidentiality pursuant to Rule 1.18(b) with respect to information the lawyer learns in the consultation, absent the prospective client's consent to disclosure or use. Whether the prospective client's identity, the fact of the consultation, and the subject matter of the consultation constitute confidential information turns on whether the information is protected by the attorney-client privilege, on whether disclosure likely would be embarrassing or detrimental to the prospective client, and on whether the prospective client has asked the lawyer not to disclose the information. Here, if the Child's consultation with the Law Firm was unrelated to the Law Firm's representation of the Father, then the information learned from Child is unlikely to be material to the firm's representation of Father, but this is a factual determination that can be made only by the lawyer. In that case, the firm would have no obligation to disclose it (and, if it is confidential to Child, no ability to do so without the consent of Child). Moreover, if the information is confidential to Child, then the Law Firm has no obligation to disclose it to Child's lawyer in an unrelated matter, or the ability to do so without the consent of Child. Whether the consultation precludes or restricts the lawyer from undertaking representation of another client or continuing to represent another client depends on whether the matters are the same or substantially related and on whether the information the lawyer learned from the prospective client could be "significantly harmful" to the prospective

client in the matter.

(17-15)

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ☐ PH 518.463.3200 ☐ www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1107 (10/21/16)

Topic: Law firm name; use of "legal services" in firm name.

Digest: A law firm that is not a qualified legal assistance organization may not use the name "Jane Doe Legal Services, PLLC" without violating Rule 7.5(b), which prohibits law firms from using certain names that are associated with legal assistance organizations.

Rules: Rule 7.5(b)

FACTS

1. The inquirer, a lawyer we will call "Jane Doe", is an attorney who is forming a new law firm and wants to know if she can use her name in the title together with the phrase "Legal Services, PLLC."

QUESTION

2. May a private law firm use the name "Jane Doe Legal Services, PLLC?"

OPINION

3. Rule 7.5(b) contains prohibitions relating to the naming of law firms engaged in private practice. Relevant to the current inquiry, the rule states that "[s]uch terms as 'legal clinic', 'legal aid', 'legal service office', 'legal assistance office', 'defender office' *and the like* may be used only by qualified legal assistance organizations, except that the term 'legal clinic' may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein." [emphasis added] The question then is whether the title "legal services" is "like" the terms "legal aid," "legal service office," "legal assistance office," or "defender office."

4. The title "legal services" is almost identical to the title "legal service office." *Cf.* N.Y. State 869 (2011) (use of the title "Smith Law Firm" does not violate Rule 7.5); N.Y. State 732 (2000) (use of the title "The [Attorney Name] Group" does not violate Rule 7.5). In addition to this facial similarity, the term "legal services," like the other terms on the list, is often used by qualified legal assistance organizations *(e.g.,* "Bronx Legal Services", "Legal Services of Central New York", "Prisoner's Legal Services of New York", "MFY Legal Services", "Neighborhood Legal Services"). Thus, the use of the term "legal services" in a title is likely to cause the public to believe that the law firm at issue is a legal assistance organization. Preventing this type of misunderstanding by the public is the very purpose of Rule 7.5(b).

5. That the term "legal services" is joined with the name of one of the lawyers in the firm does not save the title. Notably, Rule 7.5(b) allows one term – "legal clinic" – to be used by private law firms when it is joined with the name of one of the lawyers in the firm, but this safe harbor does not apply to any of the other terms. Thus, any term that is "like" the other terms cannot take advantage of the legal clinic safe harbor. Moreover, since legal assistance organizations sometimes use one of the terms on the Rule 7.5(b) list together with the name of an individual as their title – either in memoriam or to recognize a sponsoring donor (*e.g.*, "Hiscock Legal Aid Society", "Jerome N. Frank Legal Services Organization", "WilmerHale Legal Services Center"), the risk of confusion remains.[1]

6. Although Rule 7.5(b) prohibits the use of "legal services" in the name of a law firm, the provision of legal services is, of course, central to what lawyers do. Consequently, nothing in this opinion is meant to prohibit a lawyer from indicating, other than as part of the name of a firm, that the lawyer renders legal services.

CONCLUSION

7. A law firm that is not a qualified legal assistance organization may not use the name "Jane Doe Legal Services, PLLC" without violating Rule 7.5(b), which prohibits law firms from using certain names that are associated with legal assistance organizations.

(27-16)

[1] We recognize that restrictions on a law firm's use of a trade name may raise constitutional issues. *Compare Friedman v. Rogers*, 440 U.S. 1 (1979) (upholding a Texas law prohibiting optometry trade names), with *Alexander v. Cahill*, 598 F.3d 79, 95 (2d Cir.), *cert. denied*, 131 S. Ct. 820 (2010) (distinguishing Friedman on its facts but also noting doubt as to Friedman's continued validity). As of now, however, the courts have not struck down Rule 7.5(b). Nor was that provision challenged in Alexander v. Cahill. If the constitutionality of the prohibition on the use of trade names by private lawyers is someday litigated, one of the issues may be the potential for deception that we have mentioned above. Ultimately the courts may or may not see that potential as sufficient to justify the restriction, but the constitutionality of the prohibition on trade names is a question of law beyond our Committee's jurisdiction.

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1207 (11/09/2020)

Topic: Firm names; trade names

Digest: A law firm may practice in New York using a name that does not include the name of any lawyer currently or formerly practicing in the firm (*i.e.,* under a "trade name") as long as the name under which the firm practices is not false, deceptive or misleading. A law firm may continue to practice under the same name after a name partner retires from the practice of law.

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

FACTS

1. In the wake of the recent amendment to Rule 7.5(b) of the New York Rules of Professional Conduct, three inquiries have come to the Committee asking closely aligned questions.

2. The first inquiry comes from a national law firm that maintains offices in several states where trade names are permitted and currently practices in those states under a trade name we will call "LONG Legal Group." LONG is an acronym for "Law Office of Norman Grant" (also fictional) who is the sole owner of the firm. In New York, Grant and two New York admitted attorneys, who we will call Hudson and India, practice in a law firm we will call "Grant, Hudson & India, P.C."

3. The second inquiry comes from a firm located in New York that maintains a physical location on a street we will call "Maple Street," and wishes to practice under the trade name "Maple Street Law Group."

4. The third inquiry comes from a lawyer named Jones who informs us that Smith, one of the name partners in a law firm we will call "Smith & Jones, LLP," will soon be retiring. The remaining name partner, Jones, wants to continue practicing under the same name.

QUESTIONS

5. May a law firm practice under a name that does not contain the name of any lawyers (in other words, under a trade name)?

6. May a law firm practice under a trade name based on its street address?

7. May a law firm continue to practice under a firm name that includes the name of a retired name partner?

DISCUSSION

8. For decades, lawyers have been required to practice under a firm name that contains the name of one or more of the lawyers in the firm or the name or names of one or more deceased or retired members of the firm (or of a predecessor firm) in a continuing line of succession. Prior opinions issued by this Committee under this Rule have stressed the purpose of the requirement is to protect the public from being deceived or misled as to the identity of lawyers using or practicing under the firm name.

9. On June 24, 2020, however, the Appellate Divisions issued a Joint Order amending Rule 7.5(b) so that it now reads, in pertinent part:

> (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.

***

10. The June 24, 2020 amendment deleted language in former Rule 7.5(b) that prohibited a "firm name containing the names other than those of one or more of the lawyers in the firm" except "the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession." Thus, had the Rule remained unchanged, the Committee would have concluded that practicing under a trade name, whether an acronym or a street name, was prohibited.

11. The clear implication of the additions to and deletions from Rule 7.5(b) is that law firm names no longer need to contain the names of lawyers practicing in the firm. However, the Rule as amended reaffirms and makes explicit the longstanding principle that law firm names must not be false, misleading, or deceptive.

12. This principle is reflected in Comment [2] to the Rule 7.5 as amended, which states,

> [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.

13. Comments [3], [4] and [5] give examples of deceptive or misleading firm names. Among other things, they interpret Rule 7.5 to prohibit a law firm name that (i) falsely implies a connection with a government agency, (ii) contains the name of a deceased or retired lawyer not in a continuing line of succession, (iii) contains the name of a lawyer holding public office, or (iv) implies that lawyers are partners when in fact they are not partners. Those Comments provide:

> [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.

14. In these inquiries before us, the proposed names do not fit any of the examples of names that would be prohibited as false, deceptive, or misleading. In the first inquiry, the proposed name is merely an acronym using the abbreviated form of the name of the owner of the firm and, in the second inquiry, the proposed name is the name of a street where the law office is located.

15. The third inquiry is slightly different. In the firm of Smith & Jones, LLP, we are told that Smith will soon be retiring but Jones wants to continue practicing under the same name.

In former Rule 7.5(b) (*i.e.,* before June 24, 2020), the black letter text expressly provided that, "if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession." That language was deleted by the recent amendments, but only because it was unnecessary now that the amended black letter text permits trade names that are not false, deceptive, or misleading.

16. In any event, essentially the same the language appears in Comment [2], which says: "It is not false, deceptive, or misleading for a firm to be designated by ... the names of retired or deceased members where there has been a continuing line of succession in the firm's identity." While the Comments are adopted only by the New York State Bar Association and not by the New York Courts, they are accepted as reliable guides to interpreting the Rules as long as they do not contradict the black letter text. *See* Preamble, ¶ 13 ("The Comments are intended as guides to interpretation, but the text of each Rule is authoritative"). Here, Comment [2] does not contradict the black letter text. Accordingly, it is not false, deceptive or misleading for the law firm of Smith & Jones, LLP, to continue practicing under the same name after Smith retires.

17. Whether a particular firm name is false, deceptive or misleading is a heavily fact-based inquiry, and the outcome will depend on a close context-based examination of the proposed name.

18. In circumstances where a contrary result might be reached, Rule 7.5(b) is not the only relevant rule. Using a firm name or domain name that is false, deceptive or misleading, or using a name that misrepresents the identity of the lawyer or lawyers practicing in the firm, might also constitute conduct involving deceit or misrepresentation in violation of Rule 8.4(c).

19. The general principles set forth in this opinion govern the ethical analysis of the myriad trade names that New York admitted attorneys may choose for their firms now that the use of trade names is no longer prohibited. The ethical propriety of each name under Rules 7.5(b) and 8.4(c) will always turn on the particular facts and circumstances.

CONCLUSION

20. A law firm may practice in New York using a name that is not the name of any lawyer practicing in the firm – in other words, under a trade name – so long as the name under which the firm practices is not false, deceptive or misleading. A New York law firm may continue to include the name of a retired partner in its name.

(16-20 & 17-20)

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1222 (04/12/2021)

Topic: Non-legal services; mediation; unauthorized practice of law

Digest: Lawyers may not jointly own a mediation business with nonlawyers if the mediation business employs lawyers to provide legal services to mediation clients. Lawyers may jointly own a mediation business with nonlawyers if the mediation business does not employ any lawyers and provides only nonlegal services. Lawyers who own a mediation business may accept referrals from it, subject to certain restrictions, and may enter into a non-exclusive reciprocal referral agreement with the mediation business. The Rules of Professional Conduct will apply to the mediation business where a mediation client could reasonably believe that the mediation services are the subject of a client-lawyer relationship and the lawyers who co-own the mediation business do not provide the mediation client with a written disclaimer stating that the mediation services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the mediation services.

Rules: 1.7(a)(2) & (b), 1.12(b), 2.4, 5.5(a), 5.7(a)

FACTS

1. The inquirers are a law firm ("Law Firm") and three partners in that law firm. Law Firm currently offers three types of services: (i) divorce litigation, (ii) collaborative law, and (iii) mediation services.

2. The inquirers believe that Law Firm's mediation services are not attractive because many clients and potential clients are reluctant to use lawyers as mediators. However, the inquirers have an opportunity to purchase a controlling interest in a divorce mediation business ("Mediation Business"). They plan to own the Mediation Business together with an experienced, respected mediator who is not a lawyer.

3. The Mediation Business and Law Firm will occupy separate locations and will not use the Law Firm name or the names of any of the inquiring law partners in the Mediation Business practice Following a successful mediation, the Mediation Business might employ lawyers to draft a separation agreement and related documents to effectuate the divorce on the terms agreed by the parties.

QUESTIONS

4. The inquirers pose five questions:

- May a mediation business co-owned by lawyers and non-lawyers employ lawyers to provide post-mediation legal services to the mediating parties?

- May lawyers and non-lawyers co-own a divorce mediation business?

- May a law firm accept referrals from a mediation business partly owned by partners in the law firm?

- May a law firm and a mediation business enter into a non-exclusive mutual referral agreement?

- How does Rule 5.7 apply to services offered by nonlawyer mediators at a mediation business co-owned by lawyers?

OPINION

May a mediation business co-owned by lawyers and non-lawyers employ lawyers to provide post-mediation legal services to the mediating parties?

5. Rule 5.4 ("Professional Independence of a Lawyer") of the New York Rules of Professional Conduct (the "Rules") governs this question. Rule 5.4(a), (b) and (d) provide, in pertinent part:

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

6. Under Rule 5.4, the Mediation Business may *not* employ lawyers to provide legal services as proposed. First, Rule 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer, so any revenues from the legal services could not be shared with the nonlawyers. Second, even if the legal fees could be segregated from the fees for mediation services, or even if the Mediation Business did not charge fees for the legal services, the Mediation Business would still be barred from offering legal services because Rule 5.4(b) prohibits lawyers from jointly owning a business with nonlawyers "if any of the activities of the partnership consist of the practice of law." Third, any lawyer employed by the Mediation Business would be in violation of Rule 5.4(d), which prohibits a lawyer from practicing with "an entity authorized to practice law for profit."

7. We also direct the inquirers' attention to N.Y. Judiciary Law § 495, which states: "No corporation or voluntary association shall (a) practice or appear as an attorney-at-law for any person in any court in this state...(c)...or to render legal services or advice, nor (d) furnish attorneys or counsel, nor (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner...." We do not have authority to construe Section 495, but the inquirers should be aware of it.

May lawyers and non-lawyers co-own a divorce mediation business?

8. The answer to this question depends on whether mediation services constitute the practice of law.

9. If providing mediation services constitutes "the practice of law," then the same provisions that prohibited the arrangement addressed in the first question would come into play. Fees earned by the Mediation Business would constitute legal fees that would be shared with the nonlawyers, in violation of Rule 5.4(a); lawyers would be in a partnership (or other entity) with nonlawyers where some of the activities of the partnership would consist of the practice of law, in violation of Rule 5.4(b); and a nonlawyer would own an interest in "an entity authorized to practice law for profit," in violation of Rule 5.4(d).

10. However, in N.Y. State 1026 (2014), we said: "Mediation is a 'nonlegal service' as defined by Rule 5.7(c) ...." See also Rule 2.4 (implying a distinction between legal services, on one hand, and mediation services, on the other hand); N.Y. State 1178 (2019) ("Only when a lawyer-mediator engages in services beyond providing neutral services, such as filing papers in court, does the lawyer-mediator cross the line into providing legal services"). Thus, the answer to the second question is that lawyers and non-lawyers may jointly own a business that provides only mediation services and does not provide any legal services. In this regard, we express no opinion whether mediators who prepare a separation agreement and related divorce documents are engaged in the unauthorized practice of law as that is a question of law that we lack jurisdiction to answer.

May a law firm accept referrals from a mediation business partly owned by the partners in the law firm?

11. The Rules of Professional Conduct contain no per se prohibition against accepting referrals. However, when the Mediation Business refers clients who have successfully mediated their divorce to Law Firm, inquirers may have a conflict of interest under Rule 1.7(a)(2) because of their ownership interest in the Mediation Business. Rule 1.7(a)(2) provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that...
>
> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

12. If a divorce mediation client expresses unhappiness or second thoughts about the process or results of a "successful" mediation (despite having agreed to the settlement terms), or if an

individual inquirer sees reason to question the mediation settlement, the inquirer's ownership interest might create a "significant risk" of adversely affecting the inquirer's professional judgment on behalf of the client. Whether such a risk exists will require a case-by-case analysis, and if does exist it will be imputed to all lawyers "associated in" the firm. *See* Rule 1.10(a). If there is a conflict under Rule 1.7(a)(2), then the inquirers will need to determine whether the conflict is consentable (*i.e.,* waivable) under Rule 1.7(b)(1) and, if so, obtain the client's "informed consent,confirmed in writing" under Rule 1.7(b)(4).

May a law firm and a mediation business enter into a non-exclusive mutual referral agreement?

13. Subject to various conditions, Rule 5.8, allows contractual relationships between lawyers and certain nonlegal professionals (such as accountants, social workers, land surveyors, engineers and architects -- see 22 NYCRR §§ 1205.3). Rule 5.8(c), however, includes this exception to its application:

> (c) This Rule shall not apply to relationships consisting solely of ***non-exclusive reciprocal referral agreements or understandings*** between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm. [Emphasis added.]

14. Comment [4] to Rule 5.8 elaborates on this language by saying, "A lawyer may enter into such an arrangement only if it is nonexclusive on both sides, so that both the lawyer and the nonlawyer are free to refer clients to others if that is in the best interest of those clients." Thus, in N.Y. State 755 (2002) (which construed the Code predecessor to Rule 5.8), we said that non-exclusive reciprocal referral relationships between lawyers and nonlawyers were permissible even if the nonlawyers are not "professionals," as long as the lawyers do not (among other things) pay for the recommendations. *See also* N.Y. State 1155 (2018) (concluding that Rule 5.8 "by its terms" does not apply to non-exclusive referral relationship between estate planning lawyer and investment firm); N.Y. State 976 ¶ 19 (2013) (lawyer or law firm may not maintain an "exclusive" contractual arrangement with a company owned by nonlawyers). Accordingly, inquirers may enter into a non-exclusive mutual referral agreement with the Mediation Business as long as they do not pay for those referrals.

15. What is the meaning of "non-exclusive"? Basically, inquirers may not agree that they will refer clients only and exclusively to the Mediation Business, because in some instances a client of Law Firm may be better served by a referral to a different mediation business. Nor may inquirers agree to accept every referral from the Mediation Business. Sometimes, inquirers will have to turn down referrals because they have a conflict of interest or are too busy or lack legal competence to handle to handle a particular referral. And of course inquirers may not refer their clients to the Mediation Business if mediation is not an appropriate approach in the particular client's matter.

16. Thus, a non-exclusive reciprocal referral relationship is essentially an agreement to consider referring a client to the nonlawyer professional (here, the Mediation Business), or to *consider* accepting a referral from the nonlawyer professional. It cannot be a promise to refer every client to the Mediation Business or to accept every referral from the Mediation Business.

How does Rule 5.7 apply to services offered by nonlawyer mediators at a mediation business co-owned by lawyers?

17. When nonlegal services are being provided not by a law firm but rather by a nonlegal entity owned by lawyers, the gateway governing provision is Rule 5.7(a)(3), which provides:

> (3) A lawyer or law firm that is an owner ... of ... an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services ***if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship***. [Emphasis added.]

18. Applying Rule 5.7(a)(3) here, we know that each of the inquiring lawyers is an "owner" of the Mediation Business and that the Mediation Business is "providing nonlegal services." Thus, the question is whether persons receiving the mediation services "could reasonably believe" that such services "are the subject of a client-lawyer relationship."

19. In the present inquiry there are several factors which appear to support the conclusion that a client of the Mediation Business could not reasonably believe that she or he was receiving legal services. The Mediation Business and Law Firm offices are separate, their names are different, and there are no lawyers actually providing mediation services. On the other hand, divorce mediation arises in the context of a legal dispute and – unlike many types of disputes – divorce can ultimately be resolved only through the court system. Divorce mediators also often need to explain basic legal principles of divorce, such as equitable distribution, joint custody, and maintenance. In addition, as many divorce mediators are, in fact, lawyers, divorcing spouses may not appreciate the difference between a mediator who is a lawyer and one who is not a lawyer. There are doubtless additional relevant factors that may arise in a particular case, including the scope and precise language of any oral or written disclaimer provided by the mediators that they are not providing any legal services.

20. If after weighing all relevant factors, a person receiving divorce mediation services could not reasonably believe that the nonlegal services are the subject of a client-lawyer relationship, the inquiry would be at end. If, however, a person receiving divorce mediation services *could* reasonably believe that the nonlegal services are the subject of a client-lawyer relationship, compliance with Rule 5.7(a)(4) by the inquirers would be required. Rule 5.7(a)(4) provides:

> (4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship ***unless*** the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is *de minimis*. [Emphasis added.]

21. In other words, once it is determined that a client of the Mediation Business *could* reasonably believe that the nonlegal mediation services are legal services, it will be *"presumed"* that the client *actually* believes that the services are legal services unless the lawyer's interest in the Mediation Business is "de minimis" (apparently not the case here), or the inquirers who co-own the Mediation Business provide a written disclaimer stating that "the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services." The requirement that, in order to rebut the presumption arising under

subparagraph (a)(3), the lawyer-inquirers must provide this disclaimer pursuant to subparagraph (a)(4), cannot be avoided by any earlier disclaimer given by a non-lawyer mediator where the balance of factors, notwithstanding the non-lawyer mediator's disclaimer, tips in favor of concluding that the client *could* reasonably believe that the mediation services are the subject of a client-lawyer relationship under subparagraph (a)(3).

22. Lawyer-owners of a nonlegal entity providing nonlegal services, like the Mediation Business, are not required to provide this written disclaimer, but if they do not, then the Rules of Professional Conduct apply to the nonlegal mediation services, essentially as if the nonlegal mediation services were being provided by lawyers. Here, for example, if the inquirers do not provide the disclaimer specified in subparagraph (a)(4) to rebut the presumption that arises under subparagraph (a)(3), the Mediation Business will be required to abide by Rules 1.7, 1.8, 1.9, 1.18, and other Rules governing conflicts of interest (including Rule 1.10(e), which will require the Mediation Business to check each new mediation engagement for conflicts with Law Firm's clients), and must abide by Rule 1.6 regarding the duty of confidentiality.

CONCLUSION

23. Lawyers may not jointly own a mediation business with nonlawyers if the mediation business employs lawyers to provide legal services to mediation clients. Lawyers may jointly own a mediation business with nonlawyers if the mediation business does not employ any lawyers and provides only nonlegal services. Lawyers who own a mediation business may accept referrals from it, subject to certain restrictions, and may enter into a non-exclusive reciprocal referral agreement with the mediation business. The Rules of Professional Conduct will apply to the mediation business where a mediation client could reasonably believe that the mediation services are the subject of a client-lawyer relationship and the lawyers who co-own the mediation business do not provide the mediation client with a written disclaimer stating that the mediation services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the mediation services.

(35-20)

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1233 (12/07/2021)

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

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

Rule: 7.5(b)

FACTS:

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

QUESTIONS:

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

OPINION:

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

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

4. Comment [5] to Rule 7.5 provides:

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

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

employee who is not a partner of a firm").

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

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

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

CONCLUSION:

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

(30-21)

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

Committee on Professional Ethics

Opinion 1235 (01/03/2021)

Topic: Firm Name; Trade Names; Assumed Names

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

Rule: 7.5(b)

FACTS:

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

QUESTION:

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

OPINION:

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

4. The same analysis applies to the current inquiry. In our view, there is nothing inherently false, deceptive or misleading in a single law firm using two separate assumed names when holding itself out or marketing itself as a provider of legal services in two distinct practice areas, but there could well be particular facts and circumstances that would cause us to reach a different conclusion in a different case. No such particular facts or circumstances were presented to us here, especially

where the firm will disclose its full name wherever the assumed names are posted or published, so we conclude that using two distinct "d/b/a" names for different practice areas within the same firm would not be false, deceptive, or misleading and thus would not violate Rule 7.5(b).

CONCLUSION:

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

(24-21)

NEW YORK CITY BAR

FOR CONSIDERATION BY THE NEW YORK STATE BAR ASSOCIATION
HOUSE OF DELEGATES, JANUARY 2022

REPORT BY THE PROFESSIONAL RESPONSIBILITY COMMITTEE, PROFESSIONAL ETHICS COMMITTEE, PROFESSIONAL DISCIPLINE COMMITTEE, LEGAL REFERRAL SERVICE COMMITTEE, SMALL LAW FIRM COMMITTEE AND THE COUNCIL ON THE PROFESSION

PROPOSED AMENDMENT TO NEW YORK COURT OF APPEALS PART 523 RULES FOR THE TEMPORARY PRACTICE OF LAW IN NEW YORK

I. SUMMARY

We propose amendments to the New York Court of Appeals Part 523 ("Rules for the Temporary Practice of Law in New York") in order to confirm that lawyers who practice law outside New York State do not engage in the practice of law in this State solely by virtue of physically working remotely from their homes in this State.[1]

II. RATIONALE FOR THE PROPOSAL

Prior to the recent COVID-19 pandemic, lawyers and other professionals worked from their homes on an occasional basis. Since the pandemic and because of improvements to video communications and the proliferation of software facilitating working remotely, it appears that work patterns have changed. It is expected that lawyers may continue to work remotely from their homes, but now on a more long-term basis. This report proposes the adoption of a new court rule designed to formalize what we believe has always been the case: namely, that the fact that a person is physically situated in this State while practicing law in another jurisdiction does not mean that they are practicing law in this State. In other words, it is the nature of the person's work and their public presence, not their physical location, which is determinative of whether a person is engaged in the unauthorized practice of law.

To take the view that, say, Connecticut or New Jersey lawyers working from their residence in New York on Connecticut or New Jersey matters are engaged in the unauthorized practice of law in New York would be to discourage such lawyers from residing in this State, with all of the revenue and other benefits such residence brings to this State. It would also ignore the growing reality of "work from home" situations in law practice and a variety of other industries. Further, the New York rules against unauthorized practice are primarily designed to protect the New York public, and the public is not put at risk when lawyers happen to be working remotely from their New York residence while practicing law in other jurisdictions.

[1] This proposal, as originally drafted in early 2021, was reviewed by the Committee on Statewide Attorney Conduct, after which COSAC's suggested modifications were incorporated. The final proposed language of the amendment is set forth in an appendix immediately following this report and has COSAC's support and endorsement.

Similarly, many New York lawyers reside in adjoining states, such as Connecticut and New Jersey. Although we do not believe that New York considers those lawyers to be engaged in the unauthorized practice of law every time they cross the New York border to return home, our hope is that clarifying New York's position will encourage such other states to reciprocate and thus provide similar comfort that New York lawyers need not fear that working from their homes in such states will result in liability for unauthorized practice of law claims.

Arizona, Minnesota, New Hampshire, North Carolina and Ohio have temporary practice rules which specifically permit remote practice, as does Colorado so long as the lawyer is not domiciled there. Arizona Rule 5.5, Minnesota Rule 5.5, New Hampshire Rule 5.5, North Carolina Rule 5.5, Colorado R. Civ. P. 205.1, Ohio Rule 5.5. And the bars in Florida, Maine, Utah, Virginia and New Jersey have issued advisory opinions interpreting their respective temporary practice rules to permit remote practice. Florida 2019-4 (2020), Maine 189 (2005), Utah 19-03 (2019), Virginia 1856 (2016), New Jersey 59/742 (2021).

Our proposed amendments are also in accord with the recent American Bar Association ethics opinion, which observes that unauthorized law prohibitions are designed to "protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed." ABA 495 (2020).

****

We respectfully urge adoption of these amendments.

Council on the Profession
Dean Matthew Diller and Melissa Colon-Bosolet, Chairs

Professional Discipline Committee
Brenda Correa, Chair

Professional Ethics Committee
Tyler Maulsby, Chair

Professional Responsibility Committee
Aegis Frumento, Chair; Wally Larson, Immediate Past Chair

Legal Referral Service Committee
David G. Keyko, Immediate Past Chair and primary contact person
david.keyko@pillsburylaw.com

Small Law Firm Committee
Anne Wolfson, Chair

Reissued November 2021

APPENDIX

Part 523 with proposed new language in bold and double underlined (the only proposed changes are in § 523.1 and to add a new § 523.5)

Part 523 - Rules for the Temporary Practice of Law in New York

Table of Contents

§ 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 **such as §523.5 below**, 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.

(b) A person licensed as a legal consultant pursuant to 22 NYCRR Part 521, or registered as in-house counsel pursuant to 22 NYCRR 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.

§ 523.5 Working from home

A lawyer who is not admitted to practice in this State but who is authorized to practice law in one or more other jurisdictions identified in § 523.2(a)(1), may practice law from a temporary or permanent residence or other temporary or permanent location in this State to the same extent that such lawyer is permitted to practice law in the jurisdiction(s) where the lawyer is duly admitted or authorized, provided:

(a) the lawyer does not practice the law of this State except to the extent permitted by this Part, by other laws of this State, and by the laws of jurisdictions in which the lawyer is authorized to practice;

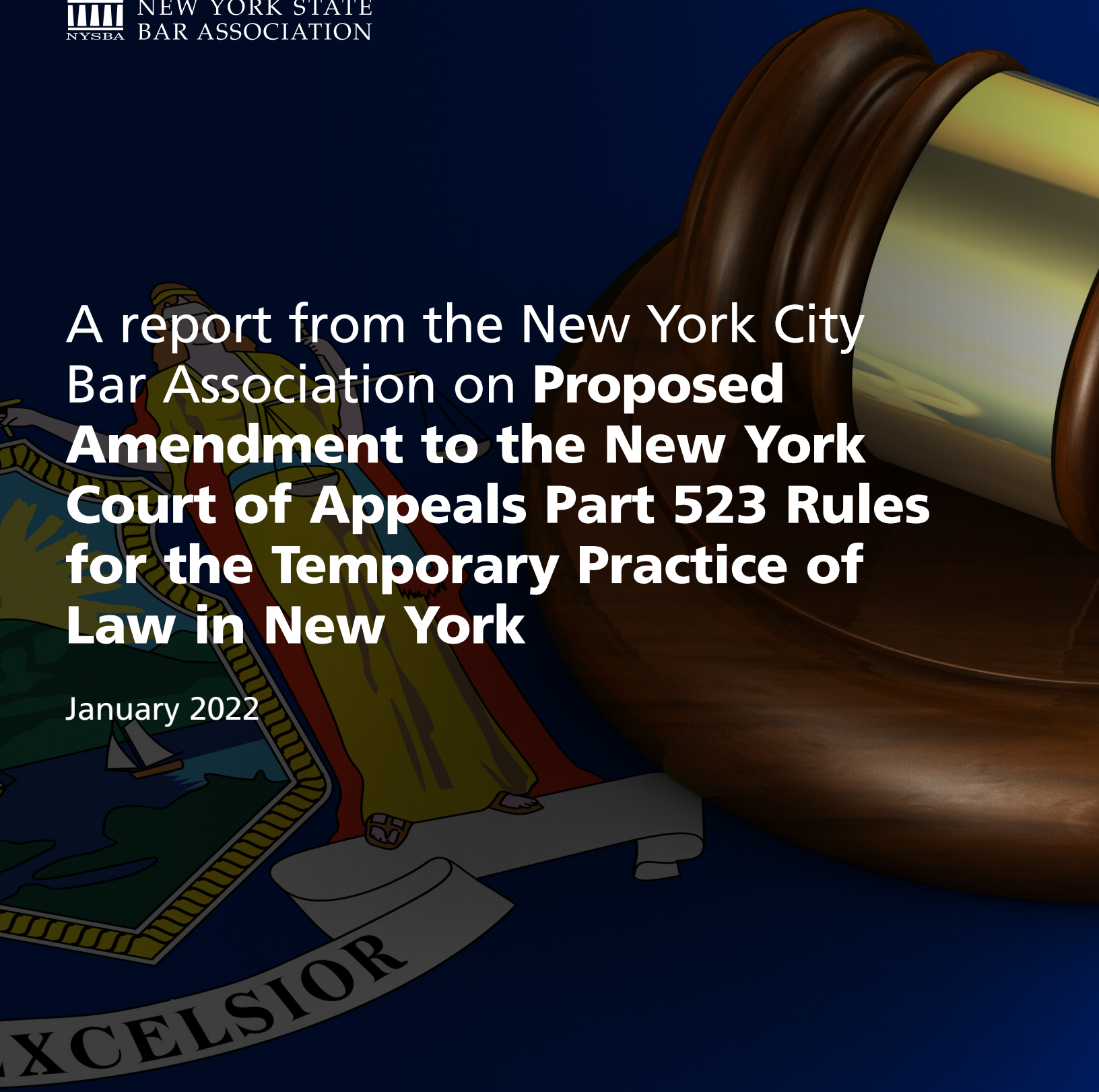
(b) the lawyer does not use advertising, oral representations, business letterhead, websites, signage, business cards, email signature blocks or other communications to hold himself or herself out, publicly or privately, as authorized to practice law in this State or as having an office for the practice of law in this State;

(c) the lawyer does not solicit or accept residents or citizens of New York as clients on matters that the lawyer knows primarily require advice on the state or local law of New York, except as permitted by 22 NYCRR § 522.4 (in the in-house registration rule) or by other New York or federal law;

(d) the lawyer does not regularly conduct in-person meetings with clients or third persons in New York except as would otherwise be permitted under § 523.2 of this Part; and

(e) when the lawyer knows or reasonably should know that a person with whom the lawyer is dealing mistakenly believes that the lawyer is authorized to practice in this State, the lawyer shall make reasonable efforts to correct the misunderstanding.

NEW YORK STATE BAR ASSOCIATION



A report from the New York City Bar Association on **Proposed Amendment to the New York Court of Appeals Part 523 Rules for the Temporary Practice of Law in New York**

January 2022

Approved by the New York State Bar Association House of Delegates on January 22, 2022

NEW YORK CITY BAR

FOR CONSIDERATION BY THE NEW YORK STATE BAR ASSOCIATION
HOUSE OF DELEGATES, JANUARY 2022

REPORT BY THE PROFESSIONAL RESPONSIBILITY COMMITTEE, PROFESSIONAL ETHICS COMMITTEE, PROFESSIONAL DISCIPLINE COMMITTEE, LEGAL REFERRAL SERVICE COMMITTEE, SMALL LAW FIRM COMMITTEE AND THE COUNCIL ON THE PROFESSION

PROPOSED AMENDMENT TO NEW YORK COURT OF APPEALS PART 523 RULES FOR THE TEMPORARY PRACTICE OF LAW IN NEW YORK

I. SUMMARY

We propose amendments to the New York Court of Appeals Part 523 ("Rules for the Temporary Practice of Law in New York") in order to confirm that lawyers who practice law outside New York State do not engage in the practice of law in this State solely by virtue of physically working remotely from their homes in this State.[1]

II. RATIONALE FOR THE PROPOSAL

Prior to the recent COVID-19 pandemic, lawyers and other professionals worked from their homes on an occasional basis. Since the pandemic and because of improvements to video communications and the proliferation of software facilitating working remotely, it appears that work patterns have changed. It is expected that lawyers may continue to work remotely from their homes, but now on a more long-term basis. This report proposes the adoption of a new court rule designed to formalize what we believe has always been the case: namely, that the fact that a person is physically situated in this State while practicing law in another jurisdiction does not mean that they are practicing law in this State. In other words, it is the nature of the person's work and their public presence, not their physical location, which is determinative of whether a person is engaged in the unauthorized practice of law.

To take the view that, say, Connecticut or New Jersey lawyers working from their residence in New York on Connecticut or New Jersey matters are engaged in the unauthorized practice of law in New York would be to discourage such lawyers from residing in this State, with all of the revenue and other benefits such residence brings to this State. It would also ignore the growing reality of "work from home" situations in law practice and a variety of other industries. Further, the New York rules against unauthorized practice are primarily designed to protect the New York public, and the public is not put at risk when lawyers happen to be working remotely from their New York residence while practicing law in other jurisdictions.

[1] This proposal, as originally drafted in early 2021, was reviewed by the Committee on Statewide Attorney Conduct, after which COSAC's suggested modifications were incorporated. The final proposed language of the amendment is set forth in an appendix immediately following this report and has COSAC's support and endorsement.

Similarly, many New York lawyers reside in adjoining states, such as Connecticut and New Jersey. Although we do not believe that New York considers those lawyers to be engaged in the unauthorized practice of law every time they cross the New York border to return home, our hope is that clarifying New York's position will encourage such other states to reciprocate and thus provide similar comfort that New York lawyers need not fear that working from their homes in such states will result in liability for unauthorized practice of law claims.

Arizona, Minnesota, New Hampshire, North Carolina and Ohio have temporary practice rules which specifically permit remote practice, as does Colorado so long as the lawyer is not domiciled there. Arizona Rule 5.5, Minnesota Rule 5.5, New Hampshire Rule 5.5, North Carolina Rule 5.5, Colorado R. Civ. P. 205.1, Ohio Rule 5.5. And the bars in Florida, Maine, Utah, Virginia and New Jersey have issued advisory opinions interpreting their respective temporary practice rules to permit remote practice. Florida 2019-4 (2020), Maine 189 (2005), Utah 19-03 (2019), Virginia 1856 (2016), New Jersey 59/742 (2021).

Our proposed amendments are also in accord with the recent American Bar Association ethics opinion, which observes that unauthorized law prohibitions are designed to "protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed." ABA 495 (2020).

****

We respectfully urge adoption of these amendments.

Council on the Profession
Dean Matthew Diller and Melissa Colon-Bosolet, Chairs

Professional Discipline Committee
Brenda Correa, Chair

Professional Ethics Committee
Tyler Maulsby, Chair

Professional Responsibility Committee
Aegis Frumento, Chair; Wally Larson, Immediate Past Chair

Legal Referral Service Committee
David G. Keyko, Immediate Past Chair and primary contact person
david.keyko@pillsburylaw.com

Small Law Firm Committee
Anne Wolfson, Chair

Reissued November 2021

APPENDIX

Part 523 with proposed new language in bold and double underlined (the only proposed changes are in § 523.1 and to add a new § 523.5)

Part 523 - Rules for the Temporary Practice of Law in New York

Table of Contents

§ 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 **such as §523.5 below**, 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.

(b) A person licensed as a legal consultant pursuant to 22 NYCRR Part 521, or registered as in-house counsel pursuant to 22 NYCRR 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.

§ 523.5 Working from home

A lawyer who is not admitted to practice in this State but who is authorized to practice law in one or more other jurisdictions identified in § 523.2(a)(1), may practice law from a temporary or permanent residence or other temporary or permanent location in this State to the same extent that such lawyer is permitted to practice law in the jurisdiction(s) where the lawyer is duly admitted or authorized, provided:

(a) the lawyer does not practice the law of this State except to the extent permitted by this Part, by other laws of this State, and by the laws of jurisdictions in which the lawyer is authorized to practice;

(b) the lawyer does not use advertising, oral representations, business letterhead, websites, signage, business cards, email signature blocks or other communications to hold himself or herself out, publicly or privately, as authorized to practice law in this State or as having an office for the practice of law in this State;

(c) the lawyer does not solicit or accept residents or citizens of New York as clients on matters that the lawyer knows primarily require advice on the state or local law of New York, except as permitted by 22 NYCRR § 522.4 (in the in-house registration rule) or by other New York or federal law;

(d) the lawyer does not regularly conduct in-person meetings with clients or third persons in New York except as would otherwise be permitted under § 523.2 of this Part; and

(e) when the lawyer knows or reasonably should know that a person with whom the lawyer is dealing mistakenly believes that the lawyer is authorized to practice in this State, the lawyer shall make reasonable efforts to correct the misunderstanding.

Compilation of Codes, Rules and Regulations of the State of New York
Title 22. Judiciary
Subtitle B. Courts.
Chapter I. Court of Appeals
Subchapter C. Rules for Admission of Attorneys and Counselors-at-Law
Part 523. Rules of the Court of Appeals for the Temporary Practice of Law in New York (Refs & Annos)

22 NYCRR 523.2

Section 523.2. Scope of temporary practice

Currentness

(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 subparagraph (ii) or (iii) of this paragraph 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.

(b) A person licensed as a legal consultant pursuant to Part 521 of this Title, or registered as in-house counsel pursuant to Part 522 of this Title, may not practice pursuant to this Part.

Credits

Sec. filed through Court Notices in the Dec. 30, 2015 Register.

Current with amendments included in the New York State Register, Volume XLIV, Issue 11 dated March 16, 2022. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 22, § 523.2, 22 NY ADC 523.2

End of Document

Compilation of Codes, Rules and Regulations of the State of New York
Title 22. Judiciary
Subtitle A. Judicial Administration.
Chapter I. Standards and Administrative Policies
Subchapter C. Rules of the Chief Administrator of the Courts
Part 118. Registration of Attorneys, in-House Counsel, and Foreign Legal Consultants (Refs & Annos)

22 NYCRR 118.1

Section 118.1. Filing Requirement

Currentness

(a) Every attorney admitted to practice in New York State on or before January 1, 1982, whether resident or nonresident, and whether or not in good standing, shall file a registration statement with the Chief Administrator of the Courts no later than March 1, 1982, and during each alternate year thereafter, within 30 days after the attorney's birthday, for as long as the attorney remains duly admitted to the New York bar.

(b) Every attorney admitted to practice in New York State after January 1, 1982, and on or before January 1, 1986, whether resident or nonresident, and whether or not in good standing, shall file a registration statement within 60 days of the date of such admission, and during each alternate year thereafter, within 30 days after the attorney's birthday, for as long as the attorney remains duly admitted to the New York bar.

(c) Every attorney admitted to practice in New York State after January 1, 1986, whether resident or nonresident, and whether or not in good standing, shall file a registration statement prior to taking the constitutional oath of office, and during each alternate year thereafter, within 30 days after the attorney's birthday, for as long as the attorney remains duly admitted to the New York bar.

(d) The registration statement shall be filed in person at the Office of Court Administration, 25 Beaver Street, 8th Floor, in the City of New York, or by means of an online program implemented by the Chief Administrator, or by ordinary mail addressed to:

State of New York

Office of Court Administration

General Post Office

P.O. Box 29327

New York, NY 10087-9327

The report of pro bono services and charitable contributions described in paragraph (e)(14) of this section shall be filed in the manner directed by the Chief Administrator of the Courts.

(e) The registration statement shall be on a form provided by the Chief Administrator and shall include the following information, attested to by affirmation:

(1) name of attorney;

(2) date of birth;

(3) name when admitted to the bar;

(4) law school from which degree granted;

(5) year admitted to the bar;

(6) judicial department of admission to the bar;

(7) office addresses (including department);

(8) home address;

(9) business telephone number;

(10) social security number;

(11) e-mail address (optional);

(12) race, gender/gender identity, sexual orientation, ethnicity and employment category (optional);

(13) compliance with child support obligations;

(14) in a separate statement, filed anonymously in a manner directed by the Chief Administrator;

(i) a mandatory report of pro bono services and contributions, as defined in Rule 6.1 of the attorney Rules of Professional Conduct, performed or contributed by the attorney in the previous two calendar years; and

(ii) a report of such other pro bono service and contributions over the same period as the attorney may choose to describe.

(f) In the event of a change in the name of attorney, office addresses, home address, business telephone number, or e-mail address reported pursuant to subdivision (e) of this section, the attorney shall file an amended statement within 30 days of such change.

(g) Each registration statement filed pursuant to this section shall be accompanied by a registration fee of $375. No fee shall be required from an attorney who certifies that he or she has retired from the practice of law. For purposes of this section, the **practice of law** shall mean the giving of legal advice or counsel to, or providing legal representation for, a particular body or individual in a particular situation in either the public or private sector in the State of New York or elsewhere; it shall include the appearance as an attorney before any court or administrative agency. An attorney is "retired" from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law. For purposes of section 468-a of the Judiciary Law, a full-time judge or justice of the Unified Court System of the State of New York, or of a court of any other state or of a Federal court, shall be deemed "retired" from the practice of law. An attorney in good standing, at least 55 years old and with at least 10 years experience, who participates without compensation in an approved pro bono legal services program, may enroll as an "attorney emeritus."

(h) Failure by any attorney to comply with the provisions of this section shall result in referral for disciplinary action by the Appellate Division of the Supreme Court pursuant to section 90 of the Judiciary Law.

Credits

Sec. filed Dec. 30, 1981; amds. filed: Oct. 30, 1985; June 30, 1986; Oct. 27, 1989; July 2, 1990; Oct. 4, 1990; Sept. 3, 1997; May 17, 1999; Oct. 13, 1999; June 16, 2003; Nov. 20, 2009; Aug. 26, 2010; Dec. 29, 2010; June 9, 2011; April 29, 2013 eff. May 1, 2013; amd. through Court Notices in the May 13, 2015 Register; amd. through Court Notices in the Nov. 10, 2020 Register eff. Nov. 30, 2020.

Current with amendments included in the New York State Register, Volume XLIV, Issue 11 dated March 16, 2022. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 22, § 118.1, 22 NY ADC 118.1

End of Document