CALVARY HOSPITAL

Where Life Continues

18th Annual VIRTUAL Trusts & Estates CONFERENCE

ETHICS FOR BREAKFAST

THE BEST LAID PLANS OF MICE AND MEN

Ethical Considerations in Representing the Charitably-Inclined Client

Thursday, December 16, 2021

THIS CONFERENCE HAS BEEN DEVELOPED BY THE PROFESSIONAL ADVISORS COUNCIL OF THE CALVARY FUND OF CALVARY HOSPITAL

PROGRAM

10:00 A.M.

INTRODUCTORY REMARKS

FRANK A. CALAMARI
President & CEO, Calvary Hospital

WELCOME

MICHAEL J.A. SMITH
Fiduciary Consultant
Chair, Calvary Hospital Professional Advisors Council
Vice Chair, Calvary Fund Board of Directors

PANEL INTRODUCTION

LEAH D. HOKENSON, ESQ.
Managing Director, Baldwin Brothers
Conference Co-Chair
Member, Calvary Hospital Professional Advisors Council

PANEL PRESENTATION

Moderator

THE HONORABLE NORA S. ANDERSON
Surrogate, New York County Surrogate's Court

Panelists

JOHN SARE, ESQ.
Partner, Patterson Belknap Webb & Tyler LLP

CONRAD TEITELL, ESQ.
Principal, Cummings & Lockwood LLC

JAMES SHEEHAN, ESQ.
Chief, Charities Bureau
Office of New York Attorney General

JORDAN S. WEITBERG, ESQ.
Principal, Bressler, Amery & Ross, P.C.

12:00 P.M.

FINAL REMARKS

ERIN GILMORE SMITH, ESQ.
Senior Vice President, Senior Trust Officer, Bank of America Private Bank
Conference Co-Chair
Member, Calvary Hospital Professional Advisors Council

CALVARY HOSPITAL PROFESSIONAL ADVISORS COUNCIL

Michael J. A. Smith
Fiduciary Consultant
CHAIR

Andrea Hyde, Esq.
Bond, Schoeneck & King Attorneys
VICE CHAIR

Daniel J. Arciola, Esq.
Brown Brothers Harriman
Trust Company, N.A.

Kristin J. Ashman, Esq.
First Republic
Private Wealth Management

Richard J. Bowler, Esq.

Bonnie Brennan
Christie's

Colleen F. Carew, Esq.*

Brian P. Corrigan, Esq.
Farrell Fritz, P.C.

David Crimmins, CFA
BNY Mellon Wealth Management

Ronni G. Davidowitz, Esq.
Katten Muchin Rosenman LLP

Keith C. Dolin
Bank of America Private Bank

Thomas G. Ferrara
Future Value Associates, Ltd.

Amber Ferrero
Glenmede

Robert M. Freedman, Esq.
Tarter Krinsky & Drogin LLP

Magdalen Gaynor, Esq.

Paul Golinski, Esq.

Rorrie Gregorio
Marcum LLP

Judith Grimaldi, Esq., CELA, CSW
Grimaldi & Yeung

Charles J. Groppe, Esq.

Edward D. Heben CPA, PC

Leah D. Hokenson, Esq.
Baldwin Brothers, LLC

Gerard F. Joyce, Jr., Esq.
Fiduciary Trust Company International

Peggy Sheahan Knee, Esq.
The Knee Law Firm, LLC

Stanley S. Leffler, Esq.

Martin E. Levine, ChFC, CPA
4Thought Financial Group, Inc.

Rebecca Lockwood, Esq.
Sotheby's

Mary Ellen Manley, Esq.

Michael M. Mariani, Esq.

Daniel J. McSwiggan, Esq.
Carter Ledyard & Milburn LLP

Lee Miller, Esq.
Glenmede

Kate Mulvany
Evercore Wealth Management, LLC

Charles J. Ogeka, Esq.
Ogeka Associates, LLC

Timothy M. Paul, Esq.
Goldman Sachs Trust Company, N.A.

Victoria Richardson
Bonhams

Paul I. Rosenberg, Esq.
Bressler, Amery & Ross

Eileen Caulfield Schwab, Esq.

Joseph F. Scorese, Esq.
Sills, Cummis & Gross P.C.

Alan D. Seget, Esq.
Davidson, Dawson & Clark LLP

Erin Gilmore Smith, Esq.
Bank of America Private Bank

Frank W. Streng, Esq.
McCarthy Fingar LLP

Joseph A. Tarantino
Protiviti

Gerald C. Tobin, Esq.
Cullen and Dykman LLP

Wayne L. Warnken, Esq.
Condon & Forsyth LLP

Michael R. Weaver, Esq.

*Emerita

The Society of 1899

CALVARY HOSPITAL

CALVARY WAS FOUNDED IN 1899 BY DEDICATED VOLUNTEERS WITH SUPPORTING GIFTS AND BEQUESTS THAT DATE BACK TO THE TURN OF THAT CENTURY.

Calvary established the Society of 1899 to honor individuals who have made a planned bequest or deferred gift to the Hospital and currently has over 185 members.

The purpose of The Society of 1899 is to recognize these donors during their lifetimes for their legacy of compassionate care for those most in need.

Calvary plans special annual events such as receptions and lectures to thank Society of 1899 members for their generosity.

For more information on bequests and planned gifts, contact **Elizabeth Edds Kougasian, Esq**. via email at **ekougasian@calvaryhospital.org**.

CALVARY HOSPITAL

Where Life Continues

SPONSORS & DONORS

Calvary Hospital thanks all our Sponsors and Donors for their generous support of the 18th Annual Trusts & Estates Conference

SPONSORS

BROWN BROTHERS HARRIMAN

EVERCORE Wealth Management Trust Company
THE NEW STANDARD IN WEALTH MANAGEMENT

mpi Business Valuation & Advisory

FRIEND

CHRISTIE'S

GOLD

Bleakley Platt & Schmidt, LLP
Bond, Schoeneck & King, PLLC
Richard J. Bowler, Esq.
Bressler, Amery & Ross, P.C.
Davidson, Dawson & Clark LLP and Alan D. Seget, Esq.
Magdalen Gaynor, Esq.
Ogeka Associates
Timothy M. Paul, Esq.
Paul I. Rosenberg, Esq.
Michael J.A. Smith

SILVER

Charles J. Groppe, Esq.
Erin Gilmore Smith, Esq.

BRONZE

4Thought Financial Group Inc.
Joseph E. Scorese, Esq.

Listing as of December 10, 2021

Your children may inherit your wealth. But will they inherit your values?

Many wealthy parents hope their children share their values when they assume stewardship of the family's wealth. We facilitate family conversations to help parents prepare children for wealth transfer. Should we talk?

To learn more, please visit www.bbh.com or call 212-425-1818.

BROWN BROTHERS HARRIMAN

The future of wealth since 1818.

EVERCORE | Wealth Management
Trust Company

THE NEW STANDARD IN WEALTH MANAGEMENT

Proud supporters of Calvary Hospital since 2016.

Evercore Wealth Management and Evercore Trust Company, N.A. together serve high-net-worth individuals, families, foundations and endowments across the United States, delivering strategic wealth planning, global investment management, and trust and family office services.

We are an experienced team of independent thinkers, managing complex wealth in a culture of integrity – and focused on delivering real results.

Contact Kate Mulvany at mulvany@evercore.com or at 212.822.7639 to discover how we are setting the new standard in wealth management.

Evercore Wealth Management, LLC | Evercore Trust Company, N.A.
55 East 52nd Street | New York, NY 10055
evercorewealthandtrust.com

Rigorously prepared and meticulously documented valuations for over 80 years.

MPI is proud to sponsor Calvary Hospital's Annual Trusts and Estates Attorney Conference.

Todd G. Povlich, CFA, ASA
100 Park Avenue, Suite 1600
New York, NY 10017
212-390-8310
tpovlich@mpival.com

John L. Varga III, ASA
100 Park Avenue, Suite 1600
New York, NY 10017
212-390-8374
jvarga@mpival.com

To learn how MPI can help you meet your clients' needs, visit **www.mpival.com**.

Chicago | New York | Philadelphia | Princeton | San Francisco | Seattle | Westport

ATTORNEY AFFIRMATION
NEW YORK CLE CREDIT FOR NONTRADITIONAL FORMAT COURSE

I, _____, acknowledge receipt of the course materials for:
(attorney name)

Ethics for Breakfast: The Best Laid Plans of Mice and Men – Ethical Considerations in Representing the Charitably-Inclined Client

I certify that I have listened to and/or viewed the above course in its entirety. Therefore, I request that I be awarded the applicable number of New York CLE credits for this course.

Format *(check one)*

□ Teleconference
□ Webconference
□ Videoconference
□ Audiotape
□ Videotape
□ CD
□ CD-ROM
□ DVD
□ Audio File
□ Online
□ Live Broadcast
□ Other _____

COURSE CODE #1: _____
During the course or program you will see and/or hear a CLE code. Please enter the code in the above field. If you do not include the code, you will not be awarded New York CLE credit. If there are multiple codes (for example, a separate code for each segment of a program) please enter here:

Course Code #2: _____

Course Code #3: _____

Course Code #4: _____

Course Code #5: _____

Name of CLE Provider: Calvary Hospital

_____
Signature of Attorney

_____
Date of completion of CLE course
(*New York attorneys earn CLE credit as of the date they complete a CLE course*)

- To obtain New York CLE credit, please complete and sign this form and then submit it to the CLE provider. Once your participation is verified by the provider, a New York CLE Certificate of Attendance will be issued to you by the provider.
- New York attorneys should retain a copy of this affirmation along with their New York CLE Certificate of Attendance.

- Experienced New York attorneys (attorneys who have been admitted to the New York Bar for more than two years) may earn CLE credit through nontraditional formats. Newly admitted attorneys (attorneys who have been admitted to the New York Bar for two years or less) should confirm that the format is permissible for the category of credit.
- Please note that in New York, one hour of CLE credit consists of at least 50 minutes of instruction. Credit hours must be calculated in no less than 25-minute (.5-hour) increments.

Return completed, signed and dated form by email to:
calvaryevents@calvaryhospital.org

Elizabeth Kougasian, Esq.
Director of Major and Planned Gifts
Calvary Fund, Inc., Calvary Hospital

CALVARY HOSPITAL

Where Life Continues

Eighteenth Annual Virtual Trusts and Estates Conference
"Ethics for Breakfast: The Best Laid Plans of Mice and Men -
Ethical Considerations in Representing the Charitably-Inclined Client"
Thursday, December 16, 2021

PROGRAM EVALUATION FORM

YOUR ANSWERS ARE VALUED AND WILL INFLUENCE FUTURE CONFERENCES.

1) How many years ago were you admitted to the Bar? _____

2) How many Attorneys are there in your firm or office? _____

3) What are your primary practice areas? _____

4) Please rate the following:

	Excellent (1)	**Good (2)**	**Fair (3)**	**Poor (4)**
Content				
Instructions				
Written Materials				
Facility				
Technology				

Please provide feedback on the Speakers regarding content and instruction:

Hon. Nora S. Anderson: _____
_____
_____

John Sare, Esq.: _____
_____
_____

James Sheehan, Esq.:_____
_____
_____

Conrad Teitell, Esq.:_____
_____
_____

Jordan Weitberg, Esq.:_____
_____
_____

5) Which part(s) of the program should be expanded? _____
_____

Which part(s) shortened? _____
_____

6) How did you learn of this program? Invitation _____ Word of Mouth_____

Other (please specify)
_____

7) Did you receive adequate advance notification about this program? _____
_____

8) Did the advance publicity accurately describe the program? Yes _____ No_____

9) The registration, organization and administration of the program were:
Excellent _____ Good _____ Fair _____ Poor _____

Comments: _____
_____

10) Will the Conference be helpful to you in your practice? Yes _____ No_____

11) Have you drafted Wills this past year that included Calvary Hospital? Yes _____ No_____

Approximate Number _____ Estimated Aggregate Amount _____

12) What topic(s) would you like explored at future Conferences?
_____
_____
_____

13) Your additional suggestions and comments are welcomed:
_____
_____
_____

_____
NAME (OPTIONAL)

Thank you!!!

Please complete this form and return to:
Elizabeth Kougasian, Esq.
calvaryevents@calvaryhospital.org

Fact Pattern 1

Amanda Baker has recently been elected to the Board of Trustees of the Brilliant, But Unknown American Art Museum in Kingston, New York. The Museum was founded 40 years ago by an artist who spent many years as brilliant, but unknown and only found commercial and monetary success when she was in her mid-60s. After the artist's death in 1995, her children continued to expand the Museum, which today houses a diverse collection of American art, hosts special exhibitions, offers educational programs for children, studio workshops, and even concert experiences. The Museum also plays an integral role in the development of highly-visible public art installations in the underserved, urban communities of Upstate New York.

Amanda is passionate about making art accessible across all communities, and is excited about her new volunteer position. She adores the Museum and its involvement with her adopted community. While Amanda and her family live in Prospect Park, they have a weekend home in Rhinebeck.

One of the initiatives the Museum and its Board are undertaking is the greater development of its Planned Giving office. And this is one of the reasons Amanda was recruited onto the Board of Trustees. Amanda is a trust and estates attorney at a Manhattan law firm.

One of the Museum's annual fundraising events is its end-of-summer garden party -- an event that includes a silent auction. Amanda plans to offer her estate planning services as an item for the silent auction. If Amanda ends up with an unwaivable conflict, she plans to refer the highest bidder to another attorney and pay for the services, up to the cost of the bid.

The Museum has recently been introduced to Mr. Smith, a sophisticated and philanthropic individual, and a long-time admirer of the Museum. Mr. Smith also believes in tax avoidance, and is the grantor of a few CLATS - charitable lead annuity trust. After a few conversations with Board Members and the Planned Giving Officer, Mr. Smith makes the decision that the Museum will be the beneficiary of a new CLAT.

Given the benefit to the Museum, Mr. Smith has asked the Museum to pay for the legal fees he will be incurring in establishing the CLAT. Rather than diving into those murky non-profit ethical waters, Amanda's wife, who is also a trust and estates attorney, has offered to draft the CLAT free of charge. Amanda has also spoken to Mr. Smith about her being the Trustee; of course, Amanda would not charge a commission. Knowing a difficult client when she sees one, Amanda's wife plans to include an exculpatory provision within the CLAT.

Fact Pattern 2

Donald Smith was a spry 95 year old bachelor living in an independent living facility in Manhattan. Donald had a long career as a global investment banker, and considered himself fortunate that he had more than sufficient assets to support himself in his later years. Indeed, he had more than $10 million of highly-appreciated assets, in addition to a pension and annuity that provided an income stream.

Donald had no children, but did have three nephews of whom he was very fond. Two nephews were financially successful. The third nephew was a professional and successful as a librarian, but wasn't financial successful. Donald has no gift or estate tax exemption remaining.

One day, Donald was visited by a Planned Giving Officer from his university, Old Ivy. Donald had given modestly, but consistently, to Old Ivy over the years. Donald and Planned Giving Officer chatted about their old college days at Old Ivy, their careers – the Planned Giving Officer having recently pivoted his career from that of a Counsel position in the Private Client Group at a large Manhattan law firm -- and the conversation swung around to Donald's philanthropic legacy. Donald mentioned his plan to bequeath 70% of his estate to a variety of charities that he had supported over the years. The other 30% of his estate – roughly $3 million – would pass to his three nephews.

Rather than leaving an outright bequest to his nephews, the Planned Giving Officer suggested that Donald instead create a $3 million inter vivos Net Income With No Makeup Charitable Remainder Unitrust: a NI-CRUT. The NI-CRUT would pay a 5% unitrust to Donald for his life, and then equally to his three nephews for life, with the remainder eventually passing to Old Ivy. And rather than leaving the balance of his estate to a variety of charities, Old Ivy could be the sole charitable beneficiary. In exchange for Donald's generosity, Old Ivy would be privileged to be able to name an auditorium in its business school in Donald's honor.

Donald was intrigued by the idea of a 5% income stream, as well as his name in his alma mater. Donald's long-time attorney retired a number of years ago, so he engaged with an attorney's from Planned Giving Officer's former firm. The new attorney was recommended by the Planned Giving Officer, and happened to be the Planned Giving Officer's daughter.

The attorney drafted the trust agreement, as well as a new will for Donald; a long-time – and younger – friend is appointed as trustee of the NI-CRUT, and the attorney is the nominated executor. The trustee retained the same attorney to represent him in his fiduciary capacity.

Unfortunately, Donald passed away 11 months after creating the NI-CRUT. And perhaps even more unfortunately, the trustee failed to make three quarterly income payments to Donald.

Upon an audit of Donald's estate tax return, the IRS denied the charitable deduction on the ground that, since the trust failed to make quarterly payments to Donald, it did not actually operate as a NI-CRUT from its inception. This adjustment resulted in significant estate taxes, reduced unitrust payments, and the value of Old Ivy's remainder interest – not to mention the $300,000 in legal fees that were paid by the trust.

Fact Pattern 3

Franklin Rudder is a life-long Manhattanite. With the exception of a few years at a Connecticut boarding school, Franklin's entire education – from primary school through law school -- was in Manhattan. Franklin is a proud alum of Hudson University, where he received both his undergraduate and law degrees 45 years ago.

In 1980 when Franklin was a young associate, his law firm represented Richard Client in his estate and income tax planning. Part of this plan involved a substantial gift to Hudson University's business school, and a new building bearing Rich's name. Working on such a matter was very good experience for Franklin and certainly proved to be valuable experience when he made a lateral move a few years later.

Franklin has recently been contacted by a long-standing client, who would like Franklin's assistance in executing on her philanthropic legacy. Like Franklin, Long Standing Client is a proud alum and supporter of Hudson University.

Long Standing Client and Hudson University have begun discussions about Long Standing Client making a substantial gift to its business school. Her gift would allow Hudson University to renovate, redesign and expand the business school facilities, which have become esthetically, environmentally, and technologically outdated. This redesign will allow Hudson University to remain competitive at the highest levels. And in recognition and appreciation of Long Standing Client's generosity, Hudson University has proposed that the building housing the business school be renamed the Long Standing Client Business School Building at Hudson University. Long Standing Client has asked Franklin to engage with Hudson University to work out the details of the gift pledge agreement.

The University has assured Franklin that the terms of Richard Client's gift pledge agreement are vague enough to allow the renaming of the building. In reviewing the gift pledge agreement that he worked on so many years ago, Franklin sees that he would draft some provisions differently now, but wouldn't necessarily call the agreement vague. And he certainly remembers Richard's impression that his name would be on the building in perpetuity.

Richard Client passed away in 1998. After the funding of trusts for his children, the residue (and majority) of his estate passed to charity.

While Franklin is finalizing the negotiation of Long-Term Client's gift pledge agreement with Hudson University, word reaches Richard Client's children about the name change, and they become very vocal in their opposition. Franklin suspects that this hostility would be softened with a monetary reparation, and has made that suggestion to the University.

Fact Pattern 4

Samantha Brown is a partner in Corporate Law group of a large Manhattan law firm. One of Samantha's clients is a non-profit environment advocacy group headquartered in New York City.

The law firm also has a trust and estates department that represents Stephen Dankworth-Relish. Stephen recently contacted his estate planning attorney for his and his firm's help in facilitating a large, but anonymous cash gift to the advocacy group through the firm's escrow account. It is important for Stephen to remain anonymous to both the public and the group. Stephen is an entertainer by trade and hosts a popular podcast that actively works to discredit climate change scientists. Stephen hopes that this gift will help clear his conscience – he is beginning to feel guilty for making money off of climate change denial. He also hopes this will get him back in good standing with his tween children.

Following receipt of the gift, one particular Board Member feels that it is the obligation of the Board to determine the identity of all donors, and this Board Member has been pestering the CEO to determine the source of the anonymous gift. Since it was clear that the gift was facilitated by the Law Firm, the Board Member feels that it shouldn't be that difficult, especially considering its external corporate counsel is a member of the same firm.

Feeling bad about having to make the ask, and not really believing that the Board is entitled to the identity of the donor, the CEO asks her assistant to make the call to Samantha's office. The CEO assumes that an assistant making a call to the law firm will go nowhere, and she can report back to her Board that the law firm was unresponsive to her inquiries. Coincidentally, the assistant and Samantha's newly-hired legal secretary play on the same roller derby league, and the legal secretary was happy to place a couple of calls within the firm to identify the source of the donation.

Within a few hours, Stephen Dankworth-Relish was trending. Within 12 hours, it was known that Samantha's law firm was the source of the disclosure. Within a day, Stephen's social media followers dropped by more than half and his podcast was dropped from its platform.

Fact Pattern 5

Michael Brown is a solo practitioner, living and working in Westchester County. Michael has a respectable and growing practice that encompasses trust and estate planning and administration, elder law planning, and real estate.

Michael is a proud second-generation alum, and proud third-generation parent of PEACE – the Passionate Emu Agriculture Camp and Equine Center. PEACE is a summer camp and year-round education center located in Bedford, New York. Its mission is to develop leadership, responsibility, and life skills in young people, while introducing concepts of sustainability and healthy living.

Michael considers himself a champion of PEACE. He has a magnet on his car, he actively promotes PEACE on his personal Instagram and Twitter feeds, and has written a few professional articles for its quarterly newsletter. He even has a vintage poster framed and hanging in his conference room.

PEACE holds a special place in Michael's heart, as it does for many people, and the alumni network is quite strong. Michael's dentist, financial advisor, and yoga instructor are all PEACE alumni. The PEACE alumni network has also proven to be a strong referral source for Michael's firm. It may help that Michael advertises that, when working with PEACE alumni, he donates 5% of his fee to the organization.

For many years, Michael has hosted quarterly educational webcasts for clients and potential clients, with topics ranging from education funding options to special needs trusts. If the topic ever covers charitable planning, Michael always uses PEACE as an example. And while Michael never explicitly suggests clients support PEACE, he always mentions his connections to the organization and offers to make an introduction. This past year, Michael was quite pleased to see the names of a few of his clients on PEACE's published annual donor's list.

FACULTY BIOGRAPHIES

Hon. Nora S. Anderson
Surrogate, New York County

Surrogate Nora S. Anderson graduated from Brooklyn Law School in 1982 and was elected as Surrogate for New York County in 2008. Judge Anderson formerly served as the Deputy Chief and the Chief Clerk for New York County Surrogate's Court. Prior to her election, Judge Anderson was engaged in private practice, specializing in Trust and Estates matters in New York City and suburban counties. She is an experienced trial attorney and has frequently argued before the Appellate Division, 1st and 2nd Departments.

Surrogate Anderson has lectured for various CLE courses and the New York State Bar Association. She has served on the Executive Committee for the Trust and Estates Section of the New York State Bar and was the chairperson of the Practice and Ethics Committee. The Judge is a member of the New York State Surrogate's Committee and the Committee on Trust, Estates and Surrogate's Courts of the Association of the Bar of the City of New York.

John Sare, Esq.
Partner
Patterson, Belknap, Webb & Tyler LLP

John Sare is a Partner in the Tax-Exempt Organizations practice and the Trusts and Estates group of Patterson Belknap Webb & Tyler LLP. Mr. Sare has extensive experience in the representation of museums, colleges, private foundations and other types of exempt organizations. This work includes advising charities on the issues and options they face with respect to their endowment funds and other types of restricted gifts. Mr. Sare has significant experience representing tax-exempt organizations in connection with matters before the New York State Attorney General's Office. Mr. Sare was recognized by *Chambers High Net Worth 2021* as a notable practitioner in the area of Art and Cultural Property Law. He is described in the guide as "a well-known specialist in tax-exempt organizations work for museums and libraries, and is highly respected for his expertise in these matters."

Mr. Sare also advises individuals and fiduciaries on legal issues involving works of art, charitable giving, estate planning, and the administration of estates and trusts. He taught the Seminar in Law and the Visual Arts at the Columbia University School of Law from 2001 until 2011 and is a co-author of *Estate Planning for Artists and Authors*, published by Tax Management, Inc. (2004) and *Splendid Legacy: The Guide to Creating Your Family Foundation*, published by the National Center for Family Philanthropy (2002). He has also written and spoken about the New York Non-Profit Revitalization Act of 2013 and the Uniform Prudent Management of Institutional Funds Act and the New York version of it.

In addition frequent lectures and writings on tax-exempt organization, charitable giving, and art law topics, Mr. Sare is a co-author of several publications, including *Underwater Endowments: Understanding Your Options* (2009), *Impact of the New Form 990 on Conflicts and Disclosure Policies* (2008), and *New IRS Form 990 Changes the Landscape for Public Disclosure by Exempt Organizations* (2008).

Mr. Sare is a graduate of Southern Methodist University and Columbia Law School. Mr. Sare is admitted to practice in New York.

James Sheehan, Esq.
New York Attorney General’s Charities Bureau

James Sheehan is the Chief of the New York Attorney General's Charities Bureau, which oversees compliance and regulation of the nation's largest Charities sector.

Prior to this role, he was the New York City Human Resources Administration's first Chief Integrity Officer, overseeing audit, investigations, and data analysis for the nation's largest social services agency. From 2007 to 2011, he was New York's first Medicaid Inspector General, overseeing the country's first mandatory compliance program, and New York's' leading role in health care data analytics.

Prior to his New York public service roles, Mr. Sheehan was an Assistant and Associate US Attorney in the Eastern District of Pennsylvania, where he developed a nationally recognized program working with whistleblowers under the False Claims Act.

He is a graduate of Swarthmore College and Harvard Law School, and is admitted to the bar in New York.

Conrad Teitell, Esq.
Principal
Cummings & Lockwood LLC

Conrad Teitell is a principal in the Connecticut and Florida law firm of Cummings & Lockwood, based in the firm's Stamford office and chairs the firm's National Charitable Planning Group. He is an adjunct professor (Masters Graduate Program in Estate Planning) at the University of Miami School of Law. He holds an LL.B. from Columbia Law School and an LL.M. from New York University Law School, and is admitted to the bars of New York and the District of Columbia.

He has lectured in all 50 states on taxes and estate planning for thousands of hours at programs sponsored by bar associations, estate planning councils, colleges, universities, law schools, community foundations, hospitals, museums, retirement communities, religious, health, social welfare and other organizations. He lectures annually at Columbia Law School's Stone Circle luncheon. He also teaches ethics in charitable gift planning.

His publications on taxes, wills and estate planning have been read by millions—lay people and professional tax advisers. His many articles include columns in *Trusts & Estates* magazine and the *New York Law Journal*. He is the editor and publisher of *Taxwise Giving*, a monthly newsletter and is the author of the five-volume treatise, *Philanthropy and Taxation*. His column, *Speaking and Writing*, has appeared in the American Bar Association's *Journal* and in *TRIAL*, the magazine of The American Association for Justice.

Conrad Teitell founded and taught the American Bar Association's (ALI/CLE's) public speaking courses for over 25 years. He teaches public speaking to other professional advisers and laypeople and teaches public speaking for the Practicing Law Institute and the New York City Bar Association. He taught public speaking in a six-part PBS television series.

Teitell was the on-air tax adviser for the PBS series *On The Money* produced by WGBH/Boston. He has done six PBS television specials on taxes and estate planning—two produced by WGBH/Boston, two produced by KVIE/Sacramento, one produced by WMHT/Schenectady and one produced by KCTS/Seattle. He has been a commentator on National Public Radio's *Marketplace.*

Conrad Teitell has testified at hearings held by the Treasury, the Internal Revenue Service, the Senate Finance Committee, the House Ways and Means Committee and the House Judiciary Committee. He was one of four invited witnesses to testify at the Senate Finance Committee on estate tax revision. The other invited witnesses were a businessman from Iowa, a rancher from South Dakota and the Oracle from Omaha—Warren Buffett.

Jordan S. Weitberg, Esq.
Principal
Bressler, Amery & Ross, P.C.

Jordan Weitberg is a trusts and estates lawyer who focuses on complex trusts and estates disputes and fiduciary litigation. He represents individuals, charitable organizations and banks and trust companies as executors, trustees, beneficiaries in all facets of his practice. Clients look to Jordan to provide them with critical guidance in successfully resolving family and personal disputes that are legally challenging and emotionally taxing.

Jordan regularly handles trust and will contests involving allegations of undue influence, incompetency, and fraud; breach of fiduciary duty and removal actions; contested accountings; trust reformation, modification, and construction and turnover proceedings; trust and estate property disputes; contested guardianships; and trials, appeals, mediations and arbitrations in New Jersey and New York courts.

Jordan also advises and assists individuals, executives and family business owners in their trusts and estates planning by preparing estate planning documents including wills and trusts that meet his clients' needs. He brings his tax expertise and vast experience to bear so that his clients accomplish their objectives of minimizing and deferring tax, retaining maximum control, satisfying charitable giving objectives, and protecting assets against claims of potential creditors.

Jordan's expertise has been recognized by various professional organizations. Since 1999, he has been a Fellow of the American College of Trust and Estate Counsel (ACTEC), a select association of peer-elected trusts and estates lawyers. He presently serves on its Fiduciary Litigation and Professional Responsibility Committees. From 2001 to 2002, he served as Chair of what is now the Real Property, Trust and Estate Law Section of the New Jersey State Bar Association. He helped develop important trusts and estates legislation in New Jersey by serving on the Section's Uniform Trust Code Committee, the Uniform Probate Code Revision Committee and the Prudent Investor Rule Drafting Committee. He is also a member of the Trusts and Estates Section of the New York State Bar Association, and its Estate Litigation committee.

Jordan has lectured and published extensively on trusts and estates issues. His articles have been featured in the *New Jersey Law Journal* and the *New Jersey Lawyer.* He has lectured on numerous occasions for ACTEC, the New Jersey Institute for Continuing Legal Education (NJICLE), and other organizations, and has served as an instructor for NJICLE's Skills and Methods course in the areas of will drafting and probate practice.

Jordan is a graduate of Rutgers College, University of Michigan Law School, McGeorge School of Law, University of the Pacific; and is admitted to the bars of New York and New Jersey.

Written Materials

Ethics for Breakfast:
The Best Laid Plans of Mice and Men – Ethical Considerations in Representing the Charitably-Inclined Client

Relevant New York Rules of Professional Conduct

New York State Bar Association Ethics Opinion 941

New York State Bar Association Ethics Opinion 1150

New York State Bar Association Ethics Opinion 971

New York City Bar Association Formal Ethics Opinion 2016-1

Heather Rhodes, Esq. & Conrad Teitell, Esq., Ethics in Charitable Planning

Nassau County Bar Association Ethics Opinion 1997-11

Estate of Edel, 700 N.Y.S.2d 664 (Sur Ct. 1999)

New York State Bar Association Ethics Opinion 1008

New York State Bar Association Ethics Opinion 871

New York State Bar Association Ethics Opinion 723

New York State Bar Association Ethics Opinion 1103

Nassau County Bar Association Ethics Opinion 2020-1

Bent v. St. John's Univ., 2019 N.Y. Misc. LEXIS 16798 (Sup. Ct. Queens Cnty. 2019), aff'd 2020 N.Y. App. Div. LEXIS 7622 (2nd Dep't, Dec. 9, 2020)

Smithers v. St. Luke's-Roosevelt Hospital Ctr., 723 N.Y.S.2d 426 (N.Y. App. Div. 2001)

New York State Bar Association Ethics Opinion 907

New York City Bar Association, Frequently Asked Legal Ethics Questions

Restatements Third, The Law Governing Lawyers, Sec. 130

Relevant New York Rules of Professional Conduct

RULE 1.0: TERMINOLOGY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RULE 1.1: COMPETENCE

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

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

(c) A lawyer shall not intentionally:

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

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

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

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

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

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

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

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

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

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

RULE 1.3: DILIGENCE

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

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

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

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of:

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

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

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

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

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

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

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

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

RULE 1.5: FEES AND DIVISION OF FEES

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

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

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

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

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

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

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

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

(3) a fee based on fraudulent billing;

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

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

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

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

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

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

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

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

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

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

(3) the total fee is not excessive.

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

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

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.

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 of prospective client.

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

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

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

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

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

(1) the client gives informed consent;

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

(3) 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.

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.

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.

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.

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.

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

RULE 4.3: COMMUNICATING WITH UNREPRESENTED PERSONS

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

RULE 5.1: RESPONSIBILITIES OF LAW FIRMS, PARTNERS, MANAGERS AND SUPERVISORY LAWYERS

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 5.7: RESPONSIBILITIES REGARDING NONLEGAL SERVICES

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could

reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

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

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and Rule 1.6(c) with respect to the confidential information of a client receiving legal services.

(c) For purposes of this Rule, "nonlegal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

RULE 7.2: PAYMENT FOR REFERRALS

(a) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

(1) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and

(2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).

(b) A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer's services or those of a partner or associate or

any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school;

(ii) operated or sponsored by a bona fide, non-profit community organization;

(iii) operated or sponsored by a governmental agency; or

(iv) operated, sponsored, or approved by a bar association;

(2) a military legal assistance office;

(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;

(ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;

(iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

(iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;

(v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations; and

(vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its

legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

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.

RULE 8.4: MISCONDUCT

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status, sexual orientation, gender identity, or gender expression. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

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 941 (10/16/12)

Topic: Conflict of interest involving an attorney's spouse

Digest: A lawyer on a county panel of the Attorneys for Children Program may serve as "attorney for the child" even though another party in the proceeding is represented by the lawyer's spouse (an Assistant Public Defender) or by another lawyer who works in the same office as the lawyer's spouse, unless (i) the circumstances create a conflict of interest under Rule 1.7(a)(2) or Rule 1.10(h), and (ii) the child has no legal representative who can and does consent to the conflict on the child's behalf.

Rules: 1.0(h), 1.7(a) & (b), 1.10(a), (d) & (h)

QUESTION

1. May a lawyer on a county panel of the Attorneys for Children Program serve as attorney for the child in court proceedings if the petitioner or respondent is represented by the lawyer's spouse (who is an Assistant Public Defender) or by another lawyer who works in the same office as the lawyer's spouse?

BACKGROUND

2. Under New York Law, children (minors) in many kinds of court proceedings (including juvenile delinquency matters, custody and visitation disputes, and child protective proceedings) are entitled to be represented by counsel in Family Court, Supreme Court, Surrogate's Court, and appellate courts. A governmental office entitled the Attorneys for Children Program ("AFC Program") maintains a list or "panel" of attorneys qualified to represent children, and assigns an attorney from the panel to children involved in the judicial system who qualify by law for an appointed attorney.

3. When an AFC Program panel member is assigned to a case, the panel member plays the role of "attorney for the child," and functions as the child's lawyer. An attorney for the child is generally responsible for representing and advocating the child's wishes in the proceeding, which may or not be in the "best interests" of the child.[1]

---

[1] According to a Fourth Department publication entitled *Ethics for Attorneys for Children* (Aug. 2011):

> [T]he role of the attorney for the child is very different from that of a guardian ad litem. A guardian ad litem, who need not be an attorney, is appointed as an arm of the Court to protect the best interests of a person under a legal disability. In contrast, the role of the attorney for the child is to serve as a child's lawyer.

The publication is available at http://www.nycourts.gov/courts/ad4/AFC/AFC-ethics.pdf.

4. The AFC Program operates under the supervision of the Appellate Division in each judicial department, and is governed by §7.2 of the Rules of the Chief Judge. [2] That section, entitled "Function of the attorney for the child," provides that the attorney for the child "is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on … conflicts of interest …."

5. The inquirer, Attorney X, is on the panel of the Attorneys for Children Program in a particular county. Attorney X's spouse is an Assistant Public Defender in the same county. When Attorney X represents a child in a proceeding, the petitioner or respondent is often represented by an attorney from the same Public Defender's Office in which Attorney X's spouse works. Attorney X does not directly oppose the petitioner or respondent in those proceedings, but rather represents the child.

OPINION

Rule 1.10(h): Spouse v. Spouse

6. In the New York Rules of Professional Conduct (the "Rules"), only one provision directly addresses conflicts between spouses. Rule 1.10(h) provides:

> 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.

[2] 22 N.Y.C.R.R. §7.2. Rule 7.2(c) and (d) help to understand the role of an attorney for the child. They provide as follows:

> (c) In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child.
> (d) In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position.
>
> (1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.
> (2) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.
> (3) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

7. If Attorney X is assigned to represent a child in a proceeding in which Attorney X's spouse is representing another party to the matter whose interests differ from the child's interests, then Attorney X must decline or withdraw from the representation of the child per Rule 1.16(b) (lawyer "shall withdraw" from representing a client if the lawyer "knows … that the representation will result in violation of these Rules or of law") unless, per Rule 1.10(h), the child (Attorney X's client) "consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client."[3]

8. However, a client who is a child may be incapable of consenting to the conflict under Rule 1.10(h). In a prior opinion involving a minor client, we cited three opinions decided under the old Code of Professional Responsibility – N.Y. State 256 (1972), N.Y. State 274 (1972), and N.Y. State 790 n.4 (2005) – in which "this Committee determined that a minor by himself or herself could not consent to a conflict," and we added that "[n]othing in the Rules of Professional Conduct changes this conclusion." N.Y. State 895 (2011) ¶15. Although a child acting alone lacks capacity to consent to a conflict, consent may be possible if the child has a separate law guardian or other representative who has power to consent on the child's behalf. Whether a representative does have such power is a question of law that we cannot answer. *See* N.Y. State 895 ¶ 16 (2011). (Nor do we know whether any of the children Attorney X will represent will have a law guardian or other legal representative.)

Rule 1.7(a)(2): Personal Interest Conflicts

9. Attorney X, even if not barred from the representation by Rule 1.10(h), must also consider another Rule when another party in the proceeding is represented by Attorney X's spouse or another Assistant Public Defender. Spousal conflicts may arise not only under Rule 1.10(h), but also under New York's more general rules on conflicts of interest. In particular, Rule 1.7(a)(2) provides that a lawyer generally may not represent a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client would be adversely affected by the lawyer's own financial business, property or other personal interests. Even in such cases, however, the lawyer may represent the client if each of four conditions is met. Among these are the conditions that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client," and that "each affected client gives informed consent, confirmed in writing." Rule 1.7 (b).

10. We lack sufficient facts to determine whether there is a "significant risk" that the professional judgment of the attorney for the child will be thrown off course ("adversely affected") by the lawyer's "personal interests" in the success of the spouse's employer (here, the Public Defender). The fear, stated in the abstract, is that when an Assistant Public Defender

[3] In contrast to Rules 1.7(b)(4), 1.9(a), and various other rules, Rule 1.10(h) does not expressly require that the client's consent be "confirmed in writing." However, in N.Y. State 895 (2011), we pointed out that a client's consent to a Rule 1.10(h) conflict must be confirmed in writing because Rule 1.10(d) says: "A disqualification prescribed by this Rule may be waived by the affected client … under the conditions stated in Rule 1.7." The conditions stated in Rule 1.7 include informed consent, confirmed in writing. In any event, confirming a client's consent to a conflict in writing is a wise policy because it impresses on the client the importance of that consent, and avoids later confusion about whether consent was given.

represents another party, Attorney X will somehow pull punches or represent the child-client less diligently than if the spouse did not work at the Public Defender's Office. Whether that abstract fear would become a reality may depend on multiple factors such as (a) the position the spouse holds at the Public Defender's Office, (b) how secure the spouse's job is at that office, (c) the relationship between the spouse and the Assistant Public Defender involved in the case, (d) whether the interests of the child and of the party represented by the Assistant Public Defender are aligned or antagonistic, and (e) whether the case is attracting attention from the press or from politicians. Those are just illustrative factors, not an exhaustive list. When the Assistant Public Defender involved in the case is actually Attorney X's spouse, then – even if there were not differing interests creating a Rule 1.10(h) conflict – there would be a heightened likelihood of a personal interest conflict.[4] Each matter will turn on its own circumstances, and Attorney X must exercise his or her own best judgment in identifying and weighing the relevant factors. *See, e.g.,* N.Y. State 895 ¶ 11 (2011) (applying various factors to analyze a potential conflict with a spouse's law firm).

Rule 1.10(a): Imputed Conflicts

11. If Rule 1.7(a)(2) disqualifies Attorney X from representing a child in a particular matter, then Rule 1.10(a) ordinarily imputes that conflict to every other lawyer who is associated in the same "firm." We must therefore determine whether the AFC Program is a "law firm" within the meaning of Rule 1.0(h), which provides as follows:

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

12. As we understand the AFC Program, it falls outside that definition. Nor are the attorneys on the panel of the AFC Program automatically deemed to belong to a single firm for conflict of interest purposes, such as sometimes happens when attorneys share offices in a way that gives each other access to the confidential information possessed by other attorneys in the office-sharing arrangement. *See, e.g.,* N.Y. City 80-63 (1980) (two firms that shared offices could not represent opposing parties in litigation because of the "strong likelihood" that the separate law firms could not maintain the confidences and secrets of their respective clients); N.Y. County 680 (1990) ("Even though lawyers who share office space are not partners, they may be treated as if they were partners for some purposes" if they share confidential information.)

[4] "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)." Rule 1.7, Cmt. [11].

13. Rather, the only connection between the attorneys on the panel, aside from a common purpose, is that they obtain assignments and seek reimbursement from the same administrator. This does not transform them into a law firm. *Compare Rosenblum v. Great Neck Teachers Ass'n Benefit Trust Fund,* 36 Misc. 3d 1203(A) (Nassau County Sup. Ct. 2012) ("organization that makes referrals to a panel of lawyers" falls outside the definition of "law firm" under Rule 1.0(h)) *with* N.Y. State 804 (2006) (independent private practitioners who formed a "qualified legal services corporation" to represent indigent clients, and who each received a pro rata share of the fees paid by the county to the corporation, constituted a "law firm" for conflicts purposes). Because the AFC Program is not a law firm within the meaning of the Rules, a conflict for Attorney X will not be imputed to other lawyers in the AFC program (but if Attorney X is associated with other lawyers in some firm, a Rule 1.7 conflict will be imputed to them).

14. The Public Defender's Office, however, is a law firm, assuming it either is a "government law office" or comes within the definition of a qualified legal assistance organization under Rules 1.0(p) and 7.2(b)(1). *See* N.Y. State 862 (2011) (finding that Public Defender's Office was a firm). Thus its lawyers, unlike those of the AFC Program, are subject under Rule 1.10(a) to mutual imputation of personal-interest conflicts.[5]

15. We note – as we did in N.Y. State 895 at ¶ 14 – that an Assistant Public Defender who works in the same office as Attorney X's spouse may have a "mirror-image conflict under Rule 1.7(a)(2)." Whether such a conflict arises will depend on the kinds of factors discussed in paragraph 10 above. If it does arise, then under Rule 1.10(a), the conflict will be imputed to every lawyer "associated in" the Public Defender's Office who knowingly undertakes a representation despite the conflict. However, if the client of the Public Defender's Office has the capacity to give informed consent to a conflict, then that client's consent may cure the imputed conflict. *See* Rule 1.10(d) (clients may waive imputed conflicts "under the conditions stated in Rule 1.7"). But the consent of the Assistant Public Defender's client will not cure any conflict that Attorney X may have in representing the child-client.

16. Finally, we point out that whenever Attorney X is called upon to serve as attorney for a child, he should heed the mandate of Rule 1.14(a) by seeking, "as far as reasonably possible, [to] maintain a conventional relationship with the client."

CONCLUSION

17. A lawyer on a county panel of the Attorneys for Children Program may serve as attorney for the child even though another party in the proceeding is represented either by the lawyer's spouse, who is an Assistant Public Defender, or by another lawyer who works in the same office as the lawyer's spouse, unless (i) the circumstances create a conflict under Rule 1.7(a)(2) or Rule 1.10(h), and (ii) the child has no legal representative who can and does consent to the conflict on the child's behalf.

(54-12)

[5] Spousal conflicts under Rule 1.10(h), on the other hand, are not among those listed as requiring imputation under Rule 1.10(a).

New York State Bar Association
Committee on Professional Ethics

Opinion 1150 (4/30/2018)

Topic: Solicitations and Referrals: Spouses in Related Businesses

Digest: A lawyer's spouse engaged in a non-legal business related to the lawyer's practice area may for ethics purposes be equated to the lawyer in certain circumstances. Thus, a real estate lawyer whose spouse is a real estate broker may receive referrals from the broker/spouse only if the broker/spouse is not involved in the real estate transaction and the broker/spouse fully complies with the rules governing lawyer solicitations. A real estate lawyer may refer clients to a broker spouse only if the lawyer is not involved in the real estate transaction and may be required, in some instances, to obtain informed consent from the referred client, confirmed in writing.

Rules: 1.7(a)(2); 1.7(b), 1.8(e), 1.8(i), 7.3(a)(1); 7.3(b), 8.4(a).

FACTS:

1. The inquirer is a transactional real estate attorney whose spouse is a real estate broker. The couple wishes to refer matters to each other. In some circumstances, the inquirer would refer clients to the spouse as a broker; in others, the broker/spouse would recommend the inquirer to represent a party in the closing of a real estate transaction. The inquirer understands that the inquirer and broker/spouse may not participate in their respective roles in the same real estate transaction.

QUESTIONS:

2. The inquirer poses three questions:

(a) May a real estate attorney accept referrals from a broker/spouse who has no personal involvement in the real estate transaction?

(b) May a real estate attorney refer business to a broker/spouse if the attorney does not represent any party in the real estate transaction?

(c) May a real estate attorney representing a client in the sale of property refer the selling client to the broker/spouse in connection with the client's rental of an apartment in which the real estate attorney does not represent the selling client?

OPINION

3. The inquirer recognizes that a lawyer may not represent a party to a real estate transaction if the attorney's spouse is involved in the transaction. This is consistent with a view

we have long held. *See* N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 244 (1972), *modified on other grounds* in N.Y. State 340. Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer may not represent a client if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." The reach of a "lawyer's own financial, business, property or other personal interests" extends to the "financial, business, property or other personal interests" of the lawyer's spouse.

4. Such is the teaching of N.Y. State 855 (2011). There, the issue was whether a personal injury lawyer could permissibly refer a client to a litigation financing company in which the lawyer's spouse owned a controlling financial interest. We concluded that a lawyer could not ethically do so. We reasoned that a lawyer is not allowed (with exceptions inapplicable there) to subsidize a client's litigation, Rule 1.8(e), nor permitted to acquire a proprietary interest in a litigation, Rule 1.8(i). *Id.* ¶¶ 4-7. Thus, we said, under the Rules, the lawyer could not personally own an interest in the litigation financing company to which the lawyer referred clients for funding. *Id.* ¶ 5; *see* N.Y. State 1145 ¶¶ 13-20 (2018) (a lawyer may not refer clients to a litigation funding firm in which the lawyer is a direct and substantial investor). The unifying interest that marriage entails persuaded us that, if the lawyer could not directly violate Rules 1.8(e) and 1.8(i), then the lawyer could do not so indirectly with a an entity owned by a spouse. Accordingly, in interpreting Rule 1.7(a)(2), we consider any referral relationship between a lawyer and a lawyer's spouse to implicate the lawyer's own "financial, business, property or other personal interests." *See* N.Y. State 855 ¶¶ 11-12.

5. N.Y. State 855 relied, as we do here, on Rule 8.4(a), which forbids a lawyer a lawyer "to violate or attempt to violate" a Rule "through the acts of another." N.Y. State 855 ¶ 12. Rule 8.4(a) is of particular importance on the subject of the inquirer's first question -- the proposed broker/spouse's referral of parties to the inquiring lawyer.

6. Rule 7.3 regulates solicitation and recommendation of professional employment. Rule 7.3(b) defines "solicitation" to mean, in part, "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," the "primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Rule 7.3(a)(1) specifically forbids a solicitation "by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client." In any outreach by the broker/spouse initiated by or on behalf of the lawyer/spouse, the broker/spouse recommending the inquirer as a lawyer in a real estate transaction stands in the shoes of the inquirer as if the inquirer were personally making the outreach. Thus, for instance, the exception for persons who may be contacted in person or in real time – such as former or existing clients – refers to the inquirer's former or existing clients, not those of the broker/spouse. Likewise, Rule 7.3 sets forth other provisions on solicitations – such as recordkeeping and filing – for which the lawyer/spouse must assure compliance. By reason of Rules 1.7(a) and 8.4(a), these regulations apply to the actions of the broker/spouse as if done by the lawyer/spouse.

7. Whether a particular advertisement is a regulated solicitation "initiated by or on behalf of a lawyer" turns on the facts and circumstances of the communication. Rule 7.3(b) "makes an important distinction between communications initiated by the lawyer and those initiated by a

potential client." N.Y. State 1049 ¶ 8 (2015); *see* Rule 7.3, Cmt. [2] ("A 'solicitation' means any advertisement" that is "initiated by a lawyer or law firm (as opposed to a communication made in response to any inquiry initiated by a potential client)"). A spectrum exists, on one end, between an unprompted question by a person on whether the broker/spouse knows any real estate lawyers, and, on the other, the broker/spouse's unprompted recommendation of the lawyer/spouse as a lawyer to handle a real estate transaction. *See* N.Y. State 1049 ¶ 17 (a web posting "directed to, or intended to be of interest only to, individuals" referring to a particular incident "would constitute a solicitation under the Rules"); N.Y. State 1014 ¶¶ 8, 10 (2014) (a current client's recommendation of a lawyer to a person in need of legal services, made without the lawyer's participation or knowledge, is not a solicitation "initiated by or on behalf of the lawyer").

8. The inquirer's second and third questions are really the same: May a lawyer refer a client to the lawyer's broker/spouse to act in a real estate transaction in which the lawyer is not representing the referred client? The Rules set forth no categorical ban on the lawyer making such a referral. Nevertheless, the lawyer owes ongoing duties of care and loyalty to an existing client, including the duty to exercise independent professional judgment on the client's behalf. Not every client request for a referral, no matter how unrelated to the subject of the lawyer's representation of the client, invariably occasions these duties of care and loyalty. Rather, in our view, whether a lawyer's referral of an existing client to a non-lawyer service provider implicates these duties depends on the circumstances. If, for example, a meaningful relationship is present between the subject matter of the lawyer's representation of the client in a particular matter and the nature of the referral the client seeks, then we believe that the client has a reasonable right to expect that, in making the referral, the lawyer will exercise independent professional judgment on the client's behalf. It follows that the duty to exercise independent professional judgment requires an assessment whether any conflict of interest may burden that judgment.

9. In the current inquiry, we believe that the client could reasonably believe that the subject matter of the lawyer's representation of the client and the client's referral request are not so attenuated as to release the lawyer from the duties of care and loyalty to the client. In our view, a reasonable lawyer could well conclude that referring a client to a broker/spouse creates a significant risk that the lawyer's own "financial, business, property or other personal interests" will adversely affect the exercise of professional judgment in making the referral. We believe, however, that this conflict is subject to waiver by the referred client upon informed consent, confirmed in writing, pursuant to Rule 1.7(b). The requirement of consent is not onerous. The lawyer needs to disclose, at a minimum, the marital relationship with the broker/spouse, and the possibility that, if retained, any commission the broker/spouse earns in the matter could benefit the referring lawyer. This disclosure may be oral. The requirement that consent be "confirmed in writing" – which may be written by either the lawyer or the client, by email or other form of written communication – need acknowledge only that, pursuant to the requisite disclosures, the client agrees to waive any conflict.

CONCLUSION

10. A lawyer who is engaged in a transactional real estate practice and whose spouse is a real estate broker may receive client referrals from the lawyer's spouse provided that the broker/spouse is not involved in the real estate transaction and the lawyer assures that the

broker/spouse fully complies with rules governing solicitation by lawyers. A real estate lawyer may refer a client to a broker/spouse provided that the lawyer does not represent the client in the real estate transaction and, if the circumstances suggest a conflict, the lawyer obtains the informed consent of the referred client, confirmed in writing.

(40-17)

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 971 (6/26/13) – Overrules N.Y. State 524

Topic: Solicitation; auction of legal services by charity

Digest: Subject to disclosure requirements and limitations, a lawyer may donate legal services to a charitable organization for auction as a fund-raising device.

Rules: 1.1(b), 1.2(c), 1.7, 1.9, 7.1, 7.2(a)

FACTS

1. In N.Y. State 524 (1980), this Committee concluded that it is improper for a lawyer to donate legal services to a charitable organization for auction as a fund-raising device. The inquirer asks whether this remains the Committee's opinion under the New York Rules of Professional Conduct.

QUESTION

2. May a lawyer donate legal services to a charitable organization for auction as a fund-raising device?

OPINION

3. N.Y. State 524 concluded that a lawyer may not donate legal services to a charitable organization for a fund-raising auction. The principal reasoning was as follows:

> [A] lawyer who has committed his services to be auctioned is unable to exercise the professional judgment and discretion that must be brought to bear in deciding to accept a client. The Code specifies a number of factors relating to the client and the legal matter that a lawyer must consider prior to undertaking representation. …. For example, and most obviously, a lawyer "should accept employment only in matters which he is or intends to become competent to handle." EC 6-1. In the context of a charitable auction, the lawyer has agreed to represent the successful bidder without knowing whether the employment will involve him in a matter beyond his competence.

Additionally, the Committee expressed concern that "[t]he practice of donating legal services to a charitable organization to be auctioned as a fundraising device may also be deemed improper under DR 2-103(B), which prohibits the lawyer from giving anything of value to a third party for

recommending or obtaining the lawyer's employment." Finally, the Committee expressed a concern that "the offering of legal services as a fundraising device does not appear to be an appropriate means of publicizing the lawyer whose services are being offered," because the Committee believed that such devices "tend to confuse the process of intelligent selection of counsel with the objectives of the fundraising organization."

4. Most other ethics committees that considered the question at around the same time reached a similar conclusion. *See, e.g.*, ABA Inf. 1250 (1972) (advertising the auction of the lawyer's services by a charitable organization would contravene the spirit of the advertising and solicitation rules and be undignified); Kentucky Opinion E-239 (1981) (the auction does not facilitate an informed decision whether to retain the lawyer "but merely forces a particular person(s) to go to a particular lawyer"); New Jersey Opinion 319 (1975) ("this arrangement puts the charity in the position of recommending [the] attorney and then being remunerated by him for the introduction"); San Diego County Opinion 1974-19 (1974) ("An attorney may not offer free legal services to a charitable organization because such would be a solicitation of business."). *But see* California Opinion 1982-65 (auctioning legal services in a charitable fund raiser is not forbidden, and "the benefits that flow from an attorney's donation of legal services" outweigh "the remote likelihood of abuse of fundamental public policies," but the lawyer must comport with limitations established by the advertising, competence and conflict rules).

5. The language of the rules applicable to this inquiry has not meaningfully changed since 1980, when this Committee issued Opinion 524. The restriction on undertaking work for which the lawyer is unqualified is codified in Rule 1.1(b), which generally provides: "A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle … ." The earlier solicitation rule against compensating others for recommending the lawyer's services has been carried over into Rule 7.2(a), which provides, subject to exceptions inapplicable here, that: "A lawyer shall not compensate or give anything of value to recommend or obtain employment by a client … ."

6. Nonetheless, the courts' approach and, accordingly, this Committee's approach to interpreting rules on lawyers' advertising and solicitation has become less restrictive since 1980, particularly in light of evolving constitutional case law under the First Amendment recognizing the right of lawyers and other professionals to engage in commercial speech.[1] Where once this Committee interpreted advertising and solicitation rules sweepingly to prevent deceit and the other harms against which the rules protect, the Committee now interprets the rules more cautiously. Our objective is to effectuate the rules' language and purpose consistently with the public interest in access to information about lawyers' services, and lawyers' legitimate interest

[1] *See, e.g.*, N.Y. State 933 (2012) (citing, among other sources, *Ibanez v. Florida Dep't of Business and Professional Regulation*, 512 U.S. 136 (1994), which struck down advertising restriction on lawyer-accountant); N.Y. State 757 (2002) (discussing implications of *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), which recognized a lawyer's First Amendment right to state on letterhead "certified civil trial specialist by the National Board of Trial Advocacy"); N.Y. State 637 (1992) (citing, among other cases, *von Wiegen v. Committee on Professional Standards*, 63 N.Y.2d 163, 481 N.Y.S.2d 40 (1984), holding that the blanket prohibition of mail solicitation of accident victims is unconstitutional).

in marketing their services. *See, e.g.*, N.Y. State 897 (2011) (concluding that "[l]awyer may market legal services on a 'deal of the day' or 'group coupon' website provided that the advertising is not misleading or deceptive and makes clear that no lawyer-client relationship will be formed until the lawyer can check for conflicts and competence to provide the services").

7. Since the mid-1980s, perhaps influenced by the courts' evolving approach to lawyers' advertising and solicitation, many more ethics committees have concluded, contrary to Opinion 524, that subject to certain restrictions, lawyers may donate legal services to a charitable organization to be auctioned at a fund-raising promotion. *See, e.g.*, Florida Opinion 86-9 (1987); Hawaii Opinion 31 (1992); Indiana Opinion 4 of 2008 (identifying caveats, including that the lawyer must be competent, avoid conflicts, and ensure that the client is satisfied with the choice of counsel, and that the description of the attorney must not include laudatory remarks or claims of special expertise); Nebraska Opinion 06-11 (2007) (rescinding earlier opinion, and reasoning that "the possibility of misleading information being communicated to the bidders could be adequately protected against by the attorney in the wording of the auction item that the services would only be in the lawyer's area of competence, that the attorney retains the right to decline the service for conflicts or other ethical problems in which case the price would be refunded by the attorney, and that communications regarding the auction not be false and misleading"); South Carolina Opinion 91-35 (1991) ("to avoid misleading the recipient of donated services, the donating lawyer must offer the services with certain express qualifications, clarifications, and reservations"). *But see* Nassau County Opinion 97-11 (1998); New Hampshire Opinion 1990-91/2 (1991) (finding that because of ethical concerns, lawyers should not donate their services to a charitable fund raiser even though the rules do not explicitly prohibit doing so); Ohio Opinion 2002-5 (concluding that donating legal services "is a giving of a thing of value which secures employment of the lawyer").

8. For example, Hawaii's ethics committee concluded:

> A lawyer may donate his or her legal services to a charitable cause or nonprofit corporation, to be auctioned to the highest bidder in fund-raising promotions, provided that:
>
> > (a) only services for which the lawyer has the requisite competence are donated;
> >
> > (b) the legal services donated and the identity of the lawyer who will perform the services must be clearly designated at the auction (for example, "preparation of a will by John Doe, Esq.");
> >
> > (c) the lawyer retains the right to decline his or her provision of the donated services in the event of a conflict of interest or for similar cause, in which event the lawyer must take steps to ensure that any auction bid paid by the prospective client is promptly refunded by the charitable organization, nonprofit corporation, or by the lawyer; and

> (d) the lawyer takes steps to ensure that communications or advertisements regarding the auction (i) accurately describe the donated legal services and the identity of the lawyer who will perform the services, and (ii) are not false, fraudulent, misleading or deceptive.

Hawaii Opinion 31 (1992) (original emphasis).

9. Likewise, Florida's ethics committee concluded, among other things, that the lawyer (1) must comply with applicable advertising rules, including by "ensur[ing] that the charitable organization, in publicizing and conducting the auction, does not describe the offered legal service in a false or misleading manner," which the lawyer can accomplish by providing the description and requiring pre-approval, and (2) "should have a guarantee from the charitable organization that the successful bidder's money will be refunded on request if the lawyer is prevented by any of the conflict rules from performing the auctioned service for that person." Florida Opinion 86-9 (1987).

10. On reexamining N.Y. State 524, we conclude for the following reasons that, consistent with the language and purposes of the Rules, a lawyer may properly donate legal services to a charitable organization to be auctioned in exchange for a contribution to the organization. However, limitations and conditions apply, including those identified in the Hawaii and Florida bar opinions noted above.

11. First, as N.Y. State 524 correctly recognized, a lawyer will not necessarily be able to provide the requested legal services to the winner of the auction. A lawyer may not accept a representation that the lawyer cannot perform competently. Rule 1.1(b). Nor may a lawyer accept a representation if it would involve an impermissible conflict of interest. *See, e.g.*, Rules 1.7 and 1.9. In allowing his or her services to be auctioned, the lawyer must ensure that bidders are apprised of these limitations and any other applicable limitations in advance, so that prospective clients are not misled. The lawyer must also ensure that the charitable organization sponsoring the auction will offer to refund the bidder's contribution if for any reason the lawyer ultimately cannot provide the relevant legal services. But the fact that there are limitations does not mean that the lawyer cannot participate at all. *See, e.g.*, N.Y. State 897 (2011), cited above.

12. Second, we conclude on reflection that participating in a charitable fundraising auction does not violate Rule 7.2(a) by giving something of value to the charitable organization for the purpose of having it recommend the lawyer's services. The lawyer's purpose is to assist the organization's charitable fund-raising efforts, not to secure a referral. Indeed, it is fair to assume that lawyers will conclude that they have achieved their primary purpose if the winning bidder simply makes a donation without seeking to take advantage of the lawyer's uncompensated services.

13. Third, we do not believe that a charitable fund-raising auction of the lawyer's services will necessarily undermine the prospective client's ability to make an intelligent selection of counsel. However, the lawyer must ensure that sufficient information is provided, including about the areas of law in which the lawyer practices, to enable prospective bidders intelligently to decide whether to bid on the lawyer's services.

14. Fourth, the lawyer must comply with the advertising rules, as applicable,[2] including Rule 7.1(a)(1), which forbids any "false, deceptive or misleading" statements or claims in advertising the lawyer's services. Therefore, only accurate information about the lawyer should be provided to potential bidders. The scope of the services to be provided should be clearly described, *cf.* Rule 7.1(j), as should the limitations on the lawyer's ability to provide services.

15. Often the auctioned service may be a discrete one, such as the preparation of a simple will. However, if the lawyer were to offer a service of limited scope – e.g., a set number of hours of advice concerning estate planning – the representation would have to comport with Rule 1.2(c). That is, any limitation must be "reasonable under the circumstances," which means that the services may not be too limited to be useful to the client. If the lawyer proposes to donate a limited number of hours of advice to be auctioned by the charitable organization, but to offer the client foreseeably needed additional services for a fee, the auction materials should indicate that as well.

CONCLUSION

16. Subject to disclosure requirements and limitations as described in this opinion, a lawyer may donate legal services to a charitable organization for auction as a fund-raising device.

(4-13)

[2] Rule 1.0(a) defines an "advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." Promotional material concerning the lawyer's services, and distributed by the organization sponsoring the charitable auction, may constitute an "advertisement" under that definition. Although the lawyer's primary purpose in donating his or her services is not to secure a referral but to make a charitable contribution, the primary purpose of the promotional material describing the lawyer's services may be "for the retention of the lawyer," since that is the incentive that the organization offers to attract bids. And even if such materials are not deemed advertising, provisions in Rule 8.4 indicate that the lawyer should not assist the charitable organization in disseminating false or misleading information.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

Formal Opinion 2016-1: REFERRING A PROSPECTIVE CLIENT TO OTHER COUNSEL, WHEN THE REFERRING LAWYER HAS A CONFLICT OF INTEREST

TOPICS: Conflicts of Interest, Prospective Clients, Unrepresented Persons

DIGEST: Where an attorney is unable to represent a prospective client due to a conflict of interest with an existing client in a matter in which the attorney's firm is not representing the existing client, the attorney is ethically permitted to refer the prospective client to another attorney or list of attorneys who are competent in the field. In doing so, the attorney should consider a number of ethical limitations, including the attorney's duty to act in good faith towards the prospective client, avoid conflicts of interest, maintain confidentiality, limit communications with unrepresented adverse parties, and abide by the rules governing reciprocal referral agreements and fee sharing. Additionally, attorneys are not obligated to refer prospective clients to counsel and may choose, for professional or other reasons, not to make the referral.

RULES: 1.1(c)(2), 1.3, 1.4, 1.5(g); 1.6, 1.7, 1.10, 1.18, 4.3; 7.2; 8.4(c)

QUESTION: Is an attorney ethically permitted to refer a prospective client to another competent lawyer, if the attorney cannot take on the representation due to a conflict of interest with an existing client?

OPINION:

This opinion considers the ethical implications of the following scenario:

> A prospective client contacts a lawyer seeking representation on a legal matter. After running a conflict check, the lawyer learns that another attorney in the firm represents a client who is also involved in the legal matter and has "differing interests" from the prospective client, as defined under Rule 1.0(f) of the New York Rules of Professional Conduct (the "Rules"). Although the law firm has not been retained to represent the client in that same legal matter, the law firm concludes that the existence of those "differing interests" precludes the firm from taking on the representation of the prospective client. When the lawyer notifies the prospective client that the firm cannot take on the representation due to a conflict of interest, the prospective client asks if the lawyer can suggest another attorney who might be qualified to handle the matter. Is the lawyer ethically permitted to refer the prospective client to another attorney or list of attorneys in the relevant practice area? [1]

[1] We express no opinion on whether it is ethically permissible for a lawyer to make a referral, where the law firm already represents the current client in the same legal matter. This Opinion also does not consider any restrictions on a lawyer's ability to make a referral under principals of fiduciary duty or other substantive law. This Opinion also does not address any legal or

In our view, the lawyer is ethically permitted to refer the prospective client to another attorney, subject to the limitations discussed below.

I. THE DUTY OF LOYALTY DOES NOT PROHIBIT MAKING REFERRALS TO COMPETENT COUNSEL

One of the most important fiduciary duties that a lawyer owes to her current clients is the duty of undivided loyalty. That duty is reflected primarily in three rules: Rule 1.7, Rule 1.10, and Rule 1.1(c)(2). As noted above, Rule 1.7(a)(1) prohibits a lawyer from taking on a representation if it would involve the lawyer in representing "differing interests," absent an effective conflict waiver from the affected clients. Rule 1.10 imputes that obligation to other lawyers in the same firm. "Differing interests" is defined broadly as including "every interest that will adversely affect either the judgment or the loyalty of the lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." R. 1.0(f). In the scenario described above, the lawyer fulfills her duties under Rules 1.7 and 1.10 by declining to represent the prospective client.

Rule 1.1(c)(2) states that "a lawyer shall not intentionally . . . prejudice or damage the client during the course of the representation except as permitted or required by these Rules." As Professor Roy Simon explains in his treatise, "Rule 1.1(c)(2) generally prohibits a lawyer from intentionally harming a client in the course of the professional relationship," but "[t]he literal language is broader than its actual meaning." Roy D. Simon with Nicole I. Hyland, *Simon's New York Rules of Professional Conduct Annotated* 87 (2016). A lawyer is permitted to engage in activities outside the scope of the representation that may harm the client, such as campaigning or voting against a politician the lawyer represents as a client or posting a negative online review of a client's products. *See id.* at 87-88. What the lawyer must not do is "engage in conduct that directly undermines or erects obstacles to the goals the lawyer is trying to achieve while representing the client." *Id.* For example, "a lawyer representing a client in seeking a zoning variance could not show up at a hearing to testify against the client's petition, and a lawyer helping a client develop a mall could not send a letter to the editor opposing the mall." *Id.* at 88.

In our view, referring a prospective client to a competent lawyer does not fall within the prohibitions of Rule 1.1(c)(2). While we recognize that certain clients may prefer that their attorneys not make such referrals, we are not persuaded that facing an adversary or other interested party who is competently represented by counsel necessarily constitutes "prejudice" or "damage" to a client under Rule 1.1(c)(2). Attorneys commonly provide referrals to prospective clients when they are unable to take on the representation themselves for any number of reasons, including conflicts of interest. Attorneys are particularly well-positioned to provide this service to the community as they are often the most knowledgeable about other competent lawyers in a given field. Additionally, this service enables attorneys to provide benefits to society and enhances the administration of justice by increasing the likelihood that parties who require legal advice are represented by competent counsel.

---

contractual duties that in-house counsel or government lawyers may have that would prohibit them from referring potentially adverse parties to other counsel.

Enhancing the public's awareness of available legal services is an important policy goal, which animates several of our ethics rules. For example, Rule 4.3 provides, *inter alia*, that a lawyer communicating with an unrepresented person on behalf of a client "shall not give legal advice . . . *other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client*." (emphasis added).[2] In an opinion analyzing Rule 4.3's predecessor in the New York Code of Professional Responsibility, the New York State Bar Association Committee on Professional Ethics explained that "'[t]he legal system in its broadest sense functions best when persons in need of legal assistance or advice are represented by their own counsel.'" N.Y. State Op. 728 (2000) (quoting EC 7-18). Further, the duty of loyalty does not require an attorney "to exploit" an unrepresented party's "ignorance about the need for legal assistance." *Id.*; *see also* R. 1.3, Cmt. [1] ("A lawyer is not bound . . . to press for every advantage that might be realized for a client.").

Our conclusion is supported by ethics opinions in New York and in the District of Columbia. N.Y. State Op. 1018 (2014) addressed a slightly different question than we address here. There, the inquiring law firm determined that it had a conflict of interest between two existing clients and was required to withdraw as attorney of record for one of those clients. The law firm asked whether it could ethically refer that former client to another lawyer. The Opinion concluded that the firm was ethically permitted to make the referral, relying in part on Rule 1.16(e), which requires a law firm withdrawing from a representation to take steps to avoid foreseeable prejudice to the client. Unlike N.Y. State Op. 1018, our scenario involves the rejection of a potential representation due to a conflict, as opposed to the withdrawal from an existing representation. Thus, Rule 1.16 is not relevant to our analysis. However, Opinion 1018 also relied on Rule 1.1(c)(2), stating that "a good faith recommendation of competent counsel to a former client under these circumstances" is not "the type of prejudice or damage encompassed by Rule 1.1(c)(2)." We concur.

D.C. Ethics Op. 326 (Dec. 2004) also concluded that a lawyer faced with a conflict of interest may refer the prospective client to competent counsel.[3] The opinion observed that referring the prospective client to competent counsel does not violate the lawyer's duty of loyalty, because, as Rule 1.3 makes clear, "zealous representation does not require a lawyer to press for every advantage that might be realized for a client." (quoting Cmt. [1] to D.C. R. Prof. Conduct 1.3). Opinion 326 also reasoned that lawyers regularly advise potentially adverse parties to retain counsel under Rule 4.3, and thus "[w]e do not believe that the further step of recommending a

---

[2] This policy goal of assisting the public to find competent legal counsel also animates the attorney advertising rules. *See, e.g.*, R. 7.1, Cmt. [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 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*.") (emphasis added).

[3] The D.C. Opinion assumed that the lawyer "does not represent the existing client in that particular matter," as we do here.

specific lawyer or list of lawyers prejudices the referring lawyer's existing client." Finally, the Opinion noted that "inherent in our adversary system is the principle that persons ought to be represented by competent lawyers and that disputes ought to be resolved on their merits. Assisting a person to obtain competent representation is entirely consistent with that principle."

II. ETHICAL LIMITATIONS ON REFERRING PROSPECTIVE CLIENTS TO COUNSEL

If an attorney chooses to refer an unrepresented adversary to competent counsel, she must do so within the bounds of the Rules. Below, we discuss various conditions and limitations that accompany such a referral.

A. An Attorney Who Refers a Prospective Client to Counsel Must Do So in Good Faith

Our conclusion that attorneys are ethically permitted to refer prospective clients to counsel is based, in part, on our belief that the purpose of such referrals is to provide members of the public with useful information that will help them make important decisions about retaining counsel. That goal would not be served if attorneys do not act in good faith when referring prospective clients to counsel. For example, an attorney should not seize the opportunity to sabotage her client's adversary, by referring that person to a lawyer she believes is incompetent or dishonest. Likewise, the attorney must not make any material misrepresentations about the lawyers to whom she is referring the prospective client. *See* R. 8.4(c). If the attorney is not willing to abide by these limitations, she should simply decline the prospective client's request for a referral. There is no ethical obligation to refer a nonclient to another lawyer, even if the attorney believes that the nonclient needs legal representation.[4] *See* § III, below.

B. The Attorney Should Limit the Information She Receives from the Prospective Client

Attorneys have ethical obligations to prospective clients, even if an attorney-client relationship is never formed. Specifically, Rule 1.18 requires an attorney to safeguard any confidential information she receives from the prospective client and to refrain from representing "a client with interests materially adverse to those of a prospective client in the same or a substantially

[4] In some instances, attorneys may face civil liability for making a negligent referral. *See Bryant v. State*, 23 A.D.3d 592, 593 (2d Dep't 2005); *Martini v. Lafayette Studio Corp.*, 273 A.D.2d 112, 113 (1d Dep't 2000). Although this Committee cannot opine on matters of substantive law, such as the standard of care for making a negligent referral, we simply caution lawyers that they should comply with the governing legal standards as well as the ethics rules when making referrals. Concerns about liability for a negligent referral may be alleviated by providing the prospective client with several options, instead of just one name. Providing several names gives the prospective client more information to make an informed decision and arguably avoids the inference that the lawyer has "steered" the prospective client to a particular lawyer.

related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter." R. 1.18(b), (c). This disqualification rule is imputed to all other attorneys in the firm, unless the firm meets certain conditions. R. 1.18(c), (d). Thus, in the scenario described above, if the initial communications between the attorney and the prospective client are not handled prudently, there is a risk that the entire firm could be disqualified from representing its existing client in the dispute with the prospective client.

Although an exhaustive discussion of Rule 1.18 is beyond the scope of this Opinion, lawyers should be circumspect in their communications with prospective clients, until they have run a conflict check and concluded that the potential representation does not create any conflicts with the firm's existing or former clients. Until that is done, the lawyer should refrain from having any substantive discussions with the prospective client about the matter, other than gathering the minimal information needed to run a conflict check. R. 1.18, Cmt. [4] ("[A] lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose."). Limiting the initial communication with the prospective client reduces the risk that the lawyer will receive confidential information that "could be significantly harmful" to an existing client. R. 1.18(c). If the attorney does receive disqualifying information under Rule 1.18, the firm should take immediate steps to limit the transmission of that information to other attorneys at the firm, by following the steps in Rule 1.18(d). These steps include (a) prohibiting the disqualified lawyer from participating in the representation of the existing client; (b) screening the disqualified lawyer to prevent the flow of information about the matter to others at the firm; (c) ensuring that the disqualified lawyer does not receive a portion of the fees from the matter; and (d) promptly notifying the prospective client about the firm's compliance with these steps.[5]

Another reason why the lawyer should limit her initial communication with the prospective client is to avoid a situation where she has conflicting duties to the current client and the prospective client. Rule 1.4(a)(1)(iii) requires the lawyer to "promptly inform the client of … material developments in the matter…." If the lawyer learns of information from the prospective client that is material to the current client's case, the lawyer may have a duty to inform the current client about this information. However, as explained above, Rule 1.18(b) requires the lawyer to keep that same information confidential. In such a situation, the lawyer's duty of confidentiality to the prospective client will likely trump the lawyer's general obligation to inform the current client of material developments in the matter. *See, e.g.*, D.C. Ethics Op. 326. We emphasize, however, that the lawyer should make every effort to avoid this situation by limiting her communications with the prospective client until she has run a conflict check.

C. The Attorney Must Safeguard the Existing Client's Confidential Information When Communicating With the Prospective Client

[5] The law firm may also limit its risk of disqualification by having the prospective client agree in writing that any information shared in the initial consultation shall not be used to disqualify the law firm from representing an adverse party in the matter, if an attorney-client relationship is not formed for any reason. R. 1.18, Cmt. [5]. What constitutes an effective advance conflict waiver with a prospective client is beyond the scope of this Opinion.

Rule 1.6(a) prohibits a lawyer from knowingly revealing confidential information "gained during or relating to the representation of a client" or from using such confidential information "to the disadvantage of the client or for the advantage of the lawyer or a third person" unless certain exceptions apply. Information "gained during or relating to the representation of a client" means information that "has any possible relevance to the representation or is received because of the representation." R. 1.6, Cmt. [4A]. This prohibition also extends to information that is not, in itself, confidential information, but "could reasonably lead to the discovery of such information by a third person." R. 1.6 Cmt. [4]. In the scenario described above, the lawyer should be careful not to reveal to the prospective client any confidential information about the firm's existing client. Thus, in addition to limiting the substance of the lawyer's initial communication with the prospective client, once the lawyer has identified the conflict, she should refrain from any further substantive discussions.

D. The Attorney Should Make Clear That She Does Not Represent the Prospective Client and Cannot Give Legal Advice

When dealing with an unrepresented person, the Rules place the onus on the lawyer to clarify the relationship. As noted above, Rule 4.3 states that when communicating with an unrepresented person adverse to the lawyer's client, the lawyer may not give legal advice beyond the advice to secure counsel. Additionally, the Rule requires that if the lawyer believes that the unrepresented person "misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." *Id.* A prospective client may not automatically understand whether – and at what point – an attorney-client relationship has formed. For example, the prospective client may think that by having one or two initial communications with the lawyer, they have formed an attorney-client relationship. At the outset, the burden is on the lawyer to make clear that she does not represent a prospective client until the matter has cleared conflicts and the parties have agreed to the terms of engagement. Where a conflict is identified, the lawyer should communicate to the prospective client that the firm will not take on the representation and that the lawyer cannot provide any legal advice.

E. The Attorney Must Comply With the Rules Regarding Referral Fees and Reciprocal Referral Relationships

Rule 7.2 states that a lawyer shall not "compensate or give anything of value to a person … to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client" subject to certain exceptions not applicable here. The only type of payment a lawyer may receive for referring a potential client to another attorney is a division of fees under Rule 1.5(g). *See* R. 7.2(a)(2). Rule 1.5(g) allows lawyers to divide a legal fee only in two circumstances: (1) if the fee is shared in proportion to the amount of work done by each lawyer or (2) if both attorneys assume joint responsibility for the matter in writing. *See* R. 1.5(g)(1), (2). Rule 1.5(g) also requires the lawyer to disclose the division of fees to the client and secure the client's written consent. *See* R. 1.5(g)(2). In either case, the total fee must not be excessive. *See* R. 1.5(g)(3), (a). In our view, a lawyer who is prohibited from taking on a matter due to an unwaived or unwaivable conflict of interest cannot share in the legal fees generated by that matter, because she would be ethically prohibited from either performing any work on the matter or accepting joint responsibility for the matter. *See* ABA Formal Op. 474 (2016) ("Unless a client gives informed consent confirmed in writing, a lawyer may not accept a fee when the

lawyer has a conflict of interest that prohibits the lawyer from either performing legal services in connection with or assuming joint responsibility for the matter.").

The lawyer may, however, refer the prospective client to another attorney with whom she has a reciprocal referral relationship. *See* R. 7.2, Cmt. [4] ("A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the undertaking of that person to refer clients or customers to the lawyer."). Such arrangements do not violate Rule 7.2, even though a referral could be construed on its face as something "of value." *See* Simon at 1730. A reciprocal referral relationship, however, is subject to certain conditions. Such arrangements "must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services" and must be "nonexclusive," such that both participants are free to make referrals that are "in the best interests" of the clients. R. 7.2, Cmt. [4]. In addition, the lawyer should disclose the existence of the reciprocal referral agreement to the prospective client when making the referral. *See id.*

There is a difference between a formal reciprocal referral agreement described in Comment [4] and the informal practice of maintaining and utilizing a network of referral relationships. We do not believe that two attorneys who regularly refer business to one another on an informal basis are parties to a reciprocal referral agreement. Thus, if a lawyer merely refers a prospective client to another lawyer in her referral network with whom she does not have a reciprocal referral relationship, she is not required to disclose her referral practices to the prospective client.

III. ATTORNEYS ARE NOT ETHICALLY OBLIGATED TO REFER PROSPECTIVE CLIENTS TO COUNSEL

As stated above, an attorney owes a duty to preserve a prospective client's confidential information and to avoid certain limited conflicts of interest. R. 1.18(b), (c). There is no ethical obligation to assist a prospective client with obtaining counsel.

Indeed, there are several practical considerations that may weigh against making a referral. For example, the lawyer may anticipate that the firm's existing client will be displeased to learn of the referral. This reaction would be particularly understandable in highly adversarial matters. Under those circumstances, making a referral may sour the lawyer's relationship with the client, causing more harm than good. Choosing not to make the referral, while not an ethical decision, may be a prudent client-relations decision. Furthermore, the attorney may have her own personal or professional reasons for declining to make the referral. She may feel uncomfortable assisting her client's adversary or may not wish to assume potential liability for making a negligent referral. No matter the reason, a lawyer who chooses not to refer a prospective client to another attorney does not violate the ethics rules.

IV. CONCLUSION

An attorney who is unable to represent a prospective client owing to a conflict of interest with an existing client is ethically permitted to refer the prospective client to another attorney or a list of attorneys who are competent in the field. In doing so, the attorney should consider a number of ethical limitations, including the attorney's duty to act in good faith towards the prospective client, avoid conflicts of interest, maintain confidentiality, limit communications with

unrepresented adverse parties, and abide by the rules governing reciprocal referral agreements and fee sharing. Additionally, attorneys are not obligated to refer prospective clients to counsel and may choose, for professional or other reasons, not to make the referral.

July 2016

ETHICS IN CHARITABLE PLANNING

By: Conrad Teitell* and Heather J. Rhoades**

Table of Contents

APPENDICES

---

* A principal in the Connecticut and Florida law firm of Cummings & Lockwood LLC, based in the firm's Stamford office. He chairs the firm's National Charitable Planning Group and is an adjunct professor at the University of Miami School of Law.
Cummings & Lockwood LLC, Six Landmark Square, P.O. Box 120, Stamford, CT 069040120.
Direct phone: 203.351.4164, Direct fax: 203.708.3840, Email: cteitell@cl-law.com.

** A principal in the Connecticut and Florida law firm of Cummings & Lockwood LLC, based in the firm's West Hartford office. She is a member of the firm's National Charitable Planning Group.
Cummings & Lockwood LLC, 75 Isham Road, Suite 400, West Hartford, CT 06107.
Direct phone: 860.313.4933, Direct fax: 860.313.4968, Email: hrhoades@cl-law.com.

ETHICS IN CHARITABLE PLANNING

By: Conrad Teitell and Heather J. Rhoades

I. HypoEthicals

HypoEthical No. 1

William (Bill) Able is a triple threat — lawyer, CLU and financial planner. He is hardworking (friends call him Billable), a meat-and-potatoes guy, enjoys watching sports on television and going to football games and NASCAR races. When he see movies (not films), he likes them packed with action — car chases and shooting. He is divorced.

Sarah Sensitive is a poet (unpublished). When she goes to the cinema, she sees films (subtitles, of course). A vegetarian, she frequents health-food stores and restaurants. When not taking long walks in the rain along the beach, she enjoys sitting in front of the fire. She has never married and lives off a comfortable inheritance from her father.

Bill and Sarah met on Disharmony.com — the dating site whose motto is "Opposites Attract."

Although Bill and Sarah have been "dating" for over two years, their relationship is still platonic.

One day warming up in front of the fire (after a long walk along the beach in the rain), Sarah told Bill of her deep love for the environment and her concerns about greenhouse gases. She planned on making a major gift to a new charity, GreenhouseGases-B-Gone. Bill questioned whether she should make a sizeable gift. "You might need those assets for a rainy day" — and he wasn't talking about a walk along the beach.

Bill suggested that Sarah create a net-income-with-makeup charitable remainder unitrust (NIMCRUT) that would pay her income for life with remainder to her charity.

Sarah: "But I really don't need any income."

Bill: "That's why I have suggested a net-income-with-makeup trust. The trust will be funded with a deferred payment commercial annuity. No payments will be made to you. However, if you do need income, you can draw down on the annuity — not just for payments in the future but to make up some or all deficits from past years."

Sarah asks Bill to draft the trust and obtain the annuity. Biting on a celery stalk, he tells her that he will not charge her for drafting the trust. But he will get the annuity and receive the same commission that any other CLU would receive. Talking a puff on one of Bill's Camel cigarettes, she says that will be just fine.

Bill drafts the trust and it is a beauty — follows all the provisions of the IRS's safe harbor specimen trusts. Bill, after purchasing the annuity for the trust, contributes 10% of the commission (without telling Sarah) to GreenhouseGases-B-Gone.

Any issues?

HypoEthical No. 2

Alice's revocable living trust provides that on her death one-third of the residue is to be paid to Major University to be added to its endowment and the income be used for scholarships.

Bank of Banks (BoB) has been managing the assets of Alice's revocable living trust. One of its trust officers suggests to Alice that she now create an irrevocable inter vivos CRUT with onethird of her revocable trust's assets. The trust would pay a unitrust amount to Alice for life. BoB would be the trustee of the CRUT. On her death, the CRUT assets would continue to be held in trust, in perpetuity, with the annual income to be paid to Major University, to be used by it for scholarships.

Alice discussed this plan with her own lawyer, he drafted the CRUT, and she signed and funded the trust.

Alice died earlier this year.

Any issues?

HypoEthical No. 3

Donor is a dealer in and a collector of works of art. He wants to contribute a painting to Charity. The painting has a $100,000 basis and he believes it is worth $500,000.

Charity's Development Officer tells Donor that he will be deemed to have contributed $500,000 for income tax purposes and that he won't have to report any capital gain.

Donor's lawyer prepares a deed of gift; the painting, together with the deed of gift, are then delivered to Charity. Before making the gift, Donor had requested that if Charity decides to sell the painting, it will wait until more than three years. Development Officer gave his handshake on this request.

Donor's CPA advises that a qualified appraisal will be needed to claim the charitable deduction. An appraisal is obtained from an appraiser recommended by the development officer. It is timely filed with Donor's income tax return, together with a properly executed Form 8283.

The appraiser had asked Donor whether he needed an appraisal for claiming an income tax charitable deduction or for filing a gift tax return for a gift to a non-charity. Donor said that he was making a charitable gift.

The IRS, based on the valuation it placed on the painting and also for other reasons, denied the $500,000 claimed income tax charitable deduction. The Service maintained that the painting, although valued at $300,000 by the IRS Art Panel, is not deductible at more than the $100,000 basis.

Background on the IRS Art Panel. A panel of museum directors, curators, art scholars and dealers helps IRS value artwork gifts. At stake are income tax deductions for charitable donors, and gift and estate taxes for gifts to family members and other noncharities. The panel reviews artworks valued at $20,000 or more, but it can also value lesser works. If the panel rejects a taxpayer's appraisal, it may suggest a different value, get additional information, or consult a specialist. The panel's three specialty areas are: paintings and sculpture, decorative arts, and antiques.

The panel's most recent annual report (2020). Due to the Covid-19 pandemic, the panel only met once virtually. The panel reviewed 43 items with an aggregate taxpayer valuation of $57,672,000 on 14 taxpayer cases under consideration, and recommended adjustments totaling $12,372,565. The panel recommended acceptance of 28% of the appraisals reviewed and adjustments on 72%.

Historically, on the adjusted items, the panel has recommended over a 50% reduction in the amount claimed by taxpayers for income tax charitable deductions, and over a 40% increase in appraisals for noncharitable gifts. This has been the immutable pattern year after year: IRS views taxpayers' valuations as high for charitable transfers (for which income tax deductions are claimed), and low for noncharitable transfers (on which IRS wants estate and gift taxes). Not surprisingly, taxpayers see it just the other way around.

Any issues regarding Donor, the lawyer, the CPA, the development officer, the appraiser?

HypoEthical No. 4

Donor suffers from chronic hangnailitis. Not always having a nail clipper close by, he yanks hangnails off his fingers — causing pain, redness and occasional infections.

Then he sees a television commercial showing a guy running the Boston Marathon and pulling off a hangnail. While running swiftly up Heartbreak Hill, he tells TV viewers: "I used to suffer from pain and infection from hangnailitis, but not since I've been taking XANGNAILEX twice a day. Ask your doctor whether XANGNAILEX is right for you."

A nonchalant voice-over warns: "Side effects may include suicidal thoughts, elevated blood pressure, and, in rare cases, sudden death. So talk to your doctor about the risks and benefits before taking XANGNAILEX."

Donor views other TV drug commercials and sees that for many other diseases the cure can also be worse than the disease. He contributes $25 million — to be held in a separate Fund — to Local Hospital with the restriction that his gift be used for patients suffering from side effects and that Local Hospital's new wing be named after him. Local Hospital agrees.

Unfortunately, Local Hospital falls on hard times. Without contacting the Donor, Local Hospital's finance department begins borrowing from the Fund (keeping track of the borrowing as it occurs) and uses the borrowed funds for Local Hospital's general expenses. Over time, the financial problems of Local Hospital grow and it largely exhausts the Fund's assets. Upon learning that the Fund has been largely depleted and that Fund's remaining assets are being used for purposes other than the treatment of side effects, Donor is on his way to see his lawyer when he has a heart attack and dies.

Local Hospital, to raise additional funds, removes the Donor's name from the building bearing his name and replaces it with the name of another donor who made a large gift.

Any issues?

HypoEthical No. 5

Life Insurance Guy suggests to Charity that it seek life insurance gifts as part of its planned giving program. Donors would buy new policies naming Charity as the irrevocable beneficiary of those policies. Donors would be advised that the premiums they pay would be deductible as charitable contributions and on death the value of the policy would not be taxable in their estates. Life Insurance Guy asks for and receives a list of Charity's existing donors and potential donors. And he contacts them.

Life Insurance Guy tells potential clients (names given to him by Charity) and his existing clients about yet another way to benefit Charity using life insurance. He tells them about creating charitable remainder trusts that would pay them life income, provide an income tax charitable deduction and avoid estate tax on the proceeds payable to Charity.

To answer the concern that assets used to fund the CRT wouldn't go to family members but to Charity: Hey, no problem. Create a wealth replacement trust (basically an irrevocable life insurance trust — an ILIT). The life insurance owned by the ILIT will, he advises, be paid for with the income tax savings generated by the income tax charitable deduction, and by all or part of the life income payments received by a donor over the years. The potential donors are urged to see their own advisers, but are told that if Charity's lawyer or Life Insurance Guy's lawyer prepares the CRT and the ILIT, there will be no charge (the fee will be paid by Charity or Life Insurance Guy).

Any issues?

Now assume that Donor's own lawyer drafts the CRT and also the wealth replacement trust. The CRT is executed and funded. Simultaneously, the wealth replacement trust is executed by Donor. Subsequently Donor applies for life insurance and flunks the physical examination. So the wealth replacement trust was never funded. Then Donor dies, leaving some disgruntled family members.

Any issues?

HypoEthical No. 6

Harold is a double threat — he is both an attorney and a notary.

Both Harold and his father are alums of Old Ivy; Harold is active in alumni affairs, including fundraising.

Father has agreed to make an irrevocable $100,000 pledge gift to Old Ivy, payable within five years, and is given a "standard" pledge form that has to be signed and notarized.

At Thanksgiving dinner, Father shows the pledge to Harold and asks that he "notarize his signature." Father had signed the pledge before leaving for Harold's house — and not in front of Harold. Also, he didn't have any photo I.D. Harold, who is never without his notary stamp and seal, notarizes the pledge.

Any issues?

Also, Harold is never, never without his cell phone — and it is always on ring (never vibrate). Just as he is about to carve the turkey, he gets a call from Old Ivy's development officer asking him to go to the Old Timers Retirement Community that very afternoon to notarize a $100,000 pledge by a resident. The generous chap at the retirement home wants to sign and have the pledge notarized and delivered to Old Ivy that very day as a gesture of thanks to his college for his many blessings during his life. Harold protests, "Can't this wait until tomorrow?" Development Officer pleads with him and says if he does this favor, he'll give Harold two seats on the 50-yard line for Saturday's sold-out game with archrival Poison Ivy. Harold complies with Development Officer's request.

Any issues?

HypoEthical No. 7

Many Americans die of complications — one of the leading causes of death.

Patricia Patient is suffering from a severe case of complications. Dr. Uberspecialist is the leading physician in the new complication specialty and is the chairman of The American Complication Society.

Although he works six-and-a-half days a week, it takes over three months to get an appointment to see him. After numerous phone calls to his office to try to get an appointment with the good doctor if he has a cancellation, Patricia is assigned number 17 on the callifthereisacancellation list.

Finally, Patricia's second cousin, whose stepson was a classmate of Dr. Uberspecialist in kindergarten, gets an appointment for her.

According to Patricia, Dr. Uberspecialist is "down-to-earth" and a "real person." He tells her that he believes that he has a 70% chance of curing her — and coincidentally, he and his colleagues at the American Complication Society are researching her particular type of complication.

On her way out she stops at the reception desk to make another appointment. She takes a brochure from the pile on the desk. It tells about the American Complication Society, its pioneering research, Dr. Uberspecialist, its chairman — and tells how to contribute.

During her visit with Dr. Uberspecialist, she told him that she has accepted the fact that time may be short for her and also said, "I really shouldn't say this, but my late husband left me a large inheritance. I have no close relatives and in my will I give my entire estate to charity."

Later that day, Dr. Uberspecialist bumps into the hospital's Vice President for Advancement in the hospital cafeteria and asks if Ms. Patient has been a contributor to the hospital — or has told him about any planned bequests?

Any issues?

It turns out that Ms. Patient has made average-size undesignated annual gifts to the hospital over the years.

Another leading cause of death in the United States is "Died of Natural Causes."

The Development Officer now plans to ask to meet with Ms. Patient and to tell her about the important research being conducted by the American Natural Causes Society.

Any issues?

HypoEthical No. 8

Call me Codicil. I had signed on as the planned giving officer at Pequod Maritime Academy. Agrab, Pequod's president, was hunting down a whale of a gift from Toby Glick.

Meanwhile, Starbuck, the vice president for development, and I, while sipping on our Grande Mocha Lattes, agreed that we also had to go after smaller fish — donors who could make $10,000 bequests.

Drafting a new will is expensive. I suggested to Starbuck that a donor could make his or her $10,000 bequest with a codicil. But I'm not a sea or any other kind of lawyer. So I met with a real lawyer and asked her if she could prepare a sample codicil to be adapted for use by individual donors.

She wondered whether if she represents a donor could she prepare only the codicil without reviewing the donor's entire estate plan. She also wondered whether she could limit the scope of her representation to just preparing the codicil.

The planned giving officer also discussed this with another lawyer who chairs the Academy's planned giving advisory committee. He's willing to prepare codicils for donors and not charge the clients or the Academy.

Any issues?

HypoEthical No. 9

Donald, a 95-year-old bachelor, is living in a nursing home. He has a commercial annuity that will be more than enough to cover his living expenses and any catastrophic medical expenses for the rest of his life. He also has paid-up-for-life medical and disability insurance — not to mention Medicare.

Donald has already used his unified gift and estate tax exemption. He has $10 million in highly appreciated listed securities. He plans to give most of his estate to charity at his death; he also wants to bequeath $1 million outright to each of his 55yearold triplet nephews, Huey, Dewey and Louie. Huey is a successful physician; Dewey is a librarian; and Louie is a renowned accountant.

Donald is visited at his nursing home by Planned Giving Officer (PGO) of his college, Old Ivy. Donald had never contributed to Old Ivy. He showed the PGO his existing will. It bequeathed $1 million outright to each nephew and the balance of his estate equally to his church, his hospital and his community foundation. He had supported those charities for many years.

PGO from Old Ivy suggests that Donald create a $3 million inter vivos netincomewithout-make-up charitable remainder unitrust (NI-CRUT) — paying a 5% unitrust amount to Donald for life and then equally to his three nephews and the survivor of them for life, with remainder to Old Ivy. He suggests that the balance of Donald's estate go to Old Ivy under Donald's will. He urges Donald to see his own lawyer.

Donald, mentally competent, thinks that the PGO's plan is a good one. Donald's longtime lawyer died last year. On the advice of his nephew Louie, the accountant, an inter vivos NICRUT is drafted by a lawyer recommended by Louie. The lawyer also drafts a new will that gives the remainder of Donald's estate to Old Ivy. The lawyer was given a copy of Donald's existing will when the lawyer visited him at the nursing home to discuss his new will and the NICRUT.

The lawyer uses CPA Louie to prepare many of his clients' income, gift, trust and estate tax returns. The lawyer suggests that Bank of Banks (BoB) serve as trustee of the NI-CRUT and the executor under Donald's will. The lawyer drafts the NI-CRUT and the will and they are executed by Donald. BoB, by the way, always retains the lawyer who drafted a trust or a will to represent it when it is named as a trustee and/or executor in documents prepared by the lawyer.

To make a long story short (too late!), Donald died 11 months after creating the NICRUT. Although the NI-CRUT earned enough income to make payments, three quarterly payments due to Donald before his death were not paid to him by BoB. We don't know whether the IRS questioned any claimed income tax deduction for the charitable remainder interest. We do know that it denied the estate tax charitable deduction on the ground that the trust didn't operate as a NI-CRUT from its inception, having missed three quarterly payments.

The lawyer represented BoB as trustee of the NI-CRUT and as executor of Donald's estate. On behalf of BoB, the lawyer unsuccessfully appealed the denial of the estate tax charitable deduction at the IRS, the Tax Court and a U.S. circuit court of appeals. And he unsuccessfully

sought certiorari by the U.S. Supreme Court. The denial of the estate tax charitable deduction resulted in significant estate taxes, reduced unitrust payments and the value of Old Ivy's remainder interest. The legal fees, almost $300,000, were paid by the NI-CRUT. That too reduced unitrust payments, and the charitable remainder interest.

Another fact. The trust's governing instrument provided that if a nephew didn't pay his share of any death taxes, he would be deemed to have predeceased Uncle Donald.

Huey and Louie refused to pay their share of the death taxes, so they had no interest in the NICRUT. Dewey also refused to pay his share of the death taxes. However, he said if he had to pay, he would make trouble (unspecified). So the estate and the trust overlooked the issue and treated Dewey as a NICRUT beneficiary.

Any issues?

HypoEthical No. 10

Back in 2005, the IRS in Rev. Proc. 2005-24 would have required donors to jump through more hoops than a circus dog to assure that inter vivos CRUTs and CRATs would not be disqualified retroactively to the date of creation if a spousal right of election existed under state law, existed in the future, existed if the grantor (donor) of a CRUT or CRAT moved, married or remarried.

Right of election: Simply stated, it is a right, in some states, that a surviving spouse has at the other spouse's death to demand and receive assets given to other individuals and charities.

The IRS in Notice 2006-15, 2006-8 IRB 1, extended Rev. Proc. 2005-24's June 28, 2005, grandfather date indefinitely. Thus a spouse's right of election — even without a waiver — will be disregarded, but only if the surviving spouse doesn't exercise the right.

To avoid potential retroactive disqualification of CRUTs and CRATs, Prudent Lawyer suggests that a spousal waiver of right of election be obtained whenever a married individual creates a CRUT or CRAT with himself or herself as the lifetime beneficiary.

Prudent Lawyer did the estate planning and drew the wills for spouses, Thomas and Louise.

Several years later, Louise visits Prudent Lawyer, who drafts a CRUT paying Louise for life with remainder to her college.

Prudent Lawyer suggests that before Louise executes and funds the trust that she obtain a spousal waiver of right of election from Thomas that Prudent Lawyer has prepared. Thomas signs the waiver and Louise then executes and funds the trust.

Any issues?

HypoEthical No. 11

Harold was born, raised and educated in State X. He made his fortune there. He never married.

Retiring at age 65, Harold moved to State Y. He met his State Y attorney at age 67 when he bought a condo and the State Y attorney prepared his will — giving 80% of Harold's sizable estate to four State X charities that Harold had supported for years. The 20% balance was to be divided equally among his three nephews and a longtime friend (all living in State X).

At age 80, Harold executed a new will (prepared by the same State Y attorney). The new will gave 80% of Harold's estate (still sizable) to the same four charities named in his prior will, but made some adjustments in the percentage each would receive. The remaining 20% was to go to the three nephews and his friend with no change in the percentage each would receive.

When Harold was 85, his State Y attorney noticed changes in Harold when he ran into him every month or so at their country club. He seemed disoriented, and did not always remember his State Y attorney. The State Y attorney has many elderly clients and the word dementia always came to his mind every time he saw Harold. Harold was always accompanied at the country club by his longtime friend from State X who was there taking care of him. At age 86, Harold moved back to State X together with the friend who continued to take care of Harold.

State Y attorney has learned that Harold just died domiciled in State X at age 87. Six months before his death, he executed a new will in State X, drafted by a State X attorney, that reduced the percentage of his estate that was to go the State X charities from 80% to 15%. Under the new will, the 85% balance of the estate is to be divided equally among the three nephews and his longtime friend.

You are the attorney in State Y.

What, if anything, should you do — and why?

What facts do you need to help in making your decisions?

Suppose that you are the attorney in State X who Harold retained to draft Harold's new will. Issues? Solutions?

HypoEthical No. 12

In 1994, Lawyer drafted a $100 million STAN-CRUT (fixed percentage unitrust) for Client #1, funded with a close-to-zero-basis asset — an interest in an LLP. The charitable remainder interest at the trust's creation was 1%. The trust was created before the 10% minimum remainder interest requirement that is effective for transfers to trusts after July 28, 1997.

You couldn't say that Client #1 had an abundance of donative intent. Although Client #1 would receive an income tax charitable deduction for the value of the 1% remainder interest (and the charity had a remainder valued at $1 million, not chopped liver), Client #1's overriding objective was for the CRUT to sell the funding asset and reinvest the sales proceeds in marketable securities without paying any capital gains tax.

Client #1 learned from his CPA that if a janitor in one of the buildings owned by the LLP were to put 50 cents in the Pepsi machine in the building's sub-sub-basement, 10% of the profit would pass through from the LLP to the CRUT as unrelated business taxable income (UBTI). The trust would then lose its tax exemption for the year. Thus any income and/or capital gain not distributed to Client #1 under the four tiers in satisfaction of the unitrust amount would be taxable to the CRUT, making almost $100 million in capital gain potentially subject to tax. Not a good thing.

Lawyer, also in 1994, had drafted a 5% $100,000 STAN-CRUT for Client #2, funded mainly with marketable securities ($60,000 basis and a $90,000 fair market value). A $10,000 interest in a farm was also transferred to the CRUT. In year 1, the trust earned $4,500 in dividends and $500 in unrelated business taxable income. The $5,000 unitrust amount was paid by the trust to Client #2 and he reported it all as tier 1 income. Even though the trust had unrelated business taxable income and the trust lost its tax exemption for the year, no tax harm was done. The CRUT remained qualified. And the UBTI was not taxed. Only UBTI in excess of the required payout would have been taxable to the trust.

The following year, the CRUT (still valued at $100,000) earned $4,000 in dividends, $900 in capital gain and had $500 in unrelated business taxable income for the year. The trust paid Client #2 the required $5,000 for the year ($4,000 from dividends (tier 1) and $900 in capital gain (tier 2) and $100 from the unrelated business taxable income (tier 1). Of the $500 of UBTI, $400 was taxable to the trust at the regular trust tax rates.

Meanwhile, Client #1 (the $100 million CRUT guy) was getting more and more nervous about the janitor putting 50 cents in the Pepsi machine.

Lawyer (the sharpest and most well-connected pencil in the box) was instrumental in having the law changed. Starting with the 2007 tax year, a CRT that has UBTI doesn't lose its tax exemption; **but the UBTI is taxed at 100%.**

Client #1 (the big $100 million CRUT guy) is now as happy as a clam at high tide. He doesn't care that small amounts of UBTI will be taxed at 100%. He is thrilled that his CRUT can have huge capital gains and the CRUT won't run the risk of the gains being taxed.

Meanwhile, Client #2 (the little $100,000 CRUT guy) is as unhappy as a clam at low tide. Under the old rules, if his trust had UBTI, most or all of it would not have been taxable to the trust (but to him as part of his unitrust payments). And any UBTI above the payment to him would have been taxed at the regular trust tax rates. Now all UBTI will be taxed at 100%. That could reduce the value of his CRUT and also the annual payments he is to receive (5% x the fair market value of the trust assets as revalued each year). Also, he does have donative intent and is unhappy that the eventual remainder to the charity could be diminished.

Did we mention that Lawyer is on Old Ivy's board and is also chairman of the college's Planned Giving Council? The college has over 30 CRTs similar to Client #2's $100,000 CRUT.

Oh yes, the remainder charity of Client #1's $100 million CRUT is Poison Ivy, not Old Ivy.

Any issues?

HypoEthical No. 13

Lawyer, who has frequent tax-saving brainstorms, devises a plan for Client to create a STAN-CRUT (fixed percentage CRUT) that will be administered in a way that will enable Client to turn a payment that would otherwise be taxable as capital gain into a tax-free return of principal. The CRUT is measured by a very short term of years, has an extremely high percentage payout and a charitable remainder interest that is a small percentage of the then value of the funding assets.

Under the rules existing at the time, the required annual payment could properly be made after the end of the calendar tax year and before the due date for filing the STANCRUT's tax return. And at the time there wasn't a 10%-minimum-remainderinterest requirement.

When the dust settled, most of the payments received by the client were deemed to be a taxfree return of principal (instead of dreaded capital gain). And the client had returned to him assets equal in value to a huge percentage of what he used to fund the trust.

Although Charity's remainder interest was a small percentage of the assets funding the trust, it nevertheless received a nice gift because of the high value of the assets transferred to the trust.

When the IRS learned of this plan, it announced that it would challenge these trusts. To date, there have been no reported court cases, and it is not known whether any taxpayers' returns were questioned and settlements made with the Service.

What is known: The law was subsequently changed to provide that the minimum remainder interest must be a minimum of 10%. As a side effect, many CRUTs and CRATs can no longer be created for younger beneficiaries — and even for some older beneficiaries because of the recent low Section 7520 rates. Further, in most cases the required annual payment must be made by midnight, December 31 — not even a day's wiggle room.

Any issues?

HypoEthical No. 14

First, some background before getting to the hypo. Every schoolchild knows that capital gains tax is generally avoided on charitable gifts of appreciated property. But the kid also knows that under the anticipatory-assignment-of-income doctrine, the substance-over-form doctrine, and the IRS-was-not-born-yesterday doctrine, a donor can be taxable on the capital gain on a subsequent sale by the donee-charity (and not out of the profit, but out of the pocket — ouch!).

The anticipatory-assignment-of-income doctrine was raised by IRS in *Rauenhorst v. Commissioner*, 119 T.C. 157 (2002). The facts of that case aren't necessary for this discussion. Suffice it to say that the Tax Court granted summary judgment for the donors, saying that IRS couldn't disavow its own favorable-to-taxpayers 1978 ruling in Rev. Rul. 78-197, 19781 CB 83.

Rev. Rul. 78-197 is an important ruling. IRS didn't merely acquiesce in a significant Tax Court case, but, contrary to its usual practice, spelled out why it did so:

> "In *Palmer v. Commissioner*, 62 T.C. 684 (1974) ... the United States Tax Court held that the Internal Revenue Service incorrectly treated a gift of stock to [a charity], followed by a prearranged redemption of the stock, as a redemption of the stock from the donor followed by a gift of the redemption proceeds to the donee. The Service will follow *Palmer* on this issue ...
>
> "In *Palmer*, the taxpayer had voting control of both a corporation and a tax-exempt private foundation. Pursuant to a single plan, the taxpayer donated shares of the corporation's stock to the foundation and then caused the corporation to redeem the stock from the foundation. It was the position of the Service that the substance of the transaction was a redemption of the stock from the taxpayer, taxable under section 301 of the Code, followed by a gift of the redemption proceeds by the taxpayer to the foundation. The United States Tax Court rejected this argument and treated the transaction according to its form because the foundation was not a sham, the transfer of stock to the foundation was a valid gift, and the foundation was not bound to go through with the redemption at the time it received title to the shares.
>
> * * *
>
> "The Service will treat the proceeds of a redemption of stock under facts similar to those in *Palmer* as income to the donor only if the donee is legally bound, or can be compelled by the corporation, to surrender the shares for redemption."

In *Rauenhorst*, the IRS argued that Rev. Rul. 78-197 wasn't controlling and gave its arguments — and the Tax Court dismissed them.

The crux of IRS's position. Rev. Rul. 78-197 wasn't controlling in *Rauenhorst*; furthermore, revenue rulings aren't binding on IRS or the courts.

That's no way to treat taxpayers. The Tax Court noted that IRS had neither revoked nor modified Rev. Rul. 78-197. "We agree with [IRS] that revenue rulings are not binding on this Court, or other Federal courts for that matter ... However, we cannot agree that the Commissioner is not bound to follow his revenue rulings in Tax Court proceedings. Indeed, we have on several occasions treated revenue rulings as concessions by the Commissioner where those rulings are relevant to our disposition of the case."

The Tax Court's bottom line in *Rauenhorst.* "Rev. Rul. 78-197 ... is contrary to [IRS's] litigation position in this case. Instead of accepting the legal principles articulated in that ruling, [its] counsel contends that the Commissioner is not bound by revenue rulings, and his reliance on *Blake* v. *Commissioner*, 697 F.2d at 480-481, demonstrates that he is taking the position in this case that the ruling is incorrect.

The ... Treasury's [own] ... regulations, provide:

* * *

(d) Revenue Rulings ... do not have the force and effect of Treasury Department Regulations (including Treasury decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. * * *

(e) Taxpayers generally may rely upon Revenue Rulings published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published Revenue Ruling to the facts of their particular cases. * * *"

The Tax Court after noting that similar statements appear in other IRS publications, stated: "Surely, given these statements, taxpayers should be entitled to rely on revenue rulings in structuring their transactions, and they should not be faced with the daunting prospect of the Commissioner's disavowing his rulings in subsequent litigation."

Now the hypo. Is it cricket (ethical) for the IRS's attorneys to take a position contrary to a published revenue ruling?

We'll answer this hypo ourselves. While we haven't found a Code of Conduct for IRS people, here's a "commentary" from the IRS Chief Counsel (apparently in response to *Rauenhorst*).

> "It has been a longstanding policy ... that we are bound by our published positions, whether in regulations, revenue rulings, or revenue procedures, and that we will not argue to the contrary. Accordingly, we do NOT take positions in litigation, TAMs, PLRs, CCAs, advisory opinions, etc., inconsistent with a position that the Service has taken in published guidance or in proposed regulations. This policy applies even when

attorneys disagree with the published guidance or even if there are plans to revoke, change or clarify the position taken in the published guidance. The policy applies regardless of the age of the guidance and regardless of whether courts have chosen to follow the published position. So long as the published guidance remains on the books, the Office of Chief Counsel will follow it. Counsel can, however, take positions inconsistent with prior informal advice, such as TAMs, CCAs, etc., but should never take a position inconsistent with published guidance or proposed regulations." CC2002043.

II. Watch Your Step

A. Provisions in CRUT Agreements

. CRUT agreements should provide that if at the time the CRUT is funded, the CRUT would fail the 10% remainder interest test, then the percentage distribution and/or length of the CRUT's term be recalculated so that the CRUT would pass that test. If the document is silent and the Trustee must decide what to do, the Trustee may have a conflict.

B. Two-life Charitable Gift Annuity

. Example: Husband for life and then wife for life.

If the gift annuity is funded with Husband's separate property, the property is appreciated and the annuity is nonassignable, then gain is reported ratably over Husband's life expectancy.

If, however, the annuity is funded with joint property, the gain is reported ratably over Husband's and Wife's joint life expectancies.

Is it unethical not to raise this issue when advising Donors who are contemplating two-life charitable gift annuities?

C. Charitable Gifts of S Corp Stock

. Client has S Corp Stock and wants to make a gift of the stock to charity. Advisers should pay attention to S Corp status. If Client gives S Corp stock to CRUT, the S election will be lost. Do the advisers owe a duty to the S Corp shareholders (who are not creating the CRUT) to avoid the loss of the S election? Any issue if the Donor makes an outright charitable gift of S Corp Stock?

D. Disclaimer when Discussing Tax Benefits of Charitable Planning

. If a charity's advertising/promotional materials discuss the tax benefits of charitable gifts, the materials should state "See your own adviser."

E. Gift Tax Returns

. Does charity have an ethical obligation to tell Donor about the need to file a gift tax return for split-interest charitable gifts?

F. Charitable Contributions included in a Plea Agreement?

A man who pleaded guilty to kidnapping his daughters from his exwife 20 years ago was given a plea agreement that included five years of probation, 2,000 hours of community service, and the requirement of making a $100,000 charitable contribution. Commentators on the case noted that the plea agreement was a way for the

wealthy to avoid jail time through the exercise of their ability to make large charitable contributions. The issue of whether permitting charitable contributions in plea agreements is an ethical practice has not been decided and there are differing opinions on this issue. One writer proposes that charitable contributions could be incorporated as part of plea agreements in an ethical manner by creating a uniform system to determine the appropriateness of the charitable contribution. (Donating Debt to Society: Prosecutorial and Judicial Ethics of Plea Agreements and Sentences that Include Charitable Contributions, Sylvia Shaz Shweder, Fordham Law Review, October 2004.)

III. Model Rules of Conduct for various Legal, Charitable and Financial Professions

The appendices have the model rules of conduct for various charitable, legal and financial professions. Common threads run through these rules.

A. Competency

A hallmark of the model rules of conduct for nearly every charitable, legal and financial profession is competency.

1. General Competency. All the model rules require a minimal level of skill, knowledge and understanding in the chosen area of practice.

Example re lawyers. Rule 1.1 of the ABA Model Rules of Professional Conduct provides that a lawyer must provide competent representation to a client, and that competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Example re CPAs. The American Institute of Certified Public Accountants Code of Conduct requires that a member observe the profession's technical and ethical standards of the practice, strive continually to improve competency and the quality of services, and discharge professional responsibility to the best of the member's ability. That Code further provides that competency is derived from education and experience and requires a commitment to learning and professional improvement that continues throughout an individual's professional lifetime. Competency represents the attainment and maintenance of a level of understanding and knowledge that enables the individual to render services with facility and acumen.

2. Recognition of Limitations. Related to the minimal level of skill required for a professional, many of the canons require that the professionals recognize their professional limitations and limit their practice to those areas to which their professional knowledge and competency extends.

The Association of Fundraising Professionals Code of Ethical Standards requires that its members recognize their individual boundaries of competency and are forthcoming and truthful about their professional experience and qualifications, and that they represent their achievements accurately and without exaggeration.

Similarly, the Model Standards of Practice for the Charitable Gift Planner require that the gift planner strive to achieve and maintain a high degree of competence in his or her chosen area, and that he or she shall advise only in areas in which he or she is qualified. Those model standards require that individuals realize when they have reached the limits of their

knowledge and expertise, and look to involve other professionals when appropriate.

The American Institute of Certified Planners Code of Ethics and Professional Conduct requires that a planner owes diligent, creative, independent and competent performance of work in pursuit of the client's or employer's interests. Accordingly, a planner must not accept or continue to perform work beyond his or her professional competence, accept work which cannot be performed with the promptness required by the prospective client or employer, or which is required by the circumstances of the assignment.

3. Lifelong Education and Training. A focus of many of the canons is the continuous pursuance of education and training. The National Association of Estate Planners and Councils Code of Ethics requires that a member continually improve his or her knowledge, skill and competency throughout his or her working life. Similarly, the Society of Financial Service Professionals Code of Professional Responsibility requires that a member continue his education throughout his professional life, and in order to advise and serve competently, a member must continue to maintain and improve his professional abilities. The Financial Planning Association requires members to maintain the necessary knowledge and skill to continue to provide services to clients competently in those areas in which the designee is engaged.

B. Conflicts of Interests

Another thread throughout most of the canons is the requirement that professionals place the interests of those they are advising first, and to disclose and/or avoid any potential conflicts of interests.

1. Interests of Client must be Paramount. Since a hallmark of the legal profession is the zealous representation of the interests of the client, the ABA Model Rules of Professional Conduct provides, in Rule 1.7, that a lawyer may generally not represent a client if the representation involves a conflict of interest. If, however, the client provides informed consent and the attorney believes that he or she can continue to competently and diligently represent the client, the representation may still be permissible.

Similarly, the American Institute of Certified Planners Code of Ethics and Professional Conduct provides that a planner must not accept or continue to work for a client if there is an actual, apparent or foreseeable conflict, without the consent of the client and only after full disclosure.

The Society of Financial Service Professionals Code of Professional Responsibility provides that in a conflict of interest situation, the interest of the client must be paramount.

Sensitive to the risk of conflicts of interest when engaging in fundraising practices, the Association of Fundraising Professionals Code of Ethical Standards requires that its members may not engage in activities that conflict with their fiduciary, ethical and legal obligations to their organizations, clients or profession. In addition, members shall disclose all potential and actual conflicts of interest. Moreover, those fundraising professionals are not permitted to accept compensation or enter into a contract based on a percentage of contributions, nor shall those professionals accept contingent fees. In addition, members shall not accept performancebased compensation, commissions or finders' fees.

Similarly, the Model Standards of Practice for the Charitable Gift Planner provide that the gift planning process be fully disclosed to the Donor, including the role and relationships of all parties involved and how and by whom each is compensated. In addition, compensation paid to gift planners shall be reasonable and proportionate to the services provided. Finally, gift planners shall act with fairness, honesty, integrity and openness in all dealings with Donors and other professionals.

2. Objectivity and Fairness. Many of the canons require that the professionals provide advice that is objective and treat the various parties involved in a fair and impartial manner. The Code of Conduct for the American Institute of Certified Public Accountants focuses on objectivity and independence, whereby a member should maintain objectivity and be free of conflicts of interest in discharging professional responsibilities. The National Association of Estate Planners and Councils Code of Ethics provides that one of the professional responsibilities of the members is to be fair. This requires a member to disclose conflicts of interest in providing estate planning services. The Financial Planning Association requires members to be objective in providing professional services to clients. They must also perform professional services in a manner that is fair and reasonable to clients, principals, partners, and employers and shall disclose conflict(s) of interest(s) in providing such services.

C. Confidentiality

1. The Duty of Confidentiality. Another common thread throughout the various canons and rules of professional conduct is the requirement that the confidentiality of the persons involved be maintained. Rule 1.6 of the ABA Model Rules of Professional Conduct prohibits a lawyer from revealing information relating to a client, unless the client gives informed consent. Similarly, the Association of Fundraising Professionals Code of Ethical Standards provides that members shall protect the confidentiality of all privileged information relating to the client relationships and shall not disclose privileged or confidential information to unauthorized parties. The National Association of Estate Planners and Councils Code of Ethics requires that a member respect the confidentiality of any information

entrusted to or obtained in the course of the member's business or professional activities. The Financial Planning Association Code of Ethics states that member shall not disclose any confidential client information without the specific consent of the client unless in response to a proper legal process, to defend against charges of wrongdoing by the Financial Planning Association member or in connection with a civil dispute between the Financial Planning Association member and client. The Society of Financial Service Professionals Code of Professional Responsibility provides that a member shall respect the confidential relationship existing between client and member. Finally, the American Institute of Certified Planners Code of Ethics and Professional Conduct provides that a planner must not reveal information gained in a professional relationship which the client has requested to be held confidential.

2. Donor Advised Fund Confidentiality. As discussed earlier, a common thread throughout the various canons and model rules of practice for charitable professionals is upholding the confidentiality of the individuals whom they advise. There is a question, however, regarding the best practices for organizations that create and manage donor advised funds. To what extent can the organization share donor information (and information regarding the funds themselves) among the organization's leadership and the general public (either through annual reports, promotional materials or other means)? Some organizations restrict the circulation of certain information regarding their funds to only those essential members of their organizations. Other information, however, such as the names of funds, may be provided to the public through annual reports. Although the treatment of that information among organizations varies, it is common that certain information will be afforded a higher level of confidentiality than other information. It is important that organizations develop and follow appropriate policies regarding the sharing of the personal information of their donors — both inside their organization and to the public at large.

D. American Medical Association Code of Medical Ethics

The AMA Code of Ethics recognizes that donations play an important role in supporting health care for a community. The Code provides that physicians are encouraged to participate in fundraising and other solicitation activities while protecting the patientphysician relationship, including patient privacy and confidentiality, and ensuring that all donations are fully voluntary. The Code provides that physicians should avoid directly soliciting their own patients, especially at the time of a clinical encounter. It also provides that the physician must be clear that the patient's welfare is the primary priority and that the patient need not contribute in order to continue receiving the same quality of care. (Opinion 2.3.5 Soliciting Charitable Contributions from Patients, AMA Code of Medical Ethics.)

E. Circular 230

. The Treasury Department circular number 230 sets out the rules governing practice before the IRS. In addition, Circular 230 imposes standards of professional conduct on individuals who prepare tax returns and give tax advice. Tax preparers must follow rules such as disclosing all tax positions contrary to any published guidance or regulation, as well as tax positions for which there is less than a reasonable basis, providing clients with copies of tax returns, advising clients promptly of errors or omissions of the preparer, responding to IRS requests for records in a timely manner, and using the best practices of the profession. In addition, Circular 230 outlines when a taxpayer may rely on an opinion by a tax adviser to avoid certain penalties, known as a covered opinion.

APPENDIX A

ABA Model Rules of Professional Conduct*

Rule 1.1: Competence

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

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

A lawyer may limit the scope of his representation if the limitation is reasonable under the circumstances and the client gives informed consent.

ACTEC Commentaries provide: *Limitation on the Representation Must Be Reasonable.* This Rule recognizes that a lawyer and client may limit the scope of the representation in a manner that is reasonable under the circumstances. For example, a lawyer and client may agree that the lawyer will represent the client with respect to a single matter, such as the preparation of a durable power of attorney. See discussion of Adequate Information in the ACTEC Commentary on MRPC 1.0. Unless the scope of the representation is expanded by a subsequent agreement, the lawyer is not obligated to provide advice or services regarding other matters.

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

---

* American Bar Association Headquarters
321 North Clark Street
Chicago, IL 60654-7598

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(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.

APPENDIX B

Treasury Department Circular No. 230 (Rev. 62014)

Cat. Num. 16586R; www.irs.gov

Regulations Governing Practice before the Internal Revenue Service

§ 10.29 Conflicting Interests

(a) Except as provided by paragraph (b) of this section, a practitioner shall not represent a client before the Internal Revenue Service if the representation involves a conflict of interest. A conflict of interest exists if —

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner.

(b) Notwithstanding the existence of a conflict of interest under paragraph (a) of this section, the practitioner may represent a client if —

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

(2) The representation is not prohibited by law; and

(3) Each affected client waives the conflict of interest and gives informed consent, confirmed in writing by each affected client, at the time the existence of the conflict of interest is known by the practitioner. The confirmation may be made within a reasonable period of time after the informed consent, but in no event later than 30 days.

(c) Copies of the written consents must be retained by the practitioner for at least 36 months from the date of the conclusion of the representation of the affected clients, and the written consents must be provided to any officer or employee of the Internal Revenue Service on request.

(d) *Effective/applicability date*. This section is applicable on September 26, 2007.

§ 10.33 Best Practices for Tax Advisors

(a) *Best practices*. Tax advisors should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the Internal Revenue Service. In addition to compliance with the standards of practice provided elsewhere in this part, best practices include the following:

(1) Communicating clearly with the client regarding the terms of the engagement. For example, the advisor should determine the client's expected purpose for and use of the advice and should have a clear understanding with the client regarding the form and scope of the advice or assistance to be rendered.

(2) Establishing the facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations, relating the applicable law (including potentially applicable judicial doctrines) to the relevant facts, and arriving at a conclusion supported by the law and the facts.

(3) Advising the client regarding the import of the conclusions reached, including, for example, whether a taxpayer may avoid accuracy-related penalties under the Internal Revenue Code if a taxpayer acts in reliance on the advice.

(4) Acting fairly and with integrity in practice before the Internal Revenue Service.

(b) *Procedures to ensure best practices for tax advisors.* Tax advisors with responsibility for overseeing a firm's practice of providing advice concerning Federal tax issues or of preparing or assisting in the preparation of submissions to the Internal Revenue Service should take reasonable steps to ensure that the firm's procedures for all members, associates, and employees are consistent with the best practices set forth in paragraph (a) of this section.

(c) *Applicability date.* This section is effective after June 20, 2005.

APPENDIX C

American Institute of Certified Public Accountants
Code of Conduct*

Effective December 15, 2014. Updated through August 31, 2016.

Preface: Applicable to All Members

0.100 Overview of the Code of Professional Conduct

.01 The AICPA Code of Professional Conduct (the code) begins with this preface, which applies to all *members*. The term *member*, when used in part 1 of the code, applies to and means a *member* in *public practice*; when used in part 2 of the code, applies to and means a *member in business*; and when used in part 3 of the code, applies to and means all other *members*, such as those *members* who are retired or unemployed.

.02 A *member* may have multiple roles, such as a *member in business* and a *member* in *public practice*. In such circumstances, the *member* should consult all applicable parts of the code and apply the most restrictive provisions.

Effective Date

.03 Effective December 15, 2014.

0.100.010 Principles and Rules of Conduct

.01 The AICPA membership adopted the Code of Professional Conduct (the code) to provide guidance and rules to all *members* in the performance of their professional responsibilities. The code consists of principles and rules as well as *interpretations* and other guidance which are discussed in 0.100.020. The principles provide the framework for the rules that govern the performance of their professional responsibilities.

.02 The AICPA bylaws require that *members* adhere to the rules of the code. Compliance with the rules depends primarily on *members'* understanding and voluntary actions; secondarily on reinforcement by peers and public opinion; and ultimately on disciplinary proceedings, when necessary, against *members* who fail to comply with the rules. *Members* must be prepared to justify departures from these rules.

---

* American Institute of Certified Public Accountants (AICPA)
220 Leigh Farm Road
Durham, NC 27707-8110
888.777.7077

0.100.020 Interpretations and Other Guidance

.01 *Interpretations* of the rules of conduct are adopted after exposure to the membership, state societies, state boards, and other interested parties. The *interpretations* of the rules of conduct, "Definitions" [0.400], "Application of the AICPA Code" [0.200.020], and "Citations" [0.200.030], provide guidelines about the scope and application of the rules but are not intended to limit such scope or application. A *member* who departs from the *interpretations* shall have the burden of justifying such departure in any disciplinary hearing. *Interpretations* that existed before the adoption of the code on January 12, 1988, will remain in effect until further action is deemed necessary by the appropriate senior committee.

.02 A *member* should also consult the following, if applicable:

• The ethical requirements of the *member's* state CPA society and authoritative regulatory bodies such
as state board(s) of accountancy

• The Securities and Exchange Commission (SEC)

• The Public Company Accounting Oversight Board (PCAOB)

• The Government Accountability Office (GAO)

• The Department of Labor (DOL)

• Federal, state and local taxing authorities

• Any other body that regulates a *member* who performs *professional services* for an entity when the *member* or entity is subject to the rules and regulations of such regulatory body.

0.200 Structure and Application of the AICPA Code

0.200.010 Structure of the AICPA Code

.01 A variety of topics appear in parts 1–3 of the code. When applicable, topics are aligned with the relevant rule or rules of conduct. Topics may be further divided into subtopics, and some subtopics include one or more sections. Topics, subtopics, and sections interpret the rules of conduct (see "Interpretations and Other Guidance" [0.100.020]).

.02 Defined terms (see "Definitions" [0.400]) as well as the plurals and possessives thereof, are shown in *italics* throughout the code. When a defined term is used in the code but is not shown in italics, the definition in 0.400 should not be applied.

0.300 Principles of Professional Conduct

0.300.010 Preamble

.01 Membership in the American Institute of Certified Public Accountants is voluntary. By accepting membership, a *member* assumes an obligation of self-discipline above and beyond the requirements of laws and regulations.

.02 These Principles of the Code of Professional Conduct of the American Institute of Certified Public Accountants express the profession's recognition of its responsibilities to the public, to *clients*, and to colleagues. They guide *members* in the performance of their professional responsibilities and express the basic tenets of ethical and professional conduct. The Principles call for an unswerving commitment to honorable behavior, even at the sacrifice of personal advantage. [Prior reference: ET section 51]

0.300.020 Responsibilities

.01 *Responsibilities principle.* In carrying out their responsibilities as professionals, *members* should exercise sensitive professional and moral judgments in all their activities.

.02 As professionals, *members* perform an essential role in society. Consistent with that role, *members* of the American Institute of Certified Public Accountants have responsibilities to all those who use their *professional services. Members* also have a continuing responsibility to cooperate with each other to improve the art of accounting, maintain the public's confidence, and carry out the profession's special responsibilities for self-governance. The collective efforts of all *members* are required to maintain and enhance the traditions of the profession. [Prior reference: ET section 52]

0.300.030 The Public Interest

.01 *The public interest principle. Members* should accept the obligation to act in a way that will serve the public interest, honor the public trust, and demonstrate a commitment to professionalism.

.02 A distinguishing mark of a profession is acceptance of its responsibility to the public. The accounting profession's public consists of *clients*, credit grantors, governments, employers, investors, the business and financial community, and others who rely on the objectivity and integrity of *members* to maintain the orderly functioning of commerce. This reliance imposes a public interest responsibility on *members*. The public interest is defined as the collective well-being of the community of people and institutions that the profession serves.

.03 In discharging their professional responsibilities, *members* may encounter conflicting pressures from each of those groups. In resolving those conflicts, *members* should act with integrity, guided by the precept that when *members* fulfill their responsibility to the public, *clients'* and employers' interests are best served.

.04 Those who rely on *members* expect them to discharge their responsibilities with integrity, objectivity, due professional care, and a genuine interest in serving the public. They are expected to provide quality services, enter into fee arrangements, and offer a range of services—all in a manner that demonstrates a level of professionalism consistent with these Principles of the Code of Professional Conduct.

.05 All who accept membership in the American Institute of Certified Public Accountants commit themselves to honor the public trust. In return for the faith that the public reposes in them, *members* should seek to continually demonstrate their dedication to professional excellence. [Prior reference: ET section 53]

0.300.040 Integrity

.01 *Integrity principle.* To maintain and broaden public confidence, *members* should perform all professional responsibilities with the highest sense of integrity.

.02 Integrity is an element of character fundamental to professional recognition. It is the quality from which the public trust derives and the benchmark against which a *member* must ultimately test all decisions.

.03 Integrity requires a *member* to be, among other things, honest and candid within the constraints of *client* confidentiality. Service and the public trust should not be subordinated to personal gain and advantage. Integrity can accommodate the inadvertent error and honest difference of opinion; it cannot accommodate deceit or subordination of principle.

.04 Integrity is measured in terms of what is right and just. In the absence of specific rules, standards, or guidance or in the face of conflicting opinions, a *member* should test decisions and deeds by asking: "Am I doing what a person of integrity would do? Have I retained my integrity?" Integrity requires a *member* to observe both the form and the spirit of technical and ethical standards; circumvention of those standards constitutes subordination of judgment.
.05 Integrity also requires a *member* to observe the principles of objectivity and independence and of due care. [Prior reference: ET section 54]

0.300.050 Objectivity and Independence

.01 *Objectivity and independence principle.* A *member* should maintain objectivity and be free of conflicts of interest in discharging professional responsibilities. A *member* in public practice should be independent in fact and appearance when providing auditing and other attestation services.

.02 Objectivity is a state of mind, a quality that lends value to a *member's* services. It is a distinguishing feature of the profession. The principle of objectivity imposes the obligation to be impartial, intellectually honest, and free of conflicts of interest. *Independence* precludes relationships that may appear to *impair* a *member's* objectivity in rendering attestation services.

evaluating whether education, experience, and judgment are adequate for the responsibility to be assumed.

.05 *Members* should be diligent in discharging responsibilities to *clients*, employers, and the public. Diligence imposes the responsibility to render services promptly and carefully, to be thorough, and to observe applicable technical and ethical standards.

.06 Due care requires a *member* to plan and supervise adequately any professional activity for which he or she is responsible. [Prior reference: ET section 56]

0.300.070 Scope and Nature of Services

.01 *Scope and nature of services principle.* A *member* in public practice should observe the Principles of the Code of Professional Conduct in determining the scope and nature of services to be provided.

.02 The public interest aspect of *members'* services requires that such services be consistent with acceptable professional behavior for *members*. Integrity requires that service and the public trust not be subordinated to personal gain and advantage. Objectivity and *independence* require that *members* be free from conflicts of interest in discharging professional responsibilities. Due care requires that services be provided with competence and diligence.

.03 Each of these Principles should be considered by *members* in determining whether or not to provide specific services in individual circumstances. In some instances, they may represent an overall constraint on the nonaudit services that might be offered to a specific *client*. No hard-and-fast rules can be developed to help *members* reach these judgments, but they must be satisfied that they are meeting the spirit of the Principles in this regard.

.04 In order to accomplish this, *members* should:

a. Practice in *firms* that have in place internal quality control procedures to ensure that services are competently delivered and adequately supervised.

b. Determine, in their individual judgments, whether the scope and nature of other services provided to an audit *client* would create a conflict of interest in the performance of the audit function for that *client*.

c. Assess, in their individual judgments, whether an activity is consistent with their role as professionals. [Prior reference: ET section 57]

APPENDIX D

Association of Fundraising Professionals
Code of Ethical Standards*

Adopted 1964; amended Oct. 2014

Public Trust, Transparency & Conflicts of Interest

Members shall:

- not engage in activities that harm the members' organizations, clients or profession or knowingly bring the profession into disrepute.
- not engage in activities that conflict with their fiduciary, ethical and legal obligations to their organizations, clients or profession.
- effectively disclose all potential and actual conflicts of interest; such disclosure does not preclude or imply ethical impropriety.
- not exploit any relationship with a donor, prospect, volunteer, client or employee for the benefit of the members or the members' organizations.
- comply with all applicable local, state, provincial and federal civil and criminal laws.
- recognize their individual boundaries of professional competence.
- present and supply products and/or services honestly and without misrepresentation.
- establish the nature and purpose of any contractual relationship at the outset and be responsive and available to parties before, during and after any sale of materials and/or services.
- never knowingly infringe the intellectual property rights of other parties.
- protect the confidentiality of all privileged information relating to the provider/client relationships.
- never disparage competitors untruthfully.

---

* Association of Fundraising Professionals
4300 Wilson Boulevard, Suite 300
Arlington, VA 22203

703.684.0410

Solicitation & Stewardship of Philanthropic Funds

Members shall:

- ensure that all solicitation and communication materials are accurate and correctly reflect their organization's mission and use of solicited funds.
- ensure that donors receive informed, accurate and ethical advice about the value and tax implications of contributions.
- ensure that contributions are used in accordance with donors' intentions.
- ensure proper stewardship of all revenue sources, including timely reports on the use and management of such funds.
- obtain explicit consent by donors before altering the conditions of financial transactions.

Treatment of Confidential & Proprietary Information

Members shall:

- not disclose privileged or confidential information to unauthorized parties.
- adhere to the principle that all donor and prospect information created by, or on behalf of, an organization or a client is the property of that organization or client.
- give donors and clients the opportunity to have their names removed from lists that are sold to, rented to or exchanged with other organizations.
- when stating fundraising results, use accurate and consistent accounting methods that conform to the relevant guidelines adopted by the appropriate authority.

Compensation, Bonuses & Finder's Fees

Members shall:

- not accept compensation or enter into a contract that is based on a percentage of contributions; nor shall members accept finder's fees or contingent fees.
- be permitted to accept performance-based compensation, such as bonuses, only if such bonuses are in accord with prevailing practices within the members' own organizations and are not based on a percentage of contributions.
- neither offer nor accept payments or special considerations for the purpose of influencing the selection of products or services.

- not pay finder's fees, commissions or percentage compensation based on contributions.
- meet the legal requirements for the disbursement of funds if they receive funds on behalf of a donor or client.

APPENDIX E

Model Standards of Practice for the Charitable Gift Planner*

A code of ethical practice for all professionals who work together to structure gifts that balance the interests of the donor and the purposes of the charitable institution.

PREAMBLE
The purpose of this statement is to encourage responsible gift planning by urging the adoption of the following Standards of Practice by all individuals who work in the charitable gift planning process, gift planning officers, fund raising consultants, attorneys, accountants, financial planners, life insurance agents and other financial services professionals (collectively referred to hereafter as "Gift Planners"), and by the institutions that these persons represent. This statement recognizes that the solicitation, planning and administration of a charitable gift is a complex process involving philanthropic, personal, financial, and tax considerations, and as such often involves professionals from various disciplines whose goals should include working together to structure a gift that achieves a fair and proper balance between the interests of the donor and the purposes of the charitable institution.

I. PRIMACY OF PHILANTHROPIC MOTIVATION
The principal basis for making a charitable gift should be a desire on the part of the donor to support the work of charitable institutions.

II. EXPLANATION OF TAX IMPLICATIONS
Congress has provided tax incentives for charitable giving, and the emphasis in this statement on philanthropic motivation in no way minimizes the necessity and appropriateness of a full and accurate explanation by the Gift Planner of those incentives and their implications.

III. FULL DISCLOSURE
It is essential to the gift planning process that the role and relationships of all parties involved, including how and by whom each is compensated, be fully disclosed to the donor. A Gift Planner shall not act or purport to act as a representative of any charity without the express knowledge and approval of the charity, and shall not, while employed by the charity, act or purport to act as a representative of the donor, without the express consent of both the charity and the donor.

---

* Adopted and subscribed to by the National Committee on Planned Giving (now the National Association of Charitable Gift Planners), and the American Council on Gift Annuities

National Association of Charitable Gift Planners
200 S. Meridian St., Suite 510
Indianapolis, IN 46225
317.269.6274

American Council on Gift Annuities
5151 E. Broadway Blvd, Suite 1600
Tucson, AZ 85711
770.874.3355

APPENDIX F

National Association of Estate Planners and Councils*
Code of Ethics

Preamble

The National Association of Estate Planners and Councils (NAEPC) is dedicated to setting and promoting standards of excellence for professionals in estate planning.

Membership in the Association comes from one of three sources. The first source of member is one who joins the NAEPC through membership in an affiliated local council. The second source of member is an atlarge member who joins the NAEPC as an individual due to the local council being unaffiliated. The third source of member is an atlarge member, one who is unaffiliated with a local council, whether or not the local group is not an affiliated member of the NAEPC.

To those who meet its stringent admission standards, which include, among other things, significant prior experience in estate planning activities and material formal education in the subject matter, the NAEPC confers the Accredited Estate Planner (AEP) designation.

The NAEPC recognizes the importance of promulgating a code of behavior for members that emphasizes a team approach to estate planning, and relies upon the competency, knowledge, professionalism, integrity, objectivity, and responsibility of each person qualifying as a candidate for certification.

In fulfillment of this mission, the Association's Board of Directors has adopted this Code of Professional Responsibility, which embodies the professional behavior expected of all NAEPC members, and which is consistent with the Codes of Ethics of the other gateway professional designations under which a member must conduct himself/herself.

That is, the NAEPC recognizes that those who attain the AEP designation already possess other professional designations, such as Attorney at Law, Certified Public Accountant, Chartered Life Underwriter, Chartered Financial Consultant, Certified Financial Planner, and Certified Trust and Financial Advisor. Each of those gateway designations imposes a Code of Ethics on its members. The NAEPC intends that its Code of Ethics be consistent with those Codes already imposed on its members when the AEP title is conferred.

---

* National Association of Estate Planners and Councils
1120 Chester Avenue, Suite 470
Cleveland, OH 44114
866.226.2224

Professional Responsibilities

A member of the NAEPC is required to conduct himself/herself at all times in the following manner:

1. To uphold the integrity and honor of the profession and to encourage respect for it. This involves promoting the continual development of the estate planning industry, as well as the member's respective specialization.

1. To be fair. This requires that a professional treat others as he/she would wish to be treated if in the other's position. It also means that a member shall disclose conflicts of interest in providing estate planning services.

2. A member shall continually improve his/her knowledge, skill, and competence throughout his/her working life.

3. To do the utmost to attain a distinguished record of professional service based upon diligence. This means that a professional must act with patience, timeliness, and consistency, and do so in a prompt and thorough manner in the service of others.

4. To support the established institutions and organizations concerned with the integrity of his/her profession.

5. To respect the confidentiality of any information entrusted to, or obtained in the course of, the member's business or professional activities.

6. To regulate himself or herself. That is, every member has a twofold duty to abide by his/her other applicable professional codes of ethics, and to also facilitate the enforcement of this Code of Professional Responsibility. This also means expeditiously reporting breaches of professional responsibility, including one's own, to the NAEPC. The NAEPC assumes responsibility for diligently investigating each reported breach. Confirmed breaches will result in discipline by the Association, and can include dismissal for the most egregious offenses.

7. To comply with all laws and regulations, in particular as they relate to professional and business activities.

8. To cooperate with Association members, and other estate planning professionals, to enhance and maintain the estate planning profession's public image, and to work together to improve the quality of services rendered.

APPENDIX G

Financial Planning Association*
Code of Ethics

This Code of Ethics is an expression of the financial planning profession's recognition of its responsibilities to the public, to clients, to colleagues, and to employers. These principles apply to all Financial Planning Association (FPA) members.

Principle 1: Integrity

An FPA member shall offer and provide professional services with integrity.

Principle 2: Objectivity

An FPA member shall be objective in providing professional services to clients.

Principle 3: Competence

An FPA member shall provide services to clients competently and maintain the necessary knowledge and skill to continue to do so in those areas in which the designee is engaged.

Principle 4: Fairness

An FPA member shall perform professional services in a manner that is fair and reasonable to clients, principals, partners, and employers and shall disclose conflict(s) of interest(s) in providing such services.

Principle 5: Confidentiality

An FPA member shall not disclose any confidential client information without the specific consent of the client unless in response to a proper legal process, to defend against charges of wrongdoing by the FPA member or in connection with a civil dispute between the FPA member and client.

---

* Financial Planning Association
1290 Broadway, Suite 1625
Denver, CO 80203
800.322.4237

Principle 6: Professionalism

An FPA member's conduct in all matters shall reflect credit upon the profession.

Principle 7: Diligence

An FPA member shall act diligently in providing professional services. Diligence is the provision of services in a reasonably prompt and thorough manner. Diligence also includes proper planning for and supervision of the rendering of professional services.

R1.3 A member shall disclose to the client all information material to the professional relationship, including, but not limited to, all actual or potential conflicts of interest. In a conflict of interest situation, the interest of the client must be paramount.

Applications for Rule 1.3

A1.3a. A potential conflict of interest is inherent in the relationship between the client and the financial service professional when the professional is compensated by commissions on the sale of financial products. In such circumstances, if asked by the client or prospect, the professional should disclose, to the best of his/her knowledge, all forms of compensation, including commissions, expense allowances, bonuses, and any other relevant items.

A1.3b. The potential for a conflict of interest exists when a financial service professional receives fees for referring business to another practitioner. The referring professional should disclose this information.

A1.3c. A member who serves as a director or trustee of an organization/business faces a conflict of interest when competing to provide product or services to this organization for compensation. For example, Jackie Jones, ChFC, a professional money manager, is on the board of XNet Corporation. XNet is currently interviewing candidates to manage its $10 million investment portfolio. If Jackie decides to seek XNet's account, she is in a conflict of interest situation. Under these circumstances, Jackie should disclose the conflict to all relevant parties and have the parties acknowledge and accept the conflict. Additionally, Jackie should consider recusing herself from all discussions and decision-making regarding the selection of XNet's money manager. She may also consider resigning from the board or taking her name out of consideration for the money manager position.

R1.4 A member shall give proper respect to any relationship that may exist between the member and the companies he or she represents.

Application for Rule 1.4

A1.4a. Society members frequently have contractual relationships with the company whose products they sell. Honoring the terms of these contracts and refraining from negative statements about such companies are examples of giving proper respect to the relationship. Note, however, the need to balance the requirements of Rule 1.4 with the duty to act in the best interest of the client.

R1.5 A member shall make and/or implement only recommendations that are appropriate for the client and consistent with the client's goals.

Applications for Rule 1.5

A1.5a. Compliance with Rule 1.5 requires the financial service professional to use his/her best efforts to (1) understand the client's/prospect's personal and financial background and experience; (2) understand the client's/prospect's risk tolerance; and (3) educate the client about the various options available to meet identified needs and goals. This may include utilizing a fact-finding and/or risk assessment tool, one-on-one educational/counseling sessions, sharing newspaper or magazine articles, etc. In these circumstances, the financial service professional is cautioned against providing advice if he or she is not properly licensed or authorized to do so. See also Rule 2.2 and the Application A2.2a.

A1.5b. Appropriateness of the recommendation to the client's needs must take precedence over any sales incentives available to the financial service professional, such as conventions, trips, bonuses, etc. For example, Bob Bucks needs to sell just one more policy to qualify for MDRT. He knows he can convince his best client to purchase additional insurance coverage even though Bob knows the current coverage is more than adequate. If Bob makes this sale, he has violated Rule 1.5.

R1.6 In the rendering of professional services to a client, a member has the duty to maintain the type and degree of professional independence that (a) is required of practitioners in the member's occupation, or (b) is otherwise in the public interest, given the specific nature of the service being rendered.

Application for Rule 1.6

A1.6a. The requirement of professional independence mandated by Rule 1.6 presents a special challenge for Society members who are contractually bound to sell the products of only one company, or a select group of companies. In such cases, the member must keep paramount his/her ethical duty to act in the best interest of the client, even if this means forgoing a sale.

CANON 2 Competence

A member shall continually improve his/her professional knowledge, skill, and competence.

Professionalism starts with technical competence. The knowledge and skills held by a professional are of a high level, difficult to attain, and, therefore, not held by the general public. Competence not only includes the initial acquisition of this specialized knowledge and skill, but also requires continued learning and practice.

RULES

R2.1 A member shall maintain and advance his/her knowledge in all areas of financial service in which he/she is engaged and shall participate in continuing education programs throughout his/her career.

Application for Rule 2.1

A. 2.1a. Compliance with Rule 2.1 requires, at a minimum, meeting the applicable continuing education standards set by state licensing authorities, the Society of Financial Service Professionals, the American College, the CFP Board of Standards, and any other entity with appropriate authority over the member's license(s) or other credentials. For example PACE, the joint CE program of the Society of and the American College requires 30 hours of CE every 2 years. The CFP Board of Standards also requires 30 hours of continuing education every 2 years for CFP® licensees.

R2.2 A member shall refrain from giving advice in areas beyond the member's own expertise.

Applications for Rule 2.2

A2.2a. A member shall not give tax, legal, insurance, accounting, actuarial, investment, or other advice unless the member has professional training and is properly licensed in these areas. For example, to avoid the unauthorized practice of law, the financial service professional will clearly

mark specimen documents, such as living or testamentary trusts or buy-sell agreements, as samples and inform the client that the documents must be reviewed by a licensed attorney.

A2.2b. Billy Burke, CFP®, has a specialized financial planning practice that focuses on assisting clients with funding college for their children. When Billy's long-time client and friend, Margaret Hamilton, asks for help in managing the distribution of funds from her defined benefit plan, Billy knows this is beyond his area of expertise, but he doesn't want to let his friend down. Billy proceeds to recommend several investment options to Margaret, but neglects to mention the early withdrawal taxes and penalties. Billy has violated Rule 2.2.

CANON 3 Confidentiality

A member shall respect the confidentiality of any information entrusted to, or obtained in the course of, the member's business or professional activities.

A financial service professional often gains access to client records and company information of a sensitive nature. Each Society member must maintain the highest level of confidentiality with regard to this information.

RULES

R3.1 A member shall respect and safeguard the confidentiality of sensitive client information obtained in the course of professional activities. A member shall not divulge such information without specific consent of the client, unless disclosure of such information is required by law or necessary in order to discharge legitimate professional duties.

Application for Rule 3.1

A3.1a. Examples of sensitive client information include, but are not limited to, medical data, information about financial status, Social Security or credit card numbers, information about personal relationships, etc. In determining whether information is sensitive, the Society member should take a cautious approach, and if in doubt, discuss the issue with the client.

R3.2 A member shall respect and safeguard the confidentiality of sensitive company/employer information obtained in the course of professional activities. A member shall not divulge such information without specific consent, unless disclosure of such information is required by law or necessary in order to discharge legitimate professional duties.

R3.3 A member must ensure that confidentiality practices are established and maintained by staff members so that breaches of confidence are not the result of intentional or unintentional acts or omissions.

Application for Rule 3.3

A3.3a. A member who employs others who work with sensitive, confidential client information has the responsibility to train these employees in the handling of such information. These employees must be instructed that they will be held responsible for unauthorized disclosure of confidential data. For example, Judy Parker has set up detailed procedures for her staff to follow in safeguarding confidential client information. On three separate occasions, Judy overhead her office manager gossiping with friends about the size of Client X's investment portfolio. Judy has not taken any action in regard to the office manager's behavior. Judy has violated Rule 3.3.

CANON 4 Integrity

A member shall provide professional services with integrity and shall place the client's interest above his/her own..

Integrity involves honesty and trust. A professional's honesty and candor should not be subordinate to personal gain or advantage. To be dishonest with others is to use them for one's own purposes.

RULES

R4.1 A member shall avoid any conduct or activity that would cause unnecessary harm to others by:

- Any act or omission of a dishonest, deceitful, or fraudulent nature.
- Pursuit of financial gain or other personal benefits that would interfere with the exercise of sound professional judgments and skills.

R4.2 A member shall establish and maintain dignified and honorable relationships with those he/she serves, with fellow practitioners, and with members of other professions.

Application for Rule 4.2

A4.2a. A member needs to be respectful in all dealings with another financial service professional in competitive engagements and avoid at all costs defamatory remarks to the client or other professionals. This does not mean a member cannot provide impartial factual information about a competitor. For example, in trying to help a friend make a decision about which long-term care policy to purchase, Joe Carter, CLU, reviews the features of each contract and accurately notes that his competitor's policy fails to provide coverage for Home care. Joe recommends that his friend review this information with his agent.

R4.3 A member shall embrace and adhere to the spirit and letter of laws and regulations governing his/her business and professional activities. See also Rule 6.1.

R4.4 A member shall be truthful and candid in his/her professional communications with existing and prospective clients, and with the general public.

Applications for Rule 4.4

A4.4a. Financial service professionals will not use words or make statements in brochures or advertising materials or in any client communication that create false impressions or have the potential to mislead. For example, product salespersons should not refer to themselves as financial/estate planners/consultants, if they do not provide these services. Words such as deposits or contributions should not be used to describe life insurance premiums. Life insurance policies should not be referred to as retirement plans. Discussion of vanishing premiums and guaranteed performance should be avoided. Financial service professionals must avoid creating the impression that they represent a number of companies when they place business with only a few companies. (See also Rule 1.6.)

A4.4b. Candid communication is required when a client is acting or intends to act outside the law. In such cases, the member should terminate the professional relationship and seek the

advice of appropriate advisers. For example, Lisa Long, CLU, CFP®, an investment adviser, has been asked by her client to effect a transaction based on insider information. Lisa must immediately advise her client that insider trading is a violation of SEC rules and could result in criminal charges. Lisa should also document what has happened; and if, the client plans to proceed with the transaction, Lisa should terminate the relationship. Lisa should also consult her own legal and ethical advisers as to whether she has additional legal obligations under these circumstances. Lisa's legal obligations will impact her ethical obligations.

R4.5. A member shall refrain from using an approved Society designation, degree, or credential in a false or misleading manner.

Application for Rule 4.5

A4.5a. A member must not use Society-recognized professional designations in his/her company name, tagline, or brochures in a manner which would be misleading. For example, John Smith, ChFC, and Associates is acceptable. John Smith and Associates, Chartered Financial Consultants is not because it creates the impression that everyone associated with the firm is a Chartered Financial Consultant. (See Rule 7.7 also.)

CANON 5 Diligence

A member shall act with patience, timeliness, and consistency in the fulfillment of his/her professional duties.

A professional works diligently. Knowledge and skill alone are not adequate. A professional must apply these attributes in a prompt and thorough manner in the service of others.

RULES

R5.1 A member shall act with competence and consistency in promptly discharging his/her responsibilities to clients, employers, principals, purchasers, and other users of the member's services.

R5.2 A member shall make recommendations to clients, whether in writing or orally, only after sufficient professional evaluation and understanding of the client's needs and goals. A member shall support any such recommendations with appropriate research and documentation.

R5.3 A member shall properly supervise subordinates with regard to their role in the delivery of financial services, and shall not condone conduct in violation of the ethical standards set forth in this Code of Professional Responsibility.

CANON 6 Professionalism

A member shall assist in raising professional standards in the financial services industry.

A member's conduct in all matters shall reflect credit upon the financial services profession. A member has an obligation to cooperate with Society members, and other financial service professionals, to enhance and maintain the profession's public image and to work together to improve the quality of services rendered.

RULES

Application for Rule 7.1

A7.1a. Society members are advised to review the Code of Professional Responsibility at least annually.

R7.2 A member shall not sponsor as a candidate for Society membership any person known by the member to engage in business or professional practices that violate the rules of this Code of Professional Responsibility.

R7.3. A member shall not directly or indirectly condone any act by another member prohibited by this Code of Professional Responsibility.

Application for Rule 7.3

A7.3a. If requested, a Society member should serve on such committees, boards, or hearing panels as are prescribed by the Society for administration or enforcement of the Code of Professional Responsibility. A Society member is obligated to disqualify him/herself from such service if he/she cannot not serve in a fair and impartial manner.

R7.4 A member shall immediately notify the Society if he/she is found in violation of any code of ethics to which he or she is subject and shall forward details to the Society.

R7.5 A member shall immediately notify the Society of any revocation or suspension of his/her license by a state or federal licensing or regulatory agency and forward details to the Society.

Application for Rule 7.5

A7.5a. If, after due process, a Society member is judged to have violated the code of ethics of another organization, he/she should notify the Society and provide such detail as may be necessary.

R7.6 A member possessing unprivileged information concerning an alleged violation of this Code of Professional Responsibility shall report such information to the appropriate enforcement authority empowered by the Society to investigate or act upon the alleged violation.

Applications for Rule 7.6

A7.6a. If a member believes that another member of the Society may have violated the Code of Professional Responsibility, the Society recommends, where feasible, that direct communication between the two members be the first step in addressing the problem.

A7.6b. The Society's Code of Professional Responsibility places responsibility upon all members to report violations of this Code. (See also Rule 7.6.)

R7.7 A member shall report promptly to the Society any information concerning the unauthorized use of an approved Society designation, degree, or credential.

Application for Rule 7.7

A7.7a. The Society logo may be imprinted on business cards and stationery used exclusively by the person who is a Society member. (See also Rule 4.6.)

APPENDIX I

American Institute of Certified Planners*
Code of Ethics and Professional Conduct

Adopted March 19, 2005
Effective June 1, 2005
Revised April 1, 2016

We, professional planners, who are members of the American Institute of Certified Planners, subscribe to our Institute's Code of Ethics and Professional Conduct. Our Code is divided into five sections:

Section A contains a statement of aspirational principles that constitute the ideals to which we are committed. We shall strive to act in accordance with our stated principles. However, an allegation that we failed to achieve our aspirational principles cannot be the subject of a misconduct charge or be a cause for disciplinary action.

Section B contains rules of conduct to which we are held accountable. If we violate any of these rules, we can be the object of a charge of misconduct and shall have the responsibility of responding to and cooperating with the investigation and enforcement procedures. If we are found to be blameworthy by the AICP Ethics Committee, we shall be subject to the imposition of sanctions that may include loss of our certification.

Section C contains the procedural provisions of the Code that describe how one may obtain either a formal or informal advisory ruling, as well as the requirements for an annual report.

Section D contains the procedural provisions that detail how a complaint of misconduct can be filed, as well as how these complaints are investigated and adjudicated.

Section E contains procedural provisions regarding the forms of disciplinary actions against a planner, including those situations where a planner is convicted of a serious crime or other conduct inconsistent with the responsibilities of a certified planner.

The principles to which we subscribe in Sections A and B of the Code derive from the special responsibility of our profession to serve the public interest with compassion for the welfare of all people and, as professionals, to our obligation to act with high integrity.

As the basic values of society can come into competition with each other, so can the aspirational principles we espouse under this Code. An ethical judgment often requires a conscientious balancing, based on the facts and context of a particular situation and on the precepts of the entire Code.

As Certified Planners, all of us are also members of the American Planning Association and share in the goal of building better, more inclusive communities. We want the public to be aware

of the principles by which we practice our profession in the quest of that goal. We sincerely hope that the public will respect the commitments we make to our employers and clients, our fellow professionals, and all other persons whose interests we affect.

A: Principles to Which We Aspire

1. Our Overall Responsibility to the Public
Our primary obligation is to serve the public interest and we, therefore, owe our allegiance to a conscientiously attained concept of the public interest that is formulated through continuous and open debate. We shall achieve high standards of professional integrity, proficiency, and knowledge. To comply with our obligation to the public, we aspire to the following principles:

a) We shall always be conscious of the rights of others.

b) We shall have special concern for the long-range consequences of present actions.

c) We shall pay special attention to the interrelatedness of decisions.

d) We shall provide timely, adequate, clear, and accurate information on planning issues to all affected persons and to governmental decision makers.

e) We shall give people the opportunity to have a meaningful impact on the development of plans and programs that may affect them. Participation should be broad enough to include those who lack formal organization or influence.

f) We shall seek social justice by working to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of the disadvantaged and to promote racial and economic integration. We shall urge the alteration of policies, institutions, and decisions that oppose such needs.

g) We shall promote excellence of design and endeavor to conserve and preserve the integrity and heritage of the natural and built environment.

h) We shall deal fairly with all participants in the planning process. Those of us who are public officials or employees shall also deal evenhandedly with all planning process participants.

2. Our Responsibility to Our Clients and Employers
We owe diligent, creative, and competent performance of the work we do in pursuit of our client or employer's interest. Such performance, however, shall always be consistent with our faithful service to the public interest.

a) We shall exercise independent professional judgment on behalf of our clients and employers.

b) We shall accept the decisions of our client or employer concerning the objectives and nature of the professional services we perform unless the course of action is illegal or plainly inconsistent with our primary obligation to the public interest.

c) We shall avoid a conflict of interest or even the appearance of a conflict of interest in accepting assignments from clients or employers.

3. Our Responsibility to Our Profession and Colleagues
We shall contribute to the development of, and respect for, our profession by improving knowledge and techniques, making work relevant to solutions of community problems, and increasing public understanding of planning activities.

a) We shall protect and enhance the integrity of our profession.

b) We shall educate the public about planning issues and their relevance to our everyday lives.

c) We shall describe and comment on the work and views of other professionals in a fair and professional manner.

d) We shall share the results of experience and research that contribute to the body of planning knowledge.

e) We shall examine the applicability of planning theories, methods, research and practice and standards to the facts and analysis of each particular situation and shall not accept the applicability of a customary solution without first establishing its appropriateness to the situation.

f) We shall contribute time and resources to the professional development of students, interns, beginning professionals, and other colleagues.

g) We shall increase the opportunities for members of underrepresented groups to become professional planners and help them advance in the profession.

h) We shall continue to enhance our professional education and training.

i) We shall systematically and critically analyze ethical issues in the practice of planning.

j) We shall contribute time and effort to groups lacking in adequate planning resources and to voluntary professional activities.

B: Our Rules of Conduct

We adhere to the following Rules of Conduct, and we understand that our Institute will enforce compliance with them. If we fail to adhere to these Rules, we could receive sanctions, the ultimate being the loss of our certification:

1. We shall not deliberately or with reckless indifference fail to provide adequate, timely, clear and accurate information on planning issues.

2. We shall not accept an assignment from a client or employer when the services to be performed involve conduct that we know to be illegal or in violation of these rules.

3. We shall not accept an assignment from a client or employer to publicly advocate a position on a planning issue that is indistinguishably adverse to a position we publicly advocated for a previous client or employer within the past three years unless (1) we determine in good faith after consultation with other qualified professionals that our change of position will not cause present detriment to our previous client or employer, and (2) we make full written disclosure of the conflict to our current client or employer and receive written permission to proceed with the assignment.

4. We shall not, as salaried employees, undertake other employment in planning or a related profession, whether or not for pay, without having made full written disclosure to the employer who furnishes our salary and having received subsequent written permission to undertake additional employment, unless our employer has a written policy which expressly dispenses with a need to obtain such consent.

5. We shall not, as public officials or employees, accept from anyone other than our public employer any compensation, commission, rebate, or other advantage that may be perceived as related to our public office or employment.

6. We shall not perform work on a project for a client or employer if, in addition to the agreed upon compensation from our client or employer, there is a possibility for direct personal or financial gain to us, our family members, or persons living in our household, unless our client or employer, after full written disclosure from us, consents in writing to the arrangement.

7. We shall not use to our personal advantage, nor that of a subsequent client or employer, information gained in a professional relationship that the client or employer has requested be held inviolate or that we should recognize as confidential because its disclosure could result in embarrassment or other detriment to the client or employer. Nor shall we disclose such confidential information except when (1) required by process of law, or (2) required to prevent a clear violation of law, or (3) required to prevent a substantial injury to the public. Disclosure pursuant to (2) and (3) shall not be made until after we have verified the facts and issues involved and, when practicable, exhausted efforts to obtain reconsideration of the matter and have sought separate opinions on the issue from other qualified professionals employed by our client or employer.

8. We shall not, as public officials or employees, engage in private communications with planning process participants if the discussions relate to a matter over which we have authority to make a binding, final determination if such private communications are prohibited by law or by agency rules, procedures, or custom.

9. We shall not engage in private discussions with decision makers in the planning process in any manner prohibited by law or by agency rules, procedures, or custom.

10. We shall neither deliberately, nor with reckless indifference, misrepresent the qualifications, views and findings of other professionals.

11. We shall not solicit prospective clients or employment through use of false or misleading claims, harassment, or duress.

12. We shall not misstate our education, experience, training, or any other facts which are relevant to our professional qualifications.

13. We shall not sell, or offer to sell, services by stating or implying an ability to influence decisions by improper means.

14. We shall not use the power of any office to seek or obtain a special advantage that is not a matter of public knowledge or is not in the public interest.

15. We shall not accept work beyond our professional competence unless the client or employer understands and agrees that such work will be performed by another professional competent to perform the work and acceptable to the client or employer.

16. We shall not accept work for a fee, or pro bono, that we know cannot be performed with the promptness required by the prospective client, or that is required by the circumstances of the assignment.

17. We shall not use the product of others' efforts to seek professional recognition or acclaim intended for producers of original work.

18. We shall not direct or coerce other professionals to make analyses or reach findings not supported by available evidence.

19. We shall not fail to disclose the interests of our client or employer when participating in the planning process. Nor shall we participate in an effort to conceal the true interests of our client or employer.

20. We shall not unlawfully discriminate against another person.

21. We shall not withhold cooperation or information from the AICP Ethics Officer or the AICP Ethics Committee if a charge of ethical misconduct has been filed against us.

22. We shall not retaliate or threaten retaliation against a person who has filed a charge of ethical misconduct against us or another planner, or who is cooperating in the Ethics Officer's investigation of an ethics charge.

23. We shall not use the threat of filing an ethics charge in order to gain, or attempt to gain, an advantage in dealings with another planner.

24. We shall not file a frivolous charge of ethical misconduct against another planner.

25. We shall neither deliberately, nor with reckless indifference, commit any wrongful act, whether or not specified in the Rules of Conduct, that reflects adversely on our professional fitness.

26. We shall not fail to immediately notify the Ethics Officer by both receipted Certified and Regular First Class Mail if we are convicted of a "serious crime" as defined in Section E of the Code; nor immediately following such conviction shall we represent ourselves as Certified Planners or Members of AICP until our membership is reinstated by the AICP Ethics Committee pursuant to the procedures in Section E of the Code.

C: Advisory Opinions

1. Introduction

Any person, whether or not an AICP member, may seek informal advice from the Ethics Officer, and any AICP member may seek a formal opinion from the Ethics Committee, on any matter relating to the Code of Ethics and Professional Conduct. In addition, the Ethics Committee may, from time to time, issue opinions applying the Code to ethical matters relating to planning.

2. Informal Advice

a) Any person with a question about whether specific conduct conforms to the Code of Ethics and Professional Conduct may seek informal advice from the Ethics Officer. Any such person should contact the Ethics Officer to arrange a time to discuss the issue.

The Ethics Officer will endeavor to schedule a call promptly and to provide the advice promptly.

b) Informal advice will be given orally. However, the Ethics Officer will keep a record of the issue raised and the advice given.

c) Informal advice is intended to assist the person who seeks it, but it is not binding on AICP. Nevertheless, the Ethics Committee will take it into consideration if the Committee is subsequently called upon to consider a charge of misconduct against a Certified Planner who relied on the advice.

3. Formal Advisory Opinions Requested By A Member

a) Any AICP member with a question about whether specific conduct conforms to the Code of Ethics and Professional Conduct may seek a formal opinion from the Ethics

Committee. Any such member should send a detailed description of the relevant facts and a clear statement of the question to the Ethics Officer.

b) The Ethics Officer shall review each such request and determine whether there is sufficient information to permit a fully informed response or whether additional information is required.

c) The Ethics Committee will not issue an Advisory Opinion if it determines that the request concerns past conduct that may be the subject of a charge of misconduct. It may also decline to issue an Advisory Opinion for any other reason. The Committee may, but is not required to, provide a reason for a decision not to issue an opinion.

d) If the Ethics Committee determines to issue an Advisory Opinion, it will endeavor to do so within ninety (90) days after receiving all information necessary to the provision of the opinion. Every Advisory Opinion will be in writing.

e) Any member who acts in compliance with a formal Advisory Opinion will have a defense to a charge of misconduct that is based on conduct permitted by the Opinion.

f) The Ethics Committee, in its sole discretion, shall determine whether, and how, to publish any formal Advisory Opinion. If the Committee determines to publish an Advisory Opinion, the published Opinion will not, without appropriate consent, include the name or other identifying information of any person except to the extent that identifying information is helpful in setting forth the issue or in explaining the Committee's decision.

g) Any AICP member who believes that a published formal Advisory Opinion is incorrect or incomplete may write to the Ethics Officer explaining the member's thinking and requesting reconsideration. The Ethics Officer shall transmit all such communications to the Ethics Committee. That Committee shall review such communications and determine what, if any, changes to make. The decision of the Committee shall be final.

4. Formal Advisory Opinions Issued Without Request of a Member
a) The Ethics Committee may from time to time issue, without a request from a member, formal Advisory Opinions relating to the Code of Ethics and Professional Conduct when it believes that an Opinion will provide useful guidance to members.

b) All formal Advisory Opinions issued under this paragraph shall be in writing and shall be published to the entire membership.

c) Any AICP member who believes that a formal Advisory Opinion issued under this paragraph is incorrect or incomplete may write to the Ethics Officer explaining the member's thinking and requesting reconsideration. The Ethics Officer shall transmit all such communications to the Ethics Committee. That Committee shall review such communications and determine what, if any, changes to make. The decision of the Committee shall be final.

5. Annual Report of the Ethics Officer
a) Prior to January 31 of each year, the Ethics Officer shall provide to the AICP Commission and to the Ethics Committee an Annual Report of all formal Advisory Opinions and all interpretations of the Code issued during the preceding calendar year. That report need not contain the full text of each formal Advisory Opinion and interpretation of the Code.

b) The AICP Commission shall publish an Annual Report on ethics matters to the membership.

D: Adjudication of Complaints of Misconduct

1. Filing a Complaint.
a) Any person, whether or not an AICP member, may file an ethics complaint against a Certified Planner. An ethics complaint shall be sent to the AICP Ethics Officer on a form developed by the

Ethics Officer and posted on the AICP website. The complaint must be signed and include contact information so that the Ethics Committee and the Ethics Officer will know with whom to follow up if questions arise or if the situation otherwise requires follow up. The person making the complaint ("the complainant") may request confidentiality. The AICP will attempt to honor that request. However, it cannot guarantee confidentiality and will disclose the identity of the complainant if disclosure is needed in order to reach an informed result or otherwise to advance the thoughtful consideration of the complaint. The complaint may be accompanied by a brief cover letter.

b) The complaint shall identify the Certified Planner against whom the complaint is brought, describe the conduct at issue, cite the relevant provision(s) of the Code of Ethics and Professional Conduct, and explain the reasons that the conduct is thought to violate the Code.

c) The complaint should be accompanied by all relevant documentation available to the complainant.

d) The Ethics Officer shall determine whether the complaint contains all information necessary to making a fully informed decision. If the complaint does not contain all such information, the Ethics Officer shall contact the complainant to try to obtain the information.

e) The Ethics Officer shall maintain, for use by the Ethics Committee, a log of all complaints against Certified Planners.

2. Preliminary Review.

a) The Ethics Officer shall review each complaint, together with any supporting documentation, to make a preliminary determination of whether a violation may have occurred. Before making this determination, the Ethics Officer may request from the complainant any additional information that the Officer deems relevant.

b) Within thirty (30) days after receiving all information that the Ethics Officer deems necessary to make a preliminary determination, the Ethics Officer shall make a preliminary determination whether a violation may have occurred.

c) If the preliminary determination of the Ethics Officer is that it is clear that no violation has occurred, the complaint shall be dismissed. The complainant shall be so notified. The complainant shall have twenty (20) days from the date of notification to appeal the dismissal of the complaint to the Ethics Committee.

d) If the preliminary determination of the Ethics Officer is that a violation may have occurred — or if, on appeal, the Ethics Committee reverses a preliminary dismissal, the Ethics Officer shall, within thirty (30) days, provide the complaint to the Certified Planner against whom the complaint was made ("the respondent"). The Ethics Officer shall request from the respondent a detailed response to the complaint, and any supporting documentation.

3. Fact Gathering

a) The respondent shall have thirty (30) days from the date of notification from the Ethics Officer to provide a response to the complaint, as well as any supporting documentation. The Ethics Officer may extend this time, for good cause shown, for a period not to exceed fourteen (14) days.

b) The Ethics Officer shall provide the response of the respondent to the complainant and shall give the complainant an opportunity to comment on the response within fourteen (14) days.

c) If the Ethics Officer determines that additional information is needed from either the complainant or the respondent, the Ethics Officer shall attempt to obtain such information. The parties shall have fifteen (15) days to provide the requested additional information, with up to a fifteen (15) day extension at the discretion of the Ethics Officer if a request is made for additional time.

4. Exploration of Settlement

a) At any point in the process, the Ethics Officer may, after consultation with the Ethics Committee, attempt to negotiate a settlement of the complaint in accordance with the Code of Ethics and Professional Conduct.

b) The Ethics Committee shall be notified of — and permitted to comment on — any potential settlement at an early stage. Any settlement must be approved by the Ethics Committee before becoming final. Upon approval by the Ethics Committee, a settlement agreement shall be signed by the respondent and, where appropriate, by the complainant.

c) If a negotiated settlement is approved by the Ethics Committee and is signed in accordance with paragraph 4-b, the matter will be concluded, and no further action will be taken by AICP.

5. Decision

a) If neither the Ethics Officer nor the Ethics Committee determines to explore settlement — or if the parties are unwilling to engage in settlement discussions or if a settlement is not reached, the Ethics Officer shall, after considering timely input from the parties, issue a written decision on the complaint. The Ethics Officer, at his or her sole discretion, may determine whether a hearing needs to be held. A hearing will be held by telephone or other electronic means unless all parties and the Ethics Officer agree that it should be held in person. The expenses of each party in connection with any hearing, such as transcripts, travel, and attorneys' fees, will be borne by that party.

b) The Ethics Officer may determine that there is inadequate evidence of an ethics violation and therefore dismiss the complaint. Alternatively, the Ethics Officer may find that there has been an ethics violation. In either situation, the Ethics Officer shall explain the basis for the decision in a written opinion that cites and discusses the relevant provision(s) of the Code of Ethics and Professional Conduct.

c) If the decision is that there has been a violation, the Ethics Officer shall impose such discipline as that Officer deems appropriate. The discipline may be: (1) a confidential letter of admonition, (2) a public reprimand, (3) suspension of AICP membership, or (4) expulsion from AICP. The

Ethics Officer shall explain the basis for the discipline imposed and may attach such conditions, e.g. requirement to get additional ethics training, as the Officer deems just.

d) The Ethics Officer shall transmit the decision to the Ethics Committee and shall notify the parties of the decision. However, the Ethics Officer may determine not to disclose the remedy to a complainant who is not a member of AICP.

6. Appeal

a) Within thirty (30) days after issuance of the written decision of the Ethics Officer, either the complainant or respondent may appeal the decision to the Ethics Committee by filing a timely written notice of appeal with the Ethics Officer.

b) If an appeal is timely filed, the party filing the appeal shall, within fourteen (14) days, provide the Ethics Officer with a written statement as to the basis for the appeal. The Ethics Officer shall, within ten (10) days, transmit that document to the party against whom the appeal is filed. That party shall have thirty (30) days to provide the Ethics Officer with a written statement of his or her position on the appeal. The Ethics Officer shall transmit all written statements of the parties to the Ethics Committee within ten (10) days after the record is complete.

c) After receiving any timely filed statements of the parties, the Ethics Committee shall issue a written decision on the appeal. Before issuing a decision, the Ethics Committee, in its sole discretion, may consult with the Ethics Officer. The Ethics Committee may also, in its sole discretion, determine whether to hold a hearing at which the parties may present their positions and answer questions posed by the Committee. A hearing will be held by telephone or other electronic means unless all parties and the Ethics Committee agree that it should be held in person. The expenses of each party in connection with any hearing, such as transcripts, travel, and attorneys' fees, will be borne by that party.

d) The Ethics Committee may (1) affirm the decision of the Ethics Officer; (2) affirm the decision but impose a different remedy; (3) vacate the decision of the Ethics Officer and return the case to the Ethics Officer for additional investigation, consideration of different Code sections or issues, or any other follow up; or (4) vacate the decision of the Ethics Officer and issue its own decision.

e) A decision to affirm the decision of the Ethics Officer, to impose a different remedy, or to vacate that decision and to issue the Ethics Committee's own decision shall be final.

f) If the decision is to return the case to the Ethics Officer for follow up, the Ethics Officer may seek to explore settlement or may issue a decision consistent with the decision of the Ethics Committee. Before issuing such a decision, the Ethics Officer may seek additional input from the parties in a manner and format consistent with the Code of Ethics and Professional Conduct.

7. Effect of Dropping of Charges by Complainant or Resignation by Respondent

a) If charges are dropped by the complainant, the Ethics Committee may, at its sole discretion, either terminate the ethics proceeding or continue the process without the complainant.

b) If the respondent resigns from AICP or lets membership lapse after a complaint is filed but before the case is finalized, the Ethics Committee may, at its sole discretion, either terminate the ethics proceeding or continue the process. As in any situation, the Ethics Committee may also determine to file a complaint with the appropriate law enforcement authority if it believes that a violation of law may have occurred.

8. Reporting

a) Any written decision of the Ethics Committee may, at the discretion of the Committee, be published and titled "Opinion of the AICP Ethics Committee".

b) Any written decision of the Ethics Officer shall be referenced in the Annual Report of the Ethics Officer.

E: Discipline of Members

1. General

AICP members are subject to discipline for certain conduct. This conduct includes (a) conviction of a serious crime as defined in paragraph 3; (b) conviction of other crimes as set forth in paragraph 4; (c) a finding by the Ethics Committee or Ethics Officer that the member has engaged in unethical conduct; (d) loss, suspension, or restriction of state or other governmental professional licensure; (e) failure to make disclosure to AICP of any conviction of a serious crime or adverse professional licensure action; or (f) such other action as the Ethics Committee or the Ethics Officer, in the exercise of reasonable judgment, determines to be inconsistent with the professional responsibilities of a Certified Planner.

2. Forms of Discipline

The discipline available under this Policy includes: (a) a confidential letter of admonition, (b) a public letter of censure, (c) suspension of AICP membership, or (d) revocation from AICP. The Ethics Officer or the Ethics Committee may attach conditions to these disciplinary actions, such as the writing of a letter of apology, the correction of a false statement or statements, the taking of an ethics course, the refunding of money, or any other conditions deemed just in light of the conduct in question.

3. Conviction of a Serious Crime

a) The membership of a Certified Planner shall be revoked if the Planner has been convicted of a "serious crime". Membership shall be revoked whether the conviction resulted from a plea of guilty or nolo contendere, from a verdict after trial, or otherwise. Membership shall be revoked even if the Planner is appealing a conviction, but it will be reinstated if the conviction is overturned upon appeal.

b) For purposes of this Policy, the term "serious crime" shall mean any crime that, in the judgment of the Ethics Committee or the Ethics Officer, involves false swearing, misrepresentation, fraud, failure to file income tax returns or to pay tax, deceit, bribery, extortion, misappropriation, theft, or physical harm to another.

4. Conviction of Other Crimes

a) Discipline may also be imposed if a Certified Planner has been convicted of a crime not included within the definition of "serious crime," including an action determined by the Ethics Committee or the Ethics Officer to be inconsistent with the professional responsibilities of a Certified Planner.

b) Before any discipline is imposed under this section, the member shall have a right to set forth his or her position in writing to the Ethics Officer. The Ethics Officer shall, in that Officer's sole discretion, determine whether or not to give the member a hearing. The Ethics Officer shall notify the member of the decision.

c) A member who has had discipline imposed by the Ethics Officer shall have thirty (30) days from the date of notification of the adverse decision to file an appeal to the Ethics Committee. The member may do so by filing a timely notice of appeal with the Ethics Officer. The notice shall be accompanied by a statement of the basis for the appeal. The Ethics Officer will transmit any appeal and accompanying notice to the Ethics Committee. That Committee shall determine, in its sole discretion, whether or not to grant a hearing. The Ethics Committee shall, after considering the relevant information, issue a written opinion on the appeal.

5. Unethical Conduct
The forms of discipline set forth in paragraph 2 shall apply to any member who is found to have engaged in unethical conduct in accordance with the procedures established in the Policy on Adjudication of Complaints of Misconduct.

6. Revocation, Suspension, or Restriction of Licensure
a) The Ethics Committee or Ethics Officer shall impose such discipline as the Committee or Officer regards as just if a state or other governmentally-issued professional license of a Certified Planner has been revoked, suspended, or restricted for any reason relating to improper conduct by the Planner.

b) Before any discipline is imposed under this section, the provisions of section 4 (b) and (c) shall apply.

7. Duty to Notify Ethics Officer
a) A member who has been convicted of a serious crime or who has had his or her state or other governmentally-issued professional license revoked, suspended, or restricted for any reason relating to improper conduct by the member shall promptly report the relevant development to the Ethics Officer.

b) Failure of a member to report that he or she has been convicted of a serious crime or has had a professional license revoked, suspended, or restricted for a reason relating to improper conduct by that member may itself result in discipline of that member.

8. Other Conduct Inconsistent with the Responsibilities of a Certified Planner
a) The Ethics Officer shall have the right to discipline any member for any conduct not otherwise covered by this Policy that the Officer determines to be inconsistent with the responsibilities of a Certified Planner.

b) Conduct covered by this section shall include, but not be limited to, a finding in a civil case that the member has engaged in defamation or similar unlawful action, has knowingly infringed the copyright or other intellectual property of another, or has engaged in perjury.

c) Before any discipline is imposed under this section, the provisions of section 4-b and 4-c shall apply.

9. Petition for Reinstatement

a) Any Certified Planner whose membership or certification is revoked may petition the Ethics Committee for reinstatement no sooner than five years from the time of revocation. The Ethics Committee shall determine, in its sole discretion, whether to afford the petitioner a hearing and/or whether to seek additional information. The Committee shall determine, in its sole judgment, whether reinstatement is appropriate and what, if any, conditions should be applied to any such reinstatement. The Ethics Officer shall transmit the reinstatement determination to the Planner.

b) If the Ethics Committee denies the Petition, that Officer shall advise the Planner of the opportunity to file a subsequent petition after twelve (12) months have elapsed from the date of the determination.

10. Publication of Disciplinary Actions

The Ethics Committee, in its sole discretion, may publish the names of members who have had disciplinary action imposed and to state the nature of the discipline that was imposed. The authority to publish shall survive the voluntary or involuntary termination or suspension of AICP membership and certification. The Ethics Committee, in its sole discretion, may also determine not to publish such information or to publish only so much of that information as it deems appropriate.

---

* American Planning Association
205 N. Michigan Avenue, Suite 1200
Chicago, IL 60601
312. 431.9100

APPENDIX J

Uniform Standards of Professional Appraisal Practice
2020-2021 Edition

An appraiser must promote and preserve the public trust inherent in appraisal practice by observing the highest standards of professional ethics.

An appraiser must comply with USPAP when obligated by law or regulation, or by agreement with the client or intended users. In addition to these requirements, an individual should comply any time that individual represents that he or she is performing the service as an appraiser.

Comment:

This Rule specifies the personal obligations and responsibilities of the individual appraiser. An individual appraiser employed by a group or organization that conducts itself in a manner that does not conform to USPAP should take steps that are appropriate under the circumstances to ensure compliance with USPAP.

This Ethics Rule is divided into three sections: Conduct, Management and Confidentiality, which apply to all appraisal practice.

Conduct

An appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests.

An appraiser:

- must not perform an assignment with bias;
- must not advocate the cause or interest of any party or issue;
- must not agree to perform an assignment that includes the reporting of predetermined opinions and conclusions;
- must not misrepresent his or her role when providing valuation services that are outside of appraisal practice;
- must not communicate assignment results with the intent to mislead or to defraud;
- must not use or communicate a report or assignment results known by the appraiser to be misleading or fraudulent;
- must not knowingly permit an employee or other person to communicate a report or assignment results that are misleading or fraudulent;

engaged in appraisal practice, intracompany payments to employees for business development do not require disclosure.

An appraiser must not agree to perform an assignment, or have a compensation arrangement for an assignment, that is contingent on any of the following:

1. the reporting of a predetermined result (e.g., opinion of value);

2. a direction in assignment results that favors the cause of the client;

3. the amount of a value opinion;

4. the attainment of a stipulated result (e.g., that the loan closes, or taxes are reduced); or

5. the occurrence of a subsequent event directly related to the appraiser's opinions and specific to the assignment's purpose.

An appraiser must not advertise for or solicit assignments in a manner that is false, misleading, or exaggerated.

An appraiser must affix, or authorize the use of, his or her signature to certify recognition and acceptance of his or her USPAP responsibilities in an appraisal or appraisal review assignment (see Standards Rules 23, 43, 63, 83, and 103). An appraiser may authorize the use of his or her signature only on an assignmentbyassignment basis.

An appraiser must not affix the signature of another appraiser without his or her consent.

Comment:

An appraiser must exercise due care to prevent unauthorized use of his or her signature. An appraiser exercising such care is not responsible for unauthorized use of his or her signature.

Confidentiality

An appraiser must protect the confidential nature of the appraiserclient relationship.

An appraiser must act in good faith with regard to the legitimate interests of the client in the use of confidential information and in the communication of assignment results.

An appraiser must be aware of, and comply with, all confidentiality and privacy laws and regulations applicable in an assignment.

An appraiser must not disclose: (1) confidential information; or (2) assignment results to anyone other than:

- the client;

- persons specifically authorized by the client;

- state appraiser regulatory agencies;
- third parties as may be authorized by due process of law; or
- a duly authorized professional peer review committee except when such disclosure to a committee would violate applicable law or regulation.

An appraiser must take reasonable steps to safeguard access to confidential information and assignment results by unauthorized individuals, whether such information or results are in physical or electronic form.

An appraiser must ensure that employees, coworkers, subcontractors, or others who may have access to confidential information or assignment results, are aware of the prohibitions on disclosure of such information or results.

A member of a duly authorized professional peer review committee must not disclose confidential information presented to the committee.

Comment:

When all confidential elements of confidential information and assignment results are removed through redaction or the process of aggregation, client authorization is not required for the remaining information, as modified.

APPENDIX K

Soliciting Charitable Contributions from Patients*

Code of Medical Ethics Opinion 2.3.5

Charitable contributions play an important role in supporting and improving a community's health, and physicians are encouraged to participate in fundraising and other solicitation activities.

To sustain the trust that is the foundation of the patient-physician relationship and to reassure patients that their welfare is the physician's primary priority, physicians who participate in fundraising should:

1. Assure patients that they need not contribute in order to continue receiving quality care.

2. Refrain from directly soliciting contributions from their own patients, especially during clinical encounters.

3. Solicit contributions by making information available, for example, in their office reception areas or by speaking at fundraising events.

4. Protect patient privacy and confidentiality by not acknowledging that a patient is under the physician's care when approached by fundraising personnel without the prior consent of the patient.

5. Obtain permission from the patient before releasing information for purposes of fundraising when the nature of the physician's practice could make it possible to identify the medical services provided or the patient's diagnosis.

6. Refer patients or families who wish to make charitable contributions to appropriate information or fundraising personnel.

7. Be sensitive to the likelihood that they may be perceived to be acting in their professional role when participating in fundraising activities as a member of the general community.

---

* American Medical Association
AMA Plaza
330 N. Wabash Ave., Suite 39300
Chicago, IL 60611-5885
800.262.3211

APPENDIX L

Notary Public Code of Professional Responsibility*
Guiding Principles

I. The Notary shall serve all of the public in an honest, fair and impartial manner.

II. The Notary shall act as an impartial witness and not profit or gain, nor attempt to profit or gain, from a notarial act, apart from the fee for the notarial act and any charge associated with the fee, if applicable.

III. The Notary shall require the appearance of each principal and witness identifying a principal, if any, in order to screen each for identity, willingness, and mental competence.

IV. The Notary shall not execute a false or incomplete notarial certificate, nor perform a notarial act with respect to any document or transaction that the Notary believes is false, deceptive, or fraudulent.

V. The Notary shall act with reasonable care and not provide unauthorized advice or services.

VI. The Notary shall affix or attach an official seal to every notarial certificate and not allow the seal to be used by another.

VII. The Notary shall record every notarial act in a bound paper or secure electronic journal and safeguard it as an important public record.

VIII. The Notary shall protect the privacy of each principal and not examine, copy, divulge, or use personal or proprietary information disclosed during the execution of a notarial act unless required by law.

IX. The Notary shall obey all laws and official guidelines that pertain to notarial acts and follow recognized practice standards when they are silent.

X. The Notary shall seek instruction on notarization, and keep current on the laws, official guidelines, and practice standards of the notarial office.

---

* National Notary Association
9350 De Soto Avenue
Chatsworth, CA 91311-4926
800.876.6827

APPENDIX M

Maryland State Bar Association, Inc.
Committee on Ethics

Ethics Docket 0308

May an attorney who chairs his church's legacy committee, prepare, on a pro bono basis, wills for parishioners in which the parishioners bequeath property to the church?

You chair a church committee that promotes legacygiving from its parishioners (i.e., bequests in wills, charitable trusts, charitable annuities, etc.) (the "Legacy Committee"). As chair, you "explain the program" to parishioners. You wish to volunteer your services to prepare simple wills or codicils, advance directives and power of attorneys for unrepresented parishioners. You would receive no compensation for such services from either the church or its parishioners. You have asked whether there are any conflicts of interest or other ethical considerations implicated by your proposed conduct.

Rule 1.7 of the Maryland Lawyers' Rules of Professional Conduct addresses conflicts of interest generally. In this context, the first issues presented by your inquiry are: "What duties are owed to your church?" and "Who is your client?"

It is unclear whether your chairmanship of the Legacy Committee necessarily encompasses the rendition of legal services to the church or the Legacy Committee. The Ethics Committee cannot, therefore, definitively determine whether the church might be your client.

While the Committee cannot conclude from the facts presented that the church is your client, the Committee does believe that those parishioners whom you might counsel would be. If the church were also your client, Rule 1.7(a) imposes restrictions upon the circumstances in which a lawyer may represent one client when such representation may be directly adverse to another client. To the extent your role might be in the nature of an intermediary between clients, Rule 2.2 imposes similar consultation and consent requirements.

However, even if the church is not your client, the Committee believes that in your role as a member and chair of the church's Legacy Committee you would have fiduciary and/or other duties to the church. Rule 1.7(b) provides that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities ... to a third person, or by the lawyer's own interests, unless ... the lawyer reasonably believes the representation will not be adversely affected; and ... the client consents after consultation."

The Committee believes that your role as Legacy Committee chair and/or your own interests in advancing the church's financial interests would be the sorts of responsibilities to a third person and/or personal interest that are governed by Rule 1.7(b).

Under Rule 1.7(b), in order to represent your fellow parishioners, you would have to reasonably believe that your representation of such parishioners would not be "adversely affected" by your responsibilities to your church or your own interests before obtaining a parishioner's consent to such representation. It is the consensus of the Committee, which correlates to the hypothetical

"disinterested attorney" referred to in the comments to Rule 1.7, that such a belief would not be reasonable, and that consequently you cannot simultaneously serve as a member of the Legacy Committee and represent parishioners in connection with their estate planning when they may contemplate a gift or bequest to the church.

The Committee's opinion in this regard is based upon Rule 2.1, which provides that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Similarly, Rule 5.4(c) provides that "[a] lawyer shall not permit a person who recommends ... the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

The Committee believes that your laudable interest in advancing your church's interests would inevitably compromise your independent professional judgment in advising parishioners regarding whether their own interests will be served by such giving in general or by bequests to your church in particular, as issues regarding the nature, magnitude and timing of parishioners' giving might be affected by considerations relating to your church's financial needs. The Committee also has reservations regarding whether parishioners would be sophisticated enough to weigh the risks involved in order to knowingly consent to your representation.

Consequently, it is the Committee's opinion that the conflict posed by virtue of your membership on the Legacy Committee will not be able to be addressed by the consultation and consent requirements of Rule 1.7(b) (2) and (c) (and/or Rule 2.2) and that to advise parishioners as you propose, you would have to resign from the Legacy Committee.

We hope that this opinion is of assistance.

REFERENCES: Maryland Lawyers' Rules of Professional Conduct, Rules 1.7(a), 1.7(b), 1.7(c), 2.1, 2.2, and 5.4(c)

6504221.1.doc 9/20/2021

BAR ASSOCIATION OF NASSAU COUNTY COMMITTEE ON PROFESSIONAL ETHICS

Opinion No. 1997-11

(Inquiry No.)

Topics:

Donating legal services for charitable fund-raising purposes.

Digest:

A lawyer may not donate the legal service of making a valid will to a charitable fund-raising program. However, lawyer may cooperate with a fund-raising organization to present and advertise a program in which the lawyer explains about wills and why it is important to have one, as long as the program and the advertising comply with the Code of Professional Responsibility.

Code Provisions:

EC 2-1 EC 2-5 EC 6-1 DR 2-101(C) and (D) DR 2-103(A) and (B) DR 2-104(C) and (E) DR 2-105(A) and (B) DR 2-107(A)(1) DR 4-101 DR 5-107(B) DR 6-101(A)(1)

Facts Presented:

The inquiring attorney wants to offer a fund-raising program for various organizations (e.g., school Parent/Teacher Associations, religious organizations, charities, etc.) in which the attorney would provide participants with a valid Will. The fee for participation in this fund-raising program would be paid directly to the organization and each organization would set its own registration fees. The attorney's office may charge a

nominal fee to covers its expenses (to be paid directly by the organization). The program is intended to be conducted on the organization's premises and the attorney expects the organization will likely advertise the program to its membership.

This "Make a Will" program will be presented in two sessions. In the first session, participants complete a questionnaire that helps identify their individual needs and wishes, and the process of preparing a will is explained. The second session would be devoted exclusively to the preparation of a valid, customized will. An attorney would supervise the execution of the will, including a Notary and witnesses, to ensure compliance with statutory requirements.

Inquiry:

May a lawyer donate legal services to a charitable fund-raising program intended to create valid wills for organization members, where fees are paid directly to a particular organization running the fund-raising program?

Determination:

The determination varies depending on the component of the proposed "Make a Will" program. There are three parts to the "Make a Will" program, and this opinion separately evaluates each part of the program:

(1) a program designed to give an organization's members information about wills and the importance of having a will — this part is ethically permissible;

(2) advertising this fund-raising program about making a Will — this part is likewise ethically permissible; and

(3) drawing a valid will — this part is not ethically permissible.

Analysis:

(1) A Program Explaining Wills is Ethically Permissible

The lawyer may present a program to an organization's members explaining wills and their importance as part of a fund-raising program. This type of educational program is supported by Ethical Considerations EC 2-1 and EC 2-5. Furthermore, under DR 2-104(C) and (E), the lawyer may ethically obtain business as a result of that speech, provided there is no in-person solicitation or individual advice given.

Under DR 2-104(C):

A lawyer may accept employment which 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. However, the lawyer must be careful that there is no direct or open in-person solicitation at such event. For example, the lawyer "should not say, `Call me at my office' or `Please make an appointment to see me individually.'" Simon's New York Code 90 (1995-1996). The problem with these remarks is that they will likely be construed as in-person solicitation. Id. In-person solicitation violates Judiciary Law § 479 and DR 2-103(A).

Yet there are ethical ways the lawyer may gain new clients from those who attend an informational program on wills: "The correct way to give a strong hint is to make sure that the program materials include the lawyer's business card, biography, and other marketing information permitted by DR 2-101." Id. at 91. In response to audience questions, "[t]he lawyer may probably also say, "I would have to know much more about the situation to answer your exact question," or "I cannot answer that question in public." Id. These responses may clue the questioner in that the lawyer could answer the question in private, given more time and information.

Moreover, giving out individual advice is prohibited by DR 2-104(E), which states: "Withoutaffecting 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." DR 2-104(E), essentially a more specific version of DR 2-104(C), is designed partly to guard against malpractice and partly to preserve the attorney-client privilege. The problem is that the lawyer may need more details to give competent legal advice, yet if those details are given in a public forum, such as a group presentation on making a will, the communication is not privileged. To avoid such a situation, a lawyer should say: "I can't address your specific question without knowing more facts, but generally speaking the law on that subject is thus and so." Id. at 91. But should a participant seek the lawyer out after the program for a private chat, the lawyer must be careful about responding to specific questions. The lawyer's answers may create an attorney-client relationship and subject the lawyer to malpractice if the answers are wrong.

(2) Advertising a Program Explaining Wills is Permissible

An organization may advertise that the lawyer will present a fund-raising program explaining wills and their importance. The lawyer must make sure that the advertisement does not violate DR 2-101, which prohibits false or misleading advertising (DR 2-101(A)), and puffery and self-laudation (DR 2-101(B)). As to what information may be properly set forth in the advertisement, the lawyer should look to DR 2-101(C) and (D). Additionally, the lawyer must take care that the organization's ads do not violate DR 2-105. Under DR 2-105(A), the organization may advertise the lawyer as having a wills practice, but may not call the lawyer an "expert" in the area; DR 2-105(B) prohibits the lawyer from holding himself or herself out to be a "specialist" in the wills area.

These guidelines on advertising must also be followed during the introduction of the lawyer at the wills progı

We acknowledge that the lawyer wants to send a letter to various organizations to solicit their participation in the "Make a Will" program. The letter raises the issue of DR 2-103(C), which states, in part: "A lawyer shall not request a person or organization to recommend or promote the use of the lawyer's services…"

Nevertheless, this Committee, in Opinion 93-29, approved of placement of an attorney's name on a parade banner by a not-for-profit organization for which the attorney had performed pro bono work. In part, we based our decision on our Opinion 91-10, in which we determined that a lawyer's failure or refusal to request that a third party not distribute advertising or publicity materials about the lawyer constitutes a request by the lawyer for such advertising. However, the advertising must comply with DR 2-101.

This Committee also approved of advertising legal services through a directory of attorneys and other professionals and retailers, prepared by a non-profit organization and distributed to members of the organization. (Opinion 96-4). But in the same opinion, the Committee determined that it was impermissible for the attorneys listed in the directory to donate to the organization a set percentage of any fees received in connection with legal services provided to its members. The fee donation violated DR 3-102, which prohibits splitting legal fees with non-lawyers, except in certain narrowly defined situations. Id.

(3) Impermissible to Draw a Will as Part of Group "Make a Will" Program

A lawyer may not draw a valid will for an organization's members as part of a "Make A Will" program. Both the New York State Bar Association and the American Bar Association have issued opinions on similar topics; both have opined that donating a legal service for charitable fund-raising is ethically impermissible. The following topics are at issue and are discussed below: (1) improper solicitation; (2) a lawyer's discretion and judgment as to selection of clients; (3) the competence of the lawyer to handle the needs of all participants attending a "Make a Will" program; (4) whether donating legal services to charity violates the Code provision that a lawyer may not receive anything of value from a third person in exchange for recommending the lawyer's employment; (5) intelligent selection of counsel by a client; (6) confidentiality; and (7)conflicts of interest.

N.Y. State Op. 524 (1980) addressed whether it was improper for a lawyer to donate legal services to a charitable organization for auction as a fund-raising device. In that opinion, the State Bar first discussed whether auctioning legal services was soliciting legal employment in violation of § 479 of the Judiciary Law. As this is a question of law, the State Bar declined comment; however, it noted that if auctioning legal services was considered improper solicitation of legal business, it would violate DR 2-103(A). DR 2-103(A) concerns a lawyer seeking professional employment from a person who has not sought advice regarding hiring him in violation of "any statute or court rule." This rule essentially incorporates Judiciary Law § 479, governing solicitation of legal business.

Here, there is a question as to whether the "Make a Will" program can be distinguished from the concern of improper solicitation under § 479, because participants in the "Make a Will" program may be considered to have sought advice regarding employment of the lawyer by deciding to sign up for and attend the program. Despite the possibility of removing this inquiry from § 479, other aspects of drawing a valid will as part of a "Make a Will" fund-raising program are problematic enough to make it ethically impermissible.

The auctioning of legal services also circumvents a lawyer's ability to "exercise the professional judgment and discretion that must be brought to bear in deciding to accept a client." N.Y. State Op. 524. The Code specifies several factors a lawyer must consider before deciding to represent a client. In particular, EC 6-1 states that a lawyer "should accept employment only in matters which he is or intends to become competent to handle." In the proposed "Make a Will" program, however, the lawyer has agreed to represent the participant without knowing whether the will he will be required to make is beyond his competence.

But this problem can be overcome through the lawyer's diligence. DR 6-101(A)(1) provides that a lawyer can accept a matter beyond his competence "if in good faith the lawyer expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to the client." The lawyer may also associate with a more experienced lawyer; however, if that more experienced lawyer is not within the lawyer's own firm, it brings up the issue of whether the lawyer can find another lawyer willing to donate his fee to the "Make a Will" program. Under DR 2-107(A)(1), the lawyer would also have to receive consent from the client/participant after full disclosure about the division of "fees."

The New York Bar also objected to donating legal services to charity through an auction for fund-raising because it may be "deemed improper under DR 2-103(B), which prohibits the lawyer from giving anything of value to a third party for recommending the lawyer's employment." N.Y. State Op. 524 (1990). In support of this position, the State Bar relied on ABA Inf. Op. 1288 (1974), which is directly on point for the present inquiry. In ABA Inf. 1288, a lawyer offered to prepare wills for church members, but would pay the lawyer's standard fee directly to the

church as a donation. Despite the charitable intent, the ABA opined that the arrangement was improper under DR 2-103(B), because the lawyer was giving a "thing of value" to the organization in exchange for employment. ABA Inf. 1288 (1974).

In this inquiry, the lawyer is directing payment of his fees from the "Make a Will" program to an organization in return for obtaining employment by the organization's members who participate in the program. Following the ABA's opinion, this is improper under DR 2-103(B).

But whether the lawyer is actually receiving a "thing of value" is subject to interpretation. As the fee for the lawyer's services goes to the charity and not the law firm, the value may be seen as accruing to the charity and not the law firm (See Fl. Eth. Op. 86-9 (1987), discussed below.) Another view is that, while the law firm does not take the fee, it gets value from the pool of potential new clients and name recognition from the "Make a Will" program.

The New York Bar reasoned that offering legal services as a fund-raising device is an inappropriate means of publicity, citing DR 2-101(C) and (D). "Such devices, we believe, tend to confuse the process of intelligent selection of counsel with the objectives of the fund-raising organization." N.Y. State Op. 524 (1980).

The organization's advertising will no doubt highlight the fund-raising aspect of the program: that is its draw. Consequently, it is easy to imagine members of an organization deciding to have a will drawn under the "Make a Will" program solely, or in large part, because of the benefit it will provide to the organization to which they belong, and not because of their confidence in the lawyer's competence and ability to serve their needs. What is more, they have committed to pay a "fee" to the organization without knowing whether they can be provided with th type of will they require. N.Y. State Op. 524 (1990). This scenario runs counter to DR 2- 101(D) which provides .. part that: "Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel."

Perhaps an even more harmful situation arising from the client and the lawyer both "flying blind" with regard to the selection process, is a potential for bait-and-switch. If after consulting with the lawyer, a significant number of "Make a Will"participants find that they need legal services beyond the fee for the simple will, this would create the problem of misleading advertising, a violation of DR 2-101.

To this list of ethical prohibitions, we add the problems of confidentiality covered by DR 4-101 and conflicts of interest covered by Canon 5. Within a large group setting, such as may occur within the "Make a Will" program, the lawyer may be hard-pressed to ensure the confidences and secrets of each participant. Bits of conversation may be overheard, or responses written in questionnaires may be seen by other participants or members of the organization. These acts would break the attorney-client privilege and violate DR 4-101, Preservation of Confidences and Secrets of a Client.

Furthermore, it is possible that under one or more of the Disciplinary Rules in Canon 5 (A Lawyer Should Exercise Independent Professional Judgment On Behalf Of A Client), the lawyer may face a conflicts of interest situation; the lawyer may be prevented from exercising his or her best judgment on behalf of each participant. This

situation presents the problem of the lawyer having to find adequate replacement counsel, who (1) is willing to divide fees with the lawyer and donate them to the organization and (2) is approved of by the particular "Make a Will" participant with whom the lawyer has a conflict.

The ABA also raised issues arising under DR 5-107(B) ("Avoiding Influence by Others Than the Client"). In ABA Inf. Op. 1288 (1974), there was a precondition of a gift to the church in the will the lawyer was to draw for church members. The "Make a Will" program does not have such a precondition; nevertheless, the lawyer in the "Make a Will" program might be reluctant to seem disloyal to the fund-raising organization by recommending against a gift to the organization, even if advising against such a gift would be in the best interest of the testator.

Other States Opine that Donating Legal Services to Charitable Groups is Ethically Permissible

The inquirer noted that the "Make a Will" program has been successful outside the state of New York. We note that both Florida and South Carolina, for example, have issued opinions which find it ethically permissible for a lawyer to donate legal services for fund-raising, provided it is within certain ethical bounds.

Although Florida is a Model Rules state, Florida Eth. Op. 86-9 (1987) covered many of the same issues as the ABA and New York State Bar in their opinions, albeit with a different result. The Florida Bar deemed that donating a will or other legal service for auction (or use as a door prize) by a charitable organization, was a good way to fulfill an obligation for pro bono services to a lawyer's community, as long as certain ethical provisions were considered.

Florida's Rule 4-7.2(C) parallels New York's DR 2-103(B), in that both forbid a lawyer to give anything of value to a person for recommending a lawyer's services. While the New York Bar determined that auctioning legal services for a charitable donation violates DR 2-103(A), the Florida Bar reasoned that the value of the lawyer's services in a fund-raising auction is being given directly to the organization; therefore, the lawyer is not receiving anything of value for his legal services in exchange for employment. Additionally, Florida concluded that an auction of legal services is not a recommendation of services itself; however, a lawyer should "instruct the organization not to recommend or urge, in publicizing or conducting the auction, that its patrons take their legal business to the lawyer." Florida Ethics Op. 86-9 (1987).

The Florida opinion also specified ways a lawyer could comply with the ethical rules prohibiting false or misleading advertising, such as avoiding advertising "likely to create an unjustified explanation about results the lawyer can achieve." Id.

Moreover, Florida addressed a variety of conflict of interest problems that might arise. Its solution was to have the lawyer obtain a guarantee from the charitable organization that the auction winner's donation would be "refunded on request if the lawyer is prevented by any of the conflict rules from performing the auctioned service for that person." Id. However, the lawyer may arrange with another competent attorney with whom he is not associated to provide the legal service at no charge, provided the client approves of the substitution. Id. Florida's opinion also noted that the lawyer "must not permit the charitable organization to dictate or interfere with the lawyer's performance." But Florida prefaced that remark by stating that "there is no reason to believe such a problem would materialize." Id.

The South Carolina Bar Ethics Advisory Committee also advised that it is not a violation of its Rules of Professional Conduct for a lawyer to donate legal services for auction at a fund- raiser for charity or other "good cause" organization. SC Adv. Op. 91-35 (1992). The South Carolina Committee's concern was to avoid misleading the recipient of the legal services as to what services he or she would receive from the donating lawyer. To overcome this problem, South Carolina said the donating lawyer must offer the services with certain express qualifications, clarifications and reservations, such as: (1) defining the nature and scope of the services with reasonable specificity; (2) a recipient may have need of more elaborate legal services than bid, warranting a higher fee, and; (3) there may be circumstances which would prevent the lawyer from performing the legal service, such as a conflict of interest. Id.

Notwithstanding the reasoned positions of the Florida and South Carolina Bars, this committee aligns itself with the opinions of NYSBA and the ABA, for the reasons stated above, and opines that the preparation of wills for an organization's members as part of a fund-rasing event is not ethically permissible.

[Approved by the Executive Committee on December 9,1997; Approved by the Full Committee on December 17, 1998.]

UPCOMING EVENTS

- BBQ at the Bar
- Virtual Lawyer Assistance Program Wellness Seminars
- Virtual NCBA Committee Meetings

View all events (https://www.nassaubar.org/upcoming-events/)

CLE

- CLE On Demand
- Nassau Academy of Law
- PART 36 Certified Training Order Form

NEWS AND ANNOUNCEMENTS

- Nassau County Bar Association Releases Statement on Attacks Against Asian Americans
- The Members of the NCBA LGBTQ Committee Wish Everyone a Happy Pride!
- NCBA Mourns the Loss of Hon. Jack B. Weinstein

View all announcements (/announcement)

CLICK HERE (https://www.nassaubar.org/announcements/update-regarding-covid-19/) for latest COVID-19 and Court updates.

15th and West Streets | Mineola, NY 11501 | (516) 747 4070 (tel:516 747 4070) | Fax (516) 747 4147

CLICK HERE (https://www.nassaubar.org/announcements/update-regarding-covid-19/) for latest COVID-19 and Court updates.

Page 664

700 N.Y.S.2d 664
1999 N.Y. Slip Op. 99,586
In the Matter of the ESTATE OF Arlyeen M. EDEL, Deceased.
Surrogate's Court, Cattaraugus County, New York.
Dec. 8, 1999.

Page 665

Williams, Stevens, McCarville & Frizzell, P.C., Buffalo (John T. Frizzell of counsel), for estate.

Timothy J. Greenman, West Seneca, for Charles E. Haug, Jr., objectant.

Alan Spears, Allegany, for Patricia Ceislik, objectant.

LARRY M. HIMELEIN, J.

The issue presented by this case is whether summary judgment may be granted to an estate, over the objectants' claims of fraud and undue influence, when an attorney prepares a will that leaves the bulk of the testator's estate to a charity that the attorney represents in its legal matters and also serves as Chairman of the charity's Board of Directors.

Arlene M. Edel died on January 11, 1996, leaving a will executed on December 5, 1995, which has been submitted to this court for probate. The will left a number of specific bequests including $250,000.00 to the Olean General Hospital. The hospital was also the sole residuary beneficiary.

Charles E. Haug, Sr., decedent's estranged son, and Patricia Ceislik, decedent's granddaughter, have filed objections to probate, alleging fraud and undue influence as to the hospital's share under the will. Objectants note that John M. Hart, Jr., the attorney who drafted the will, is also the Chairman of the Board of Directors of Olean General Hospital and further, that Mr. Hart is a partner in the law firm that represents the hospital in its legal matters. The claim is that Mr. Hart utilized fraud and undue influence to induce Ms. Edel to leave the bulk of her estate to the hospital. Objectants also allege fraud and undue influence on the part of Dr. Robert Catalano, M.D., the Chief Executive Officer of the hospital.

Discovery is complete and the estate has moved for summary judgment contending that (1) the prime consideration in this proceeding should be Ms. Edel's intent; (2) the opportunity to exercise undue influence is not evidence that such influence was in fact exercised; and (3) if evidence of undue influence is found, the cy pres doctrine should be invoked to insure that Ms.

Edel's estate does not pass in a way she sought to avoid. Because Ms. Edel's intent is not specifically at issue on this summary judgement motion, and because applicability of the cy pres doctrine must await a determination of the issues of fraud and undue influence, we are concerned only with this question: is there enough evidence in this record to warrant a trial?

A review of the salient facts is appropriate. Decedent first retained Mr. Hart to draw a will in 1980. Two wills were executed by Ms. Edel in 1980 but they appear to be identical. Neither will left anything to Olean General Hospital although St. Francis Hospital, which was later acquired by Olean General Hospital, was left 40% of the residuary.

Mr. Hart became a member of the Olean General Hospital Board of Directors in 1985. In August of that year, Olean General Hospital was named a 30% residuary legatee under a new will prepared by Mr. Hart and executed by Ms. Edel. Objectants contend that this bequest alone posed a potential conflict of interest that required a written acknowledgment by the client of the conflict. The court, however, is not convinced that an attorney-draftsman who serves without pay on the board of directors of a charitable organization

Page 666

has a conflict of interest simply because the attorney's client names the charity in her will. Such a holding would serve to discourage attorneys from serving on the boards of charitable and civic organizations. Were that the only issue, the summary judgment motion would probably be granted.

Decedent executed nine more wills prior to her death, all drawn by Mr. Hart and all of which left most of decedent's estate to charity. Olean General Hospital's bequest went from 30% of the residuary to 60% and ultimately to 100%. The last will drawn, the will at issue here, also left a specific bequest of $250,000.00 to the hospital. The objectants contend that the increased bequests to Olean General Hospital coincide with a closer relationship between decedent and Mr. Hart, coincide with Mr. Hart's election to the Board of Directors of Olean General Hospital and ultimately, his becoming Chairman of the Board, and coincide further with Mr. Hart's law firm's retention to handle the hospital's legal matters. The estate notes, however, that none of the wills executed by decedent left anything to Mr. Haug and the last five wills specifically disinherited him. Thus, the estate believes that Mr. Haug's contentions are meritless and are simply an effort to obtain by intestacy, if the bequests to the hospital are stricken, a share in his estranged mother's estate.

In 1989, the law firm in which Mr. Hart is a partner began doing legal work for the hospital. On December 1, 1992, Ms. Edel increased her residuary bequest to the hospital from 60% of the residuary to 100%. The following day, at a meeting of the Board of Directors, Mr. Hart moved her election as a corporate member and the motion was approved. According to the hospital, one of the benefits of corporate membership, in the event the member is hospitalized, is receiving a private room while only being billed for a semi-private room. The objectants claim that there is no evidence that this policy existed for anyone but Ms. Edel and that making her a corporate member was essentially a sham.

In June of 1994, Ms. Edel contacted Mr. Hart about a billing problem with the hospital and Mr. Hart sent her complaint to Dr. Catalano, asking him to look into the matter. Mr. Hart noted that Ms. Edel was a permanent member of the hospital and had named Olean General Hospital the beneficiary of a "major portion of her substantial estate." Two days later, Dr. Catalano responded that he had resolved the dispute by "writing off" a bill of $61.00. Dr. Catalano also indicated to Mr. Hart that he had reviewed Ms. Edel's medical chart to determine whether the treatment she received was appropriate.

On March 18, 1995, during another hospital stay, Ms. Edel sent Mr. Hart a letter stating that she believed that board members "received their hospital room during their illness." This appears to mean that Ms. Edel believed she would receive a private room but would only be billed for a semi-private room. Mr. Hart passed the letter along to Dr. Catalano and asked him to look into it, noting that Ms. Edel was leaving the hospital her residuary estate and that her estate was "substantial." Objectants contend that these communications from Mr. Hart to Dr. Catalano discussing the substance of Ms. Edel's wills and the size of her estate, violated the attorney-client privilege between Mr. Hart and Ms. Edel and support their claim that Hart and Catalano worked together to insure that Ms. Edel's entire estate was left to the hospital.

Later in 1995, Ms. Edel sent a letter to Mr. Hart discussing a potential donation to the hospital and notes, "I doubt I would have given the transfer much thought if you hadn't discussed it." John F. McLaughlin, an investment advisor from Key Bank who handled Ms. Edel's account, claims that he was asked to meet Dr. Catalano at the hospital on September 15, 1995. At this meeting, which was also attended by Mr. Hart, Mr. McLaughlin

was handed a note alleged to have been written by Ms. Edel, directing Mr. McLaughlin to liquidate $500,000.00 worth of decedent's mutual funds and give the money directly to the hospital.

Mr. McLaughlin immediately sent a memo to his superiors expressing concern about a conflict of interest between Mr. Hart's representation of Ms. Edel and his position as chairman of the hospital board and also questioned whether Ms. Edel was aware that she would no longer receive dividends if her $500,000.00 was given to the hospital at that time. He also noted that immediately prior to her being admitted to the hospital, Ms. Edel intended to live off the dividends from her investment account and give the principal to the hospital only at her death, thus implying that her wishes changed after she went into the hospital. Objectants allege that Catalano visited decedent almost daily while she was hospitalized. Mr. McLaughlin added that he was not comfortable liquidating Ms. Edel's assets and giving them to the hospital at that time unless counsel for Key Bank reviewed the situation. Ultimately, Ms. Edel's investment account was not disturbed.

On November 19, 1995, Ms. Edel wrote Dr. Catalano expressing what appears to be displeasure that neither Dr. Catalano nor Mr. Hart had explained to her that if she gifted the $500,000.00 to Olean General Hospital, she would lose the income from that money. The proponent of the will disputes the objectants' contention that this letter indicates any displeasure on decedent's part. Nonetheless, Dr. Catalano visited decedent shortly after receiving the letter and observed her to be "ill and confused" and apparently unable to recognize him. On December 5, 1995, the will sought to be admitted to probate was executed at the nursing home where Ms. Edel was then residing. She died on January 11, 1996.

In its summary judgment motion, the estate alleges certain facts it contends are "undisputed." For example, the estate contends that Ms. Edel was strong-willed and alert. It is true that the witnesses to the will, one of whom was Mr. Hart, testified that decedent was competent when the will was executed, although she was disoriented when Mr. Hart and his secretary first arrived. However, Dr. Catalano visited decedent in the nursing home prior to her execution of the will at issue and found her to be "ill and confused" and unable to "appreciate who I was."

The estate also argues that Ms. Edel's many wills establish her intent to leave the bulk of her estate to charity and to disinherit her son. However, that is simply one of many facts that a jury must consider on the claims of fraud and undue influence. Moreover, the argument is perhaps more relevant if a jury should find for the objectants on those issues. The estrangement between mother and son might be important on the question of whether the bequests to the hospital should pass by intestacy or whether

another doctrine such as cy pres or dependent relative revocation should be invoked to insure that decedent's estate does not pass to someone she intended to disinherit.

The issue this court must address is whether there are sufficient facts on the questions of fraud and undue influence to warrant a trial. As part of that issue, the court must address whether Mr. Hart's legal representation of the hospital and service as Chairman of its Board of Directors poses a conflict of interest with his representation of Ms. Edel, and if so, what impact, if any, the conflict has on the instant motion.

More than sixty years ago, in Matter of Putnam, 257 N.Y. 140, 177 N.E. 399, the Court of Appeals instructed that attorneys who have clients who intend to leave the attorney or the attorney's family a bequest should have the will drawn by another lawyer. Further, a lawyer who drafts a bequest to himself or herself must explain the circumstances and show that the gift was "freely and willingly made" (Id., 257

Page 668

N.Y. at 143, 177 N.E. 399 citing Matter of Smith, 95 N.Y. 516). Such a bequest is viewed with "great suspicion" and the absence of an explanation might permit the jury to draw an inference of undue influence (Id., see also, Marx v. McGlynn, 88 N.Y. 357; Matter of Kindberg, 207 N.Y. 220, 100 N.E. 789).

The Fourth Department has held that where a client makes a will that leaves a bequest to her lawyer, the trier of fact may draw an inference that the bequest was procured because of the undue influence of the attorney, even without direct proof of that fact (Estate of Lawson, 75 A.D.2d 20, 428 N.Y.S.2d 106). The Fourth Department has further said

"... where there is a confidential relationship between the decedent and the beneficiary/drafter of the will, the mere fact of the bequest, standing alone, [emphasis supplied] permits an inference of undue influence, and the drafter then has the burden of offering an explanation, alternative to his influence, for the contested will [citations omitted]."

(Estate of Collins, 124 A.D.2d 48, 510 N.Y.S.2d 940, 944; see also, Matter of Moran, 261 A.D.2d 936, 689 N.Y.S.2d 798). Thus, it appears that whenever a bequest is made to an attorney-draftsman, the objectants would be entitled to a trial.

While these Fourth Department cases concern bequests made directly to the attorney-draftsman, they are also notable for holding that fraud and

undue influence may be shown circumstantially. Indeed, it has been held that undue influence is usually not shown by direct proof but rather established by circumstantial evidence (Matter of Panek, 237 A.D.2d 82, 667 N.Y.S.2d 177). It seems to the court that summary judgment should rarely be granted in a circumstantial evidence case.

Here, of course, the will does not make a bequest directly to the attorney-draftsman. However, most of the estate goes to the Olean General Hospital, which pays Mr. Hart's law firm a substantial amount of money for legal services. Objectants note that Mr. Hart's firm billed Olean General Hospital more than $82,000 in the two years prior to Ms. Edel's death. They contend that this scenario is every bit as onerous as the Putnam scenario and the Putnam holding should be applied here, thus mandating a trial. Clearly, if the bequest to the hospital is deemed, because of Mr. Hart's financial and other ties to the hospital, a bequest to Mr. Hart, Putnam and the other cases apply and a trial must be held.

Matter of Henderson, 80 N.Y.2d 388, 590 N.Y.S.2d 836, 605 N.E.2d 323, while not precisely on point, may be illustrative in connection with the instant motion. There, the testator wished to leave her attorney a bequest. The attorney declined to write himself into a will and recommended that the testator retain new counsel. She did so and executed a will which made a bequest to the former attorney. Surrogate Radigan denied the proponent's motion for summary and directed a hearing. After the Appellate Division reversed (see, 175 A.D.2d 804, 572 N.Y.S.2d 932), the Court of Appeals reinstated Judge Radigan's order directing a trial. While the Court of Appeals found that Putnam was inapplicable to the case, the objectants' claims, which appear to be weaker than those made here, were sufficient to require a trial on the issues of fraud and undue influence.

In Will of Elmore, 42 A.D.2d 240, 346 N.Y.S.2d 182, the Third Department held that "[w]here a will has been prepared by an attorney associated with a beneficiary [emphasis supplied], an explanation is called for (citing Matter of Lamerdin, 250 App.Div. 133, 293 N.Y.S. 967)". Further, whether the explanation is adequate is a question of fact for the jury (Id.). If Elmore is strictly applied here, and the attorney-draftsman simply being "associated" with the beneficiary is sufficient to require an explanation, there is no question but that a trial must be held. However,

Page 669

Elmore is the only case the court has found that holds so broadly.

The issue of Mr. Hart's representation of both the hospital and Ms. Edel is important to all parties because of certain presumptions that may or may

not apply. If Mr. Hart is deemed a beneficiary under the will, he must offer evidence to explain the bequests that benefit him (Estate of Collins, supra; Estate of Lawson, supra) and the objectants would be entitled to a favorable jury charge on the issue (see, PJI 7:56, 7:57). If Mr. Hart is not deemed a beneficiary, no presumption of undue influence arises and the cited charges would not be given.

Other cases have applied these principles in different contexts. For example, the rule has been applied where the beneficiary-testator relationship is that of guardian and ward (In re Smith, 95 N.Y. 516); physician and patient (In re Satterlee's Will, 281 A.D. 251, 119 N.Y.S.2d 309, Marx v. McGlynn, 88 N.Y. 357); parent and child (Matter of Kurtz, 144 A.D.2d 468, 533 N.Y.S.2d 985); minister and congregant (Marx v. McGlynn, supra); or the beneficiary is a nursing home operator (Matter of Burke, 82 A.D.2d 260, 441 N.Y.S.2d 542). Again, however, these cases all involve instances where the bequest was made directly to the recipient and not to an organization with which the recipient had a financial or fiduciary relationship. This court, absent some higher authority, declines to apply to rule of Putnam and its progeny to the facts of this case.

That holding, however, is not dispositive. Undue influence is not limited to the classic sense of fraud and duress; insidious, subtle and impalpable pressure that subverts the testator or internalizes within the testator the desire to do, not her intent, but the intent of another, can also constitute undue influence (Will of Kaufmann, 20 A.D.2d 464, 247 N.Y.S.2d 664, affd. 15 N.Y.2d 825, 257 N.Y.S.2d 941, 205 N.E.2d 864; Estate of Antoinette, 238 A.D.2d 762, 657 N.Y.S.2d 97; Matter of Tank, 132 Misc.2d 146, 503 N.Y.S.2d 495).

Here, the amount of the bequest to the hospital, which Mr. Hart served as attorney and board chairman, increased the longer Mr. Hart was Ms. Edel's attorney. The relationship between attorney and client became closer over the years and objectants allege that Mr. Hart did not bill Ms. Edel for legal services he provided her during the last ten years of her life. The incident where Mr. Hart and Dr. Catalano are alleged to have attempted to have decedent's assets immediately transferred to the hospital is a factor for a jury to consider. While the transfer was never effected and the proponents contend that the incident is meaningless, it is not for the court to make that determination (see, Matter of Tokarz, 199 A.D.2d 400, 605 N.Y.S.2d 365). Further, Ms. Edel's own follow up letter where she appears to be critical of Dr. Catalano because she was not told that the immediate transfer of her money would leave her without income is a factor that a jury might find supportive of objectants' claims of fraud and undue influence.

Objectants also contend that the alleged violation of the attorney-client privilege demonstrates the extent of the conflict of interest they believe Mr. Hart had in this case. They further contend that Dr. Catalano became extremely solicitous of Ms. Edel during her hospital stays in order to insure that Olean General would receive her estate. The objectants also contend that Ms. Edel's being made a member of the board was a fiction designed only to insure that she would leave her estate to the hospital. At this point, of course, these are only allegations; however, the court believes that only a trial can determine what the facts are and what inferences and conclusions should be drawn from the facts (see, Estate of O'Brien, 182 A.D.2d 1135, 583 N.Y.S.2d 100; Estate of Raskas, 213 A.D.2d 718, 624 N.Y.S.2d 279;

Page 670

Estate of Delyanis, 252 A.D.2d 585, 676 N.Y.S.2d 219; Will of Moran, supra).

Objectant Ceislik has cross moved for summary judgment on the grounds that (1) EPTL § 3-3.2 makes the bequest to Olean General Hospital void as a matter of law; (2) Mr. Hart's testimony must be precluded pursuant to CPLR § 4519; and (3) a presumption of undue influence should be applied on these facts.

EPTL § 3-3.2(a)(1) provides that a disposition made to an attesting witness is void unless there are at least two other attesting witnesses. However, the court is not convinced that the bequest to the hospital falls under this section and objectant Ceislik cites no authority in support of her contention. This court declines to hold EPTL § 3-3.2 applicable to a situation where the attorney draftsman is, at most, an indirect beneficiary.

Objectant also contends that Estate of Schrutt, 206 A.D.2d 851, 615 N.Y.S.2d 204, prevents Mr. Hart from testifying in this case. However, Schrutt concerned the testimony of co-executors, not the attorney-draftsman. The court declines to hold that an attorney-draftsman's representation of a charity that receives a bequest requires application of the Dead Man's Statute, especially in a summary judgment context. Moreover, the court further declines to apply the legal presumptions from Putnam and its progeny to this case. The jury will decide what influence, if any, Mr. Hart's joint representation had on Ms. Edel in this case.

Accordingly, both motions for summary judgment are denied.

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 1008 (4/24/2014)

Topic: Representing new clients adverse to a current or former client

Digest: Whether a law firm may represent new clients against an entity that the law firm has represented in the past depends on whether the entity is a current or former client, which is a mixed question of fact and law. A law firm may not oppose a current client in any matter, related or unrelated, absent the current client's informed consent, confirmed in writing. However, a law firm may oppose a former client in any matter that is not substantially related to the firm's legal work for that former client. Even if the entity is no longer a client, a law firm has a continuing duty to protect confidential information of that entity.

Rules: 1.6(a); 1.7(a) & (b); 1.9(a) & (c)

FACTS

1. Inquirer is a law firm ("Law Firm") that desires to represent some new clients ("New Clients") against an entity that the Law Firm considers to be a former client (the "Entity"). The Entity objects to the representation. The Entity and the Law Firm have jointly prepared and submitted a detailed set of facts that we accept for purposes of this opinion. According to the jointly submitted statement of facts, the Entity at one time leased a gas station. The gas station's owner later sued the Entity and a co-defendant ("Co-Defendant") for breaching the lease agreement (the "Lease Action"). The owner sought to recover the costs of removing gasoline storage tanks and remediating the premises. The Law Firm defended the Entity in the Lease Action.

2. The defense in the Lease Action was controlled by the Entity's Co-Defendant, which had purchased the Entity's interest in the property before the Lease Action began. The purchase was made pursuant to a Purchase and Sale Agreement ("PSA") covering scores of gas stations. The Law Firm worked closely with the Co-Defendant's counsel on the Lease Action. The Lease Action eventually settled.

3. Recently, the Law Firm agreed to represent the New Clients against the Entity and/or its Co-Defendant. Specifically, the New Clients claim that the Entity and/or its Co-Defendant operated various gas stations (though not the one involved in the concluded Lease Action) in a manner that damaged the New Clients' property. The Entity at one time owned these other gas stations, but sold them to Co-Defendant pursuant to the PSA before the Lease Action was filed.

4. The Entity has asked the Law Firm to withdraw from representing the New Clients, on

two grounds: (a) the Law Firm never sent a termination letter to the Entity, which therefore contends that it remains a current client; and (b) even if the Entity is a former client, it contends that the new matter is substantially related to the Lease Action in which the Law Firm defended the Entity. Specifically, the Entity says that the matters are substantially related because the Law Firm acquired confidential information during the Lease Action regarding: (i) the Entity's negotiating strategy in the Lease Action, (ii) the Entity's interpretation of the PSA, (iii) the relationship between the Entity and its Co-Defendant in the Lease Action, and (iv) the future obligations of the environmental/remediation contractor assigned to the PSA properties by the Entity.

5. The Law Firm counters that (a) the Entity is a former client because the Law Firm has not performed any legal services for the Entity since October 2012, and (b) the New Clients' matter is not substantially related to the Lease Action. Specifically, the Law Firm contends that the New Clients' claims are not substantially related because the present claims involve a different lease agreement and different gas stations. The Law Firm recognizes that the New Clients' matters might involve theories of recovery under the PSA, but the Law Firm says the PSA would potentially be a discoverable document. In sum, the Law Firm argues that the present and former matters are not substantially related because the Law Firm did not acquire any confidential information from the Entity in the Lease Action that New Clients could use to the Entity's disadvantage in the present dispute.

QUESTION

6. If a law firm represented an entity in a matter and has not performed any legal services for the entity for more than a year, but the law firm has not sent a termination letter to the entity, may the law firm represent new clients against the entity, over the entity's objection, in a new matter that is related in some ways to the original matter?

OPINION

7. The inquiry raises three sets of issues: (i) conflicts with current clients; (ii) conflicts with former clients; and (iii) duties of confidentiality to former clients. We will address these issues in turn. We address only whether the representation is permitted under the New York Rules of Professional Conduct (the "Rules").[1] We are not taking into account additional factors that a

[1] The inquiry was submitted by a law firm rather than by an individual lawyer. For simplicity of expression, this opinion speaks in terms of duties of that firm rather than duties of its individual lawyers. At the expense of that simplicity, we could set forth our analysis in greater detail to account for the following. We rely on certain provisions of the Rules in which the direct imposition of duties is upon an individual lawyer rather than upon a law firm. *See* Rules 1.6(a), 1.7 and 1.9. It is through *other* provisions of the Rules that such duties are imposed derivatively (or related duties are imposed) on others in the lawyer's firm and on the firm as a whole. *See*, *e.g.*, Rule 1.6(c) (requiring lawyer to exercise reasonable care to prevent breaches of confidentiality by others), Rule 1.10 (a)-(c) (imputing specified conflicts to law firm and its associated lawyers), Rule 1.10(e) (requiring law firm to maintain conflict-checking system), Rule 5.1 (requiring law firm and supervisory lawyers to make reasonable efforts to ensure that lawyers in the firm conform to the Rules), and Rule 8.4(a) (providing that a lawyer "or law firm" shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do

court might consider if deciding a motion to disqualify, and we are not predicting how a court would rule if such a motion were eventually filed. Our jurisdiction extends only to interpreting the Rules; we do not opine on legal questions such as whether there is warrant for disqualification.

A. Conflicts with Current Clients: Rule 1.7.

8. The threshold question is whether the Entity is a current client or a former client. Rule 1.7(a)(1) generally prohibits a law firm from opposing a current client in any matter, related or unrelated, absent compliance with Rule 1.7(b), which among other things would require the client's informed consent confirmed in writing.[2] If the Entity remains a current client of the Law Firm, therefore, the Law Firm may not oppose the Entity on behalf of New Clients because the Entity is objecting rather than consenting to the representation. But if the attorney-client relationship between the Law Firm and the Entity has ended, then we would instead apply Rule 1.9, which governs conflicts with former clients.

9. The Rules of Professional Conduct do not define when an attorney-client relationship ends. On the contrary, Scope ¶ 9 says that "principles of substantive law external to these Rules determine whether a client-lawyer relationship exists." Thus, whether the attorney-client relationship between the Law Firm and the Entity has ended depends in part on questions of law beyond our jurisdiction. Scope ¶ 9 also says: "Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." We also lack sufficient facts to determine whether the Entity remains a current client of the Law Firm.

10. We note, however, that the Law Firm's failure to send a termination letter to the Entity does not by itself prove that the attorney-client relationship continues. A termination letter (or email) from a lawyer to a client clearly notifying the client that the attorney-client relationship has ended will often be a good practice, and in some circumstances may be dispositive. But an attorney-client relationship may also terminate without a termination letter. *See, e.g., Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.,* 687 F. Supp. 2d 381, 389-91 (S.D.N.Y. 2010) ("'In what is perhaps the most typical situation, an attorney-client relationship … is terminated, simply enough, by the accomplishment of the purpose for which it was formed in the first place,'" and a rule "that requires a law firm announce the conclusion of its engagement …. would conflict with the principle … that the relationship is terminated upon the accomplishment of the purpose for which it was created"); *Miller v. Miller*, 203 A.D.2d 338, 339, 610 N.Y.S.2d 88, 89 (2d Dep't 1994) ("When the Family Court matter concluded, so did the attorney-client relationship"); Restatement (Third) of the Law Governing Lawyers § 31(2)(e) (2000) ("a lawyer's actual

---

so, or do so through the acts of another"). However, we do not think it necessary to set forth all our analysis at that greater level of detail.

[2] "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." Rule 1.7, Cmt. [6]. Conflicts arising under Rule 1.7 (and also those arising under Rule 1.9, which we discuss below) are among those imputed by Rule 1.10(a) to other lawyers associated in the same firm.

authority to represent a client ends when … the lawyer has completed the contemplated services").

11. The passage of time is another indicator of whether a person remains a current client, but it is not dispositive. Other circumstances, such as a longstanding pattern of representation over the years or the client's reasonable belief that a lawyer needs to perform additional legal work to fulfill the purpose of the representation, could also preserve an attorney-client relationship, even if the Law Firm has no specific pending assignment for the Entity at a given moment.

12. Here, despite the lack of a termination letter, several circumstances – including the fact that the Law Firm has concluded its work on the Lease Action and has not handled (or been asked to handle) any new matters for more than a year – suggest that the Entity is a former client. The parties have not identified any countervailing factors, such as a longstanding pattern of representation over the years, or the Entity's reasonable belief that the Law Firm needs to perform additional legal work to fulfill the purpose of the earlier representation. If such factors exist, they could count in favor of the Entity being a current client.

13. Although we have set forth some relevant factors, we do not have all the facts relevant to whether the Entity remains a current client of the Law Firm, and in any event we lack authority to reach what is ultimately a legal determination on that issue. If the Entity remains a current client of the Law Firm, then the Entity is entitled to the protections of Rule 1.7(a)(1). In that case the Law Firm may not oppose the Entity in any matter, related or unrelated, unless the conflict is consentable under Rule 1.7(b)(1) and the Law Firm obtains the Entity's informed consent, confirmed in writing, under Rule 1.7(b)(4).

B. <u>Conflicts with Former Clients: Rule 1.9</u>.

14. If the Entity is not a current client, then it is a former client. Under Rule 1.9(a), a lawyer may not represent a client with interests "materially adverse" to those of a former client in a matter "substantially related" to the matter the lawyer handled for the former client, unless the former client gives informed consent, confirmed in writing. Here, the interests of New Clients in the current matter are "materially adverse" to the interests of the Entity, and the Entity has not consented (and in fact has objected) to the Law Firm's representation of New Clients. Given the former client's objection, the only open question is whether the current matter is "substantially related" to the former matter (the Lease Action).

15. Guidance on this question is found in Comment [3] to Rule 1.9. The first sentence says that matters are "substantially related" if (i) they involve the "same transaction or legal dispute" or (ii) a reasonable lawyer would perceive "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." Here, the new matter is plainly not the "same transaction or legal dispute" as the old one, but the new and old matters could still be substantially related based on the risk that confidential information acquired by the Law Firm in the old matter would materially advance the position of New Clients in the new matter. We therefore turn to the balance of Comment [3], which discusses how even distinct matters may be substantially related through confidential information.

16. Some parts of Comment [3] address what "normally" or "ordinar[il]y" happens, rather than whether the lawyer *actually* obtained confidential information in the particular case. It makes sense that what normally happens should trigger the protections of Rule 1.9(a). As Comment [3] notes, the purpose of those protections would be defeated if a party seeking disqualification had to reveal its confidential information in order to protect it:

> 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.

17. The relevance of what normally or ordinarily happens is reflected in the Comment's example of a matter deemed to be substantially related even though the example identifies no particular actually acquired confidential information: "[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…." Rule 1.9, Cmt. [3].

18. On the other hand, the *actual* receipt of confidential information in the prior matter would seem even more compelling than a mere likelihood of its receipt. "*A fortiori*, matters are also substantially related if the lawyer in question actually and knowingly obtained (and now possesses) confidential factual information that would materially advance the prospective client's position in the subsequent matter." N.Y. State 992 ¶7 (2012). This view is supported by the following language from Comment [3]:

> [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…. [K]nowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

19. Comment [3] also suggests various reasons that current and former matters might *not* be substantially related:

- The environmental lawyer mentioned above "would not be precluded … 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."

20. The inquiring Law Firm should apply the precepts of Rule 1.9(a) and Comment [3] to the various kinds of information that the Entity contends demonstrate a substantial relationship between the Lease Action and the current matter, and to other kinds of potentially relevant information as well, such as the practices of the Entity in maintaining gas stations.

21. If any of these kinds of information would "materially advance" New Clients' position against the Entity, that would make the matters substantially related and preclude the new representation. However, the "materially advances" inquiry is fact-intensive, so we cannot reach a definitive conclusion as to whether the matters are substantially related.

C. Confidentiality Duties to Former Clients: Rule 1.9(c).

22. Whether or not the present and former matters are substantially related, the Law Firm has a continuing duty of confidentiality to the Entity pursuant to Rule 1.9(c), which "generally extends the confidentiality protections of Rule 1.6 to a lawyer's former clients." Rule 1.9, Cmt. [8]. Specifically, Rule 1.9(c) provides that a lawyer (1) shall not "*use*" confidential information "to the disadvantage of the former client" unless the Rules "would permit or require [such use] with respect to a current client" or the information has become "generally known" and (2) shall not "*reveal*" a former client's confidential information "except as these Rules would permit or require with respect to a current client."[3]

23. Particular pieces of confidential information may lose their protected status as time goes by, such as when the information becomes generally known or when disclosure would no longer be embarrassing or detrimental to the client. But otherwise, a lawyer's duty to protect such information remains in force even after a current client becomes a former client. We lack sufficient facts to determine what information is protected by Rule 1.9(c), but we note that the duty of confidentiality under Rule 1.9(c) applies whether or not matters are substantially related under Rule 1.9(a).

CONCLUSION

24. Whether a law firm may represent new clients against an entity that the law firm has represented in the past depends on whether the entity is a current or former client, which is a mixed question of fact and law. A law firm may not oppose a current client in any matter, related or unrelated, absent the current client's informed consent, confirmed in writing. However, a law firm may oppose a former client in any matter that is not substantially related to the law firm's legal work for that former client. Even if the entity is no longer a client, a law firm has a continuing duty to protect confidential information of that entity.

(46-13)

[3] The term "confidential information" is broadly defined in Rule 1.6(a) to include (subject to certain exceptions not applicable here) "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."

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

Committee on Professional Ethics

Opinion 871 (5/31/11)

Topic: Conflicts of interest with former clients

Digest: An attorney may not oppose a former client in a different matter without the former client's informed consent, confirmed in writing, if a reasonable lawyer would perceive a substantial risk that the attorney would normally have learned confidential information during the prior representation that could be used against the former client in the present matter.

Rules: 1.9(a) & (c)

QUESTION

1. May an attorney represent a new client who is adverse to a former client in a different matter?

OPINION

2. The inquiring attorney wishes to represent a husband (the "Husband") in a divorce proceeding against his wife (the "Wife"). However, the attorney is concerned because he represented the Wife three years ago in a Family Court matter. In that Family Court matter, the Wife sought to modify a child visitation order regarding her child from a previous relationship. That child is not the Husband's child, and the Husband was not involved in the previous matter. However, the Husband and the Wife have three children in common through the present marriage. An existing Family Court order has already determined custody issues regarding the three children in common, and the inquiring attorney considers it "likely" that the existing custody order regarding these three children will be incorporated into the ultimate divorce decree. The inquirer does not say, however, whether the Wife agreed to the existing custody order or whether she will agree to its incorporation into the divorce decree. May the inquirer represent the Husband in the divorce proceedings?

3. Under Rule 1.9(a) of the New York Rules of Professional Conduct (the "Rules"), an attorney may not represent a client whose interests are materially adverse to a

former client, unless the former client gives informed consent, confirmed in writing, if the matter on behalf of the present client is "substantially related" to the matter in which the attorney represented the former client. According to Comment [3] to Rule 1.9:

> 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***. [Emphasis added.]

4. Here, the matters plainly do not involve "the same transaction or legal dispute." The matter the inquirer handled for the Wife was a visitation dispute in which the Husband was not involved, whereas the new matter is a divorce action in which the Husband is involved. But as explained by Comment [3] to Rule 1.9, the matters are nevertheless "substantially related" for purposes of Rule 1.9(a) if "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 [present] client's position in the subsequent matter." Comment [3] also provides an illustration that may apply here: "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."

5. We emphasize that the "reasonable lawyer" test articulated in Comment [3] is not whether the lawyer *actually* obtained confidential information about the former client in the prior matter that would be useful against her in the present matter. Rather, the test is whether a reasonable lawyer would perceive a sizeable *risk* that a competent lawyer handling the prior matter would *normally* have gained confidential information about the former client that could be turned to the present client's advantage in the matter against the former client. In other words, the "reasonable lawyer" test *presumes* that an attorney has confidential information about a former client if a reasonable lawyer would see a substantial risk that a typical attorney would have acquired such information in the prior matter. As Comment [3] explains:

> … 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.*** [Emphasis added.]

6. Here, the former representation of the Wife concerned visitation rights of third parties regarding a child unrelated to the marriage in which a divorce is now sought. A reasonable lawyer may conclude that the inquirer, in that former representation, would normally have obtained information concerning such things as the Wife's financial

resources, the home life of the child, and the Wife's parenting skills. If that information is also relevant in the impending divorce action, a reasonable lawyer might also perceive a significant risk that the inquirer will use that information to the Husband's material advantage (and to the Wife's material disadvantage) in the divorce proceeding. However, applying the reasonable lawyer test to determine whether to matters are "substantially related" within the meaning of Rule 1.9 requires a factually intensive analysis, and we have only a skeletal version of the facts. What a "reasonable lawyer" would conclude in the situation at hand depends on a more nuanced description of the nature of the two matters than we have been given here.

7. For example, if the parenting ability or financial condition of the Wife were issues in the prior representation, or if other issues would normally have given a competent attorney reason to seek out confidential information during the prior representation that would materially advance the interests of the Husband (and be materially damaging to the Wife) in the divorce case, then the "reasonable lawyer" test of Comment [3] would be satisfied and the two matters will be deemed "substantially related" under Rule 1.9(a).

8. If the former matter and the present matter are deemed "substantially related," then Rule 1.9(a) prohibits the inquirer from representing the Husband in the divorce matter absent the Wife's informed consent, confirmed in writing. The terms "confirmed in writing" and "informed consent" are defined in Rule 1.0(e) and (j) respectively as follows:

> (e) "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
>
> (j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

9. Whether or not the prior and present matters are substantially related, the inquirer must abide by the restrictions of Rule 1.9(c) in the divorce proceeding and elsewhere. Specifically, Rule 1.9(c)(1) prohibits the inquirer from *using* confidential information of the former client 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," and Rule 1.9(c)(2) prohibits the inquirer from *revealing* confidential information of the former client that is protected by Rule 1.6 – whether to

her advantage, disadvantage, or otherwise – “except as these Rules would permit or require with respect to a current client.”

CONCLUSION

10. Whether an attorney may oppose a former client in a new and different matter without the former client's informed consent (confirmed in writing) depends on whether a reasonable lawyer would perceive a substantial risk that a competent attorney would normally have learned confidential factual information during the prior representation that could be used against the former client in the new matter.

(14-11)

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 723 (10/12/99)

Modifies: N. Y. State 638 (1992)

Topic: Conflict of interest; former client; vicarious disqualification; confidences and secrets.

Digest: Absent former client's consent, a lawyer changing firms may not undertake representation adverse to the former client if (1) moving lawyer personally "represented" the client or otherwise acquired relevant confidences or secrets of the client, and (2) moving lawyer would be undertaking representation in the same matter or in a matter that is substantially related to one in which the moving lawyer or the old firm previously represented the former client. Absent client consent, if moving lawyer is disqualified from engaging in representation under this rule, the moving lawyer's new law firm is also disqualified.

Code: DR 4-101(A), 5-105(D), 5-108.

QUESTION

Under what circumstances is a lawyer, previously associated with another firm, ethically precluded from representing clients of the lawyer's new firm? Under what circumstances is the lawyer's new firm precluded from representing certain clients?

OPINION

The inquirer is a member of a firm ("New Firm") that primarily represents claimants in hearings before the Workers' Compensation Board. New Firm proposes to hire a new associate ("L"), who is currently an associate with a firm ("Old Firm") that primarily does workers' compensation defense work. In the course of employment with Old Firm, L appeared at compensation hearings on behalf of employers and carriers.

On June 30, 1999, amendments to the New York Lawyer's Code of Professional Responsibility became effective. DR 5-108, which imposes certain limitations on representations that relate to former clients, was among the disciplinary rules amended. It now provides:

> A. Except as provided in DR 9-101(B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
>
> 1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.
>
> 2. Use any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret has become generally known.

In addition, a new section, DR 5-108(B), was added. It provides:

> B. Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
>
> 1. Whose interests are materially adverse to that person; and
>
> 2. About whom the lawyer had acquired information protected by DR 4-101(B) that is material to the matter.

In situations in which a lawyer is precluded by DR 5-108 from representation, DR 5-105(D) prohibits other lawyers associated with the lawyer from undertaking the representation as well:

> While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them

> practicing alone would be prohibited from doing so under...DR 5-108 (A) or (B)...except as otherwise provided therein.[1]

This Opinion applies these rules in a variety of fact situations raised by the proposal of New Firm to hire L.

A. Ongoing Litigation Involving Former Client

1. Moving Attorney Represented Client.

As an associate at Old Firm, L worked on a pending matter on behalf of a client, Jones Co., in which Smith is the claimant. If L joins New Firm, Jones Co. would become L's former client. DR 5-108(A) precludes L's representation of Smith because that would involve L in representing another person (Smith) in the same matter in which that person's interests are materially adverse to the former client (Jones Co.). If, however, the former client, Jones Co., provides consent after full disclosure, L may represent Smith. Further, absent consent, New Firm could not continue to represent Smith if it were to hire L, because New Firm is precluded from continuing employment when any one of the lawyers associated with the firm is prohibited from doing so by DR 5-108. DR 5-105(D).[2]

For purposes of DR 5-108(A), a lawyer has "represented a client" if the lawyer has obtained or had access to confidences or secrets of the former client. There are some circumstances, however, where a lawyer may bill work to a client, but not represent a client. For example, where a subordinate lawyer researched a point of law with respect to a matter, without knowing any underlying facts and without the possibility of acquiring any confidences or secrets of the client, the lawyer cannot be said to have "represented" the client. See *Kassis v. Teacher's Insurance and Annuity Ass'n,*____N.Y.2d ____(1999) (holding that the presumption of disqualification will not apply if the moving lawyer did not obtain any client confidences or did not have any opportunity to acquire confidential information in the former employment). We caution, however, that in most circumstances, any information about the client could constitute a confidence or secret. In some circumstances, the mere identity of the client may constitute a secret.

2. Moving Attorney Did Not Represent the Client

---

1 DR 5-105(D) was amended effective June 30, 1999 to reflect the addition of DR 5-108(B) to the Code.

2 Neither DR 5-108(A) nor DR 5-105(D) provides authorization for the use of screening to avoid the ethical prohibition against the new firm's engaging in representation adverse to L's former client. *See Kassis v. Teacher's Insurance and Annuity Ass'n*, ____N.Y.2d ____ (1999).

While L was an associate at Old Firm, the firm represented Jones Co. on a pending matter, in which Smith is the claimant. L did not work on the matter and is now an associate at New Firm, which represents Smith.

Where the moving attorney did not personally represent a client in a matter, the attorney is precluded from representing another client in the same matter only where the new client' s interests are materially adverse to the former client *and* the lawyer acquired information protected by DR 4-101(B) about the client that is material to the matter. DR 5-108(B). Thus, even if L never worked on the Jones-Smith matter, L would be disqualified from representing Smith where L obtained confidences or secrets about Jones that are relevant to the pending litigation. If L is disqualified from representing Smith, New Firm is disqualified as well because New Firm is precluded from continuing employment when any one of the lawyers associated with the firm is prohibited from doing so by DR 5-108. DR 5-105(D). If, however, L did not obtain confidences or secrets from Jones Co., L is not precluded from representing Smith and therefore New Firm can continue its representation of Smith.

The prohibition of DR 5-108(A) is premised on the irrebuttable presumption that a lawyer who formerly represented a client will have obtained secrets and confidences of the client. *See Solow v. W. R. Grace*, 83 N.Y. 2d 303, 306 (1994) (where the lawyer was previously a sole practitioner, the lawyer is automatically disqualified from representing the opposing party because there is an irrebutable presumption that the attorney obtained confidences and secrets). The adoption of DR 5-108(B) reflects that this presumption is unwarranted where the moving attorney was associated with a multi-lawyer firm and did not acquire confidences and secrets relevant to the matter.

DR 5-108(B) provides that the lawyer must have "acquired" confidences and secrets. In some circumstances, the lawyer moving from a multi-lawyer firm may be presumed to have acquired confidences or secrets relevant to the pending matter. For example, if L worked for a small firm "whose activities were characterized by an understandable informality" in which "there was constant 'cross-pollination'" and "'cross current of discussion and ideas'" among the firm's lawyers, the moving lawyer is presumed to have had access to confidences and secrets. *Cardinale v. Golinello*, 43 N.Y.2d 288, 292 (1977). Under these circumstances, it is irrelevant whether the moving lawyer actually obtained or recalls obtaining confidences and secrets of the former client.[3] Thus, if Old Firm was a firm whose character made it inevitable that L would have had access to

---

[3] As the Court of Appeals noted in *Solow*, *supra,* at 309-10, a presumption serves to protect client confidences, avoids the appearance of impropriety, and encourages self-enforcement among attorneys. At the same time, however, the Court noted that a presumption imposes substantial costs on current clients, the public, and the legal profession by limiting a client 's choice of counsel and forcing the client to incur additional costs. Thus, an irrebuttable presumption should apply only in those cases in which the potential harm outweighs the costs to clients and the public.

confidences and secrets of Jones Co., absent consent, both L and New Firm are precluded from representing Smith in the matter against Jones Co. even if L did not actually "represent" Jones Co. in the matter while at Old Firm.

In some circumstances, the moving lawyer will not be presumed to have acquired confidences and secrets. Among the facts that might be used to demonstrate that the attorney did not acquire confidences or secrets are the large size of the firm and its organization into different departments, see *Silver Chrysler Plymouth v. Chrysler Motors Corp.,* 518 F.2d 751 (2d Cir. 1975), and the segregation of files, documents and the like from lawyers who do not work on the case, see *Severino v. DiIorio*, 186 A.D.2d 178 (2d Dep't 1992).

B. New Litigation Against Former Client

1. Moving Attorney Personally Represented Former Client

While L was an associate at Old Firm, L worked on a matter on behalf of a client, Jones Co,. in which White was the claimant. New Firm currently represents Brown as a claimant against Jones Co., which becomes a former client of L's if L moves to New Firm.

L and New Firm are precluded from representing Brown, whose interests are materially adverse to the interests of the former client Jones Co, *if Brown v. Jones Co. is a substantially related matter with respect to White v. Jones Co.* DR 5-108(A)(1). Even if, however, the matters are not substantially related, both L and New Firm are precluded from actually using confidences and secrets against the L's former client. DR 5-108(A)(2).

The substantial relationship test initially was a judicially developed standard for disqualification. Its genesis is found in *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953)("where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation"). In that case, the court noted that "the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client." *Id.* at 268. Subsequent cases have rephrased the substantial relationship test without providing additional content. *See, e.g., General Motors Corp. v. City of New York,* 501 F.2d 639*,* 650 (2d Cir. 1974) (subsequent action is "substantially similar"); *Ceramco, Inc. v. Lee Pharmaceuticals,* 510 F.2d 268, 271 (2d Cir. 1975)("matter...was almost identical"); *Motor Mart, Inc. v. Saab Motors, Inc.*, 359 F. Supp. 156, 157 (S.D.N.Y. 1973)("essentially the same type of suit"). The substantial relationship test was subsequently adopted as an element of the ethical rules in DR 5-108. As we have noted previously, although the disciplinary standard and the disqualification standard need not be identical, N.Y. State 628,

at 3 (1992), we will look to judicial interpretations to provide guidance as to permissible ethical conduct, *id*. at 3 n.1.

Whether two matters are substantially related is a question of fact. It is clear, however, that the fact that both matters involve the same party as a defendant--here Jones Co.--does not make the matters necessarily "substantially related." *See Silver Chrysler Plymouth, Inc., supra*, at 756; *Jamaica Public Service Co. v. AIU Insurance Co.,* 92 N.Y.2d 631 (1998). We also believe that the fact that the underlying nature of the claim in both matters is the same-–here an issue of workers' compensation – does not itself make the matters related. *See* N.Y. County 717 (1996) ("the mere fact that two matters involved the same type of insurance coverage would not, by itself, make the matters substantially related"). Furthermore, the mere fact of the substantial involvement of the moving lawyer in the prior matter or the lawyer's longstanding relationship with the former client does not necessarily make the new matter substantially related to the past matter. *See* Charles W. Wolfram, Modern Legal Ethics 369 (1986).

Factors that would tend to show that the matters were substantially related would include an identity of issues in the two matters or a significant overlap of the contested facts. *See, e.g., Duncan v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 646 F.2d 1020 (5th Cir. 1981). They would also include a situation where the issue in controversy in the second matter arose out of a transaction in which the lawyer represented the former client. *See, e.g., Tekni-Plex, Inc. v. Meyner and Landis*, 89 N.Y.2d 123 (1996) (defendant law firm negotiated the sale of a company in which representations and warranties were made that were the subject of the subsequent suit as well as counseling the company about an environmental permit that was also the subject of the second suit); 1 Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering § 1.9:202 (1998 Supp.) (lawyer who represented client in a real estate transaction cannot subsequently attack the conveyance).

The most important factor, however, is whether the moving lawyer did or could have obtained confidences and secrets in the former representation that should be used against the former client in the current representation. *See, e.g.,* N.Y. State 638 (1992); Nassau County 96-16 (1996). This requires L to determine whether the information gained (or that could have been gained) in the representation of Jones Co. constitutes a confidence or secret and whether it is necessary to use the information in the current representation against Jones Co.

A confidence is information protected by the attorney-client privilege and a secret is "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A). General information about workers' compensation law, for example, does not constitute a confidence or secret even if L obtained that information while

working on a matter for Jones Co. General information concerning the former client's financial exposure, corporate or financial structure, workplace rules, settlement policies, and the like, may be a "secret" (if not a "confidence") if the information is not generally known, but the acquisition of such information is not a disqualifying circumstance "unless there are peculiar aspects of the current representation making such information particularly relevant." N.Y. State 398, at 4; see also *United States Football League v. National Football League*, 605 F. Supp. 1448, 1460 (S.D.N.Y. 1985) ("knowledge of a former client's financial and business background is not in itself a basis for disqualification if the client's background is not in issue in the later litigation"); *Jamaica Public Service, supra. Cf. Analytica Inc. v. NPD Research*, 708 F.2d 1263, 1267 (7th Cir. 1983).

Thus, L must determine whether general knowledge gleaned from a past representation of Jones Co. is generally known and, if not, whether it is relevant to litigation in which Jones Co. is now a defendant and could be used to the former client's disadvantage. For example, suppose in a prior representation of Jones Co. in a workers' compensation matter, L obtained information about certain faulty machinery used in its factory. Even though the information is clearly a secret, L's knowledge of this secret does not make another representation against Jones Co. in a workers' compensation case a substantially related matter if L has no reason to use the information about the faulty machinery to the detriment of Jones Co. in the new matter.

If Brown v. Jones Co. is not a substantially related matter and L had no access to secrets and confidences of Jones Co. that could be used against Jones Co., L (or other lawyers associated with New Firm) may represent Brown. This is so even if the representation of Jones Co. by L was very recent. N.Y. State 628, at 5. Where the matters are substantially related, L or New Firm nevertheless may represent Brown, provided that the informed consent of the former client (Jones Co.) is obtained. DR 5-108(A); N.Y. State 628, at 6. In some circumstances, such as where the former client requires L to maintain certain confidences or secrets, the consent of the current client (Brown) is also necessary. *Id*. at 7 (explaining that the lawyer needs to obtain the current client's consent where the need to protect the former client's secrets might limit the lawyer's zealous representation of the current client and that in some circumstances informed consent may be impossible to obtain without violating the duty to the former client to maintain the secrets).

If, however, consent is not forthcoming and L is precluded from representing Brown, New Firm is also disqualified. DR 5-105(D).

2. Moving Lawyer Never Represented Former Client

If L never personally represented Jones Co. but others associated with L's former firm did, L (or any other lawyer associated with New Firm) may undertake

representation of Brown if there is no substantial relationship between the earlier matter and the current matter. DR 5-108(B).[4]

If the new matter is substantially related,[5] however, L may not undertake representation of a client whose interests are materially adverse to Jones Co. if L acquired confidences or secrets material to the new matter.[6] The mere acquisition of a confidence or secret from the former client is not sufficient to trigger disqualification. The confidence or secret must be one that is material to the matter. A confidence or secret that "must be used under Canon 7 to discharge faithfully and zealously the current proposed representation," N.Y. State 638, at 7, is always material to the current matter. If, however, the secret has become generally known, L is not precluded from using the information and thus, is not precluded from the representation. DR 5-108(A)(2); see also *Jamaica Public Service Co., supra* (holding DR 5-108(A)(2) not violated when knowledge about corporate structure of former client was used by former attorney where information was available in trade periodicals and regulatory filings).

If L is precluded from representing Jones Co. under DR 5-108(B), New Firm is prohibited from undertaking the representation as well. DR 5-105(D).

C. Litigation Where Client Represented by Same Insurer

While L was associated with Old Firm, L personally participated in the defense of Box Co. in a claim by White. Box Co was insured by the XYZ Insurance Co. New Firm currently represents Green, a claimant against Paper Co, who is also insured by the XYZ insurance company.

L and New Firm can continue to represent Green although the defending employer is insured by a company that also insured former clients of L. XYZ was not the client of Old Firm despite its interest in cases in which its insureds were defendants. *See* N.Y. State 519 (1980) (opining that insured and not liability insurer is the client even though lawyer is retained by the insurer and despite the insurer's statutory interest in the matter); N.Y. State 716 (1999); *see also* Maine Op. 122 (1992); Michigan Opinion RI-89 (1991). Although the insurer is noticed for hearings and appears on behalf of the employer in workers' compensation cases, the insured/employer remains the client. Because Box Co. was a client of neither L nor Old Firm, DR 5-108 has no application.

CONCLUSION

---

4 N.Y. State 638, which interpreted DR 5-108 before the addition of subsection (B), is no longer applicable to the extent that it states that disqualification is appropriate even where the two matters are not substantially related.

5 For a discussion of when matters are substantially related, see B.1, *supra*.

6 For further discussion of the materiality of a confidence or secret, see B.1, *supra*.

Generally, absent the former client's consent, the moving lawyer may not undertake representation adverse to the former client if (1) the moving lawyer personally "represented" the client (that is, obtained or had access to a confidence or secret of the client) *or* otherwise acquired confidences or secrets of the client relevant to the current representation, and (2) the moving lawyer would be undertaking representation in the same matter or in a matter that is substantially related to one in which the moving lawyer or the old firm previously represented the former client. Further, absent client consent, if the moving lawyer is disqualified from engaging in the representation under this rule, then under DR 5-105(D) the moving lawyer's new law firm is also disqualified.

(1-99)

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 1103 (7/15/2016)

Topic: Conflicting interests; representation of competing enterprises; substantial relationship

Digest: An attorney who previously represented Corporation A may undertake the representation of Corporation B in litigation with Corporation X that is unrelated to the attorney's prior representation of Corporation A, notwithstanding that Corporations A and B are competitors in the same industry and that it is in Corporation A's economic interest for Corporation B to lose the litigation with Corporation X. Corporation A's threat to sue Corporation B in a matter unrelated to the attorney's prior representation of Corporation A similarly does not bar the attorney from representing Corporation B in the threatened litigation.

Rules: 1.0(*l*), 1.7(a) and 1.9(a) & (c)

FACTS

1. Corporation A and Corporation B are competitors. They are engaged in the same industry, in the same geographic area, providing similar services to the same customer base. The inquirer previously represented Corporation A in a matter that has been concluded ("Matter 1"). The inquirer now proposes to represent Corporation B in litigation with Corporation X ("Matter 2"). The inquirer states, and we assume for purposes of this opinion, that Matter 1 and Matter 2 are not factually related. However, if Corporation B is unsuccessful in this suit, it might be forced to cease operations, which would benefit Corporation A.

2. Also, Corporation A has recently threatened to sue Corporation B on a matter ("Matter 3") that is not factually related to Matter 1.

QUESTIONS

3. May a lawyer undertake to represent a client, Corporation B, in litigation with Corporation X, where it is in the economic interest of a former client, Corporation A, for Corporation B to lose the litigation?

4. May a lawyer undertake to represent a client, Corporation B, in litigation threatened against it by the lawyer's former client, Corporation A, when the threatened litigation is not related to the lawyer's former representation of Corporation A?

OPINION

Applicable Rules

5. The inquirer states that Matter 1 has concluded. Consequently, we assume that Corporation A is a former client of the inquirer. *But see* N.Y. State 1008 (2014) for an example where the client argues it is a current client despite the fact that the matter has concluded. Whether the client is a current or former client is a mixed question of fact and law that is outside our jurisdiction to determine.

6. We have held that a lawyer's duty of loyalty to a client ends with the termination of the representation. *See* N.Y. State 638 (1992), N.Y. State 628 (1992) (although the duty to preserve confidences remains, the duty of loyalty ends with the termination of the lawyer-client relationship).

7. The limitations on a lawyer's right to oppose a former client are defined mainly by Rule 1.9(a), which provides:

> (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. [Emphasis added]

Thus, even assuming that the former client has not consented, Rule 1.9(a) does not prohibit a lawyer from representing a new client unless both prongs of Rule 1.9(a) are satisfied -- (i) the new matter must be the "same" matter or "substantially related" to the prior matter, *and* (ii) the new client's interests must be "materially adverse" to the interests of the former client.

8. The term "matter" is defined in Rule 1.0(*l*):

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

9. Comment [2] to Rule 1.9 helps to understand the meaning of the terms "matter" and "materially adverse":

> [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. . . . [Emphasis added]

10. Comment [3] to Rule 1.9 explains what is meant by "substantially related":

> [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. . . . [Emphasis added]

11. Even if the legal issues involved in two matters are the same, it would not make the matters substantially related. As we noted in N.Y. State 1029 (2014):

> The mere circumstance that the current representation may involve legal issues that were also involved in the Litigation does not make the matters substantially related. Interpretations of the ethical rules have long distinguished between conflicts involving the same matter and conflicts involving the same legal issue. Such "issue" (or "positional") conflicts tend to be more problematic in the case of concurrent representation than in the case of former representation. Even as to concurrent representation, a lawyer may ordinarily "take inconsistent legal positions in different tribunals at different tribunals at different times on behalf of different client," although there can be circumstances in which an issue conflict arises because "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."

See also Rule 1.9, Cmt. [2] (quoted in ¶ 8 above).

12. The fact that the current client and the former client have competing economic interests does not create a conflict of interest under Rule 1.9(a). Even if Corporations A and B were both current clients of the inquirer, their economic competition would not prohibit the inquirer from representing both of them. As Comment [6] to Rule 1.7 explains, with respect to simultaneous representation of two clients:

> [S]imultaneous 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. [Emphasis added.]

See also, Charles W. Wolfram, *Competitor and Other "Finite Pie" Conflicts*, 36 Hofstra L. Rev. 539, 550-55 (2007) (discussing cases in which lawyers represent economic competitors). Since a lawyer may simultaneously represent *current* clients who are economic competitors, then *a fortiori* a lawyer may represent a client whose interests are contrary to the interests of a *former* client who competes economically with the current client.

May the inquirer represent Corporation B in Matter 2?

13. The inquirer has told us, and we are assuming, that Matter 1 (the completed matter in which the inquirer previously represented Corporation A) is not "substantially related" to Matter 2 (Corporation B's contemplated suit against Corporation X). We thus assume that Matter 1 and Matter 2 do not involve the same transaction or legal dispute. Because the contemplated and former matters are not the same or substantially related, Rule 1.9 would not bar the inquirer from undertaking the proposed representation. We therefore do not need to determine whether Corporation B's interests in Matter 2 are materially adverse to the interests of Corporation A. Rule 1.9(a) requires that both prongs of the test be met – same or substantially related, and materially adverse – and here the first prong is not met.

14. Nevertheless, it is worth noting that Corporation B's interests in Matter 2 would not be materially adverse to the interests of Corporation A under Rule 1.9. Just as competing economic interests do not create "differing interests" within the meaning of Rule 1.7(a)(1), so they do not create a "materially adverse" interest within the meaning of Rule 1.9(a). Here, the fact that Corporation A will benefit if Corporation B is unsuccessful in Matter 2 (because Corporation B is likely to be forced to go out of business if it loses, thus eliminating a competitor), does not create a materially adverse interest under Rule 1.9(a). That would stretch the meaning of "materially adverse" too far.

15. However, the inquirer remains bound by Rule 1.9(c) even if Rule 1.9(a) does not apply. Rule 1.9(c) prohibits a lawyer from using or revealing a former client's confidential information that is protected by Rule 1.6 except as the Rules would permit or require with respect to a current client.

May the inquirer represent Corporation B in Matter 3?

16. Corporation A's threat to sue Corporation B, even if the threat matures into a lawsuit, does not disqualify the inquirer from representing Corporation B in Matter 3, as long as Corporation A remains a former client and Matter 1 and Matter 3 are not the same or substantially related. *See, e.g.*, N.Y. State 1008 (2014) (discussing whether a client is a current or former client as well as the conflicts rules applicable in each situation). Since the inquirer has stated and we are assuming that Corporation A is a former client and that Matter 3 is not substantially related to Matter 1, Rule 1.9(a) does not bar the inquirer's representation of Corporation B in Matter 3 because the first prong of the test in Rule 1.9(a) is not met. In addition the second prong of the Rule 1.9(a) test is not met. The fact that Corporations A and B have generally competing economic interests does not create a "materially adverse" interest within the meaning of Rule 1.9(a).

17. If the inquirer's representation of Corporation B in Matter 3 were substantially related to

the former representation of Corporation A in Matter 1, then Rule 1.9(a) would prohibit the inquirer from defending Corporation B in the litigation brought by Corporation A unless the inquirer obtained Corporation A's informed consent, because the "materially adverse" prong of Rule 1.9(a) is always met when a former client is on the opposite side of a lawsuit involving the same or a substantially related matter, whether as plaintiff or defendant.

CONCLUSION

18. Where an attorney had previously represented Corporation A, the attorney may undertake the representation of Corporation B in litigation unrelated to the attorney's representation of Corporation A, notwithstanding that the two corporations are competitors in the same industry and that Corporation B's failure in the litigation would indirectly benefit Corporation A by eliminating a competitor. Corporation A's bringing suit against Corporation B in a matter unrelated to the attorney's prior representation of Corporation A is similarly not barred by Rule 1.9(a).

(20-16)

BAR ASSOCIATION OF NASSAU COUNTY COMMITTEE ON PROFESSIONAL ETHICS

Opinion No. 2020-1

(Inquiry No.)

Opinion No. 2020-01

Inquiry No. 2020-1

March 2, 2020

Topic: Conflict of interest – former client; imputed conflicts; responsibilities of law firm partners and supervisory lawyers

Digest:

Law firm partner, whose prior representation of a client at his former firm creates an imputed conflict as to representation of his current firm's client, is required to make reasonable efforts to ensure that lawyers under his supervision do not represent current firm's client in the absence of a conflict waiver and that management of firm is aware of imputed conflict and the prohibition of continuing the representation in the absence of a conflict waiver.

Rule Provisions:

1.9, 1.10, 5.1, 8.3

Facts Presented:

Inquiring counsel was previously an associate of Firm A. While at Firm A, inquiring counsel worked on an estate litigation matter, representing the daughter (D) of a decedent in a discovery and turnover proceeding against two defendants, a husband (H) and wife (W), alleging that H and W had fraudulently procured funds from the decedent during his lifetime, in an attempt to bring the funds back into the decedent's estate. Inquiring counsel drafted the petition which was served on H and W and did other work on the matter for a period of time until D terminated Firm A and retained new counsel to represent her in the ongoing proceeding.

Inquiring counsel left Firm A and joined Firm B as a partner in the trusts and estates department. Unbeknownst to inquiring counsel, W was a client of Firm B with respect to other matters. When W died, inquiring counsel was asked to handle the administration of W's estate. Inquiring counsel subsequently learned that D's case against H and W had not been resolved and that D was pursuing claims against W's estate. Inquiring counsel has personally withdrawn from the representation of W's estate, and inquires as to whether he has any further obligations with regard to Firm B's representation of W's estate.

Question(s):

What are inquiring counsel's obligations with regard to Firm B's administration of W's estate?

Analysis:

Inquiring Counsel's Conflict of Interest is Imputed to Firm B

Inquiring counsel's prior representation of D creates a conflict of interest prohibiting his representation of W's estate in the absence of a waiver. Rule 1.9(a) governs conflicts of interest concerning former clients, providing that "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." Rule 1.9(a) applies to the facts here, as inquiring counsel formerly represented D in the same matter in which inquiring counsel would be representing the estate of W—a party with interests materially adverse to D's interests. Thus, inquiring counsel may not represent the estate of W unless D gives informed consent, confirmed in writing.

Inquiring counsel's conflict of interest is imputed to Firm B. Rule 1.10 addresses whether an individual attorney's conflict of interest will be imputed to his or his firm. Rule 1.10(a) provides: that "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 . . . . 1.9, except as otherwise provided therein." Rule 1.10(c) further provides that "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 1.9(c) that is material to the current matter.

Thus, Firm B may not represent the estate of W unless inquiring counsel "did not acquire any information protected by Rule 1.6 or 1.9(c) that is material to the current matter." Here, due to the fact that inquiring counsel was directly working on the estate litigation on behalf of D, it would likely be presumed that inquiring counsel did acquire protected information. As Comment [3] to Rule 1.9 notes, "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."

Inquiring Counsel's Duty to Ensure Firm B's Compliance With the Rules of Professional Conduct

Because inquiring counsel is or should be aware of the fact that his conflict of interest is imputed to Firm B, he has a duty to make reasonable efforts to ensure that the other lawyers in Firm B's trusts and estates department comply with their obligations as attorneys with an imputed conflict of interest under Rule 1.10. Rule 5.1(b) provides that "A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules." Inquiring counsel, as a partner in Firm B's trusts and estates department, has supervisory authority over other attorneys in the trusts and estates department, and thus is required to take reasonable efforts to ensure that said attorneys do not violate the Rules of Professional Conduct, including Rule 1.10, by taking on, or continuing, a conflicted representation without obtaining the necessary waivers.

Moreover, pursuant to Rule 5.1(d), "A lawyer shall be responsible for a violation of these Rules by another lawyer if . . . (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and (i) knows of such conduct at a time when it could b prevented or its consequences avoided or mitigated but fails to take reasonable remedial action . . ." Under Rule 5.1(d), inquiring counsel, as a partner of the firm, could be responsible for the violation of the Rules of Professional Conduct by another lawyer at Firm B if inquiring counsel knows of such conduct and fails to take reasonable remedial action. According to Professor Roy Simon, this applies to "all lawyers in a firm who are designated by the title 'partner'" regardless of whether he or she has direct supervisory authority over the lawyer who engaged in misconduct and regardless of whether the lawyer is an equity partner or a non-equity partner. Roy D. Simon, Jr., Simon's New York Rules of Professional Conduct Annotated, §5.1:24 (2019).

The question thus becomes: what "reasonable remedial action" should the inquiring attorney take in order to avoid responsibility under Rule 5.1(d). The inquiring attorney has already undertaken some reasonable remedial action by advising his present firm of the conflict and by ending his own personal involvement in the specific matter. In the Committee's view, however, the inquiring attorney must go further. As a partner in the firm's trusts and estates department, the inquiring attorney should direct the handling attorneys to advise the former client's present attorneys of the conflict. He should further direct the handling attorney to advise the firm's client that there exists grounds for potential disqualification of the firm.

We note that Rule 1.10(d) permits a disqualification prescribed by Rule 1.10 to be "waived by the affected client or former client under the conditions stated in Rule 1.7." Thus, Firm B could represent the estate of W if the conditions under Rule 1.7 are met and D (as well as the representative of W's estate) gives informed consent,

confirmed in writing. The inquiring attorney can encourage the handling attorneys at his firm to seek such consent, and direct them to end the representation if the consent cannot be obtained.

If the inquiring attorney does not have direct supervisory control over the handling attorneys and does not have the ability to unilaterally terminate the firm's attorney-client relationship, he should advise the firm's ethics counsel, managing attorney(s) and/or management committee of the conflict and the fact that the conflict is imputed to other attorneys at the firm in accordance with Rule 1.10. The Committee does not opine as to whether the inquiring attorney has an obligation under Rule 8.3 to report professional misconduct of others at his firm, as we do not have sufficient information from which to conclude that other attorneys at his firm committed violations of the Rules of Professional Conduct which raise "a substantial question as [their] honesty, trustworthiness or fitness as . . . lawyer[s]."

Conclusion

In sum, inquiring counsel has an ethical obligation not only to address and avoid his own conflict of interest with respect to the representation of W's estate, but to take reasonable efforts to ensure that other lawyers in Firm B comply with their obligations as to imputed conflicts of interest. If inquiring counsel has supervisory authority over the attorneys handling the matter which gives rise to the conflict, he should direct them to advise both the former client's present attorneys and Firm B's client of the conflict and seek a waiver of the conflict. If the waiver cannot be obtained, Firm B should terminate the attorney-client relationship at issue. If the attorney does not have supervisory authority over the handling attorneys at Firm B, he should advise those at Firm B who do have supervisory authority.

15th and West Streets | Mineola, NY 11501 | (516) 747 4070 (tel:516 747 4070) | Fax (516) 747 4147

CLICK HERE (https://www.nassaubar.org/announcements/update-regarding-covid-19/) for latest COVID-19 and Court updates.

189 A.D.3d 973
138 N.Y.S.3d 199

Bruce R. BENT, Appellant,
v.
ST. JOHN'S UNIVERSITY, NEW YORK, Respondent.

2019–11138
Index No. 701294/18

Supreme Court, Appellate Division, Second Department, New York.

December 9, 2020
Argued November 2, 2020

[138 N.Y.S.3d 201]

Emmet, Marvin & Martin, LLP, New York, N.Y. (John Dellaportas and Beth Khinchuk of counsel), for appellant.

Garfunkel Wild, P.C., Great Neck, N.Y. (Michael J. Keane, Mickey Keane, and Marc A. Sittenreich of counsel), for respondent.

ALAN D. SCHEINKMAN, P.J., MARK C. DILLON, HECTOR D. LASALLE, LINDA CHRISTOPHER, JJ.

DECISION & ORDER

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Queens County (Marguerite A. Grays, J.), entered August 13, 2019. The order granted the defendant's converted motion for summary judgment dismissing the complaint and denied the plaintiff's cross motion for summary judgment on the issue of liability, in effect, on the causes of action alleging unjust enrichment and seeking recovery in quantum meruit.

ORDERED that the order is affirmed, with costs.

By summons and complaint dated January 26, 2018, the plaintiff, a 1961 graduate of St. John's University College of Business Administration (hereinafter the College of Business Administration), benefactor and former Trustee and member of the Executive Committee of St. John's University, commenced this action against the defendant alleging, inter alia, that it breached an alleged oral agreement entered into with the plaintiff in 1981. Under the agreement, the defendant allegedly agreed to convey to the

plaintiff, in perpetuity, the naming rights to the building which would house the College of Business Administration, in exchange for the plaintiff ‘s substantial monetary payments to the defendant's endowment. In 1981, the defendant erected the subject building on its Queens campus and it was named Bent Hall. In 2016, the building underwent a major renovation and still houses the College of Business Administration, now called the Peter J. Tobin College of Business. After the renovation, the plaintiff's name no longer appeared at the main entrance but continues to appear at the northeast and southwest corners of the building. In addition, campus signage bears the name Bent Hall.

In March 2018, prior to interposing an answer, the defendant moved pursuant to CPLR 3211(a) to dismiss the complaint. In April 2018, the plaintiff cross-moved for summary judgment on the issue of liability, in effect, on the causes of action alleging unjust enrichment and seeking recovery in quantum meruit. In an order entered March 6, 2019, the Supreme Court granted the motion and cross motion to the extent of converting the defendant's motion to dismiss into a motion for summary judgment pursuant to CPLR 3211(c). The order directed the parties to submit by March 29, 2019, "any additional evidence that could properly be considered on a motion for summary judgment." After receiving the parties' supplemental submissions, the court granted the defendant's converted motion for summary judgment dismissing the complaint and

[138 N.Y.S.3d 202]

denied the plaintiff's cross motion. The plaintiff appeals. We affirm.

The statute of frauds bars oral agreements which, by their terms, cannot be performed within one year from their making unless there is some note or memorandum in writing, subscribed by the party to be charged therewith (*see* General Obligations Law § 5–701[a][1]). To satisfy the statute of frauds, the writing need not be in a single document but may be furnished by piecing other, related documents together (*see William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh,* 22 N.Y.3d 470, 477, 982 N.Y.S.2d 813, 5 N.E.3d 976). Signed and unsigned writings can be read together to satisfy the statute, provided that they clearly refer to the same subject matter or transaction, contain all of the essential terms of a binding contract, and the unsigned writing was prepared by the party to be charged (*see Post Hill, LLC v. E. Tetz & Sons, Inc.,* 122 A.D.3d 1126, 1127, 997 N.Y.S.2d 525). At least one document signed by the party to be charged must establish a contractual relationship between the parties (*see id.* at 1127, 997 N.Y.S.2d 525).

Here, the defendant demonstrated its prima facie entitlement to judgment as a matter of law dismissing the breach of contract cause of action on the ground that the alleged oral agreement did not satisfy the statute of frauds. The oral agreement, allegedly for the naming rights of the College of Business Administration building in perpetuity, by its very nature, violated the statute of frauds since it could not be performed within one year (*see Melwani v. Jain,* 281 A.D.2d 276, 276–277, 722 N.Y.S.2d 145 ; *Montgomery v. Futuristic Foods,* 66 A.D.2d 64, 65–66, 411 N.Y.S.2d 371). Moreover, contrary to the plaintiff's contention, four written proposals from 2016 do not satisfy the statute of frauds. None of the proposals contained any details about the oral agreement itself and there was no language describing the consideration for the naming rights to the College of Business Administration building. Instead, the written proposals merely stated that the defendant granted the plaintiff the naming rights to the building "as an acknowledgment of his substantial support of the [defendant]." Significantly, none of the written proposals were signed by either the plaintiff or a representative of the defendant. In opposition to the defendant's prima facie showing, the plaintiff failed to raise a triable issue of fact (*see 443 Jefferson Holdings, LLC v. Sosa,* 174 A.D.3d 486, 487–488, 104 N.Y.S.3d 199).

Regarding the cause of action for breach of the implied covenant of good faith and fair dealing, where there is no valid contract, no basis exists to assert the implied contractual claim (*see Kim v. Francis,* 184 A.D.3d 413, 414, 125 N.Y.S.3d 411 ; *American–European Art Assoc. v. Trend Galleries,* 227 A.D.2d 170, 171, 641 N.Y.S.2d 835). Here, the defendant demonstrated, prima facie, its entitlement to judgment as a matter of law dismissing the cause of action alleging breach of the implied covenant of good faith and fair dealing, as the alleged oral agreement, which would form the basis for the implied covenant, is not valid as it does not satisfy the statute of frauds (*see Deerin v. Ocean Rich Foods, LLC,* 158 A.D.3d 603, 606, 71 N.Y.S.3d 123). In opposition, the plaintiff failed to raise a triable issue of fact.

Additionally, the defendant demonstrated its prima facie entitlement to judgment as a matter of law dismissing the promissory estoppel cause of action. " 'The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and

[138 N.Y.S.3d 203]

foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise' " (*Rock v. Rock,* 100 A.D.3d 614, 616, 953 N.Y.S.2d 165, quoting *Schwartz v. Miltz,* 77 A.D.3d 723, 724, 909 N.Y.S.2d 729 [internal quotation marks omitted]). "The existence of a valid and enforceable contract governing a particular subject matter

precludes recovery under a promissory estoppel cause of action arising out of the same subject matter" (*Bennett v. State Farm Fire & Cas. Co.,* 181 A.D.3d 777, 778, 121 N.Y.S.3d 298). Where, however, an oral agreement violates the statute of frauds, promissory estoppel may preclude application of the statute of frauds if its application would result in unconscionability (*see Matter of Hennel,* 29 N.Y.3d 487, 493–494, 58 N.Y.S.3d 271, 80 N.E.3d 1017). An "unconscionable injury" is "injury beyond that which flows naturally ... from the non-performance of the unenforceable agreement" (*Merex A.G. v. Fairchild Weston Sys., Inc.,* 29 F.3d 821, 826 [2d Cir.] [internal quotation marks omitted]). Here, the defendant established that the plaintiff did not suffer an unconscionable injury so as to permit a cause of action based on promissory estoppel where the underlying contract is invalid because of the statute of frauds. In opposition, the plaintiff failed to raise a triable issue of fact.

Finally, the defendant demonstrated its prima facie entitlement to judgment as a matter of law dismissing the remaining causes of action, alleging unjust enrichment and seeking recovery in quantum meruit. "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*GFRE, Inc. v. U.S. Bank, N.A.,* 130 A.D.3d 569, 570, 13 N.Y.S.3d 452 [internal quotation marks omitted]). A plaintiff may not assert a cause of action sounding in unjust enrichment or quantum meruit to circumvent the statute of frauds (*see Matter of Zelouf,* 183 A.D.3d 900, 902, 124 N.Y.S.3d 701 ; *Strauss v. Fleet Mtge. Corp.,* 282 A.D.2d 736, 737, 724 N.Y.S.2d 356). Here, the defendant established that it was not against good conscience for it to retain the $500,000 donation from 1981 despite the renovations to the College of Business Administration building. The plaintiff's name has been on the building for 35 years. The name Bent Hall remains on the renovated College of Business Administration building, albeit not in the pre-renovation location, and Bent Hall also appears on campus directional signs. The plaintiff failed to raise a triable issue of fact in opposition to the defendant's prima facie showing and, on its cross motion, failed to demonstrate its prima facie entitlement to judgment as a matter of law on the issue of liability, in effect, on the causes of action alleging unjust enrichment and seeking recovery in quantum meruit (*see generally Excel Realty Advisors, LP v. Engel Burman Group, LLC,* 134 A.D.3d 668, 670, 20 N.Y.S.3d 563).

The plaintiff's remaining contention, raised for the first time on appeal, is not properly before this Court.

Accordingly, we agree with the Supreme Court's determination granting the defendant's converted motion for summary judgment dismissing the complaint and denying the plaintiff's cross motion for summary judgment

on the issue of liability, in effect, on the causes of action alleging unjust enrichment and seeking recovery in quantum meruit.

SCHEINKMAN, P.J., DILLON, LASALLE and CHRISTOPHER, JJ., concur.

Bruce R. Bent v. St. John's Univ.

Supreme Court of New York, Queens County

August 8, 2019, Decided; August 13, 2019, Filed

Index Number 701294 2018

Reporter
2019 N.Y. Misc. LEXIS 16798 *

BRUCE R. BENT, Plaintiff(s) -against- ST. JOHN'S UNIVERSITY, NEW YORK., Defendant(s)

Subsequent History: Affirmed by *Bent v. St. John's Univ., N.Y., 2020 N.Y. App. Div. LEXIS 7622, 2020 WL 7233877 (N.Y. App. Div. 2d Dep't, Dec. 9, 2020)*

Core Terms

rights, restitution, statute of frauds, Donor, gift, cause of action, front entrance, donation, unjust enrichment, renovation, parties, settlement agreement, new building, one year, perpetuity, alleges, promise, circumstances, speculation, part performance, damages

Judges: [*1] MARGUERITE A. GRAYS, Justice.

Opinion by: MARGUERITE A. GRAYS

Opinion

The following papers numbered EF6-EF12, EF-13-EF24, EF26-EF28, EF37, EF31-EF32, EF10, EF25, EF29, EF30 read on this motion by Defendant St. John's University, New York, which has been converted into a motion for summary judgment pursuant to *CPLR §3211(c)*, and on this cross-motion by plaintiff Bruce R. Bent for summary judgment on his claim for restitution.

Papers

Numbered

Notice of Motion - Affidavits - Exhibits.....EF6-EF12

Notice of Cross Motion - Affidavits - Exhibits.....EF13-EF24

Answering Affidavits - Exhibits.....EF26-EF28, EF 37

Reply Affidavits.....EF31-EF32

Memoranda of Law.....EF10, EF25, EF29, EF30

Upon the foregoing papers it is ordered that the defendant's motion is granted, and the plaintiff's cross-motion is denied.

By Order dated March 1, 2019, defendant's motion was converted to a motion for summary judgment pursuant to *CPLR §3211 (c)*, and the parties were directed to submit any additional evidence to be considered, on or before March 29, 2019.

By Stipulation executed by the parties on March 27, 2019, and 'So Ordered' by the Court on March 28,2019, the time to submit any additional evidence was extended to April 29, 2019.

I. The Plaintiff's [*2] Allegations:

Plaintiff Bruce R. Bent averred as follows:

Bruce R. Bent graduated from St. John's University College of Business Administration in 1961, and he subsequently served as a University Trustee over the years, he donated millions of dollars to the university.

In 1981, as the university erected a new building for its College of Business Administration on its Queens' campus, a representative of the University President offered Bent the naming rights to the new building, including a prominent sign, in exchange for a $500,000 payment to the university's endowment fund. Bent agreed to make the payment, and, on September 18, 1981, the university held a ceremony for the "Dedication of Bent Hall." The new building had prominent signage over the front entrance and throughout the building. The University President assured the plaintiff that "future generations" would be able to see the name "Bent Hall" over the front entrance to the building.

On October 16, 2015, the university's current President, Conrado Gempsaw, invited the plaintiff to lunch and informed him about renovations being made to Bent Hall. The plaintiff declined to make any new donations or payments to defray the cost of **[*3]** the renovations.

The university requested that the plaintiff return the naming rights to the building so that they could be resold to another individual. The parties attempted to arrive at an agreement whereby the plaintiff would return the naming rights in exchange for their fair value. Between March, 2016 and October, 2016, the University's Office of General Counsel sent Bent four written proposals stating "the University acknowledges that the Naming Rights were granted to Donor in perpetuity." The parties did not reach a signed agreement.

The plaintiff subsequently learned that the university had removed the name "Bent Hall" from the front entrance to the buildings and had replaced it with a sign stating "Peter J. Tobin College of Business." Tobin is another benefactor of the university. Moreover, the university in its external communications no longer calls the building "Bent Hall," but rather " the newly renovated Tobin College of Business building."

This action ensued when the plaintiff received a letter from President Gempshaw informing him that the university was free to revoke the naming rights since Bent had no agreement in writing concerning them.

II. The Defendant's Allegations: [*4]

Joseph E. Oliva, the Vice President for Administration, Secretary, and General Counsel of St. John's University, averred as followed: The plaintiff made a $500,000 donation to help pay for the construction of a new building for which he claimed a personal income tax deduction. The University decided to name the new building "Bent Hall" in "tribute" to the plaintiff. Plaintiffs did not purchase naming rights, and the University does not possess any document evidencing that he did so. At the dedication ceremony for the new building, the University gave plaintiff Bent its Medal of Honor and a written citation which included the language to be set on the cornerstone. The language reads: "This cornerstone /l of Bent Hall /l St. John's University, New York, /l a tribute in the name to Bruce R. Bent *** was blessed by /l and set in place by ***." The building has borne the plaintiff's name from 1981 to the present. In 2016, the University began a "gut renovation" of the building, but the plaintiff refused his financial support. "The scope of the construction was so vast that, for all intents and purposes, the University constructed a new building." The building has not been renamed, and it **[*5]** still has a sign stating "Bent Hall" on its side. The plaintiff declined to provided financial support for the extensive renovation. At a meeting in October, 2015, "President Gempesaw asked if Plaintiff was interest in providing an additional financial pledge to the University in order to defray the estimated $30 million cost of the renovations, but Plaintiff declined to do so."

III. Discussion

The Court initially questions whether the plaintiff has suffered a wrong in the magnitude that he alleges. He alleges that the building for the business school was to be named "Bent Hall" in perpetuity. He complains that people passing by the building now will see a large sign over the entrance stating "The Peter J. Tobin College of Business," and will think that is the name of the building. "Any passerby," Bent alleges, "will rightly assume, based on the huge new sign over the entrance, that the Building is now called 'The Peter J. Tobin College of Business.'" But the name of the building must be distinguished from the name of the school itself. The name of the university's business school has been "Peter J. Tobin College of Business" since 1999. The University did not rename Bent Hall after **[*6]** another alumnus. That more than one name will appear on a building or in and around its various parts for various purposes may be expected from an institution dependent on philanthropy. Moreover, although the plaintiff's name no longer appears over the front entrance, it does appear on the cornerstone in front of the building and on a sign on the side of the building. Despite the foregoing, the Court recognizes that the plaintiff may justifiably perceive injury to a degree.

The plaintiff asserts five causes of action, the first for breach of contract, the second for the breach of the implied covenant of good faith and fair dealing, the third for promissory estoppel, the fourth for unjust enrichment and the fifth for quantum merit.

Turning first to the cause of action for breach of contract, and leaving aside the statute of frauds for the moment, donor recognition agreements are enforceable (*see, Allegheny Coll. v. Nat'l Chautauqua Cty. Bank of Jamestown*, 246 NY369 [1927] [where a party promises a charitable donation to an institution on the condition of its use as a fund in the name of the promisor and makes the donation, the duty assumed by the institution to comply with the condition **[*7]** is a sufficient consideration in itself to create a bilateral agreement];

Reed Found., Inc. v. Franklin D. Roosevelt Four Freedoms Park, LLC, 108 AD3d 1 [2013] [grant agreement required developer to complete an engraving]). The public has an interest in enforcing donor recognition agreements in order to promote philanthropy (*see, Reed Found., Inc. v. Franklin D. Roosevelt Four Freedoms Park, LLC, supra*).

In *Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt Univ., (174 SW3d 98 [Tenn. Ct. App. 2005])*, relied upon by the plaintiff, the court held, *inter alia*, that if the recipient of a conditional gift fails or ceases to comply with the conditions, the donor has a remedy in the recovery of the gift. "However," the court continued, " it would be inequitable to allow Vanderbilt to 'return' the gift at issue here simply by paying the Tennessee U.D.C. the same sum of money the Tennessee U.D.C. donated in 1933 because the value of a dollar today is very different from the value of a dollar in 1933. To reflect the change in the buying power of the dollar, the amount Vanderbilt must pay to the Tennessee U.D.C. in order to return the gift should be based on the consumer price index published by the Bureau of Labor Statistics of the United States Department of Labor" (*Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt Univ., supra*). In other words, the recipient is required to make appropriate restitution.

In the case at bar, before reaching the equitable causes of action which provide the basis for the **[*8]** plaintiff's demand for restitution, the causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing must be dealt with.

Defendant St. John's University initially raised *General Obligations Law §5-701* "Agreements required to be in writing," as the statute of frauds applicable to this case, and the plaintiff objected that *General Obligations Law §5-703*, " Conveyances and contracts concerning real property required to be in writing," is the relevant statute of frauds. (*General Obligations Law §5-703(4)* authorizes the Court "to compel the specific performance of agreements in cases of part performance"). The defendant university aptly replied that both statutes apply to oral real estate transactions that cannot be performed within one year. In *Bowman v. Di Placidi (27 AD3d 259, 259 [2006])*, the appellate Court held: "Plaintiffs' claims for breach of an alleged oral contract for the transfer and reconveyance some three years later of a parcel of real property, were properly dismissed since the purported agreement is void under the statute of frauds (see *General Obligations Law § 5-701* and *§ 5-703*.)" Citing *General Obligations Law § 5-701*, the Court reasoned: "since the agreement was not performable within one year, plaintiffs' reliance upon part performance to remove the agreement from the statute's preclusive scope is, in any event, unavailing ***" **[*9]** *(Bowman v. Di Placidi, supra, 259-60*). The defendant university correctly contends that plaintiff Bent must clear the hurdles placed in his path by both *General Obligations Law § 5-701* and *§ 5-703*.

General Obligations Law § 5-701, " Agreements required to be in writing," states in relevant part: "a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: 1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime ***" (*see, Foster v. Kovner, 44 AD3d 23 [2007]*.) The statute includes within its scope only those contracts "which by their very terms have absolutely no possibility in fact and law of full performance within one year "*(D& N Boening, Inc. v. Kirsch Beverages, Inc., 63 NY2d 449 [1984]*; *Foster v. Kovner, supra*).

In the case at bar, plaintiff Bent alleges that he had an agreement with St. John's University whereby the latter promised to leave his name on a building in perpetuity. "[W]e expressly agreed the grant of Naming Rights would be perpetual." (Emphasis in original.) This is obviously not a contract that could be performed within one year, and, thus, it is within the statute of frauds. An oral agreement calling for a performance **[*10]** in perpetuity is unenforceable under the Statute of Frauds as incapable of performance within one year or of complete performance before the end of the plaintiff's lifetime, (*see, Melwani v. Jain, 281 AD2d 276 [2001]*; *Myers v. Waverly Fabrics, 101 AD2d 777 [1984])*, aff'd as modified sub nom. *Meyers v. Waverly Fabrics, Div. of F. Schumacher & Co., 65 NY2d 75 [1985]*. *Webber v.Dash*, 2019 WL 1213008, [S.D.N.Y.2019]). Plaintiff Bent alleges that he was promised that " 'future generations' would see my name above the front entrance to the Building," but this also calls for performance by the university beyond one year. Even if the alleged contract is construed as "limited to the life of the building itself" (*see, Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt Univ., supra, 117*), it still violates *General Obligations Law § 5-701*.

General Obligations Law §5-701(a) does not require that the agreement itself be in writing, only "some note or memorandum thereof." This "note or memorandum" may be comprised of multiple documents, signed and unsigned, provided (1) that they concern the same subject matter or transaction, (2) that together, the documents include all the essential terms of the agreement, and (3) that a note or memorandum showing a contractual relationship between the parties is signed by the party to be charged or his lawful agent (*see,* Crabtree v. Elizabeth Arden Sales Corp., 305 NY 48[1953]). In the case at bar, the four unsigned draft settlement agreements (captioned "Gift Agreement") do not satisfy the statute of frauds.

First, the draft settlement agreements **[*11]** do not embody all of the essential terms of the alleged contract between the parties to name the building "Bent Hall" with a prominent sign over the front entrance in exchange for $500,000. The settlement agreements are not notes or memoranda of the transaction sued upon here. In the settlement agreements, taking the first one as typical, plaintiff Bent returns the naming rights that he claims back to the university. 9"3. Release: Donor hereby releases and forever surrenders all rights, title and interest in the Naming Rights to the University"). He does so in return for tax advantages "4. The University will provide Donor with a gift receipt that acknowledges his release of the naming rights. At Donor's request, and upon receipt of Donor's executed IRS Form 8283, the University will execute Part IV of IRS Form 8283 (Donee Acknowledgment"). This is a new contract which deals with new subject matter (tax advantages) and a new transaction. The plaintiff relies on one of the recitals in the draft agreements which states: "WHEREAS, the University acknowledges that the Naming Rights were granted to Donor in perpetuity***." However, this recital does not express all of the essential terms **[*12]** of the alleged contract entered into in 1981, nor does it even state that naming rights were granted to the plaintiff pursuant to a contract. Indeed, it can be argued that a previous recital undermines the claim of contract: "WHEREAS, as an acknowledgment of his substantial support of the University, the University granted the naming rights to the building (the 'Naming Rights') to Donor, a distinguished alumnus of St. John's University College of Business Administration ***." In other words, in gratitude for his "substantial support," the university named a building for him.

Second, the draft settlement agreements call for the signatures of plaintiff Bent and of Conrado Gempesaw, the President of St. John's University. Neither signed any of the draft settlement agreements. The cover emails sent by agents of the University along with copies of the draft agreements do not satisfy the subscription requirements (*see,* Leist v. Tugendhaft, 64 AD3d 687 [2009]). "At best, the e-mail was the equivalent of a cover letter to a proposed contract, the signing of which is insufficient to satisfy the subscription requirement ***," (Leist v. Tugendhaft, supra, 688.) The plaintiff's reliance on Forcelli v. Gelco Corp., 109 AD3d 244 [2013]) is misplaced since the email that was sent was more than a mere cover letter, **[*13]** and it was sent by an agent with authority to settle a case.

Third, the draft settlement agreements are not admissible evidence. CPLR§4547 "Compromise and offers to compromise," provides in relevant part: "Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible." The statute applies to such conduct or statements occurring even before the commencement of a lawsuit (*see, Keitel v. E*TRADE Fin. Corp., 153 AD3d 1181 [2018]).* The relevant time under CPLR §4547 is the period when there is "a claim which is disputed." The statute makes clear that the rule of exclusion is applicable only when the claim or its amount was disputed at the time of the communication.

Finally, the plaintiff cannot successfully rely on the doctrine of part performance. "The exception to the statute of frauds for part performance has not been extended to General Obligations Law § 5-701" (*Kelly v. P&G Ventures 1, LLC, 148 AD3d 1002, 1004 [2017]*; Best Glob. Alternative, Ltd. v. FCIC Constr. Servs., Inc., 170 AD3d 1101 [2019]; Shapiro v. Eltman, Eltman & Cooper, P.C, 157 AD3d 835 [2018]).

The oral agreement alleged by plaintiff Bent violates General Obligations Law § 5-701, and his case cannot be saved by the doctrine of part performance (*see,* Bowman v. Di Placidi, supra*).* Since plaintiff Bent did not successfully clear the hurdle placed in his path by General Obligations Law § 5-701, the first of two possible hurdles (*see,* Bowman v. Di Placidi, supra), the Court does not have to determine whether General Obligations Law § 5-703 is applicable to this case. The Court notes that the parties dispute whether **[*14]** the "oral naming rights transaction" falls within the scope of General Obligations Law §5-703.

The cause of action for breach of an implied duty of good faith and fair dealing must be dismissed because of the absence of a valid and binding contract from which such a duty would arise (*Am.-European Art*

Assocs., Inc. v. Trend Galleries, Inc., 227 AD2d 170, [1996]).

The defendant successfully demonstrated that the statute of frauds bars the plaintiff's causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, which leaves for consideration the causes of action for promissory estoppel, unjust enrichment and quantum meruit.

In regard to promissory estoppel, it is true that "where the elements of promissory estoppel are established, and the injury to the party who acted in reliance on the oral promise is so great that enforcement of the statute of frauds would be unconscionable, the promisor should be estopped from reliance on the statute of frauds". (*In re Estate of Hennel, 29 NY3d 487, 494 [2017])*. The Court finds that, considering all of the facts of this case, the enforcement of the statute of frauds would not be unconscionable (*see, In re Estate of Hennel, 29 NY3d 487 [2017]* ["petitioners cannot invoke that doctrine here because application of the statute of frauds would not inflict an unconscionable injury upon petitioners."]; *Aziz v. Anna Dev. LLC, 165 AD3d 580 [2018])*. Among **[*15]** these numerous circumstances, the donation was made by a wealthy and successful businessman, sophisticated enough to "get it in writing," who had his name alone on the building for at least thirty seven years. The university did not change the name of the building despite its $30,000,000 renovation, and the plaintiff's name remains on the cornerstone and on a sign over a side entrance.

The cause of action for quantum meruit is not barred by the statute of frauds because it seeks "restitution" concerning the plaintiff's gift to the university and it is not an improper attempt to enforce an oral agreement alleged to be for perpetuity (*see, Hernandez v. Florian*, -AD3d-, *2019 WL 2607667, [2019]*; *Lake Overlook Partners, LLC v. Sosa, 163 AD3d 945 [2018]*; *Kennedy v. Leibowitz, 303 AD2d 375 [2003])*. However, under all of the facts and circumstances of this case, the Court finds that the cause of action for quantum meruit cannot withstand this motion for summary judgment. The plaintiff did not show that he can prove the value of his gift as diminished over time and circumstances (*see, Home Const. Corp. v. Beaury, 149 AD3d 699 [2017])*.

In regard to unjust enrichment, the plaintiff did not show that under all of the facts and circumstances of this case it would be against equity and good conscience for the university to keep the gift (*see, Zamor v. L & L Assocs. Holding Corp., 85 AD3d 1154 [2011])*. "The essential inquiry **[*16]** in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered ***" (*Paramount Film Distrib. Corp. v. State, 30 NY2d 415, 421 [1972])*. In the case at bar, the University substantially complied with the promise allegedly made to the plaintiff that "future generations" would see his name on a sign over the front entrance to the building. The plaintiff's name remained over the front entrance of the building for approximately thirty-five years, Moreover, the plaintiff's attempt to obtain restitution is a reach for a remedy that would be based on sheer speculation. "Restitution is a remedy for unjust enrichment, not a separate basis for liability. In other words, one who establishes a prima facie case of unjust enrichment is entitled to the equitable remedy of restitution. The unifying theme of restitution is the prevention of unjust enrichment, and its object is to restore the status quo ante—to put the parties back into the position they were in before unjust enrichment occurred." (22A NY. Jur2d, Contracts). The plaintiff made his donation approximately thirty-seven years ago, taking a tax deduction for it, and he had his name over the front entrance **[*17]** for approximately thirty-five years, until the building underwent a $30,000,000 renovation. Adjusting the donation to its present value would involve so many disputable factors that sheer speculation would result, and, thus, restoration of the status quo is no longer possible.

This Court is mindful of *Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt Univ. (supra)*, but respectfully declines to follow it. The Tennessee Court did not fully consider all the complex factors involved in making restitution in this type of case and largely dealt with a method of accounting for the changed monetary value of the original contribution due to the passage of time. However, the Court just resorted to the Consumer Price Index and ignored other factors that affect the return value of the gift. The Tennessee court admitted: "Determining the value of an inscription is not a matter that is subject to easy proof or to reasonably definite calculation, and any attempt to do so would lead to a calculation of damages that was impermissibly speculative in nature" (*Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt Univ., supra, 119*).

The difficulty of awarding damages or making restitution in this type of case has been noted by other court. In *Prentis Family Found, v. Barbara Ann Karmanos Cancer Inst., (266 Mich. App. 39, 55-56* [Court of Appeals of Michigan 2005]), the appellate court stated:

"In granting defendant summary **[*18]** disposition, the trial court noted that plaintiff had not cited any authority with respect to the value of the loss of naming rights by a family charitable foundation, found that there was no method to measure damages, and concluded that plaintiff's damages were too speculative." Similarly, under the facts and circumstances of this case, the amount of the plaintiff's damages or amount due for restitution is just a matter for speculation. *Allegheny Coll. v. Nat'l Chautauqua Cty. Bank of Jamestown (supra)* offers little guidance because there the action brought by Allegheny College to recover the unpaid balance of a pledge did not concern restitution.

In sum, the Court recognizes that donor recognition agreements can be enforceable on a contract theory (*see, Allegheny Coll. v. Nat'l Chautauqua Cty. Bank of Jamestown, supra)*, and that a remedy may be had on other theories as well. However, this is not a typical case. Unfortunately, for plaintiff Bent, his own actions, the passage of time, and changing circumstances have deprived him of a remedy. Large contributions subject to conditions made to charitable institutions are often, if not always, accompanied by written donor's agreements. **[*19]** Such written agreements may be enforced by way of specific performance (*see, Reed Found., Inc. v. Franklin D. Roosevelt Four Freedoms Park, LLC, supra*), thereby avoiding the speculative issues present in this case. Plaintiff Bent's case is anomalous, and, because of the absence of an agreement outside the Statute of Frauds and other factors, his lawsuit is futile.

Dated: AUG 08 2019

/s/ [Signature]

J.S.C.

End of Document

Page 426

723 N.Y.S.2d 426 (A.D. 1 Dept. 2001)
Adele Smithers, etc., Plaintiff-Appellant,
v.
St. Luke's-Roosevelt Hospital Center, et al., Defendants-Respondents.
543
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT
April 5, 2001

Plaintiff appeals from an order of the Supreme Court, New York County (Beatrice Shainswit, J.), entered December 18, 1998, which, inter alia, denied her motion for a preliminary injunction and granted defendants' motions to dismiss the complaint.

Paul R. Levenson, of counsel (August C. Venturini, Andrew B. Siben and Frederick Fagelson, on the brief, Kaplan Gottbetter & Levenson, LLP and Siben & Siben) attorneys for plaintiff-appellant,

Edward S. Kornreich, of counsel (Charles S. Sims, Leonard A. Feiwus and Herschel Goldfield, on the brief, Proskauer Rose LLP, attorneys) for defendants-respondents St. Luke's-Roosevelt Hospital Center and Continuum Health Partners, Inc. (formerly Greater Metropolitan Health Systems, Inc.),

William Josephson, of counsel (Peter H. Schiff, Dietrich Snell and Paula Gellman, on the brief, Eliot Spitzer, Attorney General of the State of New York, attorney) for defendant-respondent Dennis C. Vacco.

Page 427

Angela M. Mazzarelli, J.P., Betty Weinberg Ellerin, Alfred D. Lerner, David Friedman, JJ.

ELLERIN, J.

The issue before us is whether the estate of the donor of a charitable gift has standing to sue the donee to enforce the terms of the gift. We conclude that in the circumstances here present plaintiff estate does have the necessary standing.

A recitation of the factual allegations in the complaint, which must be deemed true on this application to dismiss (see, e.g., Cron v Hargro Fabrics, 91 N.Y.2d 362), is instructive. Plaintiff Adele Smithers is the widow of R.

Brinkley Smithers, a recovered alcoholic who devoted the last 40 years of his life to the treatment and understanding of the disease of alcoholism. In 1971 Smithers announced his intention to make a gift to defendant St. Luke's-Roosevelt Hospital Center (the "Hospital") of $10 million over time for the establishment of an alcoholism treatment center (the "Gift"). In his June 16, 1971 letter to the Hospital creating the Gift, Smithers stated, "Money from the $10 million grant will be supplied as needed. It is understood, however, that the detailed project plans and staff appointments must have my approval."

According to the complaint, the Hospital agreed to use the Gift to expand its treatment of alcoholism to include, following five days of detoxification in the hospital, "rehabilitation in a free-standing, controlled, uplifting and non-hospital environment," that is, a "therapeutic community" removed from the hospital setting. With $1 million from the first installment of the Gift, the Hospital purchased a building at 56 East 93rd Street in Manhattan to house the rehabilitation program, and in 1973 the Smithers Alcoholism Treatment and Training Center opened there.

Smithers thereafter remained involved in the management and affairs of the Smithers Center. At times, according to the complaint, the Hospital sought to avoid its obligations under the terms of the Gift, and its relationship with Smithers was an uneasy one. On July 31, 1978, Smithers wrote that the Hospital had "not lived up to my letter of intent," and that "[u]nder the circumstances no funds or stock will be forthcoming from me." Only slightly more than half of the Gift had been made at that time.

In 1981 the president of the Hospital, Gary Gambuti, commenced discussions with Smithers in an effort to induce him to complete the Gift. In a November 5, 1981, letter, Smithers informed Gambuti that he had no objection to the sale of the building. Smithers noted in the letter that when the Smithers rehabilitation facility was set up there was practically no place in the New York area for an alcoholic to undergo rehabilitation after detoxification, but now there are a number of facilities, most of which "have the advantage of being at least a few miles out of town--so there is more chance of outdoor recreation." According to Mrs. Smithers, her husband had no intention of completing the Gift, but agreed to the sale of the building to keep the Smithers Center afloat. In any event, Gambuti, in response, assured Smithers of the Hospital's continuing interest in the Smithers Alcoholism Program and its commitment to expanding its entire alcoholism treatment program. He wrote that he saw no reason to sell the building until a plan for this program had been proposed, and that he would appreciate receiving Smithers's comments and suggestions before the

plan was finalized. He expressed his hope that Smithers would be willing "to sit down with us and review our proposals for the future expansion in alcoholism." Contrary to the dissent's categorical conclusion that this appeal concerns merely the sale of the building, expressly agreed to by Smithers, that consent was given before the Gift's completion and must be viewed in the context of what follows.

Over the next two years, Gambuti repeatedly assured Smithers that the Hospital would strictly adhere to the terms of the Gift and carry out Smithers's intent in making it. Only when Smithers was completely satisfied of the Hospital's intentions did he agree to complete the Gift, which he accomplished in an October 24, 1983 letter, stating:

Thanks to the cooperation of the officers and staff of the Smithers Center and St. Luke's-Roosevelt Hospital Center (the "Hospital"), the Smithers Center is now in splendid shape, and I feel that the time has come for me to complete the funding of the project. (In this letter I will refer to all aspects of the existing alcoholism program, including in-patient, out-patient and rehabilitation services, and any future extension thereof, collectively as the "Smithers Center"). (Emphasis added.)

This final contribution is subject to the following restrictions and is to be used exclusively for the following purposes.

First, it is my intention that my final contribution be set aside as an endowment fund, (the "Smithers Endowment Fund"). The income is to be used exclusively for the support of the Smithers Center, to the extent necessary for current operations, and any unused income remaining at the end of each calendar year is to be accumulated and added to principal. Principal of the Smithers Endowment Fund is not to be expended for any purpose except for remodeling or rebuilding the administration section and out-patient floor at the Building on 58th Street, and for construction, repairs or improvements with respect to any other building space at any time used directly in connection with the Smithers Center. Such capital expenditures should be considered as secondary to the endowment function and should in no event exceed in the aggregate one half of the initial value of the Smithers Endowment Fund.

Beneath Smithers's signature is the following paragraph signed and dated by Gambuti:

The contribution of the number of shares of IBM Stock referred to above by R. Brinkley Smithers is gratefully accepted, subject to the restrictions set forth in this letter, in full satisfaction of any outstanding pledge or other obligation. (Emphasis added.)

The existing rehabilitation services, which Smithers included in his definition of the Smithers Center and which the Hospital's acceptance of the Gift encompassed, were housed in the free-standing Smithers building and, according to the complaint, were intended always to be housed in a free-standing facility.

In late 1992, the Hospital asked Mrs. Smithers to organize a "Silver Anniversary Gala," in honor of her husband and herself, to raise funds for restoration of the building and for a scholarship program for Smithers Center patients in need of financial assistance. From 1992 to March 1995, she and, until his death in January 1994, Smithers successfully solicited millions of dollars' worth of donated goods and services for a total restoration of the building and organized the fundraiser, scheduled for April 1995. Then, in March 1995, just

Page 429

over a year after Smithers's death, the Hospital announced that it planned to move the Smithers Center into a hospital ward and sell the East 93rd Street building. The Hospital directed Mrs. Smithers, a month and a half before the fundraiser was scheduled to be held, to cancel the event.

The Hospital's announced intentions aroused Mrs. Smithers's suspicions. First, relocating the patients in a hospital ward would violate the Hospital's obligation to run the Smithers Center in a free-standing facility physically separate from the Hospital. Second, the Hospital's claim that it had to sell the building to become more competitive was inconsistent with its assurances to her husband and her through the years that the Smithers Center was operating at a profit. Mrs. Smithers notified the Hospital of her objections to the proposed relocation of the program and demanded an accounting of the Smithers Center's finances.

The Hospital at first resisted disclosing its financial records, but Mrs. Smithers persisted, and in May 1995 the Hospital disclosed that it had been misappropriating monies from the Endowment Fund since before Smithers's death, transferring such, monies to its general fund where they were used for purposes unrelated to the Smithers Center. Mrs. Smithers notified the Attorney General, who investigated the Hospital's plan to sell the building and discovered that the Hospital had transferred restricted assets from the Smithers Endowment Fund to its general fund in what it called "loans." The Attorney General demanded the return of these assets and in August 1995 the Hospital returned nearly $5 million to the Smithers Endowment Fund, although it did not restore the income lost on those funds during the intervening years.

In the next three years, Mrs. Smithers tried to negotiate a resolution with the Hospital. The Attorney General participated in the negotiations, seeking, according to an affidavit in support of his motion to dismiss the complaint, "to effectuate a settlement that would resolve the plaintiff's concerns and benefit the Smithers Alcoholism Program." When the negotiations proved unsuccessful, the Attorney General, according to the affidavit, "proceeded to conclude his investigation.. and to resolve those issues identified during the course of the investigation." On April 21, 1998, the Attorney General, having received a letter from an attorney writing on behalf of Mrs. Smithers, wrote to counsel for the Hospital advising that he would not object to the sale of the East 93rd Street building "so long as the Hospital can demonstrate [] to our satisfaction," inter alia, that the Hospital's plan for the Smithers program and the Smithers Center would continue "in accordance with the donor's gift," that the Hospital would disclose to the Attorney General any changes to the Smithers program budget resulting from "the proposed relocation of the inpatient rehabilitation unit from the East 93rd Street building to the Hospital," and that safeguards had been put into place to prevent future commingling of restricted funds. The letter stated that the Attorney General would require an assurance that no such commingling of funds would occur in the future.

In July 1998, the Attorney General entered into an Assurance of Discontinuance Pursuant to Executive Law §63(15) with the Hospital. Under the terms of this assurance the Hospital agreed to make no more transfers or loans from Gift funds for any purpose other than the benefit of the Smithers Center and to return to the Gift fund $1 million from the proceeds of any sale of the building. The Attorney General did not require the Hospital to return

the entire proceeds of such a sale, because he found that, contrary to Mrs. Smithers's contention, the terms of the Gift did not preclude the Hospital from selling the building.

Two months later, Mrs. Smithers commenced this suit to enforce the conditions of the Gift and to obtain an accounting by the Hospital of its handling of the Endowment Fund and property dedicated to the Smithers Center. The Hospital and the Attorney General were named, inter alia, as defendants. Mrs. Smithers had obtained Special Letters of Administration from the Nassau County Surrogate's Court appointing her the Special Administratrix of Smithers's estate for the purpose of pursuing claims by the estate against the Hospital in connection with its administration of the Smithers Center. The named executor of Smithers's estate had consented to the issuance of the Special Letters of Administration. The Attorney General

had appeared before the Surrogate on behalf of ultimate charitable beneficiaries. The Surrogate issued the letters "upon the understanding that the Court takes no position with regard to the advisability of any contemplated litigation.

Mrs. Smithers sought an injunction to permanently enjoin the Hospital from selling the building and relocating the Smithers Center without court approval, for specific performance by the Hospital of the terms of the Gift, e.g., perpetual maintenance of a free-standing rehabilitation unit and return to the Gift funds of all proceeds of any sale or rental of the building, for return of all income lost on the funds misappropriated by the Hospital from the Gift funds, for imposition of a constructive trust, for an accounting, and for a judicial declaration concerning the terms and conditions under which the Gift fund is to be administered. She then moved for a preliminary injunction against the sale of the building by the Hospital. The Hospital moved to strike a notice of pendency that Mrs. Smithers had filed against the building and moved to dismiss the complaint for lack of standing. The Attorney General also moved to dismiss for lack of standing and for failure to state a cause of action. Supreme Court denied the motion for a preliminary injunction, granted the motions to dismiss, and canceled the notice of pendency on the building. Mrs. Smithers then moved this Court for a preliminary injunction pending appeal to prevent the sale of the building or, alternatively, to enjoin disbursement of the proceeds in the event of a sale. We granted the motion to enjoin disbursement of the sale proceeds and directed that the proceeds be placed in escrow pending our further order.

On appeal, the Attorney General's office, having reevaluated the matter "under the direction of the newly elected Attorney General, " reversed its position and urged this Court to remand for a hearing on the merits to determine whether or not the building was subject to gift restrictions. If it were, then all proceeds of the sale would be subject to the same restrictions and could not be used for the Hospital's general purposes. The Attorney General was constrained to point out that, in that case, the Assurance of Discontinuance could not authorize the sale of the building and the application of only $1 million of the sale proceeds to the Smithers Center in the absence of the donor's release of the restrictions or a court order authorizing the release of the restrictions. He explained that he had supported Mrs. Smithers's motion before this Court for a preliminary injunction against the sale of the building because he agreed that a hearing was required to determine whether such restrictions existed. However, the Attorney General urged that the issue of Mrs. Smithers's standing to bring the suit need not, and should not, be reached in this

action, since he certainly had standing and had joined with her in seeking reversal and remand.

We note that, not only did the Hospital (and the Attorney General) fail to seek court approval of the Assurance of Discontinuance, which was required by § 522 of the Not-For-Profit Corporation Law because the Assurance contemplated the sale of the building, the diversion of all the appreciation realized upon the sale, and the relocation of the rehabilitation unit out of a free-standing, non-hospital environment and into a hospital ward, all of which may have been contrary to the terms of the Gift (see, Alco Gravure v Knapp, 64 N.Y.2d 458), but also, just before signing the Assurance of Discontinuance, the Hospital had closed the in-hospital detox unit without even informing the Attorney General. The Attorney General learned of the closing a few months later from Mrs. Smithers's papers on her motion for a preliminary injunction. In his reply memorandum of law in support of the motion to dismiss, the Attorney General argued that he had not abdicated his duty by failing to prevent the closing, but had "reasonably relied on a specific representation" made by the executive vice president of the Hospital's corporate parent that the Smithers Alcoholism Center would remain at the Hospital, and that the Hospital had not advised the Attorney General of its actions "in breach of that representation." It may be observed that it was only Mrs. Smithers's vigilance that brought this to light, since apparently the Attorney General had no procedure in place by which to insure compliance by the donee. Appropriate oversight undoubtedly would have been provided had the requisite court approval been sought as statutorily required.

While this appeal was pending, the Attorney General and the Hospital reached another agreement. This agreement raised some issues for the first time, but it brought the position of the Attorney General and the Hospital on other issues into accord with Mrs. Smithers's position. For example, the Hospital agreed to allocate the entire net proceeds of the sale of the building to the restricted purposes of the Gift and to restore the income lost as a result of the transfer of Gift funds to its general fund Reversing his position again, the Attorney General returned to his predecessor's contention that Mrs. Smithers has no standing to bring this suit, and asked this Court to modify the decision dismissing the complaint for lack of standing so as to hold only that plaintiff does not have standing as special administratrix of the donor's estate and affirm, as modified, on that narrow ground. He sought a remand of the matter, not for further proceedings on the merits, but for the court's approval and implementation of his settlement stipulation with the Hospital.

The sole issue before us is whether Mrs. Smithers, on behalf of Smithers's estate, has standing to bring this action. The Attorney General

maintains that, with a few exceptions inapplicable here, standing to enforce the terms of a charitable gift is limited to the Attorney General. Most recently, the Attorney General has urged that, pursuant to the above-mentioned proposed settlement stipulation between himself and the Hospital, he has achieved all the relief that is appropriate in this case.

We begin by acknowledging that, pursuant to Article 8 of the Estates, Powers & Trusts Law governing the disposition of property for charitable purposes, "[t]he Attorney General shall represent the beneficiaries of such dispositions for religious, charitable, educational or benevolent purposes

Page 432

and it shall be his duty to enforce the rights of such beneficiaries by appropriate proceedings in the courts" (EPTL 8-1.1[f]). By designating the Attorney General as the representative of undesignated beneficiaries, the Legislature provided a mechanism for enforcing charitable trusts, which for a time had been deemed invalid in New York State because they lacked certain beneficiaries who could claim their enforcement (Lefkowitz v Lebensfeld, 51 N.Y.2d 442, 446). However, while EPTL 8-1.1(f) expressly extended the Attorney General's enforcement powers to all charitable dispositions, including absolute gifts, case law had already recognized the Attorney General's power to insure that charities used absolute gifts in accordance with the donors' stated purposes (id., citing St. Joseph's Hosp. v Bennett, 281 N.Y. 115, 119). In St. Joseph's, a charitable corporation that operated a hospital had obtained a declaratory judgment, over the Attorney General's opposition, that the testator's bequest for an endowment fund did not create a trust but was an absolute gift and as such need not be maintained intact as an endowment fund. The Court of Appeals held that whether the clearly expressed direction of a testator must be obeyed did not depend upon whether the gift was absolute or created a trust.

The authorities sustain the validity of the direction of the testator, and equity will afford protection to a donor to a charitable corporation in that the Attorney-General may maintain a suit to compel the property to be held for the charitable purpose for which it was given to the corporation.... Nothing in authority, statute or public policy has been brought to our attention which prevents a testator from leaving his money to a charitable corporation and having his clearly expressed intention enforced (281 N.Y. at 119).

The question of whether the donor who is living and can maintain his or her own action need rely on the protection of the Attorney General to enforce the terms of his gift was not before the Court in either Lebensfeld or St. Joseph's. This question was addressed in Associate Alumni of the

General Theological Seminary of the Protestant Episcopal Church in the United States of America v The General Theological Seminary of the Protestant Episcopal Church in the United States (163 N.Y. 417). Alumni of a seminary had contributed money for the endowment of a professorship, on certain specified conditions, and retaining the right of nomination when the chair became vacant. When disputes arose concerning those conditions, the voluntary association of alumni formed a corporation and brought an action against the seminary. The matter was submitted upon an agreed statement of facts to the Appellate Division, which found that the corporation had standing to bring suit as successor in rights and interest of the voluntary association of alumni, the donor of the fund, and that the seminary had received the fund in trust and had breached the terms of the trust. The court directed the seminary to transfer the fund to the corporation.

The Court of Appeals affirmed the Appellate Division's determination of the rights of the respective parties, but modified the judgment to decree specific performance by the seminary of the terms of the trust, instead of directing the return of the fund to the corporation. In the event of failure to comply with the judgment, the fund would be surrendered to the court or trustees appointed by the court, after which the corporation could apply to the court for disposition of the fund.

Page 433

The general rule is "If the trustees of a charity abuse the trust, misemploy the charity fund, or commit a breach of the trust, the property does not revert to the heir or legal representative of the donor unless there is an express condition of the gift that it shall revert to the donor or his heirs, in case the trust is abused, but the redress is by bill or information by the attorney-general or other person having the right to sue." [2 Perry on Trusts, sec. 744; Sanderson v White, 18 Pickering, 328; Vidal v Girard's Executors, 2 Howard (U.S.), 191; Mills v Davison, 54 N.J. Eq. 659.] The judgment below practically abrogates the trust and restores the fund to the plaintiff. To such return the plaintiff was not entitled, though as donor and possessor of the right to nominate to the professorship, it had sufficient standing to maintain an action to enforce the trust. [Mills v Davison, supra.] (163 N.Y. at 422; emphasis added.)

In dismissing Mrs. Smithers's complaint, Supreme Court relied on Associate Alumni, supra, and Alco Gravure, Inc. v Knapp Foundation (64 N.Y.2d 458) to hold that, since the Gift instruments do not provide Mrs. Smithers with the right of oversight, that right is vested exclusively in the Attorney General and Mrs. Smithers has no standing to sue. However, neither Associate Alumni nor Alco Gravure mandates this result. The holding of the former that the donor alumni association had standing to

enforce its gift explicitly forecloses the conclusion that the Attorney General's standing in these actions is exclusive. At the same time, the Court's characterization of the association as "donor and possessor of the right to nominate to the professorship" does not necessitate the conclusion that no donor has standing without having retained such a right. In the case on which the Court relied for its holding of donor standing, the donor had not retained any rights, but, "as the founder of the charity, has a standing to appear in court to restrain the diversion of the property donated from the charitable uses for which it was given" (Mills v Davison, 54 N.J. Eq. 659, 35 A 1072).

The dissent relies heavily on an observation of the Court in Alco Gravure that, " [n]ormally, standing to challenge actions by the trustees of a charitable trust or corporation is limited to the Attorney General" (64 N.Y.2d at 466). However, this observation was only an incomplete recapitulation of the general rule cited in full earlier in the opinion, that "one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust [citations omitted]. Instead, the Attorney-General has the statutory power and duty to represent the beneficiaries of any disposition for charitable purposes (EPTL 8-1.1[f]; [additional citations omitted])" (64 N.Y.2d at 465). The rule does not designate the Attorney General as the exclusive representative of donors of charitable dispositions, and the Court in Alco Gravure was not addressing the issue of donor standing. The issue was the standing of a certain group of beneficiaries. The Court held that the section of the Not-For-Prof it Corporation Law that permits amendment of the certification of incorporation of a charitable corporation does not authorize an amendment inconsistent with the purposes for which the funds were given to the corporation without compliance with the quasi-cy pres principles incorporated in the law, and that this particular group of beneficiaries of the charitable corporation had

standing to oppose the amendment. The Court found that the group, which was comprised of beneficiaries who were entitled to a preference in the distribution of the charitable funds, was sharply defined and limited in number and, as such, constituted an exception to the general rule. Moreover, the policy reason for limiting standing -- "to prevent vexatious litigation and suits by irresponsible parties who do not have a tangible stake in the matter and have not conducted appropriate investigations" (64 N.Y.2d at 466) -- was not applicable in this case. The plaintiffs' tangible stake in the matter derived from their status as preferred beneficiaries of the funds, which status would have been completely eliminated by the dissolution of the charitable corporation.

Supreme Court incorrectly characterized Mrs. Smithers as one who "positions herself as the champion and representative of the possible beneficiaries of the Gift," with no tangible stake because she has no position or property to lose if the Hospital alters its administration of the Gift. Mrs. Smithers did not bring this action on her own behalf or on behalf of beneficiaries of the Smithers Center. She brought it as the court-appointed special administratrix of the estate of her late husband to enforce his rights under his agreement with the Hospital through specific performance of that agreement. Therefore, the general rule barring beneficiaries from suing charitable corporations has no application to Mrs. Smithers. Moreover, the desire to prevent vexatious litigation by "irresponsible parties who do not have a tangible stake in the matter and have not conducted appropriate investigations" has no application to Mrs. Smithers either. Without possibility of pecuniary gain for himself or herself, only a plaintiff with a genuine interest in enforcing the terms of a gift will trouble to investigate and bring this type of action. Indeed, it was Mrs. Smithers's accountants who discovered and informed the Attorney General of the Hospital's misdirection of Gift funds, and it was only after Mrs. Smithers brought her suit that the Attorney General acted to prevent the Hospital from diverting the entire proceeds of the sale of the building away from the Gift fund and into its general fund. The Attorney General, following his initial investigation of the Hospital's administration of the Gift, acquiesced in the Hospital's sale of the building, its diversion of the appreciation realized on the sale, and its relocation of the rehabilitation unit, even as he ostensibly was demanding that the Hospital continue to act "in accordance with the donor's gift" (see April 21, 1998 letter, supra). Absent Mrs. Smithers's vigilance, the Attorney General would have resolved the matter between himself and the Hospital in that manner and without seeking permission of any court.

The donor of a charitable gift is in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent. Smithers was the founding donor of the Smithers Center, which he established to carry out his vision of "first class alcoholism treatment and training." In his agreement with the Hospital he reserved to himself the right to veto the Hospital's project plans and staff appointments for the Smithers Center. He and Mrs. Smithers remained actively involved in the affairs of the Smithers Center until his death, and she thereafter. During his lifetime, when Smithers found that, as he wrote on July 31, 1978, "[c]ertain things that were definitely understood were not carried out" by the Hospital, he decided not to donate the balance of the Gift. It was only when the Hospital expressly agreed to the various restrictions imposed by Smithers that he completed the Gift.

The Hospital's subsequent unauthorized deviation from the terms of the completed Gift commenced during Smithers's lifetime and was discovered shortly after he died. To hold that, in her capacity as her late husband's representative, Mrs. Smithers has no standing to institute an action to enforce the terms of the Gift is to contravene the well settled principle that a donor's expressed intent is entitled to protection (see St. Joseph's, supra; Lefkowitz v Lebensfeld, supra; Alco Gravure, supra) and the longstanding recognition under New York law of standing for a donor such as Smithers (see Associate Alumni, supra). We have seen no New York case in which a donor attempting to enforce the terms of his charitable gift was denied standing to do so. Neither the donor nor his estate was before the court in any of the cases urged on us in opposition to donor standing (see, Alco Gravure, supra; Stewart v Franchetti, 167 A.D. 541; Matter of DeLong, 169 A.D.2d 1005 lv denied 77 N.Y.2d 809; Lefkowitz v Lebensfeld, 68 A.D.2d 488, aff'd 51 N.Y.2d 442). The courts in these cases were not addressing the situation in which the donor was still living or his estate still existed. Cf., Herzog Foundation v University of Bridgeport (243 Conn 1).

Moreover, the circumstances of this case demonstrate the need for co-existent standing for the Attorney General and the donor. The Attorney General's office was notified of the Hospital's misappropriation of funds by Mrs. Smithers, whose accountants performed the preliminary review of the Hospital's financial records, and it learned of the Hospital's closing of the detox unit -- a breach, according to the Attorney General, of a specific representation -- from Mrs. Smithers's papers in this action. Indeed, there is no substitute for a donor, who has a "special, personal interest in the enforcement of the gift restriction" (Note, Protecting the Charitable Investor: A Rationale for Donor Enforcement of Restricted Gifts, 8 BU Pub Int U 361 [1999]). Mrs. Smithers herself, who the Supreme Court found had no position to lose if the Hospital altered its administration of the Gift, has her own special, personal interest in the enforcement of the Gift restrictions imposed by her husband, as is manifest from her own fundraising work on behalf of the Smithers Center and the fact that the gala that she organized and that the Hospital ultimately cancelled was to be in her honor as well as her husband's. In any event, the Attorney General's interest in enforcing gift terms is not necessarily congruent with that of the donor. The donor seeks to have his or her intent faithfully executed, which by definition will benefit the beneficiaries, and perhaps also to erect a tangible memorial to himself or herself. In the June 16, 1971 letter to the Hospital in which Smithers created the Gift, he wrote that it "is to be used to set up the Smithers Alcoholism Treatment and Training Center." As the Court of Appeals has observed, a donor's desire to perpetuate his name as a benefactor of a particular

charitable institution and humankind is not a selfish one (Matter of Scott, 8 N.Y.2d 419, 427). "These desires are deeply ingrained in human nature and are effective motivating forces in donations of this character" (id. at 428) Perpetuating the donor's good name is certainly also a profound concern of his or her estate. We conclude that the distinct but related interests of the donor and the Attorney General are best served by continuing to accord standing to donors to enforce the terms of their own gifts concurrent with

Page 436

the Attorney General's standing to enforce such gifts on behalf of the beneficiaries thereof.

Mrs. Smithers, appointed the Special Administratrix of Smithers's estate for the purpose of pursuing claims by the estate against the Hospital in connection with its administration of the Smithers Center, therefore has standing to sue the Hospital for enforcement of the Gift terms (EPTL 11-1.1[b][13]; see, Estate of Rappaport, 102 Misc.2d 910).

Since we hold that the common law of the State of New York permits Mrs. Smithers to bring this action, we need not reach the issue of whether N-PCL 522 authorizes it.

Accordingly, the order of the Supreme Court, New York County (Beatrice Shainswit, J.), entered December 18, 1998, which, inter alia, denied plaintiff's motion for a preliminary injunction and granted the motions of defendants St. Luke's-Roosevelt Hospital and the Attorney General to dismiss the complaint, should be modified, on the law, to grant plaintiff's motion for a preliminary injunction to the extent of staying disbursement of the proceeds of the sale of the East 93rd Street building, to deny defendants' motion to dismiss the complaint and to reinstate the complaint, and otherwise affirmed, without costs.

Order, Supreme Court, New York County (Beatrice Shainswit, J.), entered December 18, 1998, modified, on the law, to grant plaintiff's motion for a preliminary injuction to the extent of staying disbursement of the proceeds of the sale of the East 93rd Street building, to deny defendants' motion to dismiss the complaint and to reinstate the complaint, and otherwise affirmed, without costs.

All concur except Friedman, J. who dissents in an Opinion.

FRIEDMAN, J. (dissenting)

This appeal has its origins in a $10,000,000 gift made by R. Brinkley Smithers to defendant St. Luke's-Roosevelt Hospital Center for the creation

of an alcoholism treatment program. Mr. Smithers began funding the gift in 1971 and, soon thereafter, in accordance with his desire to establish a free-standing alcohol treatment center, the hospital purchased a building at 56 East 93rd Street in Manhattan for $1,000,000. The building was to provide a non-hospital setting for the rehabilitation portion of the treatment program.

As the majority aptly notes, the relationship between Mr. Smithers and the Hospital was at times strained. Yet, like the loving parent of an errant child, Mr. Smithers resolved his disputes with the hospital and kept contributing over the course of a relationship spanning 23 years, notwithstanding the hospital's failure to honor some of his wishes and its use of funds for other than anticipated purposes.

Regardless of any disagreements between the hospital and Mr. Smithers, by 1981, Mr. Smithers agreed that changing conditions meant that the sale of the East 93rd Street building was warranted. Hence, in a letter dated November 5, 1981 to Gary Gambuti, president of the Hospital, Mr. Smithers approved of the sale of the building because he recognized that a free-standing alcoholism treatment center had become obsolete. Actually, Mr. Smithers did more than approve of the sale of the building, he appears to have had a role in seeking a buyer, stating in his letter:

...I got a call today from [a broker]... She claims that she... will pay $3,000,000 cash for the building.

Page 437

I know how hard up St. Luke's-Roosevelt Hospital is and I have no objection to the sale of the building. When the Smithers Rehabilitation was set up, there was practically no place to send an alcoholic after detoxification for rehabilitation in the New York area. There are now quite a few facilities and most of them have the advantage of being at least a few miles out of town-so there is more chance of outdoor recreation...

Notwithstanding Mr. Smithers's agreement, the hospital decided not to sell at that time.

Mr. Smithers's understanding that the sale of the East 93rd Street building was inevitable is also evidenced by his letter dated October 24, 1983 to Gambuti. In that letter, Mr. Smithers set forth that he was completing the $10,000,000 pledge made in 1971 and that he wanted an endowment established. Significantly, and as the majority apparently recognizes, in discussing permitted uses of the endowment, no mention is made of the East 93rd Street building but only of one on East 58th Street.

In 1994 Mr. Smithers passed away. About a year later, the hospital decided that it wished to do that which Mr. Smithers had previously agreed to in 1981, that is, to sell the East 93rd Street building, for which there was now a purchaser willing to pay approximately $15,000,000. The hospital planned to relocate the rehabilitation portion of the program to its main complex after the sale of the building.

Mr. Smithers's wife, Adele Smithers, the plaintiff in this action, learned of the proposed sale in March 1995, when the president of the hospital called her in order to cancel a fund raising event that she had been organizing for two years. The event, which was to be held in her honor as well as that of her deceased husband, aimed to raise funds to enhance the East 93rd Street building.

A complaint by Mrs. Smithers to the Attorney General soon followed, leading to an extensive investigation of the hospital's use of the Smithers gift. Ultimately the Attorney General determined that the proposed sale of the building would not violate the terms of the gift. Pursuant to an Assurance of Discontinuance issued by the Attorney General (see, Executive Law § 63 [15]), the hospital could sell the building, provided it retained a portion of the proceeds for the exclusive use of the treatment program.

Dissatisfied with the results of the Attorney General's investigation, Adele Smithers obtained an order appointing her the special administratrix of her husband's estate and in that capacity commenced this action against the hospital and the Attorney General. The action sought, inter alia, an accounting of gift funds, an order directing the hospital to conform to the terms of the gift, and an order precluding it from selling the East 93rd Street building. In prosecuting the action, Mrs. Smithers candidly acknowledged that neither she nor the estate had any continuing financial interest in, or right to exercise any control over, the gift. Supreme Court dismissed the complaint, finding that plaintiff lacked standing to prosecute the action. This appeal followed.

During the pendency of this appeal, it is uncontroverted that the hospital and the Attorney General entered into a stipulation superceding the previously issued Assurance of Discontinuance. This new stipulation provided for the hospital to dedicate the entire net proceeds arising from the $15,000,000 sale of the building to the Smithers Endowment Fund for the treatment of substance abuse, and addressed virtually all of the concerns initially voiced

by plaintiff. Notwithstanding this, plaintiff continued to voice objection to the settlement apparently because it permitted the East 93rd Street building to be sold and allowed the hospital to use the funds not just for the treatment of alcohol addiction but also for the treatment of other addictions.

On this appeal, both the hospital and the Attorney General assert that Adele Smithers's complaint must be dismissed because she lacks standing. The emergent issue, therefore, is whether Adele Smithers, as the representative of her husband's estate, has standing to bring this action seeking to enforce the terms of a charitable gift given by her husband, the funding of which was completed approximately 12 years before this action was commenced. Because I believe that plaintiff does not have standing, I respectfully dissent.

In considering the subject of standing, I begin with the observation that, when a charitable gift is made, without any provision for a reversion of the gift to the donor or his heirs, the interest of the donor and his heirs is permanently excluded (see, Associate Alumni v General Theological Seminary, 163 N.Y. 417, 422; Stewart v Franchetti, 167 AD 541, 547). Accordingly, in the absence of a right of reverter, the right to seek enforcement of the terms of a charitable gift is restricted to the Attorney General (see, Alco Gravure Inc. v Knapp Found., 64 N.Y.2d 458, 466; Matter of DeLong, 169 A.D.2d 1005, 1006 lv denied 77 N.Y.2d 809; Lefkowitz v Lebensfeld, 68 A.D.2d 488, 495, affd 51 N.Y.2d 442; Stewart v Franchetti, supra see also, Herzog Foundation v University of Bridgeport, 243 Conn 1 [Sup Ct, Conn. 1997]). As unequivocally stated by the Court of Appeals in Alco Gravure Inc. v Knapp Found. (supra), the general rule is that "standing to challenge actions by the trustees of a charitable trust or corporation is limited to the Attorney-General."

The majority seeks to avoid the impact of this general rule, pointing out that the issue the Court was addressing in Alco Gravure was not whether a donor had standing but whether a certain group of beneficiaries had standing. While that may be an accurate observation concerning the facts in Alco Gravure, it does not diminish or affect the general rule that the Court enunciated, that standing is limited to the Attorney General (see, Developments in the Law - Nonprofit Corporations, 105 Harv L Rev 1578, 1597).

The New York general rule on standing is not only consistent with the common-law approach (see, Herzog Foundation v University of Bridgeport, supra [after conducting nationwide analysis that included New York case law and secondary authority, concluded that donors do not have standing at common law]; see also, Charitable Trusts, 21 New Eng L Rev 131, 137), but also with the approach taken by the Restatement of Trusts [Second] (see,

§§391 [e] & [f]). With regard to this rule, one commentator has noted that, where funds are given for a charitable purpose, without a reservation of rights:

[t]here is no property interest left in the settlor or his heirs, devises, next of kin, or legatees. The settlor or his successors may have a sentimental interest in seeing that his wishes are respected, but no financial [interest].. which the law recognizes... and hence neither he nor they are as a general rule permitted to sue the trustees to compel them to carry out the trust... The better reasoned cases refuse to permit the settlor during his lifetime, or his successors after his

Page 439

death, to sue merely as settlor or successors to compel the execution of the charitable trust. (Bogert, Trusts and Trustees, 2nd ed, rev, chap 21, 415 at 53).

In holding that standing is generally restricted to the Attorney General, our courts have pointed out that a limited standing rule is necessary to protect charitable institutions from "vexatious litigation" by parties who do not have a tangible stake in the outcome of the litigation (Alco Gravure Inc. v Knapp Found., supra at 466; Matter of DeLong, supra at 1006). While the majority believes that this concern does not apply to Mrs. Smithers because her motives are altruistic (and I agree that they are), the limited standing rule enunciated by our Court of Appeals is a prophylactic one that does not permit a case-by-case inquiry into the subjective motivations of the party commencing the action. Rather, it focuses on the actual interest of the party and here Mrs. Smithers has herself conceded "that [she] ha[s] absolutely nothing to gain personally as a result of this lawsuit."

Notwithstanding the foregoing, plaintiff argues that donor standing, qua donor, is statutorily authorized by Not-For-Profit Corporation Law (N-PCL) § 522. Plaintiff's position is without merit. Section 522 of the N-PCL sets forth the procedure a donee institution must follow when it seeks to have gift restrictions released. Specifically, subdivision (a) provides:

With the consent of the donor in a writing acknowledged by him, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

Plaintiff contends that, since the consent of the donor is required when an institution seeks to release gift restrictions, by necessary implication the statute grants the donor and his estate the right to take the initiative and

commence an action to enforce the terms of the gift. Further consideration of the matter, however, shows otherwise.

Section 522 of the Not-For-Profit Corporation Law was modeled after section 7 of the Uniform Management of Institutional Funds Act (UMIFA) (see, Wyckoff, Practice Commentaries, McKinney's Cons Laws of NY, Book 37, N-PCL C522 at 190). In the comment to section 7, the drafters of UMIFA expressly provided that the donor of a completed gift would not have standing to seek enforcement of its terms, stating:

The donor has no right to enforce the [gift] restriction, no interest in the fund and no power to change the eleemosynary beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect (UMIFA, § 7, comment, 7A U.L.A. 504 [1999].

When viewed against this backdrop it becomes apparent that, although section 522 may require the institution to obtain a donor's consent when it seeks to release gift restrictions, it does not confer standing upon a donor, and certainly not upon his estate, to affirmatively seek enforcement of those restrictions, a right that is the Attorney General's (see, Herzog Foundation v University of Bridgeport, 243 Conn 1, supra).[1]

The majority nevertheless asserts that donor standing, qua donor, was recognized

Page 440

by our Court of Appeals in Associate Alumni v General Theological Seminary (163 N.Y. 417). It then goes one very significant step further, and asserts that, not only did Mr. Smithers have standing merely by virtue of his status as the donor of the gift, but that his standing somehow devolved to plaintiff as the. representative of his estate. The majority's reliance upon Associate Alumni for these views is misplaced.

Examination of Associate Alumni shows that the alumni of a seminary contributed money for the endowment of a professorship on certain specified conditions. In doing so, however, the alumni retained significant rights, including the right of nomination on the expiration of the term of the professor and the right to assign the income from the endowment to an acting professor if the office became vacant. The alumni were also entitled to be furnished with an annual statement concerning the endowment funds and could alter the conditions of the endowment by joint action of the trustees of the seminary and themselves (see, 26 App Div 144). When a dispute arose concerning the term of the professorship, the alumni, via a corporation they had formed, commenced suit.

Initially, although the Court of Appeals permitted the action to proceed, it did not, as the majority claims, hold that a donor has standing to seek enforcement of the terms of a gift merely because of its status as donor. Rather, the Court held that the alumni association had sufficient standing "as donor and possessor of the right to nominate to the professorship... [emphasis added]" (163 N.Y. 417, supra at 422). Therefore, properly read, Associate Alumni held only that, where a donor has retained significant rights to control the charitable gift, it has standing to seek enforcement of the terms of the gift. Significantly, others who have considered Associate Alumni have similarly concluded that it represents an exception to the general rule restricting standing to the Attorney General (see, Smith v Thompson, 266 Ill App 165, 180; Charities, N.Y. Jur2d § 41 at 236). Thus, contrary to the majority's position, Associate Alumni does not establish donor standing qua donor.

Any question as to this interpretation is resolved by the Court of Appeals' citation to section 744 of 2 Perry on Trusts (see, Associate Alumni v General Theological Seminary, supra at 422). The 1899 version of that treatise (published one year before the Court's decision), restates the common-law rule that, once a charitable gift is given, the "[h]eirs and personal representatives of a donor have no beneficial interest reverting or accruing to themselves from the breach or non-execution of a trust for a charitable use." A fortiori, persons having no beneficial interest in a completed gift fail to have a basis for a grant of standing.[2]

Distilled to their essentials, what emerges from the foregoing authorities is that there are three rules governing standing in this genre of litigation. First, a donor does not have standing to seek enforcement of a gift merely because he is the

Page 441

donor. Second, a donor who has retained certain rights to control the gift, i.e., a 'right to make staff appointments or exercise other decision-making authority concerning the use of the gift, may very well have standing. Third, the donor or his heirs may also have standing if the gift reverts to the donor or his heirs upon the failure to use the gift for its intended purpose. The corollary to these rules is that the estate will lack standing if it has no interest in the gift after the donor's death, i.e., there is no provision for the gift, upon misuse, to revert to the estate. Bearing these rules in mind, the fundamental flaw in the majority's grant of standing in this case becomes evident.

The principal focus of the majority's analysis centers upon the question of whether Mr. Smithers had standing to commence an action. As to this

question, I agree with the majority that Associates Alumni supports the view that he did since he seems to have retained the right to make appointments to key staff positions. This observation, however, is irrelevant to the question presented on this appeal. Here, we are not required to determine whether Mr. Smithers would have had standing, but whether his estate has standing.

With regard to this issue, and applying the rules of standing noted above, it is uncontroverted that the estate was not the donor of the gift. Thus, even if pure donor standing were recognized (as the majority concludes), this could not be a basis for granting standing to Mr. Smithers's estate. Next, to the extent that Mr. Smithers may have had standing based upon his right to exercise discretionary control over the gift, i.e., via the right to appoint key staffing positions (see, Associate Alumni v General Theological Seminary, supra), that right was personal to him, abated upon his death, and did not devolve to his estate (cf., EPTL 7-2.3[a]; see, Wier v Howard Hughes Medical Institute, 407 A.2d 1051 [Delaware]). Hence, as plaintiff concedes that the estate has no right to exercise control over the gift, this may not be a basis of standing. Finally, since it is uncontroverted that the estate does not have a right of reverter in the gift or, in fact, any right to control the gift by way of appointment to staff positions or otherwise, it follows that there is no retained interest that could support a claim of standing. In view of this, I fail to perceive the legal basis for the majority's grant of standing to plaintiff.

To all of this, the majority responds: "We have seen no New York case in which a donor attempting to enforce the terms of his charitable gift was denied standing to do so." It seems to me that this is hardly a basis upon which to grant standing to a decedent's estate, especially in view of all of the countervailing authority.

If there were any doubt as to the foregoing analysis, it seems to me that such doubt is resolved by N-PCL 522 (b). As indicated, subdivision(a) of N-PCL 522 requires an institution to obtain the consent of the donor in order to release gift restrictions. Where, however, the donor's consent cannot be obtained by reason of his death, subdivision(b) merely requires the institution to apply to either the Supreme Court or Surrogate's Court (depending on the circumstances) for a release, and to notify the Attorney General of the application (see, N-PCL 522 [b]).

Significantly, the statute does not require the estate of a deceased donor to be made a party to the application. Nor does the statute even require that the estate be given notice of the application. If the estate's consent to the application is not required (and, as noted, there is not even a notification requirement), it is self-evident that the estate does not have standing to

interpose itself, via an independent action, in what is, statutorily, a matter between the court, the Attorney General, and the charitable institution (cf., Matter of Swan, 237 A.D. 454, affd sub nom Matter of St. John's Church of Mt. Morris, 263 N.Y. 638 [in an action to release gift restrictions, heirs of donor were not necessary parties since there was no right of reverter]; see also, Weir v Howard Hughes Medical Institute, supra [administrator of estate does not have standing to enforce the terms of a gift made by his decedent]).

The inappropriateness of permitting plaintiff to interpose herself in these circumstances is also highlighted by Executive Law § 63(15). This section provides that:

In any case where the attorney general has authority to institute a civil action or proceeding in connection with the enforcement of a law of this state, in lieu thereof he may accept an assurance of discontinuance of any act or practice in violation of such law from any person engaged or who has engaged in such act or practice.

Exercising their statutorily-granted authority, two successive Attorney Generals have entered into agreements with St. Luke's-Roosevelt Hospital Center concerning the direction of the charitable gift at issue. This action, no matter how viewed, seeks to set aside those agreements. The second of those agreements, via an assurance of discontinuance, addresses all of the issues concerning Mr. Smithers's gift, including a return of all monies that were diverted from their intended uses. The agreement further requires that it be submitted to Supreme Court for approval. What is evident is that the Attorney General and the hospital are following the precise statutory mandates found in Executive Law § 63 (15) and N-PCL 522 (b). By determining that plaintiff may pursue the instant action, the majority necessarily concludes that a decedent's estate, which has no interest in a gift, may prevent the New York State Attorney General from exercising his discretion in determining how to prosecute alleged violations of law. This, it seems to me, is incongruous with the aforementioned statutes (see, People v Bunge Corporation, 25 N.Y.2d 91).

In the end, the majority holds that a donor's estate has standing to commence an enforcement action against a charitable institution to which the donor contributed. The authorities I have cited establish that primary responsibility in this area is reposed in the Attorney General, and there is no authority supporting the majority's position that a donor's estate, in the absence of some continuing right in relation to the gift, has standing to enforce the terms of the gift.

Accordingly, I vote to affirm the order dismissing the complaint.

NOTES:

1. The reason that the drafters of UMIFA sought to preclude any affirmative right of enforcement was to avoid the potential negative tax implications that would befall a donor if the rule were otherwise (see, Herzog Foundation v University of Bridgeport, supra at 14).

2. Although the majority believes that Associate Alumni's citation to Mills v Davison (54 N.J. Eq. 659 [New Jersey]) supports the conclusion that our Court of Appeals adopted a pure donor standing rule, it does not. The rule in New Jersey both before and after Mills has been that a donor generally lacks standing (see, Ludlam v Higbee, 11 N.J. Eq. 342; Leeds v Harrison, 72 A.2d 371). In fact, in Leeds (supra at 380) the court specifically noted that there was standing in Mills not because plaintiffs were the donors but because they were cestui que trust, which means: "he for whose benefit the trust was created" (see, Black's Law Dictionary, 7th ed.).

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

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 907 (2/2/12)

Topic: Protecting anonymity of client

Digest: An attorney may agree to make an anonymous donation on behalf of a client, and must protect the confidentiality of the identity of a client when asked by the client to do so, provided the request does not involve the lawyer in prohibited conduct.

Rules: 1.4, 1.6(a)(3), 1.6(b)(6), 1.15(a), (b), (c), 4.1, 8.4(a),(b), (c)

QUESTION

1. May an attorney may make a charitable donation on behalf of a client and maintain the client's anonymity at the client's request, and may the attorney use the attorney's escrow account to make the donation?

FACTS

2. The inquirer is an attorney whose client seeks to make an anonymous donation to a charity. The client would like to place the money in an escrow account under the attorney's control, and then have the attorney forward the payment of the donation to the recipient. The client has instructed the attorney not to reveal the client's identity so that the client may remain anonymous.

OPINION

3. Rule 1.6 bars lawyers from revealing confidential information without client consent unless otherwise authorized by the Rule. "Confidential Information" is defined in Rule 1.6(a)(3) as follows:

> "Confidential information" consists of *information gained during or relating to the representation of a client, whatever its source*, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) *information that the client has requested be kept confidential*. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. (Emphasis added.)

4. The attorney has a duty under Rule 1.6(a) (3)(c) to follow the client's direction because the client's identity in making an anonymous donation is "information that the client has requested be kept confidential." The attorney *must* therefore maintain the confidentiality of the information unless authorized or required to disclose it.

5. That protecting the identity of a client who has not consented to disclosure is an attorney's duty has previously arisen before for this Committee, under the Code of Professional Responsibility in effect prior to April 1, 2009. In N.Y. State 645(1993), this Committee addressed the conflict between legally mandated disclosure obligations and the attorney's duty to protect a client's identity. Specifically, N.Y. State 645 "discusses the obligations of a lawyer who contemplates accepting a position that might involve the disclosure of certain information about the lawyer's clients — the name of the client and, implicitly, the fact of the representation…." The Committee applied DR 4-101(B) requiring an attorney to protect "confidences" and "secrets."

6. The request for anonymity and the duty to protect information the client request to be kept confidential, does not alone allow the attorney to make the donation if it were unlawful to do so. The attorney must be careful not to mislead as to the identity of the donor, for example by identifying the donor as the lawyer's trust account. Rule 4.1 bars attorneys from knowingly making a false statement of fact or law to a third person. Rule 8.4(b) prohibits engaging in "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit, or misrepresentation." The inquirer has not presented us with any specific reason to believe that unauthorized disclosure of the client's identity could be legally mandated here, but it is not difficult to imagine that the donor's identity may be required to ensure that the donation is lawful (e.g., is not from an improper foreign source, does not evade disclosure or donation limits, etc.). Rule 1.6(b)(6) permits lawyers to make disclosures when required to do so by law.[1]

7. Because circumstances may arise that require the attorney to make a disclosure of the client's identity, the attorney should make sure that the client understands that the attorney may not be able to keep his identity secret and that the client still wants to go ahead with the donation knowing the risk. *See* Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

---

[1] *See also, e.g.,* Association of the Bar of the City of New York, Reforming New York State's Financial Disclosure Requirements For Attorney-Legislators: Report On Legislation By The Committee On State Affairs, The Committee On Government Ethics And The Committee On Professional Responsibility, dated January 2010, available at http://www.nycbar.org/pdf/report/uploads/20071850-ReformingNYSFinancialDisclosureRequirements.pdf. In pertinent part, the report stated that "[w]hile "information" may include the identity of a client, courts have found that revealing client identities does not breach ethical obligations because attorneys may be obligated or permitted by law to provide this information." *Id.*, *citing U.S. v. Legal Services for New York City*, 100 F. Supp 2d 42, 47 (D.D.C. 2000). "Indeed," the report continues, "Rule 1.6(b)(6) permits a lawyer to reveal information when required to comply with a law and courts have noted that such a legal obligation would override any claimed ethical duty of secrecy to a client." *Id., citing U.S. v. Hunton & Williams*, 952 F. Supp. 843, 856 (D.D.C. 1997).

8. Whether the attorney may use his escrow account in connection with the proposed anonymous donation invokes Rules 1.15(a) and (b). Rule 1.15 provides for a trust account holding "funds belonging to another person incident to the lawyer's practice of law…". In view of the use of the word client in this question we assume that the making of the donation is incident to the practice of law. (If that were not the case, it may be necessary for the attorney to set up a separate account to receive the funds and make the donation. See Comment [5] to Rule 1.15.) In general, the attorney must receive the client's funds into an attorney trust or escrow account and not commingle the funds with the attorney's own funds or the funds of any other client. Rule 1.15(c) requires the attorney to provide the client a receipt and to maintain appropriate books and records. As discussed above, to avoid misleading the recipient, the lawyer must make sure that the recipient knows that the donation is anonymous, and not actually from the lawyer.

CONCLUSION

9. A lawyer has a duty to maintain the confidentiality of a client's identity at the request of the client, and provided the lawyer does not knowingly make any false statement and segregates the client funds in a properly documented attorney escrow account, the lawyer may use the lawyer's escrow account for the purpose of making an anonymous charitable donation on behalf of the client, provided the lawyer has satisfied himself that the contemplated donation is not illegal or otherwise prohibited by law.

(15-11)

Career Development

CLE & Events

Committees

Diversity & Inclusion

Ethics

Ethics Hotline

Formal Ethics Opinions

Frequently Asked Legal Ethics Questions

How to Join the Professional Ethics Committee

Informal Ethics Opinions

New York Rules of Professional Conduct

Job Opportunities

Lawyer Assistance Program

Library

Membership

Frequently Asked Legal Ethics Questions

A review of the inquiries made to the Committee's Ethics Hotline has shown that certain legal ethics questions occur more often than others. Accordingly, the Committee has prepared a set of answers to frequently asked questions for the general edification of the Bar. The answers provide only an introduction to the topics discussed. Before taking any action, a lawyer should conduct more extensive research, consulting at a minimum relevant court decisions, the Committee's formal opinions, and the opinions of the Professional Ethics Committees of the New York State Bar Association, the New York County Lawyers' Association, and the Nassau County Bar Association.

Select a topic, or scroll down to view the entire FAQ:

Simultaneous Representation of Multiple Clients

Q. May a lawyer simultaneously represent multiple clients with conflicting interests?

A. Rule 1.7 of the New York Rules of Professional Conduct ("Rules"), 22 N.Y.C.R.R §1200.7, governs the answer to this question.

Rule 1.7(a) provides in pertinent part that except as permitted by Rule 1.7(b) (discussed below), "a lawyer shall not represent a

Small Law Firm management

Sustaining Members

client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests." Rule 1.7(a)(1).

Even when two or more clients have "differing interests," the affected clients may be able to waive the conflict and consent to the attorney's simultaneous representation. Such waiver and consent are effective if three conditions are met:

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

2. the representation is not prohibited by law; [and]

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. . . .

Rule 1.7(b). If these conditions are satisfied, a lawyer may simultaneously represent clients notwithstanding a conflict only if "each affected client gives informed consent confirmed in writing." Rule 1.7(b)(4).

Absent consent, when a lawyer represents a client in one matter, he may not be adverse to that client in a different matter, even if the two matters are wholly unrelated. See Rule 1.7, Cmt. [6].

Rule 1.8 provides an additional caveat for attorneys involved in representing multiple clients simultaneously. "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." Rule 1.8(g). See also N.Y. City 2009-6 (before binding multiple clients to an aggregate settlement, a lawyer has a nonwaivable obligation to obtain the informed consent of every affected client).

With respect to aggregate settlements, Rule 1.8 (g) further provides that informed client consent requires disclosure to each client of "the existence and nature of all the claims involved and of the participation of each person in the settlement." In addition, Rule 1.8 requires that consent to the aggregate settlement be "in a writing signed by the client." In contrast, under Rule 1.7, the

requisite consent need only be “confirmed in writing,” as defined by Rule 1.0(e).

Rule 1.0 defines various terms used in Rules 1.7 and 1.8 as follows:

> **Confirmed in Writing**
>
> “Confirmed in writing” denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. (Rule 1.0(e))
>
> Differing Interests
>
> “Differing interests" includes every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. (Rule 1.0(f))
>
> Reasonable or Reasonably
>
> “Reasonable” or “reasonably,” when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation. (Rule 1.0(q))
>
> **Reasonable Belief**
>
> “Reasonable belief” or “reasonably believes,” when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable. (Rule 1.0(r))

Informed Consent

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

The prohibition against conflicts in the representation of multiple clients furthers a number of salutary objectives. As explained by the New York Court of Appeals, the prohibition safeguard[s] against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large.

Greene v. Greene, 47 N.Y.2d 447, 451 (1979) (citations omitted).

An attorney who has failed to recognize or ignores the existence of an impermissible conflict involved in the simultaneous representation of multiple clients may be disqualified from representing all of the clients. "'[A]n attorney who undertakes the joint representation of two parties in a lawsuit [should] not continue as counsel for either one after an actual conflict of interest has arisen' because continued representation of either or both parties would result in a violation of the ethical rule requiring an attorney to preserve a client's confidences or the rule requiring an attorney to represent a client zealously." Sidor v. Zuhoski, 261 A.D.2d 529, 530 (2d Dep't 1999) (quoting In re H. Children, 160 Misc. 2d 298, 300 (Fam. Ct. 1994)) (citation omitted). Multiple representation can therefore cause serious hardship to one or more clients if a lawyer is forced to withdraw after having performed significant legal services. (The same is true for unforeseeable conflicts "thrust upon" an attorney, through no fault of the lawyer, in the course of representing two or more clients. If such a conflict arises and the clients refuse to consent to simultaneous representation, the lawyer must withdraw from representing one or more of the clients. See N.Y. City 2005-5.)

Before representing multiple clients with actual or potentially conflicting interests, a lawyer must adequately explain to each client the implications of the common representation and otherwise provide information sufficient to permit each client to appreciate the significance of the potential conflict and its

possible effect on the attorney's ability to exercise independent professional judgment on behalf of the clients. The lawyer should accept or continue employment only if each client consents to the representation. See Anderson v. Nassau County Dep't of Corrections, 376 F. Supp. 2d 294, 299 (E.D.N.Y. 2005) (holding that an attorney has an affirmative obligation to disclose and explain a conflict and to obtain consent). The sophistication of the client is a factor in determining the effectiveness of the client's consent. See N.Y. City 2001-2 ("A client represented by other counsel or in house counsel in connection with the waiver may more readily comprehend the possible effects on loyalty and confidentiality of the simultaneous adverse representation. To be sure, sophisticated corporate and institutional clients can consent to conflicts which might be non-consentable in cases involving unsophisticated lay clients who are not represented by independent counsel in connection with the consent.").

It may be easier to obtain waivers of conflicts in a non-litigation context than in the context of litigation. See id. ("[A] lawyer may represent one client in a transaction with a concurrent client in another matter, with disclosure and informed consent, so long as a 'disinterested lawyer would believe that the lawyer can competently represent the interests of each.' A lawyer may also represent multiple parties in a single transaction where the interests of the represented clients are generally aligned or not directly adverse, with disclosure and informed consent, so long as the 'disinterested lawyer' test is satisfied. Satisfaction of the 'disinterested lawyer' test in a non-litigation context will depend on an evaluation of the circumstances of the simultaneous representations. . . .").1

A lawyer's possession of confidential information of one client that may be relevant to a matter the lawyer is handling for another client does not automatically create a conflict of interest. The existence or absence of a conflict will depend on whether the lawyer is able to avoid using one client's confidential information in the representation of another client and whether possession of that information may reasonably affect the lawyer's independent professional judgment in the representation of the other client. See N.Y. City 2005-2.

Back to Top

Successive Adverse Representation

Q. When may a lawyer represent a client with interests adverse to those of a former client?

A. Successive representation is permitted when there is no conflict between the interests of the former and current clients (under Rule 1.9) or when written waiver of the conflict has been obtained. Under Rule 1.9, all conflicts arising out of successive adverse representation may be waived by "informed consent, confirmed in writing" by the former client. But see N.Y. State 829 (oral waivers obtained before April 1, 2009 need not subsequently be confirmed in writing).

Where successive representation is permitted, Rule 1.9 requires attorneys to refrain from disclosing the confidences of their former clients or otherwise using them to the disadvantage of those clients. The following discussion pertains to lawyers in private practice only. Rule 1.11 governs conflicts involving government lawyers and should be consulted for guidance in addressing conflicts in those circumstances.

Prior representation, "Substantially related" and "materially adverse"

In some instances, there may be a threshold question of whether there has been a prior representation, i.e., whether the attorney "formerly represented" a person as a client in an earlier matter. SeeWorld Hill Ltd. v. Saar, No. 116916/07, 2009 NY Slip Op. 52289U, at *4 (N.Y. Sup. Ct. Nov. 6, 2009) (finding no conflict under 1.9 where no attorney-client relationship was formed in the prior, allegedly substantially related matter). In World Hill, the court denied a disqualification motion based on an alleged prior representation, holding that "[i]t is well settled that '[t]o determine whether an attorney-client relationship exists, a court must consider the parties' actions. An attorney-client relationship is established when there is an explicit undertaking to perform a specific task. While the existence of the relationship is not dependent upon the payment of a fee or an explicit agreement, a party cannot create the relationship based on his or her own beliefs or actions'." Id. at *3 (quoting Pelligrino v. Oppenheimer & Co., 49 A.D.3d 94, 99 (1st Dep't 2008)) (second alteration in original).

The second inquiry is whether the current and prior representations involve the same or a "substantially related matter." See Rule 1.9(a), 1.9(b). The comments to Rule 1.9 explain that "[m]atters are substantially related" 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.See Rule 1.9, Comment [3]. The comments further note that the passage of time may be relevant in determining whether matters are substantially related, as "[i]nformation acquired in a prior representation may have been rendered obsolete." Id. Moreover, information that has been disclosed to the public or other adverse parties "ordinarily will not be disqualifying." Where a client is an organization, "knowledge of specific facts . . . relevant to the matter in question" will generally preclude representation, while "general knowledge of the client's policies and practices" will not. Id.

A third consideration is whether the former client's "interests are materially adverse" to those of the prospective client. Rule 1.9(a), 1.9(b)(1). This is also a fact-specific inquiry. See e.g., Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123 (1989) (holding that interests of acquired corporation were materially adverse to interests of selling shareholder in a post-sale dispute regarding the corporation's pre-sale environmental compliance).

There is no prohibition or restriction on successive adverse representations involving unrelated matters or related matters where the interests of the former and current clients are not materially adverse.

The Individual Lawyer's Role in the Prior Matter

If both the "substantially related" and "materially adverse" prongs are satisfied, a lawyer must next consider the extent of her involvement or connection to the prior matter. Pursuant to Rule 1.9(a), where the lawyer herself has represented the former client, she may not take on the new matter unless the former client "gives informed consent, confirmed in writing." Moreover, pursuant to Rule 1.10, Imputation of Conflicts of Interest, no lawyer associated with the conflicted lawyer may accept the engagement. Rule 1.10(a) ([w]hile 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 . . . 1.9, except as otherwise provided therein").

To obtain the informed consent required by the rule, a lawyer must adequately explain to the former client "the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j).

Confirmation in writing must be obtained or transmitted "at the time the person gives oral consent" or "within a reasonable time thereafter." Rule 1.0(e). This confirmation can take one of several forms under the rules:

> (i) a writing from the person to the lawyer confirming that the person has given consent,
>
> (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or
>
> (iii) a statement by the person made on the record of any proceeding before a tribunal.

Rule 1.0(e). A "writing" under the rules denotes a "tangible or electronic record of a communication" and broadly includes "handwriting, typewriting, printing photocopying, photography, audio or video recording and email." Rule 1.0(x).

Switching Firms

Conflict issues involving successive adverse representation often arise after a lawyer switches firms and her prior law firm represented a client adverse to a current or prospective client of her new firm.

This situation requires examination of the lawyer's involvement in the prior law firm's representation of the former client in order to determine whether the former client's informed consent is necessary to permit the lawyer and/or her new firm to continue representing a current client or to undertake the representation of a new client. See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp. 518 F.2d 751, 756 (2d Cir. 1975) (construing the predecessor rule; the test differentiates between "lawyers who become heavily involved in the facts of a particular matter and

those who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions.").

Rule 1.9(b) provides that where “a firm with which the lawyer formerly was associated had previously represented” the former client and "the lawyer had acquired” confidential information, as specified in Rule 1.6 and Rule 1.9(c), discussed supra, the lawyer may not engage in a subsequent “substantially related” and “materially adverse” representation unless the former client “gives informed consent confirmed in writing.”

Moreover, where the newly-associated lawyer is barred from the representation, the lawyer's firm is too. Pursuant to the imputation provisions of Rule 1.10(c), “[w]hen 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.”

Lawyer’s obligations if representation is permitted and undertaken.

Where a successive representation is permitted, certain obligations to a former client remain. Under Rule 1.9(c)(2), a lawyer may not reveal confidential information of the former client protected by Rule 1.6 except as the Rules otherwise permit or require with respect to a current client.

(Emphasis added.) “Confidential information,” as defined by Rule 1.6, is not limited exclusively to privileged information, but rather

> consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential.

Rule 1.6. Rule 1.9 not only prohibits the disclosure of this information, it also provides that a lawyer may not

> 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.

Rule 1.9(c)(1) (emphasis added.) See alsoJamaica Pub. Serv. Co. v. AIU Ins. Co., 92 N.Y.2d 631, 637-38 (1998) (noting exception to client information that is generally or publicly known under former DR 5-108(A)(1).) The prohibition against use of confidential information remains fully applicable even if the lawyer is able to use the information without disclosing it to others.

Back to Top

Withdrawal and the Retention of Client Files When a Client Fails to Pay the Lawyer's Fees

Q. When a client fails to pay its legal bills, may a lawyer withdraw from the representation, and if so, how? Can the lawyer retain the file until the bills are paid? Even after bills are settled, may a lawyer refuse the client access to portions of the file?

A. General summary. A lawyer generally may withdraw from the representation when the client fails to pay the lawyer's fees, but must take steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client. See Rule 1.16(c)(5), (e). In litigation proceedings, court rules commonly require consent of court before withdrawing. The exercise of retaining liens has been approved as an ethical matter, but their precise contours are questions of law, not ethical command. The client is presumptively afforded full access to the attorney's entire file, with narrow exceptions.

Deliberate disregard of fee agreement required . Rule 1.16(c)(5) provides:

> Except as stated in paragraph (d), a lawyer may withdraw from representing a client when . . .
>
> (5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees. . .

Rule 1.16 (c)(5). The requirement that the client "deliberately disregard" an obligation to pay fees and expenses means that the failure must have been conscious, not inadvertent, and not de minimis in either amount or duration. See N.Y. State 598 (1989). In that connection, a number of courts and ethics opinions have found that prior to withdrawal for nonpayment of fees, a lawyer first must ask the client to honor her payment obligations and warn the client that the lawyer will withdraw unless the fees are paid. See ABA/BNA Lawyers' Manual on Professional Conduct 31:1108 (2006); see also N.Y. State 598 (1989) (attorney must provide "clear notice to the client of the attorney's desire to withdraw"). In addition, when a client has a bona fide dispute with her lawyer regarding the amount of the fees due and owing, some courts have suggested that the dispute should not be regarded as a deliberate disregard of the client's obligations. See Dar v. Nadel & Assocs., P.C., 2004 N.Y. Slip Op. 51390(U), at *4 (N.Y.City Civ. Ct. Kings County No. 3379/04, 2004), available at 2004 WL 2624612 (“[d]isputing the amount owed is not a refusal to pay”).

Duties upon withdrawal . Where withdrawal is permitted, the Rules provide that

upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

Rule 1.16(e). Further, in litigation matters, permission of court is required as a matter of course under applicable rules of procedure, seee.g., N.Y. C.P.L.R. 321(b), which are incorporated into the Rules. See Rule 1.16(d) ("If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.").

Retaining liens . Retaining liens provide certain rights to retain, until the lawyer's fees and expenses are paid, a client's papers,

money, and other property that have come into the lawyer's possession in the course of the lawyer's professional employment. Ethics opinions have approved the exercise of a retaining lien to the extent such a lien is permitted by law. See, e.g.,N.Y. City 82-74 (file); N.Y. State 567 (1984) (money); N.Y. County 678 (general but restricted right); Nassau County 90-5 (wills while client is alive); see also Rule 1.15(c)(4) (requiring return of property "that the client ... is entitled to receive"); Rule 1.8(i)(1) (charging liens permitted).

“Because the retaining lien is such a powerful weapon, both ethics committees and courts have placed limitations on the circumstances in which it can be exercised.” N.Y. County 678; see also Shoe Show, Inc. v. Launzel, No. 92-CV-2794, 1993 WL 150322, at *1 (E.D.N.Y. May 3, 1993) (“An exception to the attorney's right to a retaining lien may be found, in the court's discretion, where the client has made a clear showing of: (1) a need for the documents, (2) prejudice that would result from the denial of access to the papers, and (3) inability to pay the legal fees or post a reasonable bond”). The precise scope of a lawyer's right to assert a retaining lien presents questions of law. See N.Y. City 82-74. See generally ABA/BNA Lawyers' Manual on Professional Conduct 41:2102-2111 (1992); Rotker v. Rotker, 195 Misc. 2d 768, (N.Y.Sup. Ct., Westchester County 2003).

Counsel retained by insurance company . A number of courts have held that where counsel is retained by the client's insurance carrier and the carrier fails to pay counsel, counsel's rights to withdraw and exercise a retaining lien may be more limited than when the client alone is responsible for, but does not pay, the attorney's fees. SeeDennis v. Young, 106 A.D. 2d 762, 763 (3d Dept. 1984) (counsel could not withdraw at least until dispute over coverage decided);Turzio v. Ravenhall, 34 Misc. 2d 17, 18 (N.Y. City Ct., Kings County. 1962) (counsel could not exercise retaining lien). But see Cullen v. Olins Leasing, Inc., 91 A.D. 2d 537, 537 (1st Dept. 1982) (insurance company insolvent, lawyer permitted to withdraw).

Scope of Retention of Legal Files . Upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding, the client is presumptively accorded full access to the entire client file, with narrow exceptions. See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, L.L.P., 91 N.Y.2d 30, 34 (1997). In Sage Realty, the Court of Appeals held that (1)

counsel's former client is entitled to inspect and copy any documents which relate to the representation and are in counsel's possession, absent "substantial grounds" for counsel to refuse access (abrogating Zackiva Commcn's Corp. v. Milberg Weiss Bershard Specthrie & Lerach, 223 A.D.2d 417, (1st Dep't 1996)); (2) a law firm is not required to disclose documents that might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law, or firm documents intended for internal law office review and use; and (3) generally, unless the law firm has already been paid for assemblage and delivery of documents to the client, performing that function is properly chargeable to the client.

Back to Top

Of Counsel Relationships

Q. Under what circumstances may a lawyer or law firm enter into an "of counsel" relationship with another lawyer or law firm?

A. Under the Rules, lawyers or law firms may hold themselves out as "of counsel" to another lawyer or law firm, provided: (1) they have "a continuing relationship with [that] lawyer or law firm, other than as a partner or associate" (Rule 7.5(a)(4)); and (2) the use of the "of counsel" title is not false or misleading in other respects. (Rule 7.2, cmt. [1] ("In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status.")).

A "continuing relationship" is regularly defined as a "close, regular, personal relationship." *See* N.Y. City Formal Op. 1996-8; ABA Formal Op. 90-357 (holding that use of "the title 'of counsel,' or variants of that title, in identifying the relationship of a lawyer or firm with another lawyer or firm is permissible as long as the relationship between the two is a close, regular, personal relationship and the use of the title is not otherwise false or misleading"); *see also* N.Y. State Ethics Op. 793 (2006) (of counsel lawyer must be "available to the firm for consultation and advice on a regular and continuing basis"). An "of counsel" relationship must be more than "a relationship involving only occasional collaborative efforts among otherwise unrelated lawyers or firms." ABA Formal Op. 90-357.

Whether an "of counsel" relationship exists is a fact-based analysis involving the consideration of a variety of factors. *See* N.Y. City Formal Op. 2013-3. The following factors, which are not intended to be exclusive or exhaustive, may be relevant to determine whether a relationship is "continuing, regular and personal" within the meaning of Rule 7.5(a)(4):

- whether the lawyer shares office space with the law firm;
- whether the lawyer is actively involved in the firm's day-to-day affairs;
- whether the lawyer is actively involved in the firm's cases;
- the frequency and nature of the lawyer's communications with the firm;
- whether and to what extent the firm's clients use the lawyer's services;
- whether the lawyer's relationship with the firm is extremely limited, such a relationship that involves only the referral of business or occasional consulting.

N.Y. City Formal Op. 2013-3. Because "of counsel" relationships vary significantly from firm to firm, the fact that some of these elements are not present in a particular relationship (or that other elements not listed above are present) does not necessarily make the of counsel designation inappropriate. *See id.*; N.Y. State Ethics Op. 936 (2012) (no "fixed set of a few factors will answer the question whether a relationship is sufficiently close, regular and personal as to justify any form of 'counsel' designation"). Conversely, the existence of a particular factor or combination of factors does not conclusively determine that an "of counsel" relationship is appropriate. *See* N.Y. City Formal Op. 2013-1; N.Y. City Formal Op. 1995-8 ("sharing of space and availability for consultation on a regular basis are strongly indicative of the requisite closeness of relationship, but not conclusive absent closeness, regularity and a personal dimension in the relationship").

In addition, as noted above, the "of counsel" title must not be false or misleading in other respects. See N.Y. City Formal Op. 2013-3. In deciding whether to use the "of counsel" title, lawyers and law firms should give due consideration to the policies

underlying the relevant ethics opinions and rules – namely to protect the public from being misled about the relationship between the law firm and the of counsel attorney. *See id.*; N.Y. State Ethics Op. 955 (2012) ("Ethics committees have set forth criteria for use of particular designations such as 'of counsel' so as to avoid the risk of misleading the public."). By using the "of counsel" designation, both the law firm and the lawyer are conveying to the public that the lawyer's continuing relationship with the firm is close, regular, and personal. N.Y. City Formal Op. 2013-3; N.Y. State Ethics Op. 793. Where these characteristics are absent, the public – including potential clients – may be misled or harmed. N.Y. Formal Op. 2013-3.

Q. Is an "of counsel" attorney required to be compensated by any particular method?

No. The method of compensation "is not relevant" to whether a lawyer may be designated as "of counsel." N.Y. City Formal Op. 1996-8. An attorney who is paid "*per diem*" and "does not work exclusively for the firm" may be designated as "of counsel" to the firm. *Id.*

Q. May a law firm be "of counsel" to another law firm or lawyer?

A. Yes. *See* Rule 7.5(a)(4) ("a lawyer or law firm may be designated 'Of Counsel'"); N.Y. City Formal Op. 1995-8; ABA Formal Op. 90-357; *see also* N.Y. State Ethics Op. 793 (2006) (shown in hypothetical).

Q. May a lawyer be "of counsel" to more than one law firm at the same time?

A. Yes. *See* ABA Formal Op. 90-357; *see also* N.Y. City Formal Op. 1996-8; N.Y. State Ethics Op. 793 (2006). There is, however, "some point at which the number of relationships would be too great for any of them to have the necessary qualities of closeness and regularity, and that number may not be much beyond two." ABA Formal Op. 90-357; *accord* N.Y. State Ethics Op. 793 n.1 (2006); N.Y. City Formal Op. 1996-8.

Q. May a partner of one law firm simultaneously be "of counsel" to another law firm?

A. Yes, although it is "not usual, for a lawyer to satisfy the requirements to serve as both a partner in one firm and 'of counsel' to another." *See* N.Y. City Formal Op. 1995-9. The Committee has opined that these requirements is likely satisfied when, for tax reasons, an attorney who is based in Washington, D.C. and is partner in a New York law firm changes his status to become "of counsel" to the New York firm while simultaneously becoming a partner in a newly-formed D.C. partnership with those same New York partners. *Id.*

Q. May a New York law firm designate as "of counsel" a New York lawyer who resides and practices overseas?

A. A New York law firm may designate as "of counsel" a lawyer who is licensed to practice law in New York but resides and practices law mainly in a foreign country provided that the "of counsel" designation satisfies three conditions. See N.Y. City Formal Op. 2013-3.

First, the "of counsel" lawyer must have a "continuing relationship" with the law firm as required by Rule 7.5(a)(4). *Id.*; *see also* N.Y. City Formal Op. 1996-8 (an "of counsel" attorney must have a "close, continuing, regular and personal" relationship with the law firm). The criteria for assessing whether a "continuing relationship" exists are discussed in the first FAQ above.

Second, the use of the "of counsel" title must not be false or misleading in other respects. N.Y. City Formal Op. 2013-3; *see also* Rule 7.5, Cmt. [1] ("In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status."). The policies behind this requirement are discussed in the first FAQ above.

Third, the "of counsel" lawyer's practice must not constitute the unauthorized practice of law in the foreign country. N.Y. City Formal Op. 2013-3; see *also* Rule 5.5(b) ("A lawyer shall not aid a nonlawyer in the unauthorized practice of law"). The question of whether an attorney's conduct constitutes the unauthorized practice of law is an issue of substantive law and, thus, beyond the scope of the Committee's jurisdiction.

Q. How are conflicts imputed among "of counsel" lawyers and law firms?

A. In any "of counsel" relationship, conflicts are ordinarily imputed to and through the "of counsel" lawyer or law firm to the other lawyer or law firm. *See* N.Y. State Ethics Op. 793 (2006); N.Y. City Formal Op. 1996-8; *see also* N.Y. State Ethics Op. 773 (2004) (if lawyer serving on municipal board cannot appear before the board, a law firm to which the lawyer is "of counsel" is also barred); *cf*. Adv. Comm. Jud. Ethics 06-22 (if judge's personal attorney is "of counsel" to a law firm, the judge must also exercise recusal when members of the law firm appear before the judge "[i]f it is a continuing counsel relationship, evidenced, for example, by a shared letterhead and other indicia, rather than merely a retainer interest in occasional, discrete, separate cases").

Where a lawyer has an "of counsel" relationship with three law firms, conflicts of one firm are imputed to the other two. *See* ABA Formal Op. 90-357 ("[T]he effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications."); *see also Nemet v. Nemet*, 112 A.D.2d 359, 360 (2d Dep't 1985) (upholding disqualification based on the appearance of impropriety "evident in the 'of counsel' arrangement between these attorneys"); N.Y. City Formal Op. 2000-4 (extending the "of counsel" analysis to "affiliated" firms).

Q. Is a law firm permitted refer to its "of counsel" lawyers on professional notices, letterheads and signs?

A. Yes, subject to the usual restrictions on lawyer speech. *See* Rule 7.5(a)(4); N.Y. County Ethics Op. 727 (1999) (law firm may indicate on its letterhead that a lawyer "of counsel" to the firm is a retired judge, as long as the representation is truthful, not misleading, and does not suggest that the firm has improper influence over a tribunal, legislative body, or public official); *see generally* Rules 7.1-7.5.

Q. Is a law firm required refer to its "of counsel" lawyers on professional notices, letterheads and signs?

No. An "of counsel" attorney's name need not be listed on firm letterhead, and as long as the attorney's name does not so appear, there is no ethical requirement that the attorney's "of counsel" status be mentioned in connection with the attorney's signature. *See* N.Y. County Ethics Op. 662 (1984). However, if the

"of counsel" attorney's name does appear on firm letterhead, the nature of the relationship should be disclosed. *Id.*

A business card need not indicate an attorney's "of counsel" status. *See* N.Y. County Ethics Op. 682 (1990).

Q. How are "of counsel" lawyers treated for purposes of sharing fees?

A. Under Rule 1.5(g), fee splitting between lawyers who are neither partners nor associates is subject to certain limitations. The rule does not address fee splitting in the context of an "of counsel" relationship. Nonetheless, the Committee has concluded that where an "of counsel" lawyer is to receive a percentage of the fees paid by a client directly to the affiliated lawyer or law firm, the "of counsel" lawyer should be deemed an associate for purposes of the rule and the limitations do not apply. *See* N.Y. City Formal Op. 1996-8 n.2; *see also Gold v. Katz*, 193 A.D. 2d 566, 566 (1st Dep't 1993) (upholding fee splitting arrangement where "plaintiff, although listed as 'Of Counsel' to the firm, nevertheless had a 'fixed link' to it as one who 'regularly participate[d]' in its work, and thus should be deemed an 'associate' of the firm not subject to the prohibition against fee splitting").

Back to Top

Attorney Advertising, Solicitation, and Professional Notices

The following questions and answers are designed to assist the Bar in identifying issues and relevant disciplinary rules pertaining to attorney advertising and solicitations. Counsel are advised in all cases to consult the New York Rules of Professional Conduct to guide their work in the practice of law.

Q. What rules govern attorney advertisements and solicitations under New York's Rules of Professional Conduct?

A. Rule 7.1 governs attorney advertisements. Attorney advertising may not contain a statement or claim that is false, deceptive or misleading, or that otherwise violates any Rule. Rule 7.1(a).

Rule 7.3 governs in-person and other types of communications that are defined as solicitations. Solicitations must also comply with the additional requirements of Rule 7.3, including, among other things, more stringent record keeping obligations.

Additional rules concerning identifying a practice or specialty, and concerning professional letterheads, signs and other notices, are set forth in Rules 7.4 and 7.5, respectively.

Q. What is an advertisement?

A. Under the Rules of Professional Conduct, an advertisement is a 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 for which is the retention of the lawyer or law firm, except communications to current clients or other lawyers. Rule 1.0(a).

Q. What is a solicitation?

A. A solicitation is an 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 for which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain (pro bono matters are exempt). Rule 7.3(b).

Q. May I send articles, updates or speeches I have written to existing clients or other lawyers?

A. Communications to existing clients or other lawyers are not advertisements. Rule 1.0(a). A lawyer may write for publication on legal topics (or speak publicly) without affecting the right to accept employment so long as the lawyer does not undertake to give individual advice. Rule 7.1(r). In this context, "without affecting the right to accept employment" means that lawyers may ethically obtain business by giving speeches and writing articles about law.

Q. May I send articles, updates or speeches I have written to prospective clients?

A. If the primary purpose of the communication is the retention of the lawyer or law firm, the communication is advertising and must meet the requirements of Rule 7.1. If the communication is

directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, and a significant motive is pecuniary gain, the communication must also meet the requirements of Rule 7.3 for solicitations.

Q. What information must my advertisement contain under the Rules?

A. All attorney advertisements must include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered. Rule 7.1(h). For additional requirements concerning solicitations, see Rule 7.3.

Any email containing attorney advertising must contain in the subject line the notation "ATTORNEY ADVERTISING." Rule 7.1(f).

Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any website related thereto) or made in person under Rule 7.3(a)(1) must be labelled "Attorney Advertising" on the first page, or on the home page in the case of a website. Rule 7.1(f). A self-mailing brochure or postcard also must contain the words "Attorney Advertising." Rule 7.1(f).

Q. What information is prohibited in attorney advertising under the Rules?

A. The following information is prohibited in attorney advertising:

An advertisement shall not:

- include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending without informed client consent confirmed in writing;
- include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;
- include a 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;

- use actors to portray a judge, the lawyer, or members of the law firm, or clients, or utilizing depictions of fictitious events or scenes, without disclosure of same;
- be made to resemble legal documents; or
- utilize meta tags or other hidden computer codes that, if displayed, would violate the Rules.

Rule 7.1(c), (g).

Q.What information may be included in attorney advertising under the Rules?

A. Subject to the requirement of Rule 7.1(a) that an advertisement not contain any statements or claims that are false, misleading or deceptive, or otherwise violate a Rule, advertisements may include information as to:

Biographical information:

- 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 the Rules;
- public offices and teaching positions held;
- publications of law related matters authored by the lawyer;
- membership in bar associations or other professional societies or organizations, including offices and committee assignments;
- foreign language fluency;
- bona fide professional ratings;
- names of clients regularly represented, provided that the client has given prior written consent;

Non-legal services:

- non-legal 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 non-legal professional or service firm, to the extent permitted by Rule 5.8, and the nature and extent of the services available through those contractual relationships;

Financing arrangements and fees:

- bank references and credit arrangements accepted;
- prepaid or group legal service programs in which the lawyer or law firm participates;
- legal fees for initial consultation;
- contingency fee rates in civil matters when accompanied by a statement disclosing the information required under Rule 7.1(p) and Judiciary Law §488(3);
- range of fees for legal and non-legal 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 non-legal services.

See Rule 7.1(b)(1)-(4). In addition, an advertisement may provide the additional information described below only if the statement can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; the dissemination of the information does not contain statements or claims that are false, deceptive or misleading or otherwise violate a Rule; and it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome":

- statements that are reasonably likely to create an expectation about the results the lawyer can achieve;
- statements that compare the lawyer's services with the services of other lawyers;

- testimonials and endorsements of clients or former clients (except that client testimonials or endorsements with respect to a matter still pending remain prohibited without informed client consent in writing); or

- statements describing or characterizing the quality of the lawyer's or law firm's services.

Rule 7.1(d)-(e).

- A lawyer or law firm may not state that the lawyer or law firm is a specialist or specializes in a particular area of law, except as follows:

- A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

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

A lawyer who is certified as a specialist in a particular area of law or practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "Certification granted by the [identify state or territory] is not recognized by any governmental authority within the State of New York. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.

Rule 7.4.

An advertisement that otherwise complies with the Rules may include a paid endorsement of or testimonial about a lawyer or law firm only if:

- the advertisement discloses that the person is being compensated therefor (Rule 7.1(c)(2)), but if the endorsement or testimonial comes from a client with respect to a matter that is still pending, informed written consent must be obtained (Rule 7.1(e)(4)); amd
- the advertisement does not contain statements or claims that are false, deceptive or misleading, or otherwise violate a Rule; it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and it is accompanied by the disclaimer, "Prior results do not guarantee a similar outcome." Rule 7.1(d)(e).

An advertisement that otherwise complies with the Rules may use actors or fictionalized events or scenes provided that the advertisement discloses their use. Rule 7.1(c)(3).

An advertisement may use statements that compare the lawyer's services with the services of other lawyers only if the statements can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated, the advertisement is not false, deceptive or misleading, and does not otherwise violate the Rules, and the comparative statement is accompanied by the disclaimer "Prior results do not guarantee a similar outcome." Rule 7.1(e).

An advertisement may include statements that are reasonably likely to create an expectation about the results a lawyer can achieve only if the statements can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated, the advertisement is not false, deceptive or misleading, and does not otherwise violate the Rules, and the comparative statement is accompanied by the disclaimer "Prior results do not guarantee a similar outcome." Rule 7.1(e).

Q. For how long must attorneys retain copies of their advertisements and solicitations?

A. A lawyer or law firm must retain copies of all advertisements for a period of not less than three years following initial dissemination, except that copies of advertisements contained in a computer-accessed communication shall be retained for not less than one year. Rule 7.1(k).

Websites containing advertising shall be preserved upon initial publication of the website, any major website redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days. Rule 7.1(k).

A lawyer or law firm making a solicitation must satisfy additional requirements, including filing a copy of the solicitation with the appropriate attorney disciplinary committee and, if the solicitation is directed to predetermined recipients, retaining a list containing the names and addresses of all recipients for a period of not less than three years following the last date of dissemination. See Rule 7.3(c)(1),(3).

Only advertisements that are also solicitations must be filed with a disciplinary committee. Rule 7.3(b),(c).

All solicitations directed to a recipient in New York must be filed with the appropriate disciplinary committee. The filing shall consist of a copy of the solicitation and a transcript of any audio portion (must include a translation if the solicitation is in a language other than English).

The filing requirement does not apply to solicitations directed to a close friend, relative, or former or existing client; a web site, unless it is targeted at a prospective client affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or professional cards or other announcements authorized by Rule 7.5(a).

Rule 7.3(c)(1),(5).

Copies of solicitations are to 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. Rule 7.3(c).

Q. What rule governs the use of lawyer or law firm names?

A. Rule 7.5

A lawyer or law firm may use a telephone number that contains a domain name, nickname, moniker or motto that does not otherwise violate the Rules. Rule 7.5(f).

A lawyer or law firm may use a domain name for an internet web site that does not include the name of the lawyer or law firm, provide that all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm; the lawyer or law firm in no way attempts to engage in the practice of law by using the domain name; the domain name does not imply an ability to obtain results in a matter; and the domain name does not otherwise violate the Rules. Rule 7.5(e).

Lawyers cannot hold themselves out as having a partnership with one or more lawyers unless they are in fact partners. Rule 7.5(c). Whether an attorney is a partner, for purposes of disclosure to the public, is a question of law. See New York County Ethics Opinion 740; Simon, Professional Responsibility Report, December 2008. Similarly, a lawyer cannot imply that lawyers are associated in a law firm if that is not the case. Rule 7.1(c)(2).

If otherwise lawful, a law 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. Rule 7.5(b).

A lawyer who assumes a judicial, legislative or public executive or administrative post or office may not permit the lawyer's name to remain in the name of the 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 cannot use the lawyer's name in the firm name, or in professional notices of the firm. Rule 7.5(b).

Q. May I practice under a trade name?

A. No. Rule 7.5(b). *See generally* New York County Lawyers' Association, Committee on Professional Ethics, Question No. 677, p. 2, March 30, 1990. The NYCLA opinion reviews decisional law: *In re* Shephard, 92 AD2d 978 (3d Dep't 1983) (use of the name "The People's Law Firm of Jan L. Shephard" is improper since it implies that the firm is publicly supported or provides free legal

services); *but see In Re* von Wiegen, 63 N.Y. 2d 163 (1984) (using the motto "The Country Lawyer" was not improper when the lawyer's own name was inserted in addition to the motto, because there was no potential for deception about the identity of the lawyer in question).

Q. What kinds of solicitation are prohibited?

A. Solicitations by in-person or telephone contact, or real-time or interactive computer-accessed communication are prohibited unless the recipient is a close friend, relative, former client or existing client.

Solicitations by any form of communication are prohibited if:

- the communication or contact violates Rules 4.5(a)-(b) or 7.3(e) [governing communications after incidents involving potential claims for personal injury or wrongful death] or Rule 7.1(a) [prohibiting statements that are false, deceptive or misleading, or otherwise violate a Rule];
- the recipient has made known to the lawyer a desire not to be solicited by the lawyer;
- the solicitation involves coercion, duress or harassment;
- 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 the lawyer; or
- 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.

Rule 7.3(a).

No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death is permitted 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 is

permitted before the 15th day after the date of the incident. Rule 7.3(e).

In addition, no unsolicited communication is permitted to any individual injured in the accident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication is permitted before the 15th day after the date of the incident. Rule 4.5(a).

A retainer agreement may be provided along with a solicitation only if the top of each page is 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" appear on the client signature line. Rule 7.3(g).

A lawyer or law firm advertising any fixed fee for specified legal services must, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement must be available to the client at the time of retainer for any such service. Such legal services must include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where services are performed. Rule 7.1(j).

If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm cannot 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 may not charge more than the fixed fee for such stated legal services 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.

Unless otherwise specified, if a lawyer broadcasts any fee information authorized under Rule 7.1, the lawyer is bound by any representation made therein for a period of not less than 30 days after such broadcast.

Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under Rule 7.1 in a publication that is published more frequently than once per month, the lawyer is 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 Rule 7.1 in a publication that is published once per month or less frequently, the lawyer is bound by any representation made therein until the publication of the succeeding issue. If the lawyer publishes any fee information authorized under Rule 7.1 in a publication that has no fixed date for publication of a succeeding issue, the lawyer is bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

Rule 7.1(l)-(n).

Back to Top

Attorney Advertising

Please note that the following questions and answers are designed to assist the Bar in identifying the issues and relevant disciplinary rules pertaining to attorney advertising and solicitations. Counsel are advised in all cases to consult the Rules of Professional Conduct to determine whether the applicable Rules are satisfied. Please also note that certain Rules governing attorney advertising are the subject of pending litigation. See Alexander v. Cahill, 2007 U.S. Dist. LEXIS 53602 (N.D.N.Y. 2007) (appeal pending) The Committee does not opine on the likely outcome of litigation involving challenges to the Rules, which may affect your obligations.

Q. What rules govern attorney advertisements and solicitations under New York ’s Rules of Professional Conduct?

A. Rule 7.1 governs attorney advertisements. Attorney advertising may not contain a statement or claim that is false, deceptive or

misleading, or that otherwise violates any Rule. Rule 7.1(a).

Solicitations must also comply with the additional requirements of Rule 7.3.

Additional rules concerning identifying a practice or specialty, and concerning professional letterheads, signs and other notices, are set forth in Rules 7.4 and 7.5, respectively.

Q. What is an advertisement?

A. Under the Rules of Professional Conduct, an advertisement is a 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 for which is the retention of the lawyer or law firm. Rule 1.0(a).

Q. What is a solicitation?

A. A solicitation is a kind of advertisement, one directed to or targeted at a specific recipient or group of recipients, and a significant motive for which is pecuniary gain.

A solicitation is an 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 for which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. Rule 7.3(b).

Q. Can I send articles, updates or speeches I have written to existing clients or other lawyers?

A. Communications to existing clients or other lawyers are not advertisements. Rule 1.0(a). A lawyer may write for publication on legal topics (or speak publicly) without affecting the right to accept employment so long as the lawyer does not undertake to give individual advice. Rule 7.1(r).

Q. Can I send articles, updates or speeches I have written to prospective clients?

A. If the primary purpose of the communication is the retention of the lawyer or law firm, the communication is advertising and must meet the requirements of Rule 7.1. If the communication is

directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, and a significant motive is pecuniary gain, the communication must also meet the requirements of Rule 7.3 for solicitations.

Q. What information must my advertisement contain under the Rules?

A. All attorney advertisements must include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered. Rule 7.1(h). For additional requirements concerning solicitations, see Rule 7.3.

Any email containing attorney advertising must contain in the subject line the notation "ATTORNEY ADVERTISING." Rule 7.1(f).

Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any website related thereto) or made in person under Rule 7.3(a)(1) must be labeled "Attorney Advertising" on the first page, or on the home page in case of a website. Rule 7.1(f). A self-mailing brochure or postcard also must contain the words "Attorney Advertising." Rule 7.1(f).

Q. What information is prohibited in attorney advertising under the Rules?

A. The following information is prohibited in attorney advertising:

Ad advertisement shall not:

- include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending;
- include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;
- include the portrayal of a judge, a 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;
- use actors to portray the lawyer, or members of the law firm, or clients, or utilizing depictions of fictitious events or

scenes, without disclosure of same; rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence;

- be made to resemble legal documents;
- utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter;
- utilize a pop-up or pop-under advertisements in connection with computer-accessed communications, other than on the lawyer or law firm's own website or other internet presence; or
- utilize meta tags or other hidden computer codes that, if displayed, would violate the Rules.

Rule 7.1(c), (g).

Q.

A. Subject to the requirement of Rule 7.1(a) that an advertisement not contain any statements or claims that are false, misleading or deceptive, or otherwise violate a Rule, advertisements may include information as to:

- 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 the Rules;
- public offices and teaching positions held;
- publications of law related matters authored by the lawyer;
- membership in bar associations or other professional societies or organizations, including offices and committee assignments;
- foreign language fluency;
- bona fide professional ratings;

- names of clients regularly represented, provided that the client has given prior written consent;
- bank references and credit arrangements accepted;
- prepaid or group legal service programs in which the lawyer or law firm participates;
- non-legal 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 non-legal professional or service firm, to the extent permitted by Rule 5.8, and the nature and extent of the services available through those contractual relationships;
- legal fees for initial consultation;
- contingency fee rates in civil matters when accompanied by a statement disclosing the information required under Rule 7.1(p) and Judiciary Law § 488(3);
- range of fees for legal and non-legal services, provided that there be available to the public free of charge a written statement clearing describing the scope of each advertised service;
- hourly rates; and fixed fees for specified legal and non-legal services.

See Rule 7.1(b)(1)-(4). In addition, an advertisement may provide the additional information described below only if the statement can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; the dissemination of the information does not contain statements or claims that are false, deceptive or misleading or otherwise violate a Rule; and it is accompanied by the following disclaimer: “Prior results do not guarantee a similar outcome”:

- statements that are reasonably likely to create an expectation about the results the lawyer can achieve;
- statements that compare the lawyer’s services with the services of other lawyers;

- testimonials and endorsements of clients or former clients (except that client testimonials or endorsements with respect to a matter still pending remain prohibited); or
- statements describing or characterizing the quality of the lawyer's or law firm's services.

Rule 7.1(d)-(e).

A. Attorney advertising can include a nickname, moniker or motto or trade name only if that nickname, moniker, motto or trade name does not imply an ability to obtain results in a matter. Rule 7.1(c)(7). A lawyer or law firm may use a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate the Rules. Rule 7.5(f).

A. A lawyer or law firm may use a domain name for an internet web site that does not include the name of the lawyer or law firm, provide that all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm; the lawyer or law firm in no way attempts to engage in the practice of law by using the domain name; the domain name does not imply an ability to obtain results in a matter; and the domain name does not otherwise violate the Rules. Rule 7.5(e).

A. Lawyers cannot hold themselves out as having a partnership with one or more lawyers unless they are in fact partners. Rule 7.5(c). Similarly, a lawyer cannot imply that lawyers are associated in a law firm if that is not the case. Rule 7.1(c)(3).

A. A lawyer in private practice cannot practice under a trade name or a name that is misleading as to the identity of the lawyer or lawyers practicing under such a name, or containing names other than those of one or more of the lawyers in the firm. Rule 7.5(b).

A. Rule 7.5(b).

A. If otherwise lawful, a law 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. Rule 7.5(b).

A. A lawyer who assumes a judicial, legislative or public executive or administrative post or office may not permit the lawyer's name

to remain in the name of the 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 cannot use the lawyer's name in the firm name, or in professional notices of the firm. Rule 7.5(b).

A. A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law.

- A lawyer or law firm may not state that the lawyer or law firm is a specialist or specializes in a particular area of law, except as follows:
- A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
- A lawyer who is certified as a specialist in a particular area of law or practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law."

A lawyer who is certified as a specialist in a particular area of law or practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "Certification granted by the [identify state or territory] is not recognized by any governmental authority within the State of New York. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law."

Rule 7.4.

A. An advertisement that otherwise complies with the Rules may include a paid endorsement of or testimonial about a lawyer or law firm only if the advertisement discloses that the person is being compensated therefor (Rule 7.1(c)(2)); the endorsement or testimonial does not come from a client with respect to a matter that is still pending (Rule 7.1(c)(1)); the advertisement does not contain statements or claims that are false, deceptive or misleading, or otherwise violate a Rule; it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and it is accompanied by the disclaimer, "Prior results do not guarantee a similar outcome." Rule 7.1(d)(e).

A. An advertisement that otherwise complies with the Rules may use actors or fictionalized events or scenes provided that the advertisement discloses their use. Rule 7.1(c)(4).

A. An advertisement may use statements that compare the lawyer's services with the services of other lawyers only if the statements can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated, the advertisement is not false, deceptive or misleading, and does not otherwise violate the Rules, and the comparative statement is accompanied by the disclaimer "Prior results do not guarantee a similar outcome." Rule 7.1(e).

A. An advertisement may include statements that are reasonably likely to create an expectation about the results a lawyer can achieve only if the statements can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated, the advertisement is not false, deceptive or misleading, and does not otherwise violate the Rules, and the comparative statement is accompanied by the disclaimer "Prior results do not guarantee a similar outcome." Rule 7.1(e).

A. A lawyer or law firm must retain copies of all advertisements for a period of not less than three years following initial dissemination, except that copies of advertisements contained in a computer-accessed communication shall be retained for not less than one year. Rule 7.1(k).

Websites containing advertising shall be preserved upon initial publication of the website, any major website redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days. Rule 7.1(k).

A lawyer or law firm making a solicitation must satisfy additional requirements, including filing a copy of the solicitation with the appropriate attorney disciplinary committee and, if the solicitation is directed to predetermined recipients, retaining a list containing the names and addresses of all recipients for a period of not less than three years following the last date of dissemination. See Rule 7.3(c)(1),(3).

A. Only advertisements that are also solicitations must be filed with a disciplinary committee. Rule 7.3(b),(c).

A. All solicitations directed to a recipient in the State of New York must be filed with the appropriate disciplinary committee. The filing shall consist of a copy of the solicitation, 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.

The filing requirement does not apply to solicitations directed or disseminated to a close friend, relative, or former or existing client; a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to, or targeted at, a prospective client affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or professional cards or other announcements authorized by Rule 7.5(a).

Rule 7.3(c)(1),(5).

A. Copies of solicitations are to 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. Rule 7.3(c).

Q. What kinds of solicitation are prohibited?

A. Solicitations by in-person or telephone contact, or real-time or interactive computer-accessed communication are prohibited

unless the recipient is a close friend, relative, former client or existing client.

Solicitations by any form of communication are prohibited if:

- the communication or contact violates Rules 4.5(a)-(b) or 7.3(e) [governing communications after incidents involving potential claims for personal injury or wrongful death] or Rule 7.1(a) [prohibiting statements that are false, deceptive or misleading, or otherwise violate a Rule];
- the recipient has made known to the lawyer a desire not to be solicited by the lawyer;
- the solicitation involves coercion, duress or harassment;
- 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 the lawyer; or
- 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.

Rule 7.3(a).

A. No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death is permitted 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 is permitted before the 15th day after the date of the incident. Rule 7.3(e).

In addition, no unsolicited communication is permitted to any individual injured in the accident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal

prerequisite to the particular claim, in which case no unsolicited communication is permitted before the 15th day after the date of the incident. Rule 4.5(a).

A. A retainer agreement may be provided along with a solicitation only if the top of each page is 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” appear on the client signature line. Rule 7.3(g).

A. A lawyer or law firm advertising any fixed fee for specified legal services must, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement must be available to the client at the time of retainer for any such service. Such legal services must include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where services are performed. Rule 7.1(j).

A. If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm cannot 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 may not charge more than the fixed fee for such stated legal services 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.

Unless otherwise specified, if a lawyer broadcasts any fee information authorized under Rule 7.1, the lawyer is bound by any representation made therein for a period of not less than 30 days after such broadcast.

Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under Rule 7.1 in a publication that is published more frequently than once per month, the lawyer is 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 Rule 7.1 in a publication that is published once per month or less

frequently, the lawyer is bound by any representation made therein until the publication of the succeeding issue. If the lawyer publishes any fee information authorized under Rule 7.1 in a publication that has no fixed date for publication of a succeeding issue, the lawyer is bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

Rule 7.1(l)-(n).

Back to Top

42 West 44th Street, New York, NY 10036 |
212.382.6600

concerning their conflicting interests. Lawyer spent most of the closing argument explaining away A's guilt and did not mention the weak case against B, because doing so would invite the jury to consider the greater likelihood of A's guilt. Lawyer could represent B only with the informed consent of B (see § 122).

d. A criminal-defense lawyer with conflicting duties to other clients. As required in Subsection (2), a conflict exists when a defense lawyer in a criminal matter has duties to clients in other matters that might conflict. A conflict exists, for example, if the lawyer also represents either a prosecutor or a prosecution witness in an unrelated matter. The conflict could lead the lawyer to be less vigorous in defending the criminal case in order to avoid offending the other client, or the lawyer might be constrained in cross-examining the other client (see § 60(1)). A lawyer who represents a criminal defendant may not represent the state in unrelated civil matters when such representation would have a material and adverse effect on the lawyer's handling of the criminal case.

Ordinarily, these conflicts may be waived by client consent under the limitations and conditions in § 122. Because the defendant's constitutional rights are implicated, court procedures often require that consent be made part of the formal record in the criminal case (see Comment *c* hereto).

§ 130. Multiple Representation in a Nonlitigated Matter

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent two or more clients in a matter not involving litigation if there is a substantial risk that the lawyer's representation of one or more of the clients would be materially and adversely affected by the lawyer's duties to one or more of the other clients.

Comment:

b. Rationale. . . . Whether a lawyer can function in a situation of conflict (see § 121) depends on whether the conflict is consentable (see § 122(2)), which in turn depends on whether it is "reasonably likely that the lawyer will be able to provide adequate representation" to all affected clients (see § 122(2)). Conflicted but unconsented representation of multiple clients, for example of the buyer and seller of property, is sometimes defended with the argument that the lawyer was performing the role of mere "scrivener" or a similarly mechanical role. The characterization is usually inappropriate. A lawyer must accept responsibility to give customary advice and customary range of legal services, unless the clients have given their informed consent to a narrower range of the lawyer's responsibilities. On limitations of a lawyer's responsibilities, see § 19(1).

c. Assisting multiple clients with common objectives, but conflicting interests. When multiple clients have generally common interests, the role of the lawyer is to advise on relevant legal considerations, suggest alternative ways of meeting common objectives, and draft instruments necessary to accomplish the desired results. Multiple representations do not always present a conflict of interest requiring client consent (see § 121). For example, in representing spouses jointly in the purchase of property as co-owners, the lawyer would reasonably assume that such a representation does not involve a conflict of interest. A conflict could be involved, however, if the lawyer knew that one spouse's objectives in the acquisition were materially at variance with those of the other spouse.

Illustrations:

1. Husband and Wife consult Lawyer for estate-planning advice about a will for each of them. Lawyer has had professional dealings with the spouses, both separately and together, on several prior occasions. Lawyer knows them to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer may represent both clients in the matter without obtaining consent (see § 121). While each spouse theoretically could make a distribution different from the other's, including a less generous bequest to each other, those possibilities do not create a conflict of interest, and none reasonably appears to exist in the circumstances.

2. The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. Spouse A does most of the talking in the initial discussions with Lawyer. Spouse B, who owns significantly more property than Spouse A, appears to disagree with important positions of Spouse A but to be uncomfortable in expressing that disagreement and does not pursue them when Spouse A appears impatient and peremptory. Representation of both spouses would involve a conflict of interest. Lawyer may proceed to provide the requested legal assistance only with consent given under the limitations and conditions provided in § 122.

3. The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. But in this instance, unlike in Illustration 2, in discussions with the spouses, Lawyer asks questions and suggests options that reveal both Spouse A and Spouse B to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual

objectives. Lawyer has adequately verified the absence of a conflict of interest and thus may represent both clients in the matter without obtaining consent (see § 122).

Clients might not fully understand the potential for conflict in their interests as the result of ignorance about their legal rights, about possible alternatives to those that the clients have considered prior to retaining the lawyer, or about the uncommunicated plans or objectives of another client. In other situations, prospective clients might agree on objectives when they first approach the common lawyer, but it should be reasonably apparent that a conflict is likely to develop as the representation proceeds. A client's right to communicate in confidence with the attorney should not be constrained by concern that discord might result (cf. § 75). A lawyer is not required to suggest or assume discord where none exists, but when a conflict is reasonably apparent or foreseeable, the lawyer may proceed with multiple representation only after all affected clients have consented as provided in § 122.

Illustration:

4. A, B, and C are interested in forming a partnership in which A is to provide the capital, B the basic patent, and C the management skill. Only C will spend significant amounts of time operating the business. A, B, and C jointly request Lawyer to represent them in creating the partnership. The different contributions to be made to the partnership alone indicate that the prospective partners have conflicts of interest with respect to the structure and governance of the partnership (see § 121). With the informed consent of each (see § 122), Lawyer may represent all three clients in forming the business. Lawyer may assist the clients in valuing their respective contributions and suggest arrangements to protect their respective interests. With respect to conflicts and informed consent in representing the partnership as well as the partners once the business is established, see § 131, Comment *e*.

d. Clients with known differences to be resolved. Multiple prospective clients might already be aware that their interests and objectives are antagonistic to some degree. The lawyer must ascertain at the outset what kind of assistance the clients require. Service by the lawyer or another person as an arbitrator or mediator (and not as a lawyer representing clients), for example, might well serve the clients' interests.

When circumstances reasonably indicate that the prospective clients might be able to reach a reasonable reconciliation of their differences by agreement and with the lawyer's assistance, the lawyer may represent them after obtaining informed consent (see § 122). In particular, the lawyer should explain the effect of joint representation on the lawyer's ability to protect each client's confidential information (see § 75). If the joint representation is undertaken, the lawyer should help the clients reach agreement on outstanding issues but should not advance the interests of one of the clients to the detriment of another (see § 122, Comment *h*).

Relations among multiple clients can develop into adversarial, even litigated, matters. Even if the possibility of litigation is substantial and even though the consent does not permit the lawyer to represent one client against the other if litigation does ensue (see § 122(2)(b) & § 128), with informed consent a lawyer could accept multiple representation in an effort to reconcile the differences of the clients short of litigation. The lawyer should inform the clients that the effort to overcome differences might ultimately fail and require the lawyer's complete withdrawal from the matter, unless the clients agreed that the lawyer thereafter could continue to represent less than all clients (see § 121, Comment *e(i)*). The lawyer is not required to encourage each client to obtain independent advice about being jointly represented, but the lawyer should honor any client request for such an opportunity.

Illustrations:

5. The same facts as in Illustration 4, except that the partnership of A, B, and C is formed and commences business. The business encounters difficulty in securing customers and controlling costs, and it shortly appears that the business will fail unless additional funding is obtained. No outside funds are available, and A announces unwillingness to provide additional capital unless B and C agree to increase A's interest in the business. B and C believe that A is requesting an unreasonably large additional share. A, B, and C seek Lawyer's assistance in resolving their disagreements. A conflict clearly exists between the clients (§ 121). Lawyer may agree to represent the three clients in seeking to arrive at a mutually satisfactory resolution, but only after Lawyer obtains the informed consent of each client and there is a clear definition of the services that Lawyer will provide. In representing the clients, Lawyer may not favor the position of any client over the others (see § 122, Comment *h*).

6. Husband and Wife have agreed to obtain an uncontested dissolution of their marriage. They have consulted Lawyer to help them reach an agreement on disposition of their property. A conflict of interest clearly exists between the prospective clients (§ 121). If reasonable prospects of an agreement exist, Lawyer may accept the joint representation with the effective consent of both (see § 122). However, in the later dissolution