Ethics Update

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ETHICS UPDATE

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Summary of Recent Opinions
(Relevant to government attorneys)

- **NYSBA Opinion 1191-**
  - Rules 1.6, 1.7, 1.9, 1.13
  - Topics: Legal duty to client, Conflicts of interest, Reporting wrongdoing
    - What are the obligations of a municipal counsel when faced with serious and credible allegations of wrongdoing by municipal employees adversely affecting the municipal corporation?
    - What are the municipal counsel's duties when the counsel's office has previously represented, or continues to represent, the alleged wrongdoers, in their official capacities?
  - Facts/Conclusion:
    - Counsel for a municipal corporation owes a duty solely to the municipal corporation. Upon learning information of serious allegations by municipal employees injurious to the municipality, corporation counsel should report the information to higher authorities within the municipal unit, including, if need be, to the highest authority.
    - A prior or current representation of the employees in their official capacities does not relieve the corporate counsel of this duty.
- **NYSBA Opinion 1187-**
  - Rules 1.7(a), 1.7(b), 1.11(c), 1.11(d), and 1.11(f)
  - Topics: Conflicts of interest
  - Facts/Conclusion:
    - The inquirer is a police officer with a Village Police Department in New York and is admitted to practice law in New York. The inquirer wants to represent defendants in traffic court, both in the county where the inquirer serves as a police officer and in other counties
    - On our view, whether a police officer may represent clients in traffic violation matters depends on the facts and circumstances of the representation, with two caveats. First, a police officer engaged in private legal practice may not represent traffic court defendants in the same county where the police officer works, because such conflicts arising under Rule 1.7(a)(2) would on our view not be subject to consent under Rule 1.7(b)(1). Second, whatever confidential information the inquirer

learns in private practice with respect to a traffic court client or prospective client, the inquirer must not use or reveal that information to advance his work as a Village police officer except as permitted by Rules 1.6, 1.9(c), and 1.18(b).

- Applying Rule 1.7(a)(2) to the facts before us, we believe that a reasonable lawyer would perceive a "significant risk" that, in some cases, the inquirer's professional judgment on behalf of a traffic court client will be adversely affected by the inquirer's financial and personal interests. The inquirer's financial and personal interests include staying in the good graces of his superiors on the police force and in Village government, as well as not incurring the wrath of peers in police departments in the Village and in other towns and villages.
- Applying Rule 1.7(b)(1), our analysis of consent depends on whether the traffic court matter is in the same county where the inquirer serves as a police officer or instead in some other county. When a traffic court defendant will appear in a traffic court in the same county where the inquirer serves as a police officer, we believe the conflict is not subject to consent. But in other counties, the outcome will turn on whether the inquirer reasonably believes the inquirer will be able to provide competent and diligent representation to the traffic court defendant as required by subparagraph (b)(1). This is a case-by-case determination, depending on all of the facts and circumstances

- **NYSBA Opinion 1170-**
  - Rules 1.7(a)(1), 1.7(a)(2), 1.11(c), 1.11(d) and 1.11(f)
  - Topics: Conflicts of interest, Village Attorney, Private Clients
  - Facts/Conclusion:
    - Village had no village justice court or separate village police department. Village attorney did not represent Village in Town Court, where village ordinance violation cases are adjudicated. Town Court also oversees all traffic matters arising out of geographical bounds of the Town, which envelopes the Village. The Village receives some revenue as the result of disposition of some criminal matters and the disposition of village ordinance violations but does not contribute to the cost of operating the town court in any manner.
    - The inquiring village attorney has been appearing in Town Court, representing clients on matters wholly unrelated to the village. He is not ethically prohibited from representing private clients in defense of Vehicle and Traffic Law violations, criminal proceedings, or Town Ordinance violation cases brought in the Town Justice Court, provided that no uncontested financial or business conflicts of interest exist, and provided

that the provisions on current government employees in Rule 1.11 are respected.

- **NYSBA Opinion 1169-**
  - Rules: 1.11(c), (d) and (f)
  - Topics: Town Supervisor; Law Practice; Conflict of Interest
  - Facts/Conclusion:
    - The inquirer is an attorney in private practice in a Town, a municipal corporation, where the inquirer regularly represents business clients located within the boundaries of the municipality. The inquirer wishes to seek public office as Town Supervisor, the powers of which could potentially affect some private clients.
    - Initially, in addition to the Rules of Professional Conduct, a governmental body may have adopted other rules regulating the private business endeavors of public officers. Rule 1.11(d) makes clear that any law or regulation governing the conduct of a current governmental official has priority over the Rules.
    - While Rule 1.11 does not prohibit the inquirer from representing private clients located within the Township while he is serving as Town Supervisor, subject to any further restrictions under applicable law, the inquirer cannot represent any private client in a matter involving the Town and should not participate, in his role as a public official, in any matter in which he participated personally and substantially while in private practice. Additionally, the inquirer may not negotiate for private employment with any party involved in matters with the Township in which he would have a role. The inquirer should also avoid the use of his public office to obtain special treatment for a private client, to influence a tribunal in favor of a client, or to receive consideration from anyone in the guise of legal fees in order to influence official conduct. Finally, if the inquirer acquires confidential government information about any person, the inquirer may not represent a private client with interests adverse to that person in a matter in which the information could be used to that person's material disadvantage.
- **NYSBA Opinion 1148**
  - Rules: 1.0(j), 1.6, 1.9(a) & (c), 1.11(a) & (c).
  - Topics: Conflicts of Interest: Former government lawyer in private practice
  - Facts/Conclusions:
    - A lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such

employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in the same matter while a government employee

- Nothing in the Rules creates an absolute bar to a former government attorney's representation of a client in opposition to the attorney's former employer. Rule 1.11(a)(2) is the principal Rule governing conflicts that may be faced by a former government attorney. N.Y. State 1029 ¶ 9 (2014). Rule 1.11(a) provides in pertinent part that "a lawyer who has formerly served as a public officer or employee of the government . . . shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." Hence, Rule 1.11(a)(2) allows a former government attorney to represent private clients on matters in which the attorney did not participate "personally and substantially" while in government service.
- The history of Rule 1.11(a)(2) makes "clear that the disqualification must be based on the lawyer's "personal participation to a significant extent", which standard differs from Rule 1.9(a), a rule more generally regulating a lawyer's duty to former clients. Absent the former client's informed consent, the differing language of the two Rules reflects their different objectives. Rule 1.9(a) bars representation adverse to a former client "in the same or a substantially related matter" to the matter in which the lawyer previously represented a client. Rule 1.11(a) bars representation by a former government employee adverse to the former client only in the same specific matter as the matter in which the lawyer participated "personally and substantially" during the lawyer's government employment
- Consequently, we conclude that a onetime government lawyer may represent clients adverse to the lawyer's former government employer unless that lawyer had a personal and substantial involvement in the same specific matter in which the lawyer now proposes to challenge the government's position

- **NYSBA Opinion 1130**
  - Rules: 1.0 (f), (r) & (w), 1.7(a), 1.7(b)
  - Topics: Imputing Conflicts of Interest, Town Attorney
  - Facts/Conclusions:
    - A lawyer who is town attorney may not concurrently represent private clients whose interests are adverse to the town – and Rule 1.10(a) imputes the town attorney's conflicts to his entire firm

- Objective criteria, including public trust in the processes of government, are integral to the analysis of whether a conflict of interest is consentable. This analysis necessarily involves consideration of the public's reasonable view of a single law firm handling both sides of an issue that affects the public in a significant way, such as allowing industrial use of land abutting residential properties and an educational institution. Whether or not the issue provokes widespread controversy, we believe that our Opinion 630 correctly captures the ethical concerns that this inquiry raises. Where lawyers from a single law firm are both filing an application with a public agency on behalf of a private client and advising the government agency about the applied-for change in the town's current zoning and planning program, government decision-making is affected in ways that consent cannot ameliorate.
- A nonconsentable conflict exists when one member of a law firm acts as Town Attorney on, among other things, planning and zoning matters and another lawyer in the firm seeks to represent an applicant before the Town's planning board.

Summary of Recent Opinions

(Relevant to legal practice in the coronavirus era)

- **NYSBA Ethics Opinion 1189**
  - Rules 1.4, 1.6
  - Topics: Client Communication
  - Facts/ Conclusion
    - The inquirer is concerned about situations in which it becomes hard to reach clients. As an example, the inquirer notes having been "in regular contact with [a client] for a litigation and related settlement negotiations. But since the ongoing COVID 19 pandemic, [the inquirer has] been unable to reach him by email or phone despite multiple attempts."
    - A lawyer, so as to protect the ability to reach and communicate with a client, may ask the client to designate a person for the lawyer to contact in the event the lawyer is unable otherwise to reach the client.
- **NYSBA Ethics Opinion Number 1176**
  - Rules: 1.15(a), (b)(1), (b)(3)
  - Topics: Escrow Account, Commingling
  - Facts/ Conclusion
    - The inquirer's trust or escrow account has had a zero balance of funds for a period of time. The inquirer apprehends that the bank may close the account for inactivity or failure to maintain the requisite minimum balance. The inquirer is concerned that, if the inquirer deposits lawyer funds into the account to avoid bank sanction and thereafter receives client funds for deposit into the trust or escrow account, the inquirer could be impermissible commingling funds.
    - Most pertinent to this inquiry, is Rule 1.15(b)(3), which says that funds "reasonably sufficient to maintain the account or to pay account charges may be deposited therein." This is simple common sense - that a lawyer may provide a cushion from the lawyer's own funds to maintain the account and cover account charges. This is no license to pad the account with the lawyer's money: the words "reasonably sufficient" mean than that a lawyer may pay into the account such amounts as may be reasonably adequate to meet whatever bank requirements exist to sustain the account, pay the bank's charges, and meet the minimal thresholds that the bank imposes for the account to endure. Amounts beyond those "reasonably sufficient" to maintain the account may cross the line of commingling.
    - Thus, a lawyer may make nominal deposits of the lawyer's own funds into a trust or escrow account to avoid the account being closed for inactivity or failure to maintain minimum balance.

Summary of Other Ethics Materials

- **ABA Formal Opinion 488**
  - Rule: Model Rule 2.11
  - Topic: Judge's relationship with lawyers or parties as grounds for disqualification or disclosure
  - Facts/Conclusions:
    - Rule 2.11(A) of the Model Code provides that judges must disqualify themselves in proceedings in which their impartiality might reasonably be questioned and identifies related situations.
    - Personal bias or prejudice is an unwaivable ground requiring disqualification. The Rule also favors disqualification if the Judge, Judge's spouse, or a person within the third degree of relationship of either of them is: a party, a lawyer, otherwise has an interest in the proceeding, or is likely to be a material witness in the proceeding. Similarly the Rule mandates disqualification in the event that a party, lawyer, or law firm has made contributions to the Judge's election campaign in specific amounts over time.
    - Other categories of relationships possibly impacting Judge's impartiality include: acquaintances; friends, and other close personal relationships.
    - Acquaintances are those who have coincidental or relatively superficial interactions with the Judge (e.g. professional association meetings, parent-teacher functions for children, overlapping social circle, patronizing the same businesses in the same area, religious services). Neither is seeking contact with the other even though they are cordial when their lives intersect. Such a relationship is not a reasonable basis for questioning the Judge's impartiality. The Judge has no duty to disclose such a relationship.
    - Friendships imply a closer degree of affinity than an acquaintance; although not all friendships are the same. On one end of the spectrum, a Judge and Lawyer may share a past relationship (colleagues and/or classmates) and occasionally meet for a meal when the opportunity presents itself. Friends may also exchange gifts on holidays and special occasions, seek out regular social interactions, regularly community and coordinate family or other group activities. Ultimately not all friendships require disqualification. Whether a friendship is of such a degree that requires disclosure or disqualification is a case-by-case issue. A Judge should disclose the extent of a friendship with a party or lawyer involved

in a particular matter that the Judge believes might be reasonably considered in the context of a motion for disqualification. The Judge should permit such a motion and create a record to support the Judge's ultimate decision on such motion.

- Close personal relationships go beyond or differ from the concepts of friendship. This might include romantic entanglements, or situations of shared custody of children or business endeavors. A Judge should disclose the extent of such a relationship to permit a motion for disqualification and create a record to support Judge's ultimate decision on such motion.

- **ABA Formal Opinion 483**
  - Rule: Model Rule 1.4
  - Topics: Client communication following cyber attack
  - Facts/Conclusions:
    - A lawyer has an ethical responsibility to use reasonable efforts when communicating confidential information over the Internet.
    - Following a data breach exposing confidential information an Attorney's course of conduct depends on the nature of the incident, the ability of the attorney to know about the facts and circumstances surrounding the attack, and the attorney's responsibility in the law firm operations.
    - According to Model Rule 1.1 a lawyer should be competent to understand the technologies being used to deliver services to their clients. This may be satisfied by personal study and investigation or by employing qualified personnel (lawyers and non-lawyer assistants).
    - The reasoning inherent in the Model Rules (particularly Rules 5.1, 5.2, and 5.3) obligate an attorney to monitor the technology and resources used by a firm to protect the confidential information transmitted thereby. This includes monitoring those given access to the technology.
    - Not every cyber episode will trigger the obligations described in this opinion. The key issue is whether material client confidential information is actually compromised. Such information is compromised where it is stolen/obtained by another or where the attorney's access to the same is blocked with ransomware.
    - Model Rule 1.1 requires a lawyer to act reasonably and promptly to stop a breach and mitigate resulting damage. Lawyers should consider proactively developing an incident response plan to ensure appropriate actions are taken. The primary goal of such plan should permit prompt identification and evaluation of any network intrusion, the quarantine of any malware; shutdown of system access and/or other prevention of unauthorized exfiltration of data.

- Model Rule 1.6 requires a lawyer to make reasonable efforts in preventing the inadvertent or unauthorized disclosure of confidential information. The extent of such efforts to safeguard information takes into account the sensitivity of the information, the likelihood of disclosure if safeguards are not employed, the cost of safeguards, and the difficulty/burden of implementing safeguards.
- Disclosure of a breach is required where it is likely to affect the position of the client or the outcome of the legal matter. The Model Rules do not suggest that the same communication is owed to former clients. No notification is required if the lawyer's office file server was subject to a ransomware attack but no information relating to the representation of a client was inaccessible for any material amount of time, or was not accessed by or disclosed to unauthorized persons. Conversely, disclosure will be required if material client information was actually or reasonably suspected to have been accessed, disclosed or lost in a breach. The extent of the notification must be sufficient enough to provide the client the ability to make an informed decision as to what to do next, if anything.