OF NOTE

THE JUSTICE RUTH BADER GINSBURG DISTINGUISHED
LECTURE ON WOMEN AND THE LAW
INTRODUCTION: Ruth Bader Ginsburg
LECTURE: Mary Robinson

THE LESLIE H. ARPS MEMORIAL LECTURE
INTRODUCTION: Bettina B. Plevan & Barry H. Garfinkel
LECTURE: WOMEN AND THE LEGAL PROFESSION—A STATUS REPORT
Elena Kagan

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The Committee on Professional Responsibility

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Committee on Criminal Justice Operations and Budget

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OBLIGATIONS TO CLIENTS AND PROSPECTIVE CLIENTS

FORMAL OPINION 2006-01: MULTIPLE REPRESENTATIONS;
INFORMED CONSENT; WAIVER OF CONFLICTS

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Of Note

THE FOLLOWING CANDIDATES HAVE BEEN ELECTED TO THE VARIOUS Association offices and committees for 2006-2007:

President
Barry M. Kamins

Vice Presidents
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William F. Kuntz, II
Loretta E. Lynch

Secretary
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Treasurer
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Robert J. Anello
Laurie Berke-Weiss
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Christopher L. Mann
Marsha E. Simms

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ON MARCH 6TH, FORMER ASSOCIATION PRESIDENT JOHN FEERICK WAS presented with the Association Medal, an award that has been presented
only 19 times in the more than fifty years of its existence. The Association Medal is presented to a “member of the New York Bar who has made exceptional contributions to the honor and standing of the bar in this community,” and the presentation highlighted the many contributions of John Feerick.

From a distinguished, twenty-year career at Skadden Arps through his tenure as Dean of Fordham Law School and his 1992-1994 presidency of the Association, he has always made a priority of public service and contributing to the community.

The speakers included current Association President Bettina B. Plevan; Chief Judge Judith S. Kaye; Rev. Joseph A. O’Hare, S.J., former President of Fordham University; William P. Frank of Skadden Arps Slate Meagher & Flom and Federal District Judge Leonard Sand, Chair of the City Bar’s Honors Committee.

THE CITY BAR JUSTICE CENTER, THE PUBLIC SERVICE AFFILIATE OF THE New York City Bar Association, held its inaugural gala to honor leaders in the fight to increase access to justice for all New Yorkers, April 4 at the Association. The law firm of Simpson Thacher and Bartlett and the American Express Company were honored for their commitment to pro bono.

The idea for the Gala was conceived by City Bar President Bettina B. Plevan. “Those who join us in the effort to make sure that more needy New Yorkers receive legal assistance deserve a night of recognition and celebration. We are proud to be presenting the first City Bar Justice Awards to Simpson Thacher & Bartlett and American Express,” said Plevan.

American Express is a leader in corporate pro bono. From its pro bono leadership after 9/11, to its daily philanthropic work on the community level, American Express has been at the forefront in providing New Yorkers in need with vital support and assistance. Particularly noteworthy is the company’s commitment to financial literacy education to underserved populations, including the newly employed, those moving from welfare to work, and immigrants.

The law firm of Simpson Thacher & Bartlett has been dedicated to providing pro bono representation to indigent New Yorkers, particularly those fleeing persecution around the world. From its work with the City Bar Justice Center’s Refugee Assistance Project to its founding support of the Vance Center for International Justice Initiatives and its firmwide commitment to pro bono, Simpson Thacher has a history of champion-
O F  N O T E

ing causes worthy of recognition. This is exemplified by its decade-long representation of the Campaign for Fiscal Equity in its effort to provide fair public education funding for New York City’s schoolchildren.

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DUKE UNIVERSITY SCHOOL OF LAW WON THE FINAL ROUND OF THE 56th Annual National Moot Court Competition on February 2nd at the Association. Law students on the winning team were April Nelson, Sara Wickware and Audry Casusol. The University of Memphis Law School took second-place honors. The team consisted of Shannon McKenna, Todd Richardson and Mark Thompson. Best Brief honors went to the Duke University team, and Best Runner-Up Brief went to The George Washington University Law School, whose team members included Philip Warrick and V. David Zvenyack. Best Speaker was Mark Thompson of the University of Memphis team, and runner-up honors went to April Nelson of the Duke University team.

Twenty-eight winning and runner-up teams from 14 regions across the United States competed in the final rounds of the National Moot Court Competition. The American College of Trial Lawyers, a national organization composed of approximately 5,000 of the leading advocates in the United States, is a co-sponsor of the competition with the Association’s Young Lawyers Committee.

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THE ASSOCIATION HOSTED ITS FIRST THOMAS E. DEWEY MEDAL Presentation Ceremony on November 29, 2005. The award will be given every year to an outstanding assistant district attorney in each of the city’s District Attorney’s offices. The inaugural medal winners are: Michael H. Cooper—Bronx County; Anna-Sigga Nicalizzi—Kings County; LeRoy Frazer, Jr.—New York County; Scott E. Kessler—Queens County; and Timothy J. Koller—Richmond County.

The Dewey Medal is patterned after the existing Henry L. Stimson Medal, awarded annually to outstanding Assistant U.S. Attorneys in the two federal districts in New York City.

Among prosecutors in New York County, Thomas E. Dewey is remembered as having ushered in the era in which the District Attorney’s office has been staffed by professional prosecutors chosen on merit rather than through political patronage. Dewey first came to the public’s attention as a prosecutor in the 1930s, instituting successful criminal proceedings against
gangsters, bootleggers and organized crime figures of the day. By 1937, Dewey was elected District Attorney of New York County, where he served one term before resigning to run for governor.

Bettina B. Plevan, President of the Association presented the awards; Seth C. Farber (Chair, Dewey Medal Committee), moderated the proceedings; and Daniel R. Alonso (Chair, Committee on Criminal Advocacy) delivered the keynote address.
Recent Committee Reports

Administrative Law/New York City Affairs
Report endorsing the two November election ballot proposals by the 2005 New York City Charter Revision Commission. The first proposal, Ballot Question Four, would incorporate features of state law with respect to fiscal management and borrowing restrictions into the City Charter. The second proposal, Ballot Question Three, would require the establishment of a uniform code of conduct for administrative law judges and city department hearing officers.

AIDS
Letter to the New York City Council in support of Resolution 1153, which calls upon U.S. Customs and Immigration Enforcement to exercise prosecutorial discretion and decline to carry out removal orders in cases where doing so would result in extreme hardship to the immigrant, immigrant’s family or community, including instances where the foreign national suffers from a life threatening illness. For many people living with HIV/AIDS, the letter points out, enforcement of an order of deportation could have devastating effects since advanced medicines and medical expertise are often not available in the individual’s home county.

Bioethical Issues/Health Law
Testimony supporting the Family Health Care Decisions legislation, which would amend the state’s Public Health Law to establish procedures for selecting and empowering a surrogate to make health care decisions for persons who lack capacity to do so on their own behalf and who have not otherwise appointed an agent to make such decisions under Article 29-C of the Public Health Law.

Letter to the N.Y.S. Department of Health urging the department to reconsider 10 NYRR Section 52-3.4(a)(8) and 52-8.5, which concern tissue donor qualifications. In their current form, the regulations flatly prohibit any man who has had oral or anal sex with another man in the preceding five years from anonymously donating sperm. These regula-
tions, the letter argues, are far more prohibitive than is necessary to protect the health and safety of sperm donation recipients, their partners and their children.

Children, Council on
Letter to Congress urging opposition to a final Conference Report that cuts services to children who rely on Medicaid for health care coverage. If the Conference Report is approved, the letter argues, the legislation would allow states to charge premiums and cost-sharing for children (ages six and older) with incomes over the federal poverty line; and families with children under age six may be charged if their families are over 133 percent of the federal poverty line. This would affect an estimated six million children who would lose all federal cost-sharing protections.

Civil Rights
Letter to Congress expressing opposition to language in H. Amdt. 596, a manager’s amendment to H.R. 1461, that would disqualify nonprofit organizations from participating in a federal grant program designed to increase the supply of affordable housing for low-income families if the organizations or their affiliates have engaged in nonpartisan voter registration, get-out-the-vote drives or lobbying within the past twelve months. The amendment, the letter argues, would not further, and in fact could hinder, the goal of the legislation, which is the creation of affordable housing.

Letter to Congress urging support for H.R. 3734, S. 1867, the Displaced Citizens Voter Protection Act of 2005, which would permit citizens displaced by Hurricane Katrina to register to vote by absentee ballot pursuant to the efficient and reliable procedures already established under the Uniformed and Overseas Absentee Voting Act.

Letter to the U.S. Department of Labor urging that the 90-day waiver of the affirmative action requirements of Executive Order 11246 (granted on September 9 to companies awarded federal contracts for Hurricane Katrina relief activities) be rescinded. The letter argues that the waiver is an unsound and unwise exercise of discretion and that the obligation imposed by Executive Order 11246 (that firms that do business with the federal government prepare an affirmative action plan) will not present an obstacle to the speedy accomplishment of hurricane relief.
Letter to Congress supporting the holding of broad oversight hearings in the Senate to review the current state of the Civil Rights Division of the Department of Justice. The letter expresses deep concern regarding recent press reports of the growing politicization of the Civil Rights Division and what appears to be an increasing disregard for the views of the career employees of the Division, as well as the Justice Department’s recent decision to abandon well-established procedures in order to stifle the role of the staff attorneys and filter out legal advice that the political appointees do not want to hear.

**Consumer Affairs**
Testimony to the New York State Legislature supporting the enactment of a security freeze law to combat identity theft. The testimony argues that giving consumers the option of placing a security freeze on their credit information would assist in the fight against identity theft. Under the proposed legislation, consumers would be able to direct the credit reporting agencies to stop the release of the consumer’s financial data to creditors, thus effectively preventing an identity thief from obtaining false credit. The testimony went on to urge that any such law passed allow for consumers to place the freeze on their credit information at any time rather than requiring that consumers can only place the freeze on their credit information if they reasonably suspect that they are the victim of identity theft.

**Cooperative and Condominium Law**
Memorandum in opposition to proposed local law Intro.504 that would amend the New York City Human Rights Law to require apartment cooperative boards to set forth in writing specific reasons for withholding consent to the sale of an apartment.

**Criminal Justice Operations and Budget**
Letter to John Feinblatt, the city’s criminal justice coordinator, noting that state law requires the city to provide counsel to indigent inmates seeking resentencing and urging the city to do what it can to make sure adequate funding and resources are made available to defense attorneys who handle these cases.

**Criminal Law/Federal Courts/International Human Rights/International Law/Military Affairs and Justice**
Amicus Brief: *Padilla v. Hanft*. Filed in the Fourth Circuit Court of Ap-
peals. The brief argues that the court should not vacate or moot its earlier decision in the case, regarding whether the U.S. may detain Padilla as an enemy combatant even though the government has sought to transfer Padilla to the criminal justice system.

Amicus Brief: Padilla v. Hanft. Filed in the U.S. Supreme Court. The brief argues that the Supreme Court should resolve the question of whether the president may indefinitely detain, without due process, a U.S. citizen taken into custody in the United States, far from the battlefield, and designated an enemy combatant.

Criminal Law/Mental Health Law
Report commenting on the New York State Assembly’s Child Safety and Sexual Predator Punishment and Confinement Strategy, which calls for extended civil commitment of offenders who suffer from a mental illness that results in a significant likelihood that they will commit a serious sex offense. The report, while supporting the Assembly’s goal of safeguarding New York’s communities from dangerous sex offenders, offers specific suggestions as to what should be incorporated into a sex offender civil commitment bill. The report urges among other things that the goal of any civil commitment bill should be to avoid civil commitment if possible, that civil commitment should be limited to repeat offenders only and that counsel must be provided to an offender under consideration for civil commitment before the probable cause phase of the process.

Election Law
Letter to the N.Y.S. Board of Elections and the N.Y.C. Campaign Finance Board which, while supporting the recently enacted legislation to require electronic filing of campaign finance statements with the N.Y.S. Board of Elections, points out a potential problem with the legislation. The problem the letter outlines is that the software system used by the N.Y.C. Campaign Finance Board is not compatible with the system used by the NYS Board of Elections, therefore requiring campaigns to make separate electronic filings with both entities. The letter urges that two systems be made compatible so the process can work efficiently and for the benefit of the public, as the legislation intends.

Letter to the N.Y.C. Campaign Finance Board in connection with the hearing the Board must conduct after each election. The comments reiterate the Association’s overall strong support for the campaign financing
program, and makes recommendations for improving the system’s operation with regard to spending limits, candidates with limited competition, non-participating candidates, the Board’s procedures, union contributions, and candidates’ coordinated activities with third parties.

**Drugs and the Law**

Letter to Congress urging support of HR 4213, the Elimination of Barriers for Katrina Act, which would allow all victims of Hurricane Katrina or Hurricane Rita, even those who have a prior drug conviction, to obtain important federal benefits by temporarily suspending the drug offender exclusions contained in certain federal statutes. This temporary suspension would only affect victims of these two hurricanes and would only be in effect for three years.

**Environmental Law**

Report supporting A.114/S.2380, which would amend the New York State Environmental Quality Review Act (SEQRA) to ensure that petitioners are not denied standing to bring Article 78 petitions to challenge environmental decisions in state court solely on the grounds that the petitioners do not suffer an alleged injury that differs in kind from the injury that would be suffered by the public at large.

Letter to the Task Force on the National Environmental Policy Act commenting on its draft report and recommendations to improve the National Environmental Policy Act. Though the letter expresses general support of the effort by the Task Force to enhance the coordination of federal agencies with state, tribal and local agencies, there are several recommendations that should not be finalized because the proposed changes are not necessary or prudent.

**Family Court and Family Law**

“Introductory Guide to the New York City Family Court.” Originally published in 1997, the 2006 edition has been updated, revised and expanded. The Guide describes how the court works and some of the legal terms and issues that relate to family law cases, and is designed for those unfamiliar with the court and its process.

**Federal Legislation/Military Affairs**

Letter to Congress urging the inclusion of the McCain Amendment (on the treatment of enemy detainees) in H.R. 2863, the military appropria-
tion bill. The amendment seeks to codify and preserve the long-established basic standards of treatment for enemy detainees by the U.S. government in times of war.

Financial Reporting
Letter to the American Institute of Certified Public Accountants commenting on the revised draft white paper on Auditor Attendance at Due Diligence Meetings with Underwriters. This is the second letter to the Institute reiterating the concerns with the draft white paper. Specifically, the letter takes issue with the approach to due diligence advocated by the draft as it would undermine the quality of financial disclosure and is inconsistent with the goal of investor protection.

Letter to the Securities and Exchange Commission commenting on proposed rules to revise the accelerated filer definition and accelerated deadlines for filing periodic reports under the Securities Exchange Act of 1934. The letter expresses general support for the proposed rule but suggests, among other things, that the final rule should not include a new category of filer (“large accelerated filer”) nor require that large accelerated files become subject to the final phase-in of the accelerated filing transition schedule.

Futures Regulation
Letter to the Commodity Futures Trading Commission in support of the Commission’s proposal to define the term “client” in new Commission Rule 1.3(bb)(2) to clarify that all customers who receive advice from commodity trading advisors are classified in the same manner regardless of the format used to provide such advice; that all advisees of commodity trading advisors are protected by Commission antifraud jurisdiction; and that antifraud authority applies to all commodity trading advisors, regardless of the type of services they provide to customers.

Immigration and Nationality Law
Testimony before the New York City Council in support of the concept of the Voting Rights Restoration Act (Intro. No. 628), which would reinstate the ability of foreign born residents of New York City to vote in elections for city officials and ballot issues. This would permit non-citizens to exercise their right to choose the individuals who represent them in city government. The testimony identifies flaws in the legislation which, if not corrected, would in some cases jeopardize the legal status of non-citizens who vote.
International Human Rights

Letter to Secretary of State Condoleezza Rice expressing concern over human rights abuses in Ethiopia. Recently the Ethiopian government has resorted to arbitrary and politically motivated detentions and the use of excessive and deadly force to suppress political demonstrations. These actions are a clear violation of the United Nations Universal Declaration of Human Rights and the letter calls upon the Department of State to exert all possible political and financial pressure to persuade the government of Ethiopia to restore the rule of law and abide by international standards of human rights.

Letter to the President of Liberia urging that Charles Taylor be brought to trial for crimes committed during the Sierra Leone’s civil war and that Liberia request that Nigeria surrender Taylor to the Special Court. The Special Court, the letter notes, indicted Taylor over two years ago on 17 counts of war crimes and crimes against humanity for his role in deaths, rapes, disappearances and maiming of thousand of civilians during Sierra Leone’s civil war, and impunity for Taylor only undercuts justice and security in West Africa.

Letter to the president of Zimbabwe expressing concern over the intimidation of and criminal charges against Arnold Tsunga, a human rights lawyer with Zimbabwe Lawyers for Human Rights. The letter argues that the grave threats made against Mr. Tsunga are in conflict with Zimbabwe’s obligations under the International Covenant on Civil and Political Rights and urges that the government end its campaign of intimidation against Mr. Tsunga, the Zimbabwe Lawyers for Human Rights, and all human rights defenders, and uphold Zimbabwe’s international obligations.

Letter to the president of Pakistan urging the Pakistani government to comply with its obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The letter notes that some of the discriminatory laws and practices that existed in Pakistan when it ratified the CEDAW still exist today and that the Pakistani government needs to take steps to repeal these discriminatory laws. The letter also urges the government to ensure that laws are not enforced in a discriminatory matter, that those who perpetrate crimes against women be punished for their crime, and that public education programs be put in place to raise awareness of the principles of equality enshrined in the CEDAW.
Letter to the Minister of the State of Northern Ireland expressing concern over the independence of the inquiries by the government in the Patrick Finucane case. The letter urges that the government make every effort to ensure that the process is fair, independent, and open to public scrutiny and that the inquiries satisfy the United Kingdom’s obligations under Article 2 of the European Convention on Human Rights.

**Investment Management Regulation**
Letter to the SEC urging that it file an amicus brief in the case of *J.&W. Seligman & Co. Inc. v. Eliot Spitzer* in order to articulate the scope of state regulators’ authority under the Investment Company Act of 1940 and the National Securities Markets Improvement Act of 1996 (NSMIA) to investigate and litigate advisory fee issues.

Letter to the Securities and Exchange Commission setting forth a proposed policy and a set of procedures which would reasonably ensure the proper retention of e-mail containing Rule 204-2 information.

**Legal Issues Pertaining to Animals**
Report supporting H.R. 3858. This bill, known as the Pet Evacuation and Transportation Standards Act, would amend the Robert T. Stafford Disaster Relief and Emergency Assistance Act to ensure that state and local emergency preparedness operational plans address the needs of individuals with household pets and service animals following a major disaster or emergency.

Letter to the American Red Cross urging that the Red Cross adopt a policy that includes animals in a meaningful way in its disaster planning. As was evident in the Hurricane Katrina disaster, the letter points out, many people are willing to risk their lives rather than abandon their animals. Therefore, any policy that includes animals should provide for persons to be evacuated together with their companion animals and sheltered either together or close enough that people can easily spend time with and care for their animals.

Report supporting A.1835/S.2142, which would amend the environmental conservation law to allow municipalities, by local law or ordinance, to restrict, limit or prohibit trapping within its municipal limits. Every year dogs, cats, birds and other animals are crippled or killed by traps. Animals can suffer for days before they die or are rescued. Whether trapping should be permissible in a certain area is a local decision, dependant
on population density and local culture. This legislation, the report argues, would appropriately place the decisions in the hands of the various county legislators.

Lesbian, Gay, Bisexual and Transgender Rights/Sex and Law
Amicus Brief filed with the Inter-American Commission on Human Rights in the Matter of Atala. The brief argues that the Chilean Supreme Court, by denying Ms. Atala custody of her children solely on the basis of her sexual orientation, acted in a discriminatory manner and violated her rights protected by the American Convention on Human Rights.

Mergers, Acquisitions and Corporate Control Contests
Letter to the SEC commenting on proposed amendments to the Tender Offer Best-Price Rule. The letter supports the proposal, which would provide an exemption and non-exclusive safe harbor for employment compensation, severance or other employee benefit arrangements, and provide relief from the uncertainties of litigation in this area. In addition to expressing support for the amendments, the letter provides specific suggestions to refine and clarify the proposal.

Patents
Amicus Brief: eBay Inc. and Half.com v. Merc Exchange. Filed with the Supreme Court of the United States, the brief argues that the Federal Circuit erred in setting forth a general rule in patent cases that a district court must, absent exceptional circumstances, issue a permanent injunction after a finding of infringement. Claims for patent infringement arise from highly diverse circumstances and to say that in all cases and circumstances district courts must implement a general rule would only impose bias. District courts, argues the brief, should be permitted to consider a broad range of factors when deciding if injunctive relief is in accordance with the principles of equity.

Amicus Brief, Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc. Filed in the U.S. Court of Appeals, Federal Circuit, the brief argues the standard for determining whether a patent claim covers patentable subject matter as enunciated in Diehr should be reaffirmed. Diehr held that although it is well established that laws of nature, natural phenomena and abstract ideas remain in the public domain and cannot be the subject of a patent, the mere fact that a patent claim recites a law of nature does not necessarily render the claim unpatentable.
President
Letter to Congress urging the rejection of an amendment to the military appropriations bill which would remove from the U.S. courts the authority to consider a habeas petition from any alien detainee being held by the Secretary of Defense as an enemy combatant. The existence of the habeas remedy, the letter argues, is the only means by which detainees can access due process and seek relief if they have been mistreated.

Professional and Judicial Ethics
Formal Opinion 2005-06 considers retired attorneys’ use of professional letterhead and whether or not there are any special disclosure obligations to clients and prospective clients. The opinion concludes that retired attorneys may use professional letterhead and that they may, but are not required to, disclose on the letterhead that they are retired.

Formal Opinion 2006-01 considers under what circumstances a law firm may ethically request that a client prospectively waive objection to the law firm’s subsequent representation of another client that is adverse to the first client. The opinion finds that a law firm may ethically request a client to waive future conflicts if (a) the law firm makes appropriate disclosure of, and the client is in a position to understand, the relevant implications, advantages, and risks, so that the client may make an informed decision whether to consent, and (b) a disinterested lawyer would believe that the law firm can competently represent the interests of all affected clients.

Social Welfare Law
Letter to the N.Y.S. Legislature urging that legislation be sponsored that would add an additional energy allowance to the state’s public assistance grant. The purpose of the energy allowance would be to partially offset increases in the cost of living caused by the dramatic spike in energy costs that are universally anticipated during the winter of 2006.

Letter to the N.Y.S. Office of Temporary and Disability Assistance (OTDA) urging OTDA to withdraw its proposal to amend section 350.4(a)(7) of 18 NYCRR, which would require a family in receipt of Family Assistance to wait a minimum of 45 days after their Family Assistance relief has expired before becoming eligible to receive Safety Net Assistance. This, the letter argues, would create such an immediate crisis in the lives of already poor and struggling families and will leave individuals less able to
undertake the steps necessary to find employment, while pushing them deeper into poverty.

State Affairs
Report opposing the proposed constitutional amendment, S.1 (Proposal One), on the November election ballot. Proposal One would allow a contingency budget to go into effect when an agreement on the budget has not been reached by the start of the fiscal year. Such an amendment, the report argues, shifts excessive power to the legislature from the governor, by permitting the legislature to initiate its own spending plan if it does not agree with the governor’s budget.

Structured Finance
Letter to the Financial Accounting Standards Board commenting on the revised exposure draft of proposed amendments to FASB Statement No. 140 relating to the transfer of financial assets. The letter, while supporting, in general, the proposed amendments, raises concerns with regard to two unresolved issues in the exposure draft; first, that the proposed new requirements for legal isolation are inconsistent with current bankruptcy law and, second, that there are practical difficulties in applying the additional isolation guidance to asset-backed securities transactions.

Copies of the above reports are available to members at the Association’s website, www.nycbar.org, by calling (212) 382-6624, or by e-mail, at gbrown@nycbar.org.
Introduction

Justice Ruth Bader Ginsburg
Distinguished Lecture on
Women and the Law

Ruth Bader Ginsburg

It is a pleasure to introduce this evening’s lecturer, Mary Robinson, a woman who has done enormous good for her country and our world.

Elected to the Irish Senate in 1969 when she was just 25, she held for twenty years one of the three seats reserved for Trinity College, where, in 1967, she earned her first law degree. Her election to the Senate defied tradition. The Trinity electorate was aging, male, conservative, and Protestant. Mary Robinson, then Mary Bourke, was young, female, liberal, and Catholic.

One year after her election to the Senate, Mary Bourke married Nicholas Robinson, a fellow law student at Trinity. An art connoisseur, talented cartoonist, and authority on eighteenth century caricature, Nicholas probably knew, as my spouse does, how to lighten his wife’s life with laughter. During her terms as Senator, Mary Robinson gave birth to three children.

Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, introduced Hon. Mary Robinson, Executive Director of Realizing Rights: The Ethical Globalization Initiative, who delivered the fifth annual Ruth Bader Ginsburg Distinguished Lecture on Women and the Law, September 21, 2005 at the Association. Ms. Robinson is former President of Ireland and former High Commissioner for Human Rights at the UN.
Tessa in 1972; William two years later; Aubrey in 1981), and less than two years ago, her first grandchild was born.

In 1990, just a year after she decided not to seek re-election to the Senate, she made headline news by successfully running for Ireland’s Presidency, the first woman ever to hold that office. Again, she bucked tradition. From 1938 until her election, the Presidency of Ireland had been a largely home-bound ceremonial office, the preserve of aging politicians, all men.

Unlike her predecessors, Mary Robinson traveled widely and constantly, representing Ireland internationally, and establishing ties with people of Irish heritage now living in Britain, the USA, Canada, South America, Australia, and New Zealand. She was the first President of Ireland to be greeted by a British monarch. Queen Elizabeth II welcomed her at Buckingham Palace in 1993, and again in 1996. Another notable first, she visited Northern Ireland in 1993 extending a hand of friendship to local groups working toward reconciliation. In 1992, despite concerns about her security, she became the first head of state to visit Somalia, then devastated by famine and civil strife. She was also the first head of state to travel to Rwanda in 1994, after the horrendous genocide there.

I should mention, too, her academic ties. For the year following completion of her studies at Trinity, she gained a Harvard Law School fellowship, earning an LL.M. there in 1968. She was Reid Professor of Constitutional and Criminal Law at Trinity from 1969 until 1975, youngest person to hold that chair, and thereafter she lectured on European Community Law.

A short true story from her Harvard sojourn. The Dean invited foreign students awarded fellowships to dinner at his home, then asked each of them what they hoped to gain from their studies at the Law School. Others gave stock answers about the privilege accorded them, how hard they would work, and the doors a Harvard degree would open. Our speaker startled all in attendance by cheerfully responding: “I’m Mary Bourke from Ballina and I’m here to have a good time.” “She has nerve,” her fellow students whispered. More prescient, Dean Griswold told his colleagues: “This Mary Bourke is someone to be watched.”

In her lawyering days, Mary Robinson won many pathmarking cases in Irish courts, the European Court of Human Rights in Strasbourg, and the EU’s High Court in Luxembourg. Her aim was to propel the Irish state into making equal justice under law a reality for all humans, particularly women. In parliament, she sponsored bills to the same end, for example, to allow the sale of contraceptives and to permit divorce.

Deciding not to seek re-election after completion of her seven-year
term as Ireland’s President, in 1997, she took on a new challenge, the UN post of High Commissioner for Human Rights, an office she held until 2002. The office was underfunded, and staff morale was low when she took the helm. During her five-year tenure she strived mightily to integrate human rights concerns into all the UN’s activities. She traveled to scores of nations, including China, as a tireless champion for people denied the blessings of liberty and economic security. Her devotion to human dignity and freedom was undaunted by critics who considered her too assertive. Her voice was and remains determined, caring, and persuasive.

Today, she is leading a new project, Realizing Rights: The Ethical Globalization Initiative, which she founded in 2002. The organization is committed to infusing human rights, gender sensitivity, and enhanced accountability into efforts to advance world trade, meet global challenges, and address governance shortcomings.

With appreciation for her extraordinary spirit and accomplishments, may I ask you to join me in heartily welcoming Mary Robinson to deliver tonight’s lecture.
It is a special honor and a particular pleasure to be invited by the New York Bar Association to give this year’s Ginsburg Lecture. I am a great admirer of Justice Ruth Ginsburg, and I was intrigued to learn that we had something in common during our early married life. My source is another eminent member of the U.S. Supreme Court, who prefers to remain anonymous. He informed me that the newly married Ruth Ginsburg managed to burn jello. My poor husband Nick only had to endure a concoction known as “huevos Maria” (we honeymooned in Tenerife) until I learned to vary the diet. I understand that both our husbands, by coincidence, are excellent cooks at this stage!

Happily, Justice Ginsburg and I have something else in common: we share a passion for human rights in general and women’s rights in particular. I will come back to Justice Ginsburg’s record, but I would like to begin by reflecting on last week’s UN Summit which disrupted so much traffic here in New York. In theory, in this new century, a summit of world leaders should be a positive moment for women worldwide. In practice
that is not now the case. Let me quote briefly from the website of a major international women's network from the South, DAWN. The heading is as follows:

**DAWN says no to negotiations for Beijing +10 and Cairo +10**
The current political conjuncture of aggressive fundamentalism and militarism presents serious risks to women's human rights world-wide. DAWN (Development Alternatives with Women for a New Era) like a number of other organizations, is concerned about the possibility of setbacks to the gains made for women's human rights during and in relation to the UN conferences of the 1990s. Contrary to the relatively open environment for such advances that existed during the 1990s, the first decade of the 21st century confronts us with the extreme social conservatism, aggressive unilateralism, and support for militarism of the Bush administration, and the worsening of fundamentalist trends elsewhere as well. In such a context, it is very important to protect the gains made for women's human rights through careful and considered action. It is especially important not to place these gains at risk through promoting or agreeing to formats or mechanisms for regional or international meetings that are likely to be problematic.

Against this gloomy backdrop, women's organizations still worked very hard to influence the Outcome Document of last week's Summit. They were concerned that it would not adequately recognize that the promotion of women's equality and human rights is central to the achievement of human rights, security, and sustainable development. They regretted that these issues had been somewhat marginalized in Secretary General Kofi Annan's report “In Larger Freedom.”

For example, no issue better illustrates both the great insecurity and the denial of human dignity that plagues half the world's population than violence against women—yet it was barely an afterthought in that document. Ending impunity for gender-based violence should be top priority as a cross-cutting issue of human rights, security, and development.

The women's groups were concerned that the human rights of women are still largely unprotected in much of the world today, and furthermore, efforts to realize and defend these rights are under intense attacks in many places around the world. They felt that what was needed from the UN at this Summit was a vigorous defense of women's universal right
of access to their human rights and support for those who are the defenders of the human rights of women.

Although the final Outcome Document has language which reaffirms women’s human rights as central to the issues of the Summit, such commitments have been made before. The leadership women need now is concrete, specific and time-bound plans, with resources for implementation of the promises made in Nairobi, Vienna, Cairo and Beijing, to which 180 governments have made a commitment through their ratification of CEDAW (The Convention for the Elimination of all Forms of Discrimination against Women).

To be fair, there was, in the UN Summit Document, one very positive ray of light: the inclusion of important steps forward for women’s participation in peace and security processes.

The Document commits member states to implementing UN Security Council Resolution 1325 on Women, Peace and Security—passed in 2000—which promotes the role of women in peace building and conflict prevention.

Marie Cabrera-Balleza of the International Women’s Tribune Centre (IWTC) put it this way:

UN resolution 1325 is a milestone in global policy. It recognizes for the first time the different impacts that violent conflicts have on women and men, and also recognizes women’s key role in peace-building and conflict resolution.

Although women may not often be actual combatants, they are especially vulnerable to gender-based violence during situations of war and conflict. Rape, sexual slavery and assault are common weapons of war as most recently witnessed in the Balkans, in Rwanda, the DRC and Darfur.

Having set the current scene on women’s rights at the international level, I would like to share with you my core beliefs about the idea of using law and the notion of human rights to bring about a more ethical globalization, and—given the interconnectedness of our world—the ways in which I have seen individuals reaching out and making a difference.

If we were to look for models in this endeavor, we would have to look no further than the woman in whose honor we are gathered tonight. When President Clinton was searching for the right person to fill the seat on the Court being vacated by Justice Byron White, he said he was looking for someone with “a fine mind, good judgment, wide experience in the law and the problems of real people, and someone with a big heart.” That seems a fair summary of the qualities of Ruth Ginsburg.
I like the story about her that she let a male law clerk work a flexible schedule so that he could help take care of his child since his wife had a high level demanding job. In explanation Ginsburg said: “This is my dream of the way the world should be—when fathers take equal responsibility for the care of their children, that’s when women will be liberated.”

Others are better able to assess the full extent of her intellectual contribution to the Court, but it is appropriate this evening to cite the majority opinion she wrote in *US v Virginia* (1996), in which she was also joined by Justice O’Connor. The case held that the Virginia Military Academy, a state institution, could not exclude women simply on the basis of gender. Her majority opinion held that gender based official action is unconstitutional unless supported by “an exceedingly persuasive justification.” Generalized assumptions about gender difference would not do. This had the effect of raising the level of scrutiny substantially.

As was evident from her recent lecture to the American Society of International Law (ASIL) on the value of a comparative perspective in constitutional adjudication, Justice Ginsburg has been a leader in looking beyond the U.S.’s geographic borders to inform the US legal system, stressing the importance of a comparative perspective. Should it not be self-evident that just as the wisdom and experience of the U.S. judicial system can inform the progress of legal systems in other countries, so the United States can learn from others? Over the course of the last few years Justice Ginsburg has rallied her colleagues on the Court and her many audiences to this point, noting that “we are not so wise that we have nothing to learn from other democratic legal systems newer to judicial review for constitutionality.”

The Founding Fathers of this country cared how other nations viewed the U.S., and in particular the strength and justness of its legal system, and I would concur with Justice Ginsburg in finding no reason why that care would diminish over time. What the U.S. does is closely watched by the international community, particularly when it comes to respect for human dignity and human rights and respect for the rule of law—just as the U.S. feels compelled to monitor the legal situation of other countries.

Let me share a personal recollection of how inspiring it can be to hear members of the judiciary of a very large country cite the constitution and jurisprudence of another small country as providing some guidance in examining the principles on which the case will be decided. In the mid-90s I was making a state visit to India as President of Ireland, and requested a meeting with the Supreme Court of India, as was my practice on state visits. The Chief Justice invited me to sit in on a case over which
he was presiding with another judge. It was an appeal by way of judicial review. Ireland and India share the inheritance of similar common law systems, so the procedure—including the wearing of wigs and gown—was very familiar to me. Imagine my pleasure at hearing learned counsel for the applicant citing the Irish Constitution and Irish case law as being possibly helpful to his client’s case!

Sadly, I have noted the high degree of skepticism among many within the U.S. legal system about the wisdom or propriety of looking beyond U.S. borders for guidance, especially on matters touching human rights. I am sure that we are all familiar with the reasons cited, from cultural and linguistic differences to an outright rejection of the concept of universality in legal or human rights norms or standards. I would like to be a little provocative here and invite Justice Ginsburg to share with us later her view on the applicability of international human rights law here in the United States. And she might want to comment on what her sister Justice, Sandra Day O’Connor said recently: “Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit.”

Women Judges

Speaking about Justice Ginsburg inevitably stimulates conversation about the value of having women judges. And of course the pending retirement of Justice Sandra Day O’Connor prompts the question of whether it really matters that there may now be one, rather than two, women judges on the U.S. Supreme Court. This further begs the question whether having more judges who happen to be female makes any difference in the interpretation and practice of law.

I cannot help but think that Justice Ginsburg would agree with me on two things. First, that in the event of the appointment of two men to fill the vacancies on the Supreme Court it would take us back to a time of “one woman on the Court” that we hoped was well and truly over. It would be a painfully sharp reminder that despite women’s high educational achievement in law and other fields, and their high labor force participation rate, they are underrepresented at senior levels in law and most other professions.

Second—and of course she will have the opportunity as soon as I am finished to correct me if I am wrong—I believe that she would see as well the value of having women on the highest court of any country, because of the potentially moderating effect this can have on what is an enduring weakness of the judiciary: specifically that in all nations they are com-
prised mainly or exclusively of the elite, and have little or no personal
experience of discrimination and marginalization, along *any* axis.

Many women judges decide cases like their male counterparts, of course. But I believe that overall women more often “have their antennae up” for circumstances where bias, inequity, and injustice are heaped upon someone not because of what they have done or how they have behaved, but because of the sex or class or color with which they were born.

It can be demonstrated that a number of female judges are more attuned to issues of difference and marginalization. Judge Claire Dube, who retired recently from the High Court of Canada, is convinced that women judges are particularly important because they are the “great dissenters.”

Research is underway now which will be presented soon in Paris that reflects some statistics on this. Apparently it will show that this is true across many countries. Why? Judge Dube’s view is that men are more systems oriented while women are more empathetic—men see the law and women more often see the people involved within the legal system. She adds, by the way, that women have to be much better than men to be appointed to High Courts, but I don’t think she needs statistical backing for that assertion.

In any case, I am prepared to wager that women are making, and will continue to make a truly significant difference on the International Criminal Court sitting at The Hague. Six out of the eighteen judges are women, the Irish woman judge Maureen Clark being—I am proud to say—a former student of mine. In addition, the first and second vice presidents of the Court are women. Given issues such as dealing with rape as a war crime, here is an opportunity to show that *all humanity* benefits from a better gender balance in institutions of authority, whether at national or international level.

Recently I learned about a small project which to me illustrates another quality of many women judges. They are not afraid to say that they still have things to learn.

The project, the Rural Women Leadership Institute, has brought five Afghan women judges to Vermont over the past two years for judicial and leadership training. It was formed by 4 professional women in southern Vermont who felt that if there is to be peace and justice, women must be at the table. The Afghan judges expressed some of the impact the experience had on their lives.

We now emphasize that the attorney for the defendant must be present in the court before we litigate.
We women judges are perceived to be only symbolic—though we do work harder, we are not given the same authority as men judges. Seeing the excellent work the men and women judges did in Vermont encouraged us. We were inspired to keep our standards up.

We lost the most educated and experienced women judges over the past 25 years. They had more degrees and were wiser. We do the best we can. This experience has given us an education and perspective we desperately need.

As we know, women throughout the world have developed the art of networking, and know the value of learning through sharing good practices and personal experiences. Women judges are no exception.

Here I must express my admiration for the International Association of Women Judges, with more than 4,000 members at all judicial levels in 86 nations. Formed in 1991, the IAWJ brings together women judges from diverse legal and judicial systems who share a commitment to equal justice and the rule of law. The IAWJ sponsors educational and public service programs that address legal and judicial problems affecting women and children. Its aims are to advance human rights, eliminate discrimination on the basis of gender, and make courts accessible to all.

Now I would like to turn briefly to my present work and the issues that compelled me to found Realizing Rights: the Ethical Globalization Initiative. The notion of an “ethical globalization,” which uses human rights as a compass to chart the course for our collective future, is particularly apt to discuss this week, following last week’s disappointing conclusion of the UN Summit.

I am sure that all of you will agree with me that when our societies generate immeasurably more wealth than at any previous period, it is unacceptable that so many human beings continue to live in miserable circumstances—economically marginalized, unable to secure their own or their families’ basic needs, and living under the recurrent threat of violence and conflict. This is particularly true for women and girls.

I have asked myself how those of us who have been working for the universal observance of human rights can have an impact on poverty—itself a violation of human rights—on powerlessness, and on the level of conflict and human suffering.

Rights-based approaches to development integrate the norms, standards and principles of the international human rights system into the
plans, policies and processes of development. A rights-based approach requires us as practitioners to demonstrate the principles of participation, empowerment, accountability, and non-discrimination.

Rights also lend moral legitimacy and the principle of social justice to development objectives, and shift the focus of analysis to deprivations caused by discrimination. A human rights approach directs attention to the need for information, and a political voice for all women and men as a development issue. Its starting point is that civil and political rights should be embraced as integral parts of the development process, and that economic, social and cultural rights should be recognized and implemented as human rights, rather than shrugged off as fanciful ideals or abstract absolutes.

What my colleagues and I try to encourage is greater understanding of the human rights framework and its ambitious aim to develop a body of principles that, taken together, provide points of reference for all cases where issues of rights arise. It is the systemic nature of human rights which explains why advocates of rights often speak of their universality and indivisibility. This is not jargon—it highlights the belief that respect for any right cannot be achieved in the absence of respect for other rights.

We are concerned in particular with the violation of the rights of women, including the continuing violence against women in many societies, the unspeakable practice of trafficking in women, and the continuing struggle against the grinding poverty and exclusion which eight-hundred million women—representing two thirds of those living on less than a dollar a day—face in their lives.

I wish I could say that the situation has improved over the past five years. But despite economic growth and poverty reduction for many, the reality is that for millions of women things may be even worse. Reports show that the numbers of women victimised by trafficking are on the rise, resources for family planning assistance have been slashed, and the scourge of HIV/AIDS strikes women increasingly in a growing number of countries.

But despite the many challenges, I am convinced that women will prevail through their own efforts. They will continue the work to make human rights—_their_ rights, their children’s rights—a reality. I have seen for myself how women in every region are using with increasing skill the international human rights standards that their governments have accepted in order to press for change and accountability. Whether they are combating poverty and discrimination, insisting on rights to sexual and reproductive health, working for peace in zones of conflict or giving lead-
ership in political and economic spheres, the fascinating development is that their approach is increasingly rights-based.

Women are using the Convention on the Elimination of Discrimination against Women and its Optional Protocol; are drawing on the Convention on the Rights of the Child to support the rights of the girl child; and are utilizing the Covenant on Economic, Social and Cultural Rights to address issues such as the feminization of poverty. For the first time in some countries, women are recognizing that their families’ futures, and indeed the development of their countries, depend to a large extent on whether their rights are respected.

I have had many opportunities over the years to witness the contribution of African women in their own countries and increasingly at the all-Africa level. I recall, as President of Ireland, attending a Pan-African Conference for Women Leaders in Rwanda in March 1997. When I returned to Ireland, I summed it up by saying: “I have seen the future of Africa, and she works!”

When I worked as a lawyer before the Irish and European courts, I was fortunate enough to be involved in cases that affected the situation of significant numbers of Irish women. Cases which, for example, resulted in the removal of discriminatory taxation of married women, the full participation of women in the jury system in Irish courts, the introduction of legal aid, the abolition of the status of illegitimacy and the achievement of equal pay and equal opportunity in the workplace. I learned the value of individual test cases, the equivalent of class actions at the national level. Those of us who have pleaded equality cases through courts have seen how something written in a book and decided in a courtroom will sooner or later reverberate back into the lives of women, opening up possibilities, impacting individual circumstances.

In my view the most defining attribute of human rights in development is the idea of accountability. I would like to illustrate how we have tried to put this into practice in EGI. We begin with the premise that a world that is now so closely connected by commerce, technology, and information must also be connected by shared values and norms of behavior—by “rules of the road” for globalization.

Our work and that of our partners asks political leaders and business leaders the hard questions about obligations, duties and action. All partners in the development process—local, national, regional and international—must accept higher levels of accountability. At EGI we have embarked on a process of convening, influencing and mobilizing leaders around specific policies and programs that we hope will foster a new and more enduring interconnectedness—a more ethical globalization.
In selecting issues to work on we chose areas where a human rights approach would make the most difference. One area we have given special priority to is achieving the human right to health. We are working at different levels to bring the message home. Together with the UN Special Representative on Right to Health, Paul Hunt, we drew up a short but pithy statement on the Right to Health which influential leaders of opinion are currently signing and which we will publicize as a form of advocacy. Those who have signed include a number of former Heads of State such as Presidents Carter and Clinton, and also—of course—the ubiquitous Bono.

Another initiative was to make a small but hopefully significant contribution by partnering with Columbia’s Mailman School of Public Health and the Council of Women World Leaders at a Wye River conference entitled Innovations in Supporting Local Health Systems for Global Women’s Health: A Leaders’ Symposium. This meeting gathered a select group of ministers of health, senior civil service leaders, civil society representatives and other experts from North and South to discuss creative efforts to manage, support and monitor the provision of care for women in areas such as maternity, HIV/AIDS and reproductive rights in district and sub-district health facilities in the developing world. The Conference produced a Wye River Call to Action for Global Women’s Health which began as follows:

We have the power to explore the planets and walk the moon. We have the power to coax green from the deserts. We have the power to map the human genome. Yet in the year 2005, in millions of communities in every corner of the globe, people are suffering because those with political power have failed to meet their most basic responsibilities. That failure is seen in the crisis of local health systems that do not work, that excludes the poor, abuse and marginalizes women, sow distrust and feed corruption. The result is societies marked by profound insecurity, by deep and growing inequities, and by the unacceptable toll on the health and well-being of girls and women.

The long term goals of this initiative are to build a cadre of Ministers of Health and other senior leaders around the world who will, over time, explore, promote, and exchange learning on of the role of political leaders in strengthening the management and monitoring of health care systems with particular attention to women and children.

We are also involved in a project called “Parliamentarians for Women’s Health,” a three-year initiative working with select parliamentarians in Botswana.
Kenya, Namibia and Tanzania to enhance the political leadership supporting women’s health. The project provides technical assistance and facilitates linkages to communities and women living with HIV and AIDS. The involvement of parliamentarians is expressly designed to bolster the accountability of elected officials to the citizens who need them most.

**The Challenge**

We are indeed at a critical stage in the development of human rights. Women are proving to us that interest in human rights now spans the globe and surmounts race, class, gender, stage of development and even the current reaches of globalization—it has indeed become universal. I doubt there has been a time when the subject has been accorded such a key role in political and economic debate. Yet even as we welcome this evidence for the growing prominence of human rights—and specifically the rights of women—in the global arena, we inevitably come up against seemingly insurmountable walls.

To make effective progress it will be vital to place equal emphasis on all rights; civil, political, economic, social and cultural, as Eleanor Roosevelt did when she and her colleagues drafted the Universal Declaration of Human Rights. You remember her much quoted words:

> Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. ........Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

In our increasingly integrated world, we all bear a responsibility for human rights. They are the business of everyone—our communities, our workplaces, our universities, and our governments. We cannot leave behind those who do not so freely enjoy the fruits of democratic governments and economic stability; we share a common world and a common future. We also jointly hold the power to shape it into a place where rights are enjoyed by all.

Let me build on Eleanor Roosevelt’s words in a 21st century context. We will only make concrete progress by developing multi-stakeholder engagements which include international organizations, such as the UN and World Bank, willing national governments, business, the trade union movement, civil society in its widest sense and academia, working together.
in new alliances helped by advances in information technology. So, for human rights to matter “in small places” they must matter much more in the UN, World Bank, WTO, and in the board rooms of multinational corporations, as well as being tools of accountability used by civil society to hold governments to their promises.

In the end, human rights depend on how each one of us stands up for ourselves and for one another.

So let me conclude:

There is another voice in my head at the moment, which helps to link the failure of leadership on tackling world poverty at the UN Summit last week with the grim images we have seen on TV in the aftermath of hurricane Katrina. It is the voice of Martin Luther King. I would like to conclude by saluting Ruth Ginsburg for her lifelong commitment to the role of law in furthering human rights, including women’s rights. My tribute to her is to end with the voice of Martin Luther King, so that his words may ring on in our ears:

There is no deficit in human resources; the deficit is in human will. The well-off and the secure have too often become indifferent and oblivious to the poverty and deprivation in their midst. The poor in our countries have been shut out of our minds, and driven from the mainstream of our societies because we have allowed them to become invisible.

Just as nonviolence exposed the ugliness of racial injustice, so must the infection and sickness of poverty be exposed and healed—not only its symptoms but its basic causes. This, too, will be a fierce struggle, but we must not be afraid to pursue the remedy no matter how formidable the task.
Introduction

The Leslie H. Arps Memorial Lecture

Bettina B. Plevan

My name is Betsy Plevan. I am President of the New York City Bar and it is my pleasure to welcome you here this evening to the Arps Lecture, sponsored by Skadden, Arps, Slate, Meagher & Flom in honor and memory of one of its founders, Leslie A. Arps, Harvard Law School, class of 1931. Together with Marshall Skadden and John Slate in 1948 they started a firm that has become one of the largest and most prestigious firms in the country. Les, as he was known to everyone, continued as an active litigation partner until he died in 1987 at the age of 80.

As Jim Freund said in his eulogy:

If I were to try to capture the essence of Les Arps in one word, that word would be, “gentleman.” In an age where brusqueness, dissembling, commercialism and shoddy work are too often the order of the day, Les stood for values cut from a different cloth—for decency, for honesty, for courtesy, for professionalism.

Les was also a great mentor and teacher to younger lawyers, includ-
ing my husband Ken who to this day has a picture of Les hanging on the wall of his office, a cherished gift from Les’ widow Ruth. Les was a superb lawyer. He was also a perfectionist and sometimes a demanding taskmaster. He preferred to have his associates and young partners as totally absorbed in his matters as he was. To illustrate this point, Ken asked me to read an excerpt from a diary Les was keeping of the 2-3 year period of Les’ last major case which culminated in a 3-month long jury trial in Houston during the summer. Skadden was representing Westvaco. Les wrote:

In the meantime apparently Ken Plevan has disappeared from Westvaco as far as I can see. He has not been in the office for two days. Maybe he has everything under control—but I doubt it. Be that as it may I am not going to let this irritate me at this stage of the game.

Another aspect of Les (and Ruth’s) mentoring was evident in Houston. At least once a weekend during their 3 months there with at least a dozen lawyers and staff from New York, sometimes with family members, Ruth and Les would host everyone for a cocktail party at their temporary apartment there until the firm got too big. They also welcomed everyone into their home in New York City and invited us to spend a day at an outing at their home in Connecticut.

This wonderful combination of teaching, exacting standards, integrity and caring helped mold many generations of lawyers.

Les also provided a role model for public service activities by lawyers. During World War II he served as an assistant to John Harlan in England, analyzing army air corp operations. In the 1950s he served as Assistant Chief Counsel to the NYS Crime Commission (Dewey) investigating corruption on the waterfront. In the 1960s he was a consultant to the Moreland Commission. Throughout his career he was active in this association, serving as the Chair of our Executive Committee.

I believe it would have pleased Les to know that the Dean of his alma mater as well as the current president of this Association are women. And I hope he would have supported this Association’s dedication to increasing the diversity of our profession and looked forward to Dean Kagan’s talk tonight on Women in the Legal Profession.

It is now my pleasure to welcome to the podium Barry H. Garfinkel, a senior partner in SASM & F who has also long been an active member and leader of this Association. Barry is the Chair of the Arps Lecture Committee and will introduce tonight’s speaker.
Introduction

The Leslie H. Arps Memorial Lecture

Barry H. Garfinkel

Les Arps, Harvard Class of ’31 would have been enormously pleased and proud that tonight’s lecture will be delivered by Elena Kagan, the Dean of his Law School.

Dean Kagan received her bachelor’s degree, summa cum laude from Princeton. She attended Worcester College, Oxford and then attended Harvard Law where she was supervising editor of the Harvard law Review, graduating magna cum laude in 1986.

After law school she clerked for Judge Abner Mikva on the DC Circuit Court of Appeals and then for Justice Thurgood Marshall on the Supreme Court.

After a short stint with Williams & Connolly in Washington, she began her illustrious academic career at the University of Chicago Law School where in 1995 she was a tenured professor of law.

But then came a break from academia. From 1995 to 1999, Dean Kagan served in the Clinton White House, first as Associate Counsel to the President and then as Deputy Assistant to the President for Domestic Policy and Deputy Director of Domestic Policy Counsel. In these positions, she played a key role in the executive branch’s formulation and implementa-
tion of proposed legislation and policy for such diverse areas as education, crime and public health.

In 1999, academia again beckoned; she returned to Harvard, first as a visiting professor and then as a tenured full Professor, teaching administrative and constitutional law, as well as civil procedure.

Since July 2003, Elena has served as the Dean of the Law School, the first female in the school’s 188 year history to hold that office.

I am pleased to also note that the Dean is a Trustee of the Skadden Fellowship Program. Her address this evening is “Women and the Legal Profession—A Status Report.”
Leslie H. Arps Memorial Lecture

Women and the Legal Profession—A Status Report

_Elena Kagan_2

Thank you Barry, for that great introduction. And thank you Betsy, for your welcome—and for all your wonderful work on the issues that I’ll be talking about tonight.

It’s a pleasure and a privilege to be giving the Leslie H. Arps Memorial Lecture. The firm Leslie Arps co-founded—now Skadden, Arps, Slate, Meagher and Flom—is, of course, one of the world’s most celebrated law firms, known to do extraordinary corporate and transactional work. Equally impressive to my mind is Skadden’s longstanding leadership in the field of public service, an issue that was of deep importance to Leslie Arps, an HLS alumnus whose career included work on the historic investigation into corruption on New York City’s waterfront. Skadden celebrated its fortieth anniversary by establishing a pioneering fellowship program that provides funding for new lawyers starting public interest careers. I’m honored to sit on the board of this Fellowship Foundation.

1. A version of this text was originally delivered as the Leslie H. Arps Memorial Lecture at the House of the Association on November 7, 2005. I am very grateful to Amy Gutman for her superb help in preparing this speech and to Harvard Law students Yael Aridor Bar-Ilan and Lauren Popper for additional research assistance.

2. Dean and Charles Hamilton Houston Professor of Law, Harvard Law School.
Tonight I’m here to talk to you about a vitally important issue: the status of women in the legal profession. Preparing these remarks gave me a chance to pull together—and reflect on—a number of facts, trends, stories, and ideas that have been on my mind for some time. The issues are complex, and while I’ll talk about some recent research, I can’t possibly give a full picture of the subject. My goal is more modest: What I hope to do is start a conversation between law schools and the legal profession about where we go from here—about how we might work together to expand women’s choices and, by doing that, improve our profession and society.

Looking around this room, I’m heartened that so many of you have chosen to be here tonight. Not that I’m surprised. For years, this Association has done groundbreaking work aimed at expanding access for women and minorities. That mission has gained added strength from Betsy Plevan’s dedication during her tenure as President and from the opening of your new Office for Diversity, which is taking the lead in providing guidance on this issue to law firms and corporate law departments.

It’s especially fitting that I’m making these remarks here in New York City, and not just because I’m originally from here (as you can probably tell by now). As I see it—and as I often say—Harvard Law School is the New York City of law schools. Like New York, Harvard is in large part defined by its scale and scope. And like New York, Harvard is the remarkable place it is because of its diversity—because of the incredible range of talents that take root and thrive there.

And that’s what I want to focus on tonight—on concrete steps that we can take to foster this diversity. And when I use the word we, I mean it quite literally. As I see it, this is an area in which law schools and practitioners must make common cause. This is not just your problem; it is our problem too, and all of us need to look for common solutions.

But before we consider these solutions, we need to take stock. Let’s start with the good news: by the turn of the twenty-first century, women accounted for almost one-third of the nation’s lawyers and a majority of the nation’s law students. In just over a decade, the number of women law partners, general counsels, and federal judges doubled. At Harvard, women now make up almost half of the JD student body—quite a contrast to the first class of thirteen women that graduated in 1953. Two years ago, we celebrated fifty years of women at Harvard Law School.

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4. Id.
That event drew close to 1,300 people, making it the largest alumni gathering in the Law School’s history.

Such a celebration has special meaning in light of the huge obstacles faced by past generations of women—obstacles that now might seem laughable if they hadn’t been so destructive. In a recent address, Justice Ruth Bader Ginsburg recalled several inglorious cases from the world of law schools. There was Columbia’s denial of admission to several women in 1890, when one board member reportedly said: “No woman shall degrade herself by practicing law in New York especially if I can save her. . . .”5 Or consider a 1911 student resolution, widely supported—though ultimately defeated—at the University of Pennsylvania Law School: a resolution that would have introduced a twenty-five cents per week penalty on students without mustaches.6 Or the words of Harvard University’s president, when asked how the Law School was faring during World War II. His reported response: That it wasn’t as bad as he’d expected—“We have 75 students, and we haven’t had to admit any women.”7

Thankfully such attitudes have pretty much vanished from our legal landscape; they are to be heard from only the most lunatic fringe. But despite the enormous progress made—and we don’t want to lose sight of the advances—it’s also true that women lawyers still lag far behind men on most measures of success. Now, as I said before, this is an issue for all of us. And since I’m the dean of a law school, that’s where I’ll start.

Last year, a working group of Harvard Law students issued a study on women’s experiences.8 What they discovered closely tracked findings from other top schools that have studied these questions: While women and men arrive at law school with basically the same credentials, there’s a real difference in how they experience their three years of legal study.

Most troubling are disparities in the academic arena in major law schools. Women law students are less likely to speak up in class. 9 They graduate with fewer honors.10 And when asked to assess their own abili-

6. Id.
7. Id. at 803.
9. See id. at 4, 18-19.
10. See id. at 6, 25-26.
ties, they give themselves far lower marks than men do on a range of legal skills. Here's an interesting statistic: according to the Harvard student survey, 33 percent of men considered themselves in the top 20 percent of their class in legal reasoning while only 15 percent of women did. Women also gave themselves lower marks in their ability to “think quickly on their feet, argue orally, write briefs, and persuade others.” Reading this list, I had to shake my head: What exactly is left? Studies at other schools have found very similar trends. In the disturbing words of one female law student from the University of Pennsylvania: “Guys think law school is hard, and we just think we’re stupid.”

Now I’m not entirely sure what to make of such studies. Do women arrive at law school predisposed to self-doubt? Or does something happen in law school that contributes to these perceptions? In any case, we know one thing: There’s a problem here, and we need to figure out why it exists.

And as most of you know, law school is just the beginning. Recent decades have spawned something of a cottage industry in reports exposing stark differences in the career paths of men and women. These reports are rife with metaphor—we’ve read about glass ceilings and sticky floors, about clogged or leaking pipelines, about scenic highways and feeder roads, and off-ramps and on-ramps. Regardless of the image, the bottom line stays the same: Women lawyers are not assuming leadership roles in proportion to their numbers. And that is troubling not only for the women whose aspirations are being frustrated, but also for the society that is losing their talents. What we have here is a kind of brain drain, and we are all the poorer for it.

11. See id. at 22 & app.XX.
12. Id.
13. Id.
14. See, e.g., Lani Guinier, Michelle Fine & Jane Balin, Becoming Gentlemen: Women, Law School, and Institutional Change 37-38, 41, 48-56 (1997) (reporting disparities in academic achievement, class participation and self-perception between female and male students at the University of Pennsylvania Law School); Yale Law Women, Yale Law Sch., Yale Law School Faculty and Students Speak Out About Gender: A Report on Faculty-Student Relations at Yale Law School (2002) (reporting gender disparities in various classroom dynamics at Yale Law School); Janet Taber et al., Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates, 40 Stan. L. Rev. 1209, 1239 (1988) (presenting survey results indicating lower class participation by female students than male students at Stanford Law School). The Taber study also found female Stanford Law School graduates reporting lower satisfaction with their performance in law school and less favorable feelings about the school than male graduates (there was no reported difference among current students). Taber, supra.
This Association recently released a study of eighty-two New York law firms confirming this pattern of disparity.\textsuperscript{16} Some of the study’s findings come as no surprise. It’s pretty clear to anyone who’s walked the halls of major firms that the ranks of associates tend to be more diverse than the partnerships.\textsuperscript{17} For years, the assumption has been that this is a pipeline issue—that over time partnerships would come to mirror the associate pool. But this isn’t happening. Rather than seeing the predicted gradual shift, law firms are seeing the continuation of the status quo, with women and minorities promoted at rates only slightly higher than before.\textsuperscript{18} In other words, partnerships are basically replicating themselves. And this isn’t just because women are voluntarily leaving law firms in greater numbers in the early years. In 2004, women made up one-third of associates in their eighth year at a law firm, but only one-fifth of that year’s new partners.\textsuperscript{19}

The experience of women in New York seems to reflect trends all across the country. What’s more, a major new study shows that these differences become visible at the very start of legal careers.

The \textit{After the JD} project—sponsored by the non-profit NALP Foundation and the American Bar Foundation—involves a number of law schools and organizations, including Harvard Law School’s Program on the Legal Profession. (Indeed, HLS Professor David Wilkins—who is also spearheading work on gender differences among black lawyers—is one of its principal researchers.) The first phase of results—released last year—provides an intriguing snapshot of lawyers two to three years into their careers.\textsuperscript{20} Even at this stage, there are striking differences. Disparities first show up in the choice of practice settings, with women more likely to work in government, public interest, and education.\textsuperscript{21} This may not be altogether surprising. In the Harvard study of law students, the percentage of women who said that “helping others” was one of the most important factors to consider in picking a career was double that of men.\textsuperscript{22} (Just as an aside:

\begin{enumerate}
\item \textit{Ass’n of the Bar of the City of N.Y., Diversity Benchmarking Study} (2005), \url{http://www.abcny.org/pdf/report/Public_benchmarking_report.pdf}.
\item See id. at 4.
\item See id. at 5.
\item See id. at 5-6.
\item Ronit Dinovitzer et al., \textit{NALP Found. & Am. Bar Found., After the JD: First Results of a National Study of Legal Careers} (2004), available at \url{http://abfn.org/ajd.pdf} [hereinafter \textit{After the JD: First Results}].
\item Id. at 57, 59 tbl.8.1.
\item \textit{Study on Women’s Experiences}, supra note 8, at 32.
\end{enumerate}
That's a disparity we should do something about in the opposite direction.) But there are also differences, even at this early stage, in how men and women experience the same practice setting. Men were far more likely to engage in informal networking—such as joining partners for breakfast and lunch or serving on key firm committees. And men out-earned women in most practice settings. Within the largest law firms (those with more than 250 attorneys) the median salary earned by men was $15,000 higher than that earned by women.

If the past is any indication, these differences are likely to grow as legal careers advance. The 2001 report cited above from the ABA’s Commission on Women in the Profession found that despite recent progress, women were still underrepresented in top positions all across the legal profession. According to the most recent figures I could find, while women account for almost 30 percent of lawyers, they account for only about 15 percent of general counsels of Fortune 500 companies, 17 percent of law firm partners, and 23 percent of federal district and circuit judges. At law schools, women account for roughly 19 percent of deans and 25 percent of tenured professors.

Now, I want to note that this shortage of women is hardly unique to the legal profession. The same point can be—and has been—made with regard to top business and political posts. But it seems to me that there's something especially troubling about these disparities in the legal profession—a profession dedicated to the pursuit of justice. Here, the concern about equal opportunity should be at its very highest.

So where do we go from here? One of the first questions we must grapple with is “What do the numbers mean?” What accounts for the documented difference in male and female career paths? This simple question has sparked enormous controversy.

Fanning the debate in recent years are reports of an “opt-out revolution,” to use the phrase coined by New York Times reporter Lisa Belkin. In this supposed revolution, some of the nation’s most highly educated young women plan to put aside their careers once they have children;

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23. After the JD: First Results, supra note 20, at 58.
24. Id. at 58, 60 tbl.8.2.
25. See Unfinished Agenda, supra note 3, at 5, 14.
27. Id. at 1-2.
they decide, in essence, that they can’t—or don’t want to—“have it all.”

A front-page Times story this September carried the headline “Many Women at Elite Colleges Set Career Path to Motherhood.”29 This article noted results of a recent survey of Yale undergraduates in which roughly 60 percent of women students responding said they’d cut back or stop work once they had children.30 Not surprisingly, this piece triggered a flood of letters to the editor, with readers staking out deeply felt and sharply divergent positions:

“I cannot comprehend the ultimate passivity with which some women of my generation have resigned themselves to maintaining the status quo,” said one letter writer.31

“But why shouldn’t the raising of children be considered a career as well?” asked another.32

Along with judgments grounded in social and political views, came practical concerns:

“I hope that they have a backup strategy: things do not always work out as planned,” cautioned one writer.33

And then—amidst all the strongly held views—came the following musing:

“I’m glad that the things I declared when I was 19 . . . didn’t make front-page news.”34

Now this last comment is a good reality check. Who knows what these young women will be doing in five or twenty years?

And in fact, there’s reason to think that the so-called “opt-out revolution” may be something of a mirage. As one letter to the editor astutely observed, of the Yale students who said they planned to curtail careers for kids, about half said they planned to work part-time while the other half said they planned to stop work—but perhaps for only a few years. The writer of this letter—herself a member of Princeton’s Class of ’73, the first

30. Id.
to admit women—proposed an alternate (albeit somewhat unwieldy) headline for the *Times* story: “Majority of Women in Elite Colleges to Opt for Lifetime Careers Either Full Time or With a Short Pause for Children.” This, she noted, is precisely the path she and her friends followed some thirty years ago.\(^{35}\)

Backing up this hypothesis is a recent research report from the Center for Work-Life Policy that examined career paths of highly qualified women across a range of fields including law, business, medicine, and academia.\(^{36}\) The study—which was published as a *Harvard Business Review* Research Report and whose lead author is gender-and-workplace expert Sylvia Ann Hewlett—makes the notable finding that 93 percent of women who have stepped out of the labor force want to return.\(^{37}\)

Ninety-three percent—that’s huge.

But the story doesn’t end there. What happens to these women when they try to opt back in? The data suggest that far too many face impassable roadblocks. All in all, only about three-quarters of women who have left the workforce succeed in rejoining it, according to the report.\(^{38}\) And even those who leave for only a few years usually lag far behind in earning power throughout the rest of their careers. The researchers conclude that businesses have failed to take the steps needed to enable women who take some time off to resume their careers in a successful manner.\(^{39}\)

This issue is especially pressing because of its enormous scope. The report found that close to 40 percent of highly qualified women are “off-ramping”—voluntarily leaving their careers for some period of time.\(^{40}\)

What are the exit markers on this journey? What prompts women lawyers to turn off the career highway? Just over two-thirds of women—and nearly half of men—think personal and family responsibilities are the single largest barrier to women lawyers’ advancement, according to a 2001 study of top law school graduates by the women’s think tank Catalyst.\(^{41}\) But while women struggle with such obligations, it’s not clear that these are what finally drive them out the door. In fact, the Center for

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37. *Id.* at 42.
38. *Id.*
39. See *id.* at 2.
40. *Id.* at 2, 14, 16.
Work-Life Policy found that the biggest reasons women lawyers quit are because they’re dissatisfied with work or feel stalled in their careers. Even just two to three years into practice, women are far more dissatisfied than men with every aspect of their jobs except the work itself, according to the After the JD study. Given women’s disproportionately high levels of discontent on such issues as relationships with and recognition by colleagues, control over work, compensation, and opportunities for advancement, it’s not surprising that far more women than men said they planned to leave their jobs within two years.

Now I could go on about these issues at much greater length, but I think you get the idea. So I’d like to turn to solutions—to the question I asked at the start of this talk: Where do we go from here?

As we look for answers, it makes sense to consider women’s actual choices and stated preferences. But while this is important information, it’s just a starting point. That’s because women’s actual choices often reflect unnecessary structures and constraints—ways of ordering the workplace that prevent the people in it from creating the worklives they most desire. Even women’s stated desires are often the result of contingent circumstances.

This issue comes to the fore when women talk about power. The Center for Work-Life Policy study found that only 20 percent of highly qualified female lawyers singled out “a powerful position” as a very important career goal. Now to me this finding raises a red flag. Do women care so little about having an impact? About finding ways to bring their considerable talents to bear on the world’s problems? I just don’t believe it. I think women express themselves in this way only because in our society the concept of power unfortunately has become disconnected from the goal of improving our society. In any event, you see the general point I’m making: Women’s actual choices and stated preferences are crucially important, but it makes sense also to look behind them and ask what kinds of workplace and other conditions they are reflecting.

And in this vein, women’s disproportionate interest in public service activities seems to me worthy of some further thought. It is intriguing to consider whether women see public interest work not only as more personally fulfilling but also as more open to them—more likely to provide

42. OFF-RAMPS AND ON-RAMPS, supra note 36, at 93 exh.I.1.1.
43. See AFTER THE JD: FIRST RESULTS, supra note 20, at 58.
44. Unpublished data analysis (on file with the author).
45. OFF-RAMPS AND ON-RAMPS, supra note 36, at 54.
opportunities for advancement and recognition, more prone to generate mutually appreciative relationships, more flexible regarding leave-taking and reentry. Closer study of the differences across practice settings, linked to the experiences of women in those settings, could help us to improve workplaces throughout the profession.

Now as I said at the start, these are issues for law schools no less than for the rest of the legal profession, and I’d like to turn now to some concrete steps we might take to address them. This is far from a complete list but I do think it gives an idea of where we need to go. Specifically, I want to talk about career counseling, mentorship, and—more broadly—collaboration between law schools and practitioners. Something noteworthy about all these responses is that they will assist both men and women. And this is not surprising, because many of the issues that women face in the workplace are issues for men as well. Women are what my colleague Professor Lani Guinier calls a “miner’s canary”—an allusion to the bird that alerted miners to toxins in the air.46 They are a group whose greater vulnerability to certain conditions signals the dangers of those conditions for the whole population.

So first, career advising and the role law schools can play in this area. Many of the issues women face are issues that occur mid-career. We see this, in particular, in the challenges facing “off-ramped” women as they begin looking for work—often with hopes of taking their careers in new directions. Women’s careers tend to be non-linear. Indeed, the Center for Work-Life Policy report found that only 34 percent of female lawyers—and 42 percent of all the highly qualified women studied—saw their careers as progressing through a professional hierarchy.47

Given these facts, law schools need to think about new ways of serving alumni—a role that should include services aimed at helping off-ramped women find work. And the need for mid-career advising is not just a women’s issue. Unlike their predecessors, all of today’s young lawyers—both women and men—are likely to hold multiple jobs in the course of their careers, making a series of transitions. Their biggest career decisions may well come five or ten or even twenty years after law school graduation.

For this reason, Harvard Law School is exploring ways to expand alumni advising, moving toward the concept of lifelong career services. Here’s an amazing statistic: The Center for Work-Life Policy study found more than half of on-ramping women want to change professions or fields, with

47. Off-Ramps and On-Ramps, supra note 36, at 28, 94 exh.l.1.3.
more than 60 percent of these wanting to move from the corporate to the not-for-profit sector.\textsuperscript{48} We have the ability—and the responsibility—to help them to do this.

Next, mentorship. I think we all know that mentors are key to success in the legal profession—as they doubtless are in most others. In addition to giving advice, mentors often model possibilities. Among other things, they can help other women see that power and authority are compatible with an ethic of decency and a fulfilling personal life. At law schools, women faculty and deans have a big role to play here. But there are other things law schools can do as well, such as finding ways to broker connections between students and alumni. To this end, Harvard has been working to build an active Alumni Network—a way for women, as well as men, to forge ties with others who share their professional interests. Of course, the most important mentors in a lawyer’s life are likely to be on the job, so this is an even larger issue for law firms and other employers. But I think that law schools can play an important role in ensuring that women gain the kind of mentors who help them advance in the profession.

Most broadly, we must have greater collaboration between law schools and the profession in providing a forum for discussion and in otherwise addressing the whole panoply of issues affecting women’s worklives.

At Harvard Law School, we’re in the early planning stages for a Women’s Leadership Summit—something I’m very excited about. We’ll be bringing together women—and interested men—from the world of practice to brainstorm around the issues relating to women in the legal profession and to come up with concrete steps aimed at making a difference. I know our alumni. And I know that they’re going to come up with some amazing ideas. This is still a ways off—we’re thinking sometime in the next school year—but I have great hopes for this collaboration.

More generally, if we’re to succeed in any of these undertakings, we must form a new partnership between the academy and the profession. This is a critical time in our profession’s history—not just for women but for all lawyers, and indeed for all those who depend upon what we do here in the U.S. and around the globe. Charting a course for the profession in these times will require sustained cooperation between practitioners with the experience and wisdom to identify problems and implement solutions, and academic researchers with the ability to generate the systematic and unbiased research on which these solutions must be based. We at Harvard Law School are committed to forging this new partner-

\textsuperscript{48} Id. at 46.
ship, and we have established the Program on the Legal Profession to foster interdisciplinary research on the changes affecting lawyers and related professionals—very much including issues involving gender—and to build closer links between the bar and the academy.

I’ll close with an anecdote involving a former and different Harvard Law School. Some years back, a young woman named Hillary Rodham faced a tough decision between the law schools of Harvard and Yale. She writes in her book *Living History* that she made her choice after attending a cocktail party at Harvard. At that party, a Harvard Law professor she describes as “straight out of the Paper Chase” responded to her question about the two schools in the following way: “Well, first of all, we don’t have any close competitors”—(this is still something we believe, but we try not to say it)—“Secondly, we don’t need any more women at Harvard.”

Needless to say, that reply made her choice quite easy.

Flash forward to 2003. When Senator Hillary Clinton inscribed her book for me, she wrote—“to my friend Elena—who would have made sure I went to Harvard.” Of course, I like to think she’s right. And I also like to reflect on how those few words show how much has changed. A female senator from New York. A female Dean of Harvard Law School.

There’s no doubt that much progress has been made. There’s no doubt we need much more. Again, thank you for being here. I look forward to hearing from you—both now and in the future.

Proof of Foreign Law After Four Decades with Rule 44.1 FRCP and CPLR 4511

The Committee on
International Commercial Disputes

procedures for proving foreign law were dramatically overhauled for the federal courts in 1966 with the adoption of Rule 44.1, Fed. R. Civ. P. and Rule 26.1, Fed. R. Cr. P. A similar overhaul took place for the state courts of New York with the adoption in 1963 of CPLR 4511. This Committee, which focuses on improving procedures for litigating and arbitrating international commercial disputes, set out to survey how these reformed procedures are working today, and to recommend guidelines for using them optimally. In addition to reviewing relevant cases and articles, practitioners from the Committee who themselves have been involved in cases where foreign law had to be proved interviewed federal and state judges about their experiences.

We conclude that the reform procedures of the 60s have had to be modified in practice to allow for practical realities. For example, a judge is handicapped from doing independent legal research on the law of some Third World countries, which cannot readily be traced into objectively verifiable documents such as statutes and reports of judicial decisions. Reliance on experts in foreign law depends also on their reliability. On the other hand, use of court-appointed experts and special masters can clash with the demands of our adversary system.
The judges we interviewed have found ways to construct individualized solutions, which more or less work. We recommend that such individualized solutions be followed, with all their imperfections, in preference to categorical solutions such as having the judge research all foreign law issues or leaving it to the lawyers to produce reliable experts or suffer the consequences.

BACKGROUND OF THE 1960S REFORMS

The background reasons for the new rules of the 1960s were set forth persuasively in a comprehensive article by Professor Arthur Miller: “Federal Rule 44.1 and the ‘Fact’ Approach to Determining Foreign Law: Death Knell for Die-Hard Doctrine.” 65 Mich. L. Rev. 613 (Feb. 1967). We refer the reader to Prof. Miller’s article, whose most important conclusions are set forth more briefly in the Advisory Committee Notes to Rule 44.1.

In a nutshell, the courts were liberated from the constrictions of the older approach which treated proof of foreign law as proof of fact. There had been requirements that foreign law be pleaded, thereby creating issues to be researched that might never arise, that proof be limited by the rules of evidence, thus increasing the costs and difficulties of proof, that summary judgment be denied when the parties dispute the content of foreign law, even though the judge is able to reach an opinion about what the applicable foreign law provides, and that appellate review be limited by the “clearly erroneous” standard, largely immunizing district court determinations from independent review by the Courts of Appeal. All these problems were swept away by the reforms of the Federal Rules.

The new Federal Rules were supposed to give federal judges free rein to determine foreign law as a question of law rather than one of fact. No pleading was required, just notice of a foreign law issue. The judge could consider the testimony of expert witnesses called by the parties or appointed by the Court, and reports of a special master familiar with the relevant law, or use a good law library that had the relevant foreign law on its shelves. In theory at least, the judge could call up a professor friend who had studied the foreign law in question, bring the parties’ experts to his chambers ex parte for a chat on the issues, and visit ex parte with foreign scholars.

The same was more or less true for New York state courts, except that New York procedure used the concept of “judicial notice” to describe the Court’s role in deciding foreign law, a term the federal rule eschewed. New York procedure also still required that foreign law be pleaded (CPLR 3016(e)),

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and CPLR 4511(b) explicitly required a party relying on foreign law to furnish the Court “sufficient information to enable it to comply with the request” to take judicial notice of the foreign law, as opposed to leaving it to the judge.

THE DISPUTE OVER HOW MUCH TIME AND EFFORT JUDGES SHOULD INVEST IN RESEARCHING FOREIGN LAW: POLAR VIEWS

One of the new rule’s earliest critics was Judge Milton Pollack of the Southern District of New York (“SDNY”). In “Proof of Foreign Law,” 26 Am. J. Comp. Law 470, 471 (1978), he wrote: “We have quite a few things to do besides decoding the Código Civil.” As a distinguished New York State Supreme Court jurist told us in an interview, when a foreign law issue raises its head, judges hope mightily that the parties can be induced to stipulate to the law of the forum. This view holds that courts are too busy to make independent determinations of foreign law and are practically constrained to rely on experts produced by the parties, much as they did before the new rule took effect.

On the other side stands Judge Roger Miner of the Second Circuit, who wrote that Rule 44.1 “provides that ‘[t]he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.’ This clearly provides the federal courts with a tremendous amount of flexibility in ascertaining foreign law. It is just too bad that they do not use it! . . . The global economy has brought an increasing variety of foreign law issues to the federal courts . . . [Cases involving issues of foreign law] are beginning to form a significant part of the business of the federal courts. And yet the tendency of the federal courts is to duck and run when presented with issues of foreign law. Why should this be so, when we federal judges have at hand so many methods that we may employ to resolve foreign law issues? I think that the answer lies in our fear of the unknown.” “The Reception of Foreign Law in the U.S. Federal Courts,” 43 Am. J. Comp. Law 581, 584-85 (1995).

Judge Miner has carried his view into practice. For a panel of the Second Circuit, he upset a district court decision because the judge had decided the case on the law of the forum, New York, when he should have based his decision on the controlling law of the Mexican Civil Code. Curley v. AMR Corporation, 153 F.3d 5 (2d Cir. 1998). The result was the same under both legal systems, but the Court held that Mexican law should have been studied and applied. The Court ordered supplemental briefing.
regarding the contents of the Mexican law at issue and conducted independent research as well, and specifically noted that forum law is to be applied only when both parties fail to present any evidence as to the content of foreign law. Id. at 14 (citation omitted).¹

Judge Miner’s view has also been followed in a recent study for the Federal Judicial Center: Friedman, “Countering Judicial Reluctance to Use Foreign Law.” Draft 4/10/04.

HOW TRIAL JUDGES DEAL WITH PROVING FOREIGN LAW TODAY

Judges have told us that the present regimen leaves them with many problems. If they rely on expert witnesses whom the parties produce, they are leery of being blindsided by partisan guns for hire whom they cannot adequately check because of their own lack of familiarity with the law in question. Court appointed experts and special masters knowledgeable in foreign law can undercut the adversary system, since judges may be unduly influenced by the person they appoint. And thirdly, some foreign legal systems, such as those of Indonesia and Kazakhstan, are much harder to study than others, such as those of England and Canada.

A. Using the Parties’ Expert Witnesses on the Foreign Law In Question

Experts on foreign law share the infirmities of other hired gun experts. Parties paying for experts usually make sure in advance that the expert will give opinions to their liking, or they will hire a different expert who will.

When an expert such as a doctor or an economist testifies about a question of fact, the judge can let the jury decide which expert they believe; in a bench trial, the judge can do the same thing, relying on credentials, how the expert stands up on cross, demeanor, etc. Under Rules 44.1, 26.1 and CPLR 4511, however, the judge must make a determination of the law, so that if the judge lacks sufficient knowledge of the expert’s

¹. In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204 (2d Cir. 2003) (per curiam) is instructive on this point as well. Here, a party offered only affidavits regarding the interpretation of Korean law, but not “any of the relevant Korean law itself.” Id. at 209. The court held that such submissions are insufficient and correspondingly declined to independently investigate and determine the substance of Korean law. Id. (“the dearth of evidence offered by SKM prevents this court from properly considering its request for dismissal based on an issue of foreign law. While courts are not precluded from engaging in their own information gathering with regard to issues of foreign law, we do not believe it is appropriate for this court to do so in these circumstances.”). Id. at 209 (citing Fed. R. Civ. P. 44.1).
subject to decide what to believe, the problem cannot be given to a jury or resolved as for a fact witness. According to the Second Circuit, the district court’s opportunity “to assess the witnesses’ demeanor provides no basis for a reviewing court to defer to the trier’s ruling on the content of foreign law. In cases of this sort, it is not the credibility of the experts that is at issue, it is the persuasive force of the opinions they expressed.” *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998). See also, *United States v. Jurado-Rodriguez*, 907 F. Supp. 568, 574 (E.D.N.Y. 1995) (Weinstein, J.) (“The court found him credible, though, as indicated below, it did not accept all of his conclusions.”). The judge has to have other ways to resolve disputes among the experts.

Judge Miner addressed this issue as follows:

I do not agree with those who consider an expert automatically suspect because he or she is retained by one side or the other. If we think we are getting some “junk” foreign law from an expert, we can take a leaf from the book given to us by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*. In that case, it was determined that a federal judge should act as a gatekeeper in deciding whether to admit scientific evidence. I think that a federal judge can also act as a gatekeeper in deciding whether to accept the foreign law opinion of an expert. Testimony will sometimes be required to determine whether an expert’s opinion is reliable or relevant. I am not greatly enamored of taking testimony from a foreign law expert, however, and think that it would be necessary only in a rare case.

Miner, *supra*, at 588.

Without input from the parties’ expert witnesses, however, a judge may have to start from scratch in what, for many foreign law systems, might seem like a trackless waste. Judge Helen Freedman of the New York State Supreme Court told us that she needed the parties’ experts on foreign law, but suggested that there would be some wisdom in screening them as in *Daubert*, so that the parties have to produce reliable help for the court or risk losing for want of usable expert testimony.

Judge Jed Rakoff, SDNY, suggested another form of compromise. In *United States v. Schultz*, 178 F. Supp.2d 445 (S.D.N.Y. 2002), aff’d, 333 F.3d 393 (2d Cir. 2003), he heard two experts on Egypt’s law of antiquities, neither of whom he considered wholly reliable. Using the Egyptian law authorities cited by the experts, however, he independently reviewed the statutes and concluded that the opinion of the government’s expert
witness was more consistent with them. The Second Circuit concurred and affirmed.

The problem, however, was not a simple one. It was a criminal case and the issue was whether the defendant had received stolen property (Egyptian antiquities) with criminal intent. This entailed the question of not only how the foreign statute read, but also how it was enforced, and known to be enforced. Had the defendant’s conduct actually violated Egypt’s law of antiquities as it was carried out in practice so that he acted with criminal intent? This, Judge Rakoff says, was a mixed question of law and fact, even if only a question of law under Rule 26.1 F. R. Cr. P., the criminal law equivalent of Rule 44.1 FRCP. For the fact portion, he felt he had to weigh the experts’ credibility and he wound up evaluating them. Was this the equivalent of a Daubert hearing? Did it turn the whole question into one of fact? It made sense, as both Judge Rakoff and the Second Circuit concluded, but he may have moved back to the old theory that foreign law in such cases had to be proved as fact.

Another potential approach is to set conflicting experts up against each other during a hearing and have them each succinctly respond to the other’s points as opposed to the typical scripted direct and cross-examinations. Former Judge Martin, SDNY, and Professor Hans Smit of Columbia University have employed and have been involved in similar methods in both litigation and international arbitrations, and find them to be helpful. Such a jot-for-jot give and take should allow the Court to obtain a better grasp of not only the content of foreign law, but of its intellectual underpinnings and interstices as well.

B. Use of a Court-Appointed Expert

A judge who mistrusts the expert foreign law testimony presented by the parties, or is not wholly comfortable with it, can appoint his or her own expert under the reformed rules. The problem, as both Judge Rakoff and former SDNY Judge John Martin pointed out to us, is that once a Court appoints its own expert, it tends to favor the opinion of the expert it has appointed, so that the appointment may undercut the adversary system even when the parties’ expert witnesses are well qualified.

Judge John Koeltl, SDNY, a member of the subcommittee that prepared this report (but who did not participate in the interviews of other judges), says that to avoid this problem he subjects his court-appointed expert to vigorous cross-examination by the parties and avoids ex parte discussions with that expert.

There is a cost from imposing such restrictions. Since Rule 44.1 and
26.1 are supposed to allow the judge great freedom in researching foreign law, cutting off ex parte contact with an expert the judge trusts reduces that freedom. Ideally, as Judge Rakoff puts it, an expert should be available to discuss issues informally and privately with the judge, like a law clerk. He fears that the tensions with the adversary system would be too great if he did so, and he does not, and neither does Judge Koeltl, although in theory the judge should not be limited by such concerns. In practice, neither of these judges engages in ex parte discussions with the expert witnesses on foreign law, whether court-appointed experts or experts produced by the parties.

C. Appointment of a Special Master on Foreign Law

Use of a special master familiar with the foreign legal system raises many of the same issues as does the court-appointed expert, for a judge may favor the opinions of such a master over well qualified experts produced by the parties. Since a master sits in a quasi-judicial role, however, the parties may have more leeway to persuade the master at a hearing, as opposed to the court-appointed expert, who reaches his or her conclusions before the hearing and can only be challenged by cross-examination. See generally, Manual for Complex Litigation (Third) § 21.52 (Federal Judicial Center 1995) (“A special master may be asked to make findings of fact, but due process requires that these be based upon evidence presented at an adversarial hearing.”) (footnote omitted).

There are at least three reported decisions reviewing the analysis of a special master charged with the task of applying foreign law. See Henry v. S/S Bermuda Star, 863 F.2d 1225 (5th Cir. 1989); Finance One Public Co. Ltd. v. Lehman Brothers Special Financing, Inc., No. 00-CV-6739 (CBM), 2003 WL 2006598 (S.D.N.Y. May 1, 2003); Corporacion Salvadorena de Calzado, S.A. (Corsal, S.A.) v. Injection Footwear Corp., 533 F. Supp. 290 (S.D. Fla. 1982). These courts vary in terms of the level of scrutiny given to the special master’s analysis. In Henry, the Court undertook a plenary review of the foreign law at issue. In so doing, the Court declined to adopt portions of the special master’s report. In Corporacion Salvadorena, the Court was presented with a controversy governed by the law of El Salvador, and the experts’ affidavits were contradictory in every material respect. The Court opined that the appointment of a special master was “the most satisfactory means of reaching an ultimate decision in this case.” Id. at 293.

The Court also noted that the special master’s conclusions enjoy “a strong presumption of validity” but that her findings may be disregarded when “after reviewing the entire evidence [the Court] is left with the defi-
nite and firm conviction that a mistake has been made, even though there may be some evidence to support the erroneous finding.” *Id.* at 299. The Court conducted what might be termed an intermediate level of scrutiny and ultimately adopted the recommendation of the special master. *Id.* at 300.

Lastly, in *Finance One*, a case controlled by Thai law, the Court sought the assistance of a special master “because the court’s library does not carry Thai reporters, nor are they available on Westlaw or Lexis.” *Id.* at *1*. After a brief review of the master’s report, the Court adopted it in its entirety with relatively little analysis. *Id.* at *2*.

In addition, some lawyers think that use of a special master can help compensate for some judges who are too busy or too inexperienced in foreign law to adjudicate the matter properly. The master is freer to give and take with the parties and their experts than a court-appointed expert, and the master’s report may be the best thing available under those circumstances.

**D. Varying Difficulties with Different Foreign Legal Systems**

One variable that the reformed rules do not address is the foreign legal system itself. If the issue is the law of England, for example, American judges have little difficulty reading English statutes and cases. Once one crosses into civil law systems, the difficulties multiply. For third world systems, which may lack case reports and readily accessible published statutes, and whose enforcement may follow often mysterious local customs, not to speak of corruption, the difficulties multiply exponentially.

Thus the law of England may sometimes be treated like the law of an American sister state. One of our committee, however, remembers a notorious case where the events happened in London, and Judge Jack Weinstein, EDNY, concluded that he found the affidavits of Queen’s Counsel for both sides too partisan to be relied on. Though the case was decided on other grounds, the judge’s rejection of the parties’ legal expert affidavits left a situation where the acceptable method of proof was unclear.

When it comes to civil law jurisdictions, there is a much greater departure from our traditions. Judicial decisions count for less in discerning the law, and the language of statutes more; yet the underlying concepts in those statutes may be alien. Witness Judge Miner’s opinion about Mexican law in *Curley v. AMR Corporation*, where the Second Circuit panel undertook to decide whether the defendant who was sued for tort had acted “illicitly or against good customs and habits.” 153 F.3d at 15. That standard may have been easy enough to apply in the case before the Court,
where the conduct in question was clearly not tortious, but it is not hard
to conceive of situations where an American court would be hard put to
decide on its own what conduct would violate the “good customs and
habits” of Mexico.

The case of Henry v. S/S Bermuda Star, 863 F.2d 1225 (5th Cir. 1989)
presents a diligent judicial application of foreign law. The case involved a
labor dispute governed by Panamanian law and the district court em-
ployed a special master to assist it. Despite the special master’s report, the
Court researched Panamanian law on its own and even launched into a
disquisition on the differences between civil law and common law. There-
after, the Court rejected the special master’s statutory construction regarding
pay calculations.

In so doing, the Court disregarded two federal district court opinions
and an interpretative opinion of Panama’s Ministry of Labor and Social Welfare,
id. at 1232, clung to the language of the Panamanian Labor Code and
acted as a civil law court would in the process. Id. Because its analysis
differed from that of the special master’s, the Court proclaimed that it was now “plunged into virgin waters” and independently determined a
subsidiary issue of Panamanian labor law. Id. In determining this latter
issue, the Court, again acting as a civil law court, looked to past practices
of compensation and the Labor Code. Id. 1232-33 (“Under the civil law
approach, a specific provision...prevails when in conflict with a general
 provision.”). Thereafter, the Fifth Circuit panel continued its role of civil
law court and decided a host of remaining issues. See, id. at 1234-39. 2 The
Court concluded the case by returning to its common law roots by distin-
guishing precedent and examining the scope of a federal statute via ex-
amination of legislative intent and statutory construction. Id. at 1239-41.
The contrast in approaches is evident. See also an article by the opinion’s

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2. The Fifth Circuit made the contrast of its common law role quite clear:

Were we a United States Court applying United States law, we would be inclined by
the authority cited by the seaman to hold that the Decree has been incorporated. But,
we sit as a United States court applying Panamanian law within the constraints of a
civilian law system. Under our understanding of the probable doctrine (n.24, supra)
without three judgments of the same court mandating incorporation of Cabinet
Decree No. 221—the thirteenth month pay provision—into the Labor Code, we
are directed to return to the text of the Labor Code. The express provisions of the
Code and the Special Master’s analysis leads us to hold that the thirteenth month pay
bonus is not incorporated into the Labor Code. Until a third Supreme Court of Justice
decision incorporates the Cabinet decree into the Labor Code or the Code is amended
to achieve this incorporation, the thirteen month pay bonus does not apply to seamen
on vessels in the international service such as the BERMUDA STAR.
When the question is one of law for a Third World country thin in written sources of law, or where the courts are corrupt, the problem can be overwhelming. Judges tend to have the parties produce foreign law experts and struggle with the results.

One solution to the problem of unprovable foreign law may be to use the methods that Professor Miller says courts followed before 44.1, when it was too hard to prove foreign law. If the principle of law at issue was “rudimentary,” i.e. the same principle that you can assume exists in all civilized jurisdictions, you discern it and follow it. Thus, e.g., if the defendant has struck the plaintiff without cause he is liable for damages. Contracts should be carried out as written, and so on. Such an approach would eliminate many problems. It is similar to an assumption that when the foreign law is too hard to discern you follow the law of the forum, an assumption frequently made.

Another possible solution is to allocate a burden of proof to one of the parties. That would enable the case to be resolved, but it would convert the inquiry into one of fact and violate the command in the last sentence of Rule 44.1, which makes the question one of law. Judge Guido Calabresi of the Second Circuit said to us during his interview that a Court is tempted to allocate a burden of proof, but at the end of the day it would probably have to do what it considers fair. This pushes the Court to the “rudimentary” principles approach, or to the assumption that the law of the forum applies. 3

CONCLUSIONS AND RECOMMENDATIONS

The reforms of Rule 44.1 FRCP, Rule 26.1 FRCrP and CPLR 4511 have to be applied in a practical way. Thus, e.g., where the foreign law is readily determinable, as usually for the law of England, and the parties produce clearly reliable experts on foreign law, the Court can hear the testimony, check the legal sources provided, and comfortably reach its conclusions of law. Those conclusions are likely to be sound.

When any of these factors change, the Court’s procedure also has to change. When the experts do not appear to be reliable, the Court may do well to first screen them and then if still not satisfied consider using a

3. See also Pollack, supra, at 471 (“Accordingly, it is reasonable to assign most of the burden of demonstrating foreign law to the parties, and not the Court. I leave for another occasion the nice issue of which party should be obliged to carry the load.”) (emphasis in the original).
court-appointed expert or a special master versed in the applicable law. In
doing so, most judges believe that some deference must still be paid to the
adversary system. The neutral expert must be subject to cross examination
and probably should not communicate ex parte with the Court, despite
the lack of restrictions in Rule 44.1 and its related rules. The special master
must be open to vigorous criticism in an appeal to the district court from
the master's decision.

Where the law of the foreign legal system comes from a civil law
jurisdiction or a Third World country, the Court should make sure that it
has adequate expert help familiar with how law is made in the relevant
country. Independent determinations can be made when the principles
are “rudimentary,” but great care has to be taken where they are not,
despite the freedom that 44.1, 26.1 and CPLR 4511 give to the judge. Be-
fore embarking on such a determination, the Court should consider the
stakes involved, the abilities of the parties to bear the transaction costs of
producing experts, including substitutes for experts who originally prove
inadequate, and the importance of the point or points of law for the
case. Where the situation warrants it, a court-appointed expert or special
master can be appointed. Where it does not, the Court should press the
parties to supply proper expert help, and failing that, should consider
applying the law of the forum to the extent that cases like Curley v. AMR
Corporation, Judge Miner’s decision, allows it. A judge doing his own re-
search should try to have his or her views checked by knowledgeable for-
eign lawyers.

In short, we recommend that judges and litigants should be guided
by the freedom of the reformed rules, tempered with common sense, and
this is what good judges and litigants seem to be doing.

January 2005
The Committee on International Commercial Disputes

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Dear Senators and Representatives:

I am writing on behalf of the Association of the Bar of the City of New York to address certain provisions of the USA PATRIOT Act being considered by the Conference Committee, reflected in bills passed by the House and Senate, H.R. 3199 and S. 1389. H.R. 3199 and S.1389 address several of the particularly troublesome provisions of the PATRIOT Act but do not cure their fundamental deficiencies.

INTRODUCTION

The Association is particularly concerned about four provisions of the PATRIOT Act:

Section 206, which now permits “roving” and “John Doe” wiretaps not limited to particular facilities or targeted individuals;

Section 213, which permits delayed-notice or “sneak and peek” search warrants, i.e., secret searches without contemporaneous notice to the target;
Section 215, which permits the FBI to obtain orders from the Foreign Intelligence Surveillance Act Court requiring production of documents, records, and other tangible things in connection with investigations to protect against international terrorism or clandestine intelligence activities; and

Section 505, which amends various statutes to enable the FBI to unilaterally issue “National Security Letters” (NSL) to compel disclosure from financial institutions, electronic communications providers, and consumer credit reporting agencies of a wide variety of sensitive information.

The Association believes that these provisions fail to provide for adequate judicial safeguards against abusive and unwarranted use of these exceptional investigative powers and permit the government to operate in secrecy without adequate cause or reasonable limitations thus preventing meaningful oversight by the courts, Congress and the American people. As a result, these provisions, in their current form, unduly threaten to invade the privacy of innocent persons, contravene the protections of the Fourth Amendment against unreasonable searches and seizures and suppress and chill freedom of speech protected by the First Amendment. In H.R. 3199 and S. 1389 the House and Senate have sought in different ways to address some of these concerns and we commend them for their efforts. Unfortunately, however, these bills in a number of respects fail to adequately correct the problems raised by these provisions. We therefore urge the conferees to consider the following comments in negotiating a final bill. In doing so we are mindful of the special needs of law enforcement agencies in trying to prevent terrorist attacks, which sometimes require investigative procedures that permit somewhat greater latitude and secrecy than those employed in support of traditional criminal investigations. Nevertheless, we believe the PATRIOT Act provisions we discuss exceed such needs and unduly encroach on the very liberties and democratic system they are intended to preserve.

**Section 206—Roving and John Doe Wiretaps**

Section 206 of the PATRIOT Act expanded the Foreign Intelligence Surveillance Act (FISA) to permit the FBI to conduct “roving” wiretaps – that is, to intercept wire or electronic communications without first specifying to a judge which surveillance facilities will be monitored. The Intelligence Act for Fiscal 2002 further expanded this authority by allowing...
“John Doe” roving wiretaps—wiretaps in which the FBI specifies neither the facilities to be monitored nor the person whose communications will be intercepted. The FBI is not required to show “actual use” of the monitored facilities by a terrorist or foreign agent but only “possible use.” Moreover, unlike roving wiretaps permitted for criminal law enforcement under Title III, the federal wiretap statute, FISA does not require the FBI to show criminal probable cause, to demonstrate any special need to undertake electronic surveillance, or to conduct the surveillance in such a way as to minimize the likelihood of intercepting communications by innocent persons.

Nor does the statute require the FBI to make any showing that the surveillance target demonstrated an intention to “thwart interception by changing facilities,” as is now required in the criminal law enforcement context.

We recognize that the need to act quickly to preempt terrorist tactics and that the increasing sophistication of terrorists in the use of increasingly sophisticated communications devices may justify the use of devices like a roving wiretap in intelligence investigations. But we submit that section 206 fails to strike a proper balance in the protection of innocent persons whose communications may be unjustifiably tapped because they use a device that might “possibly” be used by an unidentified terrorist suspect. Under this provision any person using a pay phone in a neighborhood of a suspected terrorist or a scholar or student using a computer in a university library or computer lab that could possibly be used by a suspected terrorist could be the subject of a wiretap. This can occur without any meaningful requirements to show actual justification or to provide any specificity that would permit judicial monitoring to curb abuses. It entails not only an extraordinary invasion of personal privacy of innocent persons, which is highly questionable under the Fourth Amendment, but it has a potentially chilling effect on free speech for which anonymity and privacy are essential.

H.R. 3199 and S. 1389 recognize some of these problems in varying ways. We believe S. 1389 does so far more effectively. The House bill fails to require any showing of particularity, but the Senate bill specifies that the order authorizing the roving tap shall include “sufficient information to describe a specific target with particularity,” if facilities or the location to be tapped and the identity of the target is unknown. In addition if the tap begins to “rove” to a new device or location, under the Senate bill the government must notify the court within 10 days after the tap is moved and requires that the government specify: (1) the nature
and location of the new surveillance; (2) the facts and circumstances that justify the applicant’s belief that the facility or location is being used or is about to be used by the target of the surveillance, and (3) a statement of any proposed minimization procedures differing from those in the original order that may be necessitated by the change of location or facility. The House bill, on the other hand, would not require a showing of the basis for believing that actual use is occurring or will occur at the new surveillance facility or location; nor does the House bill require any additional statement as to minimization procedures.

The House bill would sunset section 206 in 2015, while the Senate bill would sunset the provision in 2009. The shorter period is preferable as the extraordinary powers it confers should be reviewed by Congress at the earliest feasible date.

Neither the House nor Senate bill requires specific identification of the persons who must assist the government in the effectuation of the surveillance and we believe this should be added to the final bill. More generally, we believe that roving wiretaps conducted under FISA should be conducted in accordance with the same safeguards that apply to roving surveillance conducted in criminal investigations under Title III.

**Section 213—Delayed Notice Search Warrants—Sneak and Peek Searches**

Section 213 of the PATRIOT Act amends 18 U.S.C. section 3103 to permit secret searches without immediate notice to the target. The amended provision permits the FBI to conduct “sneak and peek” searches whenever it can show, in addition to criminal probable cause, reasonable cause that delayed notice is necessary to prevent endangerment of life, flight from prosecution, tampering of evidence, intimidation of potential witnesses, or “otherwise seriously jeopardizing an investigation or unduly delaying a trial.” If a delayed notice search warrant is approved, notice must be given “within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.”

The Association is concerned with two features of Section 213. First, the catchall justification for a delayed notice search—a danger of “seriously jeopardizing an investigation or unduly delaying a trial”—is extremely broad and is likely to make delayed-notice searches routine. The practice of delaying notice makes timely challenges to search warrants by targets difficult if not impossible. This concern is compounded by the fact that the section imposes no specific time limit before notice must be given or an extension of delayed notice is sought. Prior to the PATRIOT
Act, in striking a balance between privacy concerns and law enforcement concerns, courts issuing delayed notice warrants typically limited delayed notice to 7 days and required the government to come back and justify any further delay.

We submit that neither the House nor Senate bills adequately addresses these concerns. The House bill does not narrow or remove the catchall justification. While the Senate bill deletes the phrase “or unduly delay a trial,” it would permit the FBI to conduct a sneak-and-peek search where contemporaneous notice would “seriously jeopardize an investigation.” In our view, this standard provides too little guidance to the court and is too loose to justify such an exceptional practice. We would urge that the catchall be eliminated entirely.

Neither bill imposes a satisfactory time limit on delay. The House bill permits delayed notice up to 180 days and extensions in 90-day increments. The Senate bill requires that delayed notice be provided by a date certain within a reasonable period of the warrant’s execution, as established by the court, and that extensions for good cause be justified by a showing of need for further delay. Each additional period of delay is to be limited to 90 days or less unless the facts justify a longer delay. These standards are too vague and allow too much discretion. We would urge that the section be amended to specify a specific duration for delayed notice—7 days has been used by courts in the past. The section also should be amended to provide that any further delays in notice should be permitted only upon a showing of need and then in increments of not more than 21 days. While some courts have upheld the constitutionality of delayed notice in the past, we submit that extended delays of the kind permitted by Section 213 or the House and Senate’s proposed amendments raise more serious constitutional concerns.

Sections 215 and 505—Orders to Produce Tangible Things and National Security Letters

Section 215 amended FISA’s “business records” provision. As amended, the statute permits the FBI to obtain orders from the FISA court compelling any person or organization to disclose “any tangible thing.” Prior to the PATRIOT Act, the FBI could not obtain an order under this provision unless it could show reason to believe that the person whose records were sought was a foreign agent. FISA also previously limited those from whom information could be sought to specified types of businesses; the PATRIOT Act eliminates any such limitation thus significantly expanding the reach of Section 215 to such varied institutions as libraries or hospitals. The
PATRIOT Act permits the FBI to obtain records pertaining to any person upon a certification that the records are “sought for” an authorized counterintelligence or terrorism investigation. Recipients of Section 215 orders are prohibited from disclosing to any persons, other than those necessary to produce the items, that the FBI has sought or obtained information from them.

Section 505 expanded the FBI’s authority to issue “national security letters” (NSLs). Issued unilaterally by the FBI, NSLs can be used to compel the disclosure of a wide variety of sensitive information from third-party possessors, including banks, credit reporting companies, and Internet service providers. Those served with NSLs are prohibited from disclosing to any person that the FBI has sought or obtained information from them. The FBI can issue an NSL upon a self-certification that the records are relevant to an authorized counterintelligence or terrorism investigation.

Sections 215 and 505 raise a number of similar concerns. Neither provides that organizations served with surveillance orders may seek judicial review of the FBI’s demand before complying with it. In the case of Section 215, the FBI cannot serve a surveillance order without obtaining prior authorization from the FISA court, but this authorization is granted solely on the basis of the FBI’s statement that the records are sought for an authorized investigation to “protect against international terrorism or clandestine intelligence activities.” No showing of probable cause or individualized suspicion is required. Further, the broad reach of both provisions, without requiring any showing of relevancy, increases the likelihood that they can be used to sweep up unusually sensitive records of innocent persons. Former Attorney General John Ashcroft testified before the House Judiciary Committee in June 2003 that Section 215 could be used to obtain library records, educational records, computer files, and even genetic information.

In the case of Section 505, the FBI’s surveillance activity is conducted without prior judicial authorization of any sort. Moreover, the gag order provisions of Sections 215 and 505 deter recipients from seeking the advice of legal counsel and prevent judicial challenges by recipients or persons whose information is the subject of a 215 order or an NSL. The absence of meaningful judicial review—or of any judicial review, in the case of Section 505—means that constitutional rights are left unprotected and that the surveillance authorities can be easily abused. Indeed, a federal district court in New York recently invalidated Section 505 on this basis. See Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), appeal pending sub nom Doe v. Gonzales, No. 05-0570-CV (2d Cir.). The Association be-
lieves that requiring meaningful judicial review would protect constitutional rights without undermining the FBI’s ability to conduct legitimate investigations.

The gag order provisions of Sections 215 and 505 also raise First Amendment concerns. Both statutes prohibit third parties whom the FBI approaches for information from disclosing to any other person that the FBI has sought or obtained information from them. While the Association believes that such secrecy may be necessary in unusual cases, the gag provisions raise serious concerns because they impose secrecy with respect to every investigation without requiring the FBI to make any particularized showing that such secrecy is necessary. Moreover, the current provisions do not provide for any termination of the non-disclosure provision; the secrecy they require is permanent. As a result, recipients and others affected by the 215 orders or NSLs are unable to bring abuses of these provisions to the attention of Congress or the public.

Two district courts in the Second Circuit have found the gag provision unconstitutional for this reason. See Doe v. Ashcroft, supra, 334 F.Supp. at 524-25; Doe v. Gonzales No. 3:05-CV-1256 (D. Conn. Sept. 9, 2005), appeal pending No. 05-4896 (2d Cir.).

The Senate bill would address some of the problems with Section 215. For example, S. 1389 would amend the statute to allow for judicial review of the relevance of the information sought. It also specifies that the reviewing judge shall issue an order only if the judge finds that the facts included in the application do, in fact, establish reasonable grounds to believe that the information sought is relevant to an authorized investigation. The Association believes that these amendments are preferable to the amendments proposed by HR 3199, which are unlikely to meaningfully increase the judicial review afforded to FBI surveillance conducted under this provision. The Association supports the proposed amendments specifying that organizations served with Section 215 orders may themselves challenge the validity of the orders before a federal judge—in the same way that recipients of grand jury subpoenas are permitted to do. The Association believes that such procedural safeguards would protect individual rights without compromising the FBI’s ability to conduct legitimate investigations.

The House and Senate bills would also address some of the problems with Section 505. Most importantly, they would both make clear that recipients of NSLs may challenge the FBI’s demand in court before complying with it.

The House and Senate bills also make clear that the non-disclosure
provisions of Sections 215 and 505 do not bar disclosure to legal counsel. Both bills, however, fail to address most of the other problems with these non-disclosure provisions. In particular, neither bill would require the FBI to demonstrate the necessity of secrecy on a case-by-case basis. As is the case with prior restraints in other contexts, the Association believes that the government should bear the burden of demonstrating the need for non-disclosure. In addition, the Association urges the conferees to amend the law to ensure that any non-disclosure obligation is limited to the length of time for which the FBI can demonstrate its need. Finally, the Association believes that judicial review of any non-disclosure obligation must be meaningful, and not merely pro forma. While both bills provide that recipients of 505 orders may seek judicial review of the non-disclosure obligation, the bills require the courts to defer to the FBI’s certification that secrecy is necessary. With respect to Section 215, the Senate bill specifies the availability of judicial review of the non-disclosure obligation, but the House bill does not, and the judicial review contemplated by the Senate bill appears to be toothless, because the FBI is not required even to aver that secrecy is necessary. The Association believes that the First Amendment requires “strict scrutiny” in this context and that the FBI’s legitimate needs can and should be accommodated without retreating from this well-settled constitutional standard.

In sum, while Section 1389 better addresses some of the problems with the sections of the PATRIOT Act discussed above, than does H.R. 3199, neither bill satisfactorily addresses many of the most serious problems. The Association, therefore, urges the conferees, and Congress when a final bill reaches the floor for a vote, to make the revisions to the PATRIOT Act recommended in our comments set forth above. The Association submits that such revisions will not undermine national security, and are necessary to preserve the civil liberties which are the foundation of our constitutional democracy.
Proposed Prosecutorial Ethics Rules

The Committee on Professional Responsibility

OVERVIEW

The Association of the Bar’s Professional Responsibility Committee undertook an examination of the ethics provisions governing prosecutors to determine whether the current disciplinary rules adequately reflect the unique role and responsibilities of these government lawyers. To the extent that the current provisions did not include obligations imposed upon prosecutors, the committee examined whether it should propose that New York’s disciplinary code be revised. After careful study, the Committee recommends the adoption of additional ethical provisions in three distinct areas. These are:

(a) Prosecutor’s duty to convicted defendant when presented with evidence of innocence;
(b) Standard for a prosecutor to take a case beyond the charging stage; and,
(c) Prosecutor’s special duty of candor to the court

In formulating these provisions, we reviewed pertinent case law and scholarly literature, and the current disciplinary provisions of jurisdictions throughout the United States. We focused upon New York’s disci-
plinary rule, DR 7-103 ((Performing the Duty of Public Prosecutor or Other Government Lawyer) and the comparable Model Rule 3.8 (Special Responsibilities of a Prosecutors) adopted with modifications in most jurisdictions, as well as the proposal of the New York State Bar’s Committee on Standards of Attorney Conduct (COSAC). COSAC is engaged in a thorough review of the entire New York Code of Professional Responsibility and it made specific recommendations regarding the ethics provisions governing prosecutors. We set forth each of these provisions and the COSAC report at the end of this report. In making these recommendations, we take no position on the language of Rule 3.8 as proposed by COSAC.

BACKGROUND

The longstanding recognition that a prosecutor is a “minister of justice” and not simply an advocate, led to the 1969 adoption of a disciplinary provision that reflected a few of the prosecutor’s special responsibilities. That rule, DR 7-103 (Performing the Duty of the Public Prosecutor or Other Government Lawyer) has remained virtually unchanged since its 1969 adoption by the American Bar Association in the Model Code of Professional Responsibility. It addresses only the standard for instituting criminal charges and the disclosure of evidence obligation.

Fourteen years later when the ABA adopted the Model Rules, Rule 3.8 (Special Responsibilities of a Prosecutor) contained a few additional provisions about the prosecutor’s obligations to (1) the accused regarding obtaining counsel and to (2) unrepresented defendants. Despite the literature pointing to the necessity for additional disciplinary rules for prosecutors, R 3.8 has remained virtually unchanged since then except for adoption of two amendments limiting the issuance of subpoenas to lawyers (3.8(e)) and public statements by prosecutors (3.8(g)).

Some individual state ethics codes have added provisions to their version of R 3.8. See e.g., D.C. Rules of Professional Conduct R 3.8(d)

1. See Model Code of Professional Responsibility EC 7-13; Model Rule of Professional Conduct R. 3.8, Comment.

PROPOSED PROSECUTORIAL ETHICS RULES

(2000) (providing that a prosecutor shall not “intentionally avoid pursuit of evidence of information because it may damage the prosecution’s case or aid the defense”); Mass Rules of Prof’l Conduct R 3.8(h) (2001) (providing that a prosecutor shall “not assert personal knowledge or the facts in issue, except when testifying as a witness”); See Kuckes Report, fn 2.

The American Bar Association’s “Ethics 2000” Commission, whose recommendations were adopted nearly in their entirety in February 2002 by the ABA House of Delegates, did not expand Rule 3.8 or make substantive additions to the rules governing prosecutors. Despite submissions from some lawyers and academics and the comprehensive report of the Criminal Justice Standards Committee of the ABA Criminal Justice Section pointing out troubling prosecutorial conduct not addressed in ethics provisions, the substantive rule was not changed.

The New York State Bar Association has undertaken a revision of its entire disciplinary code. The NYSBA’s Committee on Standards of Attorney Conduct (COSAC), whose work will continue through 2006, issued for public comment its proposed Rule 3.8 concerning the special responsibilities of prosecutors. Modeled upon R 3.8, it makes a few additions to the current DR 7-103 and Model Rule 3.8. It does not address many of the concerns of commentators nor reflect many of the prosecutorial obligations imposed by case law. Significant among those is the prosecutor’s obligation to the factually innocent and its duty of candor.

MISSION

Our initial task was to review the literature to determine whether it was advisable to propose additional ethical rules for prosecutors. Recognizing the complex system of regulation of prosecutorial conduct including internal enforcement, judicial review, and disciplinary sanctions, our committee decided that a comprehensive review of all aspects of prosecutorial action was neither desirable nor workable. Nor was it deemed useful to enter into the longstanding controversies about certain prosecutorial obligations, notably the R. 4.2 no-contact rule debate and the ongoing issue regarding evidence that should be presented to a grand jury.

Instead, we identified a series of issues that were of greatest concern to the prosecutor’s duty to justice. We were guided by the question of whether there are workable and enforceable standards that can augment the existing rules governing prosecutors. We asked whether a new rule would serve a useful purpose. We did not propose rules for most aspects of prosecutorial discretion, nor for the prosecutor’s duty to victims. Neither
did we suggest additional rules governing the prosecutor’s responsibility when confronted with incompetent defense counsel.

We reviewed other obligations imposed upon prosecutors by case law, court rules, the ABA Standards on the Prosecution Function, custom and practice, and the ethical rules of other jurisdictions. While we continue to recognize that the nature of criminal prosecutions in 2005 may raise questions about a need for a comprehensive review of ethical obligations of prosecutors, we declined to pursue that long term project. Instead, the three areas that we address are among the most useful and necessary to establish norms and provide enforceable rules.

FORMAT OF THE REPORT

This report is presented as follows:

(a) Proposed Rules set forth below (in bold)
   2. Background
   3. Comment to the Rule

The format of the Proposed Rules is not always consistent with the current structure of the New York Code or the Model Rules.

I. PROSECUTOR’S OBLIGATION TO THE FACTUALLY INNOCENT

A prosecutorial office shall:

(a) investigate the merits of a convicted person’s innocence claim submitted to the prosecutorial office where the assertions made by the person, if true, would raise a reasonable probability that he did not commit the offense for which he was convicted, and he identifies new material evidence, whether or not defense counsel could have found it by the exercise of due diligence that supports his assertion;

(b) disclose to the convicted person any Brady material that comes to the prosecution’s attention that was available prior to the defendant’s conviction but not previously disclosed; and,

(c) where there is clear and convincing evidence that the person did not commit the offense, join in a motion to set aside the prior judgment.
Background

A. In light of the large number of cases in which convicted defendants have been exonerated, most often as a result of DNA testing but also as a result of other proof that they were wrongfully convicted, it is appropriate to obligate prosecutors’ offices to give serious consideration and devote office resources to the consideration of credible post-conviction claims of innocence.

The literature recognizes such an obligation. Professor H. Richard Uviller, who is the former head of the appeals unit in the Manhattan D.A.’s office, posits that when there is “a firmly based charge that . . . an innocent person was convicted, . . . [a]ll efforts must be bent to the diligent investigation of the claim and, if substantiated, it is incumbent upon the [prosecutor] . . . to urge immediate remedy to assist the court in righting the wrong.” Uviller writes:

...where a post-judgment motion goes directly to the issue of guilt, the prosecutor is returned to the pre-adversary mode, and neutrality must resurface. A critical prosecution witness recants; a cop is accused of fabricating evidence in another case; a DNA test discloses that the defendant could not have been the rapist. Upon tenable grounds for such allegations, the prosecutor must resume the role of neutral investigator. A thorough and dispassionate investigation of the new development must be made, and, where the result warrants, the prosecutor must not hesitate to cancel the victorious judgment and see that justice is done in the light of the amplified or revised facts. We have read of instances in which DNA evidence has unequivocally contradicted eyewitness testimony, and the prosecutor refuses to join in the motion to set aside the prior judgment or to move to dismiss the charges after the court does so. This seems to me a grievous deviation from the role of neutral servant of justice, which the prosecutor is duty-bound to fulfill...a firmly based charge that a woeful mistake was made, that an innocent person was convicted, is not to be taken lightly. We know such mistakes are made (though we have no inkling how frequently) and each one threatens the probity of the entire system. All efforts must be bent to the diligent investigation of the claim and, if substantiated, it is incumbent upon the people’s repre-
sentative, the guardian of the integrity of the process, to urge immediate remedy to assist the court in righting the wrong.4

Professor Bruce A. Green argues that there should be an ethical standard to confess error and seek redress when post-trial evidence indicates that an innocent person was convicted. Ethics 2000 and Beyond: Reform, Or Professional Responsibility As Usual?: Prosecutorial Ethics As Usual, 2003 Ill. L. Rev. 1573, 1593-94 (2003) (footnotes omitted). Recognizing the fallibility of the trial process, and noting that the ABA Model Rules of Professional Responsibility, R. 3.8(a) is “silent about the prosecutor’s duty in these circumstances, Green cites to Young v. United States, 315 U.S. 257, 258 (1942) and Houston v. Partee, 978 F.2d 362 (7th Cir. 1992) in arguing that there is a duty to “confess error” and seek redress when post-trial evidence indicates that an innocent person was convicted. (Young stated that “[t]he public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when . . . a miscarriage of justice may result from their remaining silent”).

b. Threshold for Initiating a Re-investigation

The federal statute “Advancing Justice Through DNA Technology Act of 2003”, in § 311, dealing with establishing rules and procedures governing applications for DNA testing by inmates in the Federal system, provides that “a court shall order DNA testing if the applicant asserts under penalty of perjury that he or she is actually innocent of a qualifying offense, and the proposed DNA testing would produce new material evidence that supports such assertion and raises a reasonable probability that the applicant did not commit the offense... Penalties are established in the event that testing inculpates the applicant. Where test results are exculpatory, the court shall grant the applicant’s motion for a new trial or re-sentencing if the test results and other evidence establish by a preponderance of the evidence that a new trial would result in an acquittal of the offense at issue.” (emphasis added).

In another context, the Supreme Court in Schlup v. Delo,115 S.Ct. 851 (1995) stated that “[t]o be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.”Id. at 866 (emphasis added).

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Under New York CPL§440.10(g), a defendant is entitled to have a judgment vacation if he produces new evidence which “is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.”

Commentary

(a) The term “new material evidence” is distinct from “newly discovered evidence,” a term found in New York’s post-conviction statute and law. The reason for the distinction is to recognize that the prosecutor’s ethical obligation to the factually innocent may be different from its legal obligation. To vacate a conviction under New York Criminal Procedure Law sec. 440.10(g), the successful movant must produce newly discovered evidence, which is:

[new evidence [that] has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.]

(emphasis supplied.)

New material evidence is defined for purposes of the rule to include evidence that could have been found by due diligence of counsel but was not. (Many, if not most, innocence claims arise in instances where the defense could have found the evidence). While evidence must be newly discovered to succeed on a new trial motion, a prosecutorial office’s responsibility to serve the interests of justice should obligate it to go beyond that standard where a defendant supports a claim of factual innocence with new material evidence.

It is appropriate to impose a duty to investigate on a prosecutorial

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5. CPL 440.10(g) codified the New York Court of Appeals’ decision fifty years ago in People v. Salemi 309 N.Y. 208, 216 (1955), which held that to justify setting aside a conviction, the evidence presented “1. ...must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could have not been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and, 6. It must not be merely impeaching or contradicting the former evidence.”
office when the defendant comes forward with evidence meeting the standard of “probability that had the evidence been received at trial the verdict would have been more favorable to the defendant.”

(b) The proposed rule is based upon Brady v. Maryland, 373 US 83 (1963), Imbler v. Pachtman 424 US 409, 427 n. 25 (1976), and last year’s Supreme Court decision in Banks v. Dretke, 540 U.S. 668 (2004).

Brady holds that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Brady v. Maryland, 373 U.S. at 87 (1963).

While the Brady rule was fashioned in a pre-conviction context, the continuing nature of that duty was expressed in Imbler v. Pachtman and made explicit in Banks v. Dretke, notably for evidence in the prosecutor’s possession at the time of the conviction. “…[T]he very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence [referring to DNA evidence sought post-conviction that could prove innocence beyond any doubt]. And it does so out of recognition of the same systemic interests in fairness and ultimate truth.” Harvey v. Horan, 285 F.3d 298, 317 (4th Cir. 2002) (Judge Luttig, concurring in denial of rehearing en banc).

In Imbler v. Pachtman, 424 U.S. 409, the Court explicitly stated that a prosecutor “is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.” Imbler, at 427, n. 25. In Imbler, after obtaining a murder conviction and a death sentence, a deputy district attorney discovered evidence that tended to corroborate the defendant’s alibi and undermine the credibility of one of the prosecution’s chief witnesses. The prosecutor wrote a letter to the Governor describing the newly discovered evidence and explaining that he felt he had “a duty to be fair and see that all true facts whether helpful to the case or not, should be presented.” Id. at 413. The affirmative steps taken by the district attorney to correct a potentially erroneous conviction provide a model of prosecutorial conduct to which all prosecutors should be obligated to adhere.

In Banks v. Dretke 540 U.S. 668, the Court granted a death row inmate habeas corpus relief where the prosecutor had failed to provide him with available exculpatory evidence both prior to trial and during the petitioner’s post-conviction litigation. The Supreme Court held that the state’s suppression of evidence of a witness’s informant status constituted “cause” for the petitioner’s failure to present such evidence in support of
his Brady claim at the state post-conviction proceeding. The Court concluded that the petitioner had reasonably relied on the prosecution’s pre-trial promise to disclose all Brady material, and since the state had continued to deny that the witness was an informant at the state post-conviction proceeding, the petitioner could not be faulted for having failed to produce the evidence.

Judge Luttig’s analysis in Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002) of whether a prisoner has a post-conviction constitutional due process right of access to exculpatory evidence in the state’s possession [particularly where the evidence, as in the case of DNA, could completely exonerate the prisoner] supports the soundness of this ethics provision. Judge Luttig reasoned that it is

constitutionally intolerable for the government to withhold from the convicted, for no reason at all, the very evidence that it used to deprive him of his liberty, where he persists in his absolute innocence and further tests of the evidence could, given the circumstances of the crime and the evidence marshaled against the defendant at trial, establish to a certainty whether he actually is factually innocent of the crime for which he was convicted. The denial of access in this circumstance would not be . . . the strict equivalent of bad-faith destruction of potentially exculpatory evidence. See Arizona v. Youngblood, 488 U.S. 51. But in a system that prizes fairness and truth above all else, it comes so perilously close to such as not to be permitted.

285 F. 3d at 318.

While prosecutors do not yet have a post-conviction constitutionally mandated obligation to disclose exculpatory evidence, there should be a clear ethically mandated responsibility to do so at least to the extent that the evidence was available prior to the defendant’s conviction and not disclosed. See Kohn, Brian T., Brady Behind Bars: The Prosecutor’s Disclosure Obligations Regarding DNA In the Post-Conviction Arena, 1 Cardozo Pub. L. Pol’y & Ethics J. 35 (2003) (arguing for a more expansive post-conviction obligation compelled by the Supreme Court’s decision in Brady, but by the ethical responsibilities of prosecutors as well).

(c) The appropriate standard for the prosecution to join in a motion to set aside a prior judgment of conviction is “clear and convincing evidence.” Miller v. Commissioner of Correction, 242 Conn. 745, 700 A.2d 1108 (1997), one of the few cases to consider this issue in a post-conviction case reasoned:
In consideration of a proper balance of the interests at stake in the evaluation of a freestanding claim of actual innocence, of the well established jurisprudence regarding the functions of an appropriate burden of proof for a particular category of case, and of the remedy that would follow from a determination in a habeas proceeding of actual innocence, we conclude that the most appropriate standard of proof is as follows. First, taking into account both the evidence produced in the original criminal trial and the evidence produced in the habeas hearing, the petitioner must persuade the habeas court by clear and convincing evidence. 6 Id. at 784-95, as that standard is properly understood and applied in the context of such a claim, that the petitioner is actually innocent of the crime of which he

6. In describing the "clear and convincing evidence" standard, the Connecticut Court wrote:

The clear and convincing standard of proof is substantially greater than the usual civil standard of a preponderance of the evidence, but less than the highest legal standard of proof beyond a reasonable doubt. It "is sustained if the evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist."


Although we have characterized this standard of proof as a "middle tier standard"; J. Frederick Scholes Agency v. Mitchell, 191 Conn. 353, 358, 464 A.2d 795 (1983); and as "an intermediate standard"; State v. Davis, supra, 229 Conn. at 293, 641 A.2d 370; between the ordinary civil standard of a preponderance of the evidence, or more probably than not, and the criminal standard of proof beyond a reasonable doubt, this characterization does not mean that the clear and convincing standard is necessarily to be understood as lying equidistant between the two. Its emphasis on the high probability and the substantial greatness of the probability of the truth of the facts asserted indicates that it is a very demanding standard and should be understood as such, particularly when applied to a habeas claim of actual innocence, where the stakes are so important for both the petitioner and the state. We have stated that the clear and convincing evidence standard "should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory." (Internal quotation marks omitted.) Lopinto v. Haines, 185 Conn. 527, 539, 441 A.2d 151 (1981).

Thus, we see no functional difference between this standard, properly understood, and the formulations in Herrera v. Collins, supra, 506 U.S. 390, 113 S.Ct. 853, of both the majority—"a truly persuasive demonstration of 'actual innocence' " (emphasis added) id., at 420, 113 S.Ct. at 871; and the concurring opinion of Justices O'Connor and Kennedy—"extraordinarily high and truly persuasive demonstration[s] of actual innocence." (Internal quotation marks omitted.) Id., at 426, 113 S.Ct. at 874. Indeed, in Carriger v. Stewart, 95 F.3d 755, 757 (9th Cir.1996), the Court of Appeals equated the Herrera standard that the petitioner must " unquestionably establish [his] innocence" with the clear and convincing evidence standard.
stands convicted. Second, the petitioner must establish that, after considering all of that evidence and the inferences drawn therefrom, as the habeas court did, no reasonable fact finder would find the petitioner guilty.

700 A.2d at 1130-31. Thus, if a defendant has made a sufficient showing to meet the “clear and convincing” standard, the prosecutor should join with the defendant in moving to vacate the conviction, rather than forcing the defendant to undergo the delay attendant upon court proceedings.

(d) This rule imposes an obligation not only upon the individual prosecutor, but upon the office that prosecuted the defendant. In carrying out the requirements of this Rule, the prosecutor’s office should insure that there is an appropriate procedure in place to implement this responsibility. The prosecutor’s office should also consider recommending that a witness be granted immunity if he/she wishes to testify at a post-conviction hearing at variance with his/her trial testimony, so as to safeguard the convicted person’s opportunity to obtain essential exculpatory testimony. See Bennett Gershman, The Prosecutor’s Duty to Truth, 14 Geo. J. Legal Ethics 309, 335 (2001) (suggesting that prosecutors have the duty to immunize potentially truthful defense witnesses); United States v. Chitty, 760 F. 2d 425 (2d Cir. 1985) (holding that due process requires granting of immunity to defense witnesses to safeguard defendant’s right to essential exculpatory testimony and right to compulsory process); United States v. DePalma, 476 F. Supp. 775, 781 (S.D.N.Y. 1979) (prosecutor’s denial of immunity to defense witnesses while building case through immunity grants to government witnesses denied defendant fair trial); People v. Shapiro, 50 N.Y. 2d 747, 409 N.E.2d 897, 905 (N.Y.1980) (after prosecutor’s threats drove defense witnesses from stand, court authorized new trial only if prosecutor extended immunity to those witnesses).

II. STANDARD TO TAKE CASE BEYOND THE CHARGING STAGE

Proposed Rule 3.8(a)

A prosecutor or other government lawyer in a criminal case shall:

(1) Not institute or cause to be instituted a charge that the prosecutor or other government lawyer knows or reasonably should know is not supported by probable cause, or prosecute to trial or continue to prosecute a charge that the prosecutor knows or reasonably should know is not supported by evidence sufficient to establish a prima facie showing of guilt.
Background

Both New York Disciplinary Rule 7-103 and Model Rule 3.8 require probable cause to institute criminal charges, but neither address the standard to take a case beyond the charging stage. New York Disciplinary Rule DR 7-103 “Performing the Duty of Public Prosecutor or Other Government Lawyer” states:

(a) A public prosecutor or other government lawyers shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.

The New York State Bar Association Committee on Standards of Attorney Conduct (COSAC) has proposed the following rule: (See attached for the COSAC 3.8 recommendation) The prosecutor shall:

Not institute or cause to be instituted a charge that the prosecutor or other government lawyer knows or reasonably should know is not supported by probable cause, or prosecute to trial or continue to prosecute a charge that the prosecutor knows or reasonably should know is not supported by evidence sufficient to establish a prima facie showing of guilt.

As the attached COSAC commentary states, this rule follows DR 7-103 in “making clear that government lawyers who assist or bring about a criminal prosecution are subject to the Rule’s requirements and that the required intent is both subjective (“knows”) and objective (“reasonably should know”).

We believe that the standard to continue a case beyond the charging stage must be higher than probable cause. We consider “evidence to support a prima facie showing of guilt” to be an appropriate standard in most cases but suggest adding commentary regarding mitigation as described below.

In some cases, there may not be admissible evidence to establish a prima facie case but the prosecutor has a firm belief in the guilt of the defendant based upon excluded evidence, e.g., a suppressed tangible item or confession. In such case, we believe that if the prosecutor proceeds to trial on evidence later deemed insufficient as a prima facie showing, the prosecutor’s belief in the defendant’s guilt, based upon that the inadmissible evidence, should be considered as a mitigating factor. We therefore propose the following be added in commentary to the rule:
(1) In considering the imposition of any sanctions under this section, evidence known to the prosecutor but unavailable or inadmissible in a court of law which might have tended to establish a prima facie showing of guilt may also be considered by the tribunal as a mitigating factor in the prosecutor or other government lawyer’s actions.

III. PROSECUTOR’S DUTY OF CANDOR

Proposed Rule

The prosecutor has a duty of candor to the Court:

(a) Duty to correct false testimony—The prosecutor has the duty to correct testimony of his witness that he knows or reasonably should know is false, by asking questions designed to elicit corrections and truthful testimony. If the prosecutor has reason to believe that his witness has committed perjury, the prosecutor must immediately bring that fact to the Court’s attention.

(b) Duty as to the presentence report—The prosecutor has the obligation of correcting any errors in the pre-sentence report that work to the detriment of the defendant, regardless of whether they are noticed by defense counsel.

(c) Duty to disclose material facts to the Court—A prosecutor shall not knowingly fail to disclose to the tribunal a material fact with the knowledge that the tribunal may tend to be misled by such failure.

Background

1. General—The Disciplinary Rules and the Model Rules have rules specifically addressed to prosecutors (see DR 7-103; MR 3.8), but neither rule addresses the topic covered by the proposed rule – aspects of the prosecutor’s obligation of candor to the Court. The question of prosecutorial candor is spelled out by Bruce Green in Ethics 2000 and Beyond: Reform, Or Professional Responsibility As Usual?: Prosecutorial Ethics As Usual, 2003 Ill. L. Rev. 1573, 1593-94 (2003) (footnotes omitted):

[D]oes the prosecutor have special disclosure obligations to the court? There is case law that suggests a number of unique obligations, including a duty: (1) to disclose to the tribunal material facts necessary to correct the court’s apparent or possible
misunderstandings of the facts bearing on the court’s decision; (2) to refrain in closing arguments from drawing inferences from circumstantial evidence that are contradicted by extra-record evidence which the prosecutor knows to be accurate; (3) to refrain from seeking a legal ruling that the prosecutor knows to be contrary to law; (4) to call the court’s attention to legal or procedural errors; and (5) to correct testimony of a prosecution witness, including testimony elicited by defense counsel on cross-examination, if the prosecutor knows or reasonably should know it is false. On these disclosure questions, . . . Rule 3.8 is silent, and it is unclear whether they are adequately answered by the provisions on candor and confidentiality applicable to lawyers generally.

Professor Bennett L. Gershman, in *The Prosecutor’s Duty to Truth*, 14 Geo. J. Legal Ethics 309 (2001), provides a comprehensive analysis of these legal duties imposed on prosecutors. The proposed rules address three of these issues.

**Comment**

1. **Paragraph (a)**—If a prosecutor knows or reasonably should know that a witness has offered false testimony, the prosecutor must ask questions designed to elicit a correction. The prosecutor should be permitted to lead the witness at such times, although leading might otherwise be improper. If the prosecutor realizes that a witness is not simply mistaken, but is committing perjury, then the prosecutor has the obligation to bring that fact to the attention of the court immediately. The obligation to bring perjured testimony to the court’s attention applies regardless when the prosecutor learns of the perjury—that is, whether during or after the testimony (or even after the trial). See *United States v. Wallach*, 935 F. 2d 445 (2d Cir. 1991).

2. **Paragraph (b)**—The burden of candor on the prosecutor is especially great during the sentencing phase of proceedings because the prosecutor exercises such tremendous influence at that phase. It has been often noted that prosecutors exercise a tremendous amount of discretion in connection with sentencing (especially in the federal courts); prosecutors have a great deal of input into the content and terms of pre-sentence reports that are authored by probation departments. Courts rely extensively upon these in sentencing. Thus, paragraph (d) focuses on an area—sentencing—in which the prosecutor’s function is very different from that of the defense counsel, and in which the prosecutor’s role as “minister of
justice” is especially clear. Thus, the prosecutor must correct any error that works to the detriment of the defendant.

3. Paragraph (c)—Paragraph (c) is similar to New Jersey’s version of 3.3 of the Model Rules, which provides that: “A lawyer shall not knowingly fail to disclose to the tribunal a material fact with the knowledge that the tribunal may tend to be misled by such failure.” For the purposes of this paragraph, the definition of “tribunal” does not include a jury.

Application of such a rule to defense counsel could be problematic, because it could run counter to defense counsel’s obligation to zealously defend the interests of the client. Paragraph (c) replaces the word “lawyer” with “prosecutor.”

IV. DUTIES SHOULD EXTEND TO PROSECUTOR’S OFFICE

Proposed Amendment to Rule’s Definitions

We propose that 22 N.Y.C.R.R §1200-01(b), the definition of “law firm” should be amended to include prosecutor’s offices as follows (the proposed new language is underlined):

a professional legal corporation, a limited liability company or partnership engaged in the practice of law, the legal department of a corporation or other organization, a prosecutor’s office, and a qualified legal assistance organization.

New York’s Disciplinary Rules apply in most instances to lawyers and law firms. While the definition of “law firm” is understood to include a prosecutor’s office, the term is not sufficiently specific.

May 2005
The Committee on Professional Responsibility

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INTRODUCTION

The Committee on Standards of Attorney Conduct ("the Committee") of the New York State Bar Association (NYSBA) is considering a revision of the rules of professional conduct governing New York lawyers. This project will continue through 2004 and 2005. The Committee is issuing for purposes of professional and public comment this proposed New York version of Model Rule 3.7. The proposed rule will be reconsidered in the light of submitted comments before the Committee recommends that the NYSBA House of Delegates adopt the rule.

The Committee invites interested persons or organizations to submit comments to the Committee by letter or e-mail to:

Kathleen M. Baxter, Esq.
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One Elk Street
Albany, NY 12207
E-mail: <kbaxter@nysba.org>

Comments may be submitted at any time, but will be most effective if received within six weeks of the date of publication of the proposed rule.

Proposed Rule 3.8 concerns the special responsibilities of prosecutors. Paragraph (a) of the Proposed Rule requires a prosecution not be instituted without probable cause or continued without evidence sufficient to establish a prima facie showing of guilt. Paragraph (b) prohibits conduct that would prevent the accused from exercising the right to counsel. Paragraph (c) prevents a prosecutor from seeking waiver of important pretrial rights from an unrepresented accused. And paragraph (d) requires a prosecutor make timely disclosure to the defense of evidence or information negating guilt or mitigating the offense or sentence.

On the following pages the left-hand column contains the text of the proposed rule (in bold type), followed by comments on the rule’s text that illuminate and explain its meaning and application. The right-hand
column contains the Committee’s commentary on the text and its comments; the commentary states the policy choices made in accepting or departing from New York’s current disciplinary rule on the topic or the ABA Model Rule of the same number.

The columnar pages are followed by a Reporter’s Note that contains: (1) a brief history of ABA Rule 3.8 and its New York equivalent DR 7-103; (2) a discussion of the major departures of the Proposed Rule 3.8 from both ABA Rule 3.8 and DR 7-103; (3) the major policy issues raised by Proposed Rule 3.8; and (4) an appendix containing the text of the proposed rule, the corresponding provisions of ABA Model Rule 3.8 and of New York’s current disciplinary rules and other law.

### RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

A prosecutor or other government lawyer in a criminal case shall:

(a) not institute or cause to be instituted a charge that the prosecutor or other government lawyer knows or reasonably should know is not supported by probable cause, or prosecute to trial or continue to prosecute a charge that the prosecutor knows or reasonably should know is not supported by evidence sufficient to establish a prima facie showing of guilt;

(b) not seek to prevent the accused from exercising the right to counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) except when the prosecutor is relieved of this responsibility by a protective order of the tribunal, (i) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or to mitigate the offense, and (ii) in connection with sentencing, disclose to the defense and to

### COMMENTARY

¶ (a) follows DR 7-103 in making it clear that government lawyers who assist or bring about a criminal prosecution are subject to the Rule’s requirements and that the required intent is both subjective (“knows”) and objective (“reasonably should know”). ¶ (a) adopts the language of the 1984 Halpern report in its first clause; and follows D.C. in requiring a slightly higher standard (a prima facie showing of guilt) to take a charge to trial or continue the trial.

¶ (b), which has no counterpart in the New York code, also departs from ABA Rule 3.8(b) in stating the prosecutor’s obligation to protect an accused’s right to counsel in negative rather than affirmative language.

¶ (c), which has no counterpart in DR 7-103, is identical to its ABA counterpart.

¶ (d) is similar to ABA Rule 3.8(d), except that the “except clause” is moved from the end of ¶ (d) to its beginning to make it clear that the clause modifies everything that follows. The provision differs from DR 7-103(b) in two respects: the rule relates the nature of the disclosure obligation to the stage of the proceeding,
the tribunal all [unprivileged] information known to the prosecutor that tends to mitigate the sentence;

[(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;
(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
(3) there is no other feasible alternative to obtain the information;]

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

treating the trial and sentencing stages separately; and the except clause recognizes the authority of a court in a particular case to alter the prosecutor's responsibility by means of a protective order. The word "unprivileged" is bracketed because the Subcommittee desires further consideration of whether this qualification is necessary or desirable.

¶ (e) is virtually identical to its ABA counterpart. The paragraph is placed in brackets because the subcommittee is divided on whether it should be included in the rule. ¶ (e)(1) differs from ABA Rule 3.8(e)(1) in making it clear that the work product doctrine, as well as the attorney-client privilege, protects client files. There is no counterpart to ¶ (e) in DR 7-103.

¶ (f) is identical to ABA Rule 3.8(f). There is no counterpart to ¶ (f) in DR 7-103.
[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Applicable New York or federal law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

Comment [1] follows ABA Comment [1] except that two sentences referring to the ABA Standards of Criminal Justice Relating to the Prosecution Function and other law have been deleted and a reference to “New York or other applicable federal law” added to the last sentence.

Comment [2] is identical to ABA Comment [2].

Comment [3] is identical to its ABA counterpart.

Comment [4] is identical to its ABA counterpart.
Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(d).

Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer’s office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

Comment [5] is identical to ABA Comment [5], except that the reference to one paragraph of Rule 3.6 in the last sentence has been changed to reflect the changed numbering of the proposed rule. The intent, as in ABA Comment [5], is to refer to the “safe harbor” paragraph and the “right to respond” paragraph.

Comment [6] is identical to its ABA counterpart.
A. Relevant History

1. *ABA Model Rule 3.8*. The text of Rule 3.8 has remained substantially unchanged since its original adoption in 1983, although two amendments have struggled with the wording of former paragraph (f) [now paragraph (e)] that seeks to limit the issuance of lawyer subpoenas in grand jury or other criminal proceedings to those situations in which there is a genuine need to penetrate lawyer confidentiality. Originally adopted in 1990, the subpoena provision was amended in 1995 to reflect court decisions and prosecutorial objections that a part of the rule that required judicial approval of lawyer subpoenas amended criminal procedure codes and was not a rule of professional ethics. A 1994 amendment added a new paragraph (g) [now (f)] permitting prosecutors to make statements “necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose,” even if those statements may heighten “public condemnation of the accused.” Stylistic amendments proposed by the Ethics 2000 Commission were approved by the ABA in 2002: former paragraph (e), dealing with prosecutors exercising reasonable care to prevent law enforcement personnel from making improper statements, was moved to become a second sentence of former paragraph (g), which also deals with trial publicity, and paragraphs (f) and (g) were renumbered as (e) and (f). A new Comment [6] was added discussing improper extrajudicial statements by law enforcement personnel.

2. *New York DR 7-103* is identical to DR 7-103 of the ABA Model Code of Professional Responsibility except that stylistic changes have removed two male gender references.

3. *The Halpern Report* in 1984 recommended the adoption of ABA MR 3.8 with one change in the text and the deletion of several sentences from then Comment [1] which discussed the ABA Standards of Criminal Justice Relating to Prosecution Function. The text change preserved the language of paragraph (A) of DR 7-103 so that MR 3.8(a) would read “The prosecutor in a criminal case shall: (a) not institute or cause to be instituted or prosecute criminal charges that the prosecutor knows are not supported by probable cause” instead of “(a) refrain from prosecuting a charge that prosecutor knows is not supported by probable cause.”
B. Major Differences Between Proposed Rule 3.8 and ABA Rule 3.8

1. The proposed rule applies to “a public prosecutor or other government lawyer in a criminal case” rather than “a prosecutor.” The change, following DR 7-103(A), makes it clear that a government lawyer who has assisted or caused a prosecutor’s violation of the rule is culpable.

2. Paragraph (a) has been modified in several respects: first, “institute or cause to be instituted” is substituted for “prosecuting”; second, the intent standard is changed from “knows” to “knows or reasonably should know;” and third, before a prosecutor may take a charge to trial or continue to prosecute it, the charge must be supported by a prima facie showing of guilt. The first two changes stem from DR 7-103(A); the third follows the D.C. version of Rule 3.8(a).

3. Paragraph (b) has been converted from an affirmative duty to assist an accused in obtaining counsel to a prohibition against interfering with the accused’s right to counsel.

C. Major Differences Between Proposed Rule 3.8 and DR 7-103

1. Paragraph (a), following the D.C. version of Rule 3.8(a), provides that a charge must be supported by a prima facie showing of guilt to be taken to trial or continued.

2. Paragraphs (b) and (c) of the proposed rule are not included in DR 7-103. They deal, respectively, with protection of an accused’s right to counsel and with efforts to have an unrepresented accuse waive important pretrial rights. Paragraphs (e) and (f) also have no counterpart in DR 7-103; they deal with subpoenas to lawyers and extrajudicial statements.

3. Paragraph (d), unlike DR 7-103(B), follows ABA Rule 3.8(d) in stating the prosecutor’s obligation to disclose exculpatory information to the defendant in terms of the stage of the proceeding: before trial and before sentencing. However, the substance of both rules is much the same.

D. Major Policy Issues Raided by Proposed Rule 3.8

1. Paragraph (a): scienter, application, standard for taking a case to trial. In paragraph (a), should the intent standard be actual knowledge (as in ABA Rule 3.8(a)) or “knows or reasonably should know” as in DR 7-103(A)? Should the paragraph apply to “other government lawyers” who “cause a prosecution to be instituted”? Should a prima facie showing of guilt be required before a prosecutor may take a charge to trial or pursue it?

2. Accused’s right to counsel. Should paragraph (b), dealing with the accused’s right to counsel, be phrased as a duty not to prevent the exercise of the right, as in the proposed rule, or as an affirmative duty to assist the right, as in ABA Rule 3.8(b)?
3. **Waiver of important pretrial rights.** Should paragraph (c), prohibiting the prosecution from seeking waiver of important pretrial rights of an unrepresented accused, be included in the proposed rule?

4. **Disclosure obligations.** Should paragraph (d), dealing with the disclosure obligations of prosecutors, follow the language of ABA Rule 3.8(d) or that of DR 7-107(B)?

5. **Restrictions on subpoenas to lawyers.** Should paragraph (e), regulating subpoenas to lawyers for client information, be included in Proposed Rule 3.8?

6. **Preventing extrajudicial statements.** Should paragraph (f), dealing with prohibited extrajudicial statement by prosecutors and exercising reasonable care in preventing such statements by other law enforcement personnel, be included in Proposed Rule 3.8?

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**APPENDIX B:**

**TEXTS OF NEW YORK PROPOSED RULE, ABA MODEL RULE AND CURRENT NEW YORK DISCIPLINARY RULE**

**Proposed New York Rule 3.8: Special Responsibilities of a Prosecutor**

A prosecutor or other government lawyer in a criminal case shall:

(a) not institute or cause to be instituted a charge that the prosecutor or other government lawyer knows or reasonably should know is not supported by probable cause, or prosecute to trial or continue to prosecute a charge that the prosecutor knows or reasonably should know is not supported by evidence sufficient to establish a prima facie showing of guilt;

(b) not seek to prevent the accused from exercising the right to counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) except when the prosecutor is relieved of this responsibility by a protective order of the tribunal, (i) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or to mitigate the offense, and, (ii) in connection with sentencing, disclose to the defense and to the tribunal all [unprivileged]
information known to the prosecutor that tends to mitigate the sentence;

[(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege or the work product doctrine;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;]

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

ABA Model Rule 3.8: Special Responsibilities of a Prosecutor
The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the pros-
ecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

New York DR 7-103: Performing the Duty of Public Prosecutor or Other Government Lawyer

A. A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.

B. A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.
Statement on Civil Commitment of Sex Offenders: Senate Bill S6325 and Assembly Bill A9282

The Committee on Sex & Law, The Committee on Mental Health Law, The Committee on Criminal Law and The Committee on Criminal Justice Operations and Budget

Legislation permitting civil commitment of some sex offenders following completion of their prison sentences, under statutes directed at sex offenders specifically rather than general civil commitment laws, has been passed or is on the verge of being passed this year by both the New York State Assembly (A9282) and the Senate (S6325). The undersigned committees of the Association of the Bar of the City of New York are extremely concerned about these measures. Our committees do not believe, on balance, that such legislation is necessary or well-advised. Instead, we remain of the view that both civil rights and public safety are best protected by appropriate, but aggressive use of extant civil commitment statutes, combined with good post-release supervision and treatment plans. We also are concerned that this legislation would exacerbate the venomous and discredited\(^1\) stigma associ-

ating mental illness with violence, thereby effectively deterring people from seeking mental health treatments that are available in their communities.

However, we do share the Legislature’s concern for community safety, and its doubts that incarceration and currently available sex offender treatment are adequate to prevent some number of sex offenders from committing future acts of sexual violence. We also recognize that there is a substantial body of opinion to the effect that some form of civil commitment statute for sex offenders is one important mechanism for preventing some types of recidivism.

It cannot be overstated how readily sex offender civil commitment laws may be abused. Unwarranted community fears can produce statutes that allow civil commitment of sex offenders who in fact have no diagnosable mental illness or mental abnormality, or who do not present a real risk of serious sexual re-offense. The same misplaced fears can easily cause massive overuse of such statutes, effectively incarcerating many offenders for years past expiration of their criminal sentences, when community based-treatment and effective post-release monitoring could serve the same purpose at a far lower cost in dollars and civil liberties. Should a statute ultimately enacted by the Legislature lack the necessary standards and procedural protections to prevent such abuses, it will surely be successfully challenged in the state and federal courts. The toll in uncertainty, time and money misspent, not to mention lost liberty, will be significant.

Any measure the Legislature enacts should meet tests of constitutionality and sound policy at the outset. In order to assist the Legislature in crafting a sex offender civil commitment statute that meets these standards, the undersigned committees offer the following comments on A9282 and S6325.

At the outset, both bills are seriously flawed in a most basic respect: their definitions of offenders eligible for civil commitment are too sweeping to meet state or even the broader federal due process standards. Loosely modeled on a statute held constitutional by the United States Supreme Court in *Hendricks v. Kansas*, 521 U.S. 346 (1997), both bills target as candidates for commitment “sexual predators,” who are persons

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2. We question the extent to which funds currently allocated to the State Office of Mental Health (OMH) will be used to house and care for these offenders, many of whom may lack any treatable diagnosis under the DSM-IV-R. The limited resources the Legislature has allocated to OMH currently are insufficient to provide community-based services and treatment for people with mental illnesses.

3. We do not approve of the pejorative term “sexual predator,” because it is both vague and unnecessarily defines a person by behavior which may be correctable. We suggest, instead, that the term “sexual offender” or “serial sexual offender” (where appropriate) be used.
suffering from a “mental abnormality,” who have committed a predicate sex offense.

S6325 defines “mental abnormality” as “a congenital or acquired condition, disease or disorder that affects the emotional or volitional capacity of a person in a manner that predisposes him or her to the commission of an act or acts constituting a sexually violent offense and that results in serious difficulty in controlling behavior to a degree that the person is a menace to the health and safety of others.” The predicate sex offense that is a threshold requirement for commitment is, under S6325, a “sexually violent offense,” which, in turn, is simply any felony sex offense under Article 130 or other provisions of the Penal Law (including low level felonies such as statutory rape or surreptitiously recording someone in a dressing room), or another designated violent felony found to have been “sexually motivated,” which term is not further defined.

A8282 has a similar definition of “mental abnormality,” the standard being that a mental disease or disorder “creates serious difficulty for the person to control his or her unlawful sexual behavior [so that it is] likely that he or she will commit a felony sex offense in the future.” Like the Senate bill, the Assembly version makes the predicate conviction a conviction for any Article 130 felony offense or a designated felony that was sexually motivated. There is some attempt to define “sexually motivated,” and, unlike the Senate bill, youthful offender findings do not qualify.

First, it is doubtful that committing people with a personality disorder, but no other diagnosable mental illness, is permissible under New York State law, and even less clear whether an “emotional impairment” will suffice. The Court of Appeals has stated that dangerous propensity is an insufficient basis for commitment. In re Torsney, 47 NY2d 667, 684 (1979).

Moreover, although the language of these bills is identical in large part to that in the Kansas statute upheld in Hendricks v. Kansas, the Supreme Court has subsequently made clear that in order to meet due process standards, the offender must suffer from a “special and serious lack of ability to control” his or her unlawful behavior that “must be sufficient to distinguish the dangerous sexual offender...from the dangerous but typical recidivist convicted in an ordinary criminal case.” Kansas v. Crane, 534 U.S. 407, 413-414 (2002). While the language of a “predisposition to commission” of a sexually violent offense or “likely” to commit a felony sex offense may, on its face, be minimally adequate to pass this test, it is also clearly susceptible to much looser interpretation. Many jurisdictions have responded to this concern by employing more restrictive language, such as “substantially probable,” in describing the likelihood
that, as result of the mental abnormality, the offender will commit a
dangerous sex offense. New York's statute should do the same, in order to
remove any doubts about its constitutionality in this respect.

Nor are the predicate crimes that serve as the commitment threshold
sufficiently narrowed, under either version, to demonstrate the requisite
dangerousness or threat to safety. A number of the crimes of conviction
that could result in commitment proceedings involve no violence or abuse
of children at all. For instance, a 22 year-old first felony offender who
was convicted of the statutory rape of his 16 year-old girlfriend would be
a candidate for civil commitment, notwithstanding that his real likeli-
hood of reoffense was non-existent, and the conduct entirely consensual.
Even the Kansas statute in *Hendricks* involved a far more nuanced listing
of predicate offenses; New York's should do the same.

Having noted our objection to the basic definition of an eligible of-
fender in both versions of the sex offender commitment statute, we find
A09282 preferable in many respects to the Senate version. A9282 is a com-
prehensive statute that, while affording potential committees necessary
procedural protections, is crafted to ensure that it targets those dangerous
offenders who require treatment in restrictive settings and it provides for
such treatment. Its failure to make any provision for discharge procedures
and planning is very troubling, however, both from a public safety and a
civil liberty standpoint, and should be remedied. It is also problematic
that A9282 permits the Attorney General to file a commitment petition
even where a case review committee composed primarily of mental health
experts has recommended against it, and we urge that such unjustifiable
discretion be eliminated. We are concerned that in light of the Attorney
General's expansive authority to file over the recommendation of profes-
sional with expertise in this area, the “strict and intensive supervision”
alternative to residential commitment may be used to assure restrictive
monitoring of the majority of sex offenders after completion of their
sentences, even though they do not in fact meet constitutional standards
for commitment.

Nonetheless, in (1) mandating pre-commitment in-prison treatment,
governed by professional standards; (2) providing for pre-commitment
assessment by independent qualified professionals and for use of scienti-
fically validated tools for that purpose; (3) establishing a comprehen-
sive post-commitment treatment regimen subject to widely recognized mental
health standards; (4) providing for counsel with expertise in this special-
ized area, at an early, pre-petition phase of the proceedings, and accord-
ing the offender important rights in respect of discovery and presence,
the Assembly bill represents, in many ways, a serious effort to balance the need for civil commitment of dangerous sex offenders who suffer from a mental illness with constitutional safeguards and appropriate treatment for such offenders.

S6325 is contrastingly deficient in these areas. It contains no provision at all for treatment of convicted sex offenders while they are still serving their sentence, one important way of avoiding, through early intervention, unnecessary post-sentence restrictions on liberty as well as unnecessary expenditure of money. The process for assessing offenders to determine if a petition should be filed is strikingly tilted toward a law enforcement rather than a mental health professional perspective. The initial notification is made by corrections authorities rather than OMH. The bill establishes “multidisciplinary teams” to review each cases, but the professional composition of those teams is completely unspecified as is the method they are to use to make the evaluation. The final decision whether to recommend that a petition be filed is made by a committee of prosecutors (the “prosecutors review committee”). Psychiatric examination of the offender is conducted not by a court-appointed expert, but by one chosen by the prosecuting agency, the Attorney General. Counsel is not provided until the petition is filed, and there is no requirement and no funding to ensure that counsel has specialized expertise in this area should MHLS not serve as counsel. Venue is established in the county of incarceration rather than of conviction, depriving potential committees of support from their families and community members. Once committed, a person has no right to be present at subsequent proceedings. While the bill contains detailed provisions for security at the newly established facilities that will house committees, it is devoid of any reference to the treatment to be provided them. This omission alone is an invitation to successful litigation. See Selig v. Young, 531 U.S. 250 (2001).

There are many other objectionable features in S6325. Without enumerating them all in detail, their combined effect is to undermine the constitutionality of the proposed legislation, and to cast serious doubt on it as a legitimate tool for identifying the small group of genuinely dangerous offenders. By dramatically weakening, if not eliminating, the role of experts in favor of law enforcement officials and by unjustifiably refusing to accord committees basic procedural protections and qualified counsel, this version of a civil commitment statute is a recipe for failure.

January 2006
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Formal Opinion 2005-05

Unforeseeable Concurrent Client Conflicts

The Committee on Professional and Judicial Ethics

1. QUESTION
When unforeseeable conflicts develop between clients in the course of ongoing representation of both, without fault of the lawyer, and the clients refuse to consent to simultaneous representation, which, if any, client may the lawyer continue to represent? If the lawyer may continue to represent one but not both clients, how does the lawyer decide which client to continue representing?

2. INTRODUCTION
Conflicts that arise through no fault of the lawyer may develop in the course of representing two or more clients in unrelated matters as a result of corporate acquisitions or other unforeseeable circumstances. In those situations, lawyers typically seek conflict waivers from the affected clients, but in some instances a client may withhold consent to the multiple representation. This opinion examines the lawyer’s ethical duties when confronted with such so-called “thrust upon” conflicts, which are illustrated by the following two scenarios.

Scenario 1: A law firm represents Client A in a breach of contract suit against Company B. During the pendency of that suit, Client C, a longtime ongoing client of the law firm, acquires Company B in a stock sale, and Company B becomes a wholly owned subsidiary of Client C. The law
firm (which does not represent Client C in the acquisition of B) informs Clients A and C that it wishes to continue to represent each of them in their respective matters. Client A consents to a conflict of interest waiver, but Client C does not. May the law firm continue to represent at least one client, and if so, may the law firm choose which client to represent?

Scenario 2: A law firm has advised Client A for several years regarding various intellectual property licensing issues. The law firm has also advised Client B for several years on general corporate transactional matters not involving intellectual property licensing, including current negotiations with Company C to form a joint venture. During the course of those negotiations, Client A acquires Company C. Upon learning of the merger, the law firm seeks to obtain conflict of interest waivers from Clients A and B so that it may continue to represent both clients in their respective matters. Client A agrees to provide the necessary conflict of interest waiver, but Client B does not. May the law firm continue to represent at least one of the clients, and if so, may the law firm choose which client to represent?

As these scenarios suggest, “thrust upon” conflicts often, but do not always, arise as a result of changes in corporate ownership. Also, they may arise in both litigation and transactional practice. While in litigation a disqualification motion may as a practical matter resolve the question, in any case a lawyer’s ethical duties exist independent of court disqualification jurisprudence and a lawyer will have to guide him or herself based on analysis of ethical obligations under the Code. A lawyer faced with an unforeseen conflict that arises through no fault of his or her own, the lawyer should be guided by the factors set forth in this opinion when deciding from which representation to withdraw.

3. DISCUSSION

Lawyers have a duty to consider potential conflicts at the outset of an engagement and to decline proffered employment when such conflicts are likely. DR 5-105(A). Even careful conflicting-checking, however, will not eliminate the risk of unforeseeable conflicts arising after the lawyer or firm has commenced multiple representations. Under the New York Code of Professional Responsibility (the “Code”), a lawyer may not continue the concurrent representation of multiple clients “if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the lawyer’s representation of another client, or if it would be likely to involve the lawyer in representing differing interests,” DR 5-105(B), unless the conflict is capable of being, and is,
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consented to under DR 5-105(C). This opinion addresses the requirements of DR 5-105(B) in the case of “thrust upon” concurrent client conflicts. For purposes of this opinion “thrust upon” conflicts are defined as conflicts between two clients that (1) did not exist at the time either representation commenced, but arose only during the ongoing representation of both clients, where (2) the conflict was not reasonably foreseeable at the outset of the representation, (3) the conflict arose through no fault of the lawyer, and (4) the conflict is of a type that is capable of being waived under DR 5-105(C), but one of the clients will not consent to the dual representation. Although the “thrust upon” conflict may be unforeseeable and arise through no fault of the lawyer or law firm affected, when it gives rise to a concurrent conflict under DR 5-105, the lawyer must nevertheless take action to avoid violation of DR 5-105(B). The customary response to such conflicts is for the lawyer to withdraw as necessary to avoid the conflict. See DR 2-110(B)(2). The Code does not, however, expressly address the case of “thrust upon” conflicts, nor does it specify from which representation(s) the attorney should withdraw in order to cure the conflict.

Nor has this dilemma been addressed directly by New York ethics opinions construing the Code. A growing body of case law, however, has dealt with “thrust upon” conflicts in litigation, applying a flexible approach that is consistent with the Code and should be used as a guide to resolving such conflicts, within the limits set forth in this opinion.

A. A lawyer faced with an apparent “thrust upon” conflict should first determine whether a concurrent conflict under DR 5-105 exists

When client relationships change during the course of a representation, the lawyer should first determine whether the changed circumstances create an actual conflict. As Scenarios 1 and 2 above, as well as case law suggest, corporate transactions are often sources of apparent “thrust upon” conflicts. In such cases, an apparent conflict may arise during the repre-

1. For a more in-depth discussion of when conflicts are consentable, see, for example, N.Y. City Eth. Op. 2001-2 (addressing the circumstances in which it is permissible for a lawyer to represent a client in a corporate transaction whose interests are adverse to a client the lawyer represents in another matter, and both clients consent); N.Y. County Eth. Op. 671 (1989) (addressing the circumstances under which a lawyer who represents a corporate client may represent a second client whose interests are adverse to the first client, and both clients have consented).

sentation of two formerly unrelated clients when one becomes a member of the same corporate family (e.g., an affiliate, subsidiary, parent, or sister corporation) as another client’s adversary. Representation of one member of a corporate family, however, does not automatically constitute representation of another member of the same corporate family. For the purposes of the ethics rules, a current client’s adversary that, due to a merger or acquisition, has become the parent or subsidiary of another client, may not be considered a “client” at all. And if the apparent conflict does not actually involve two current clients, there is no conflict of interest under DR 5-105, and the attorney does not need to obtain consent from both clients in order to continue representing both.

Previous opinions have articulated the circumstances under which an apparent conflict involving a member of a current client’s corporate family will be considered an actual conflict of interest requiring consent to continue representing both parties. This determination is based on several factors, including the relationship between the two corporate entities, and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to undertake in opposition to the client’s corporate family member. See *Eastman Kodak Co. v. Sony Corp.*, 2004 WL 2984297 at *3 (W.D.N.Y. Dec. 27, 2004) (“[t]he relevant inquiry centers on whether the corporate relationship between the two corporate family members is ‘so close as to deem them a single entity for conflict of interest purposes’”); *Discotrade Ltd v. Wyeth-Ayerst Int’l, Inc.*, 200 F.Supp.2d 355, 358-59 (S.D.N.Y. 2002) (concluding that a corporate affiliate was also a client for conflict purposes because, among other things, the affiliate was an operating unit or division of an entity that shared the same board of directors and several senior officers and used the same computer network, e-mail system, travel department and health benefit plan as the client); *J.P. Morgan Chase Bank v. Liberty Mutual Insurance Co.*, 189 F.Supp.2d 20, 21 (S.D.N.Y. 2002) (concluding that a subsidiary of a corporate client is also a client for conflicts purposes because “the relationship [between the two] is extremely close and interdependent, both financially and in terms of direction;” among other things they operated from the same headquarters, shared the same board of directors, and the general counsel (and senior vice president) of the parent was also the general counsel (and senior vice president) of the subsidiary). See also N.Y. City Eth. Op. 2003-03 (whether a corporate affiliate is a client for conflicts purposes “will depend on many factors, including the relationship between the two corporations and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to under-
take in opposition to the client’s corporate family member”); See also ABA Formal Op. No. 95-390 (1995) (factors as to whether a corporate affiliate of a client is also considered a client include whether the subject matter of the representation involves the affiliate; whether affiliate reasonably believes that it is a client of the lawyer; whether the affiliate imparted confidential information to the lawyer in expectation of representation; and whether the lawyer may be required to regard the affiliate as a client due to the relationship between the client and affiliate); N.Y. County Eth. Op. 684 (1991) (factors as to whether representation of parent company extends to subsidiary include whether either the parent or subsidiary reasonably believes that an attorney-client relationship exists; whether counsel to the parent is privy to confidential information about subsidiary that could be detrimental to the subsidiary’s interests; and whether the parent’s interests would be materially adversely affected by an action against its subsidiary).

In “thrust upon” conflict situations, application of the factors articulated in the cited ethics opinions will often lead to the conclusion that no conflict exists. For example, in Scenario 1 above, Company B has become a subsidiary of a long-time firm Client C. If the firm has no pre-existing relationship with Company B, is not representing Company B at the time the purported conflict arises, was not involved in the transaction whereby Company B became a subsidiary of Client C, and the firm has not acquired confidences of Company B that are relevant to the litigation, then, absent other factors, it may be that the firm will be able to conclude that it does not have an attorney-client relationship with Company B. As a result, there is no concurrent conflict and it would be permitted to continue to represent Client A in litigation without the consent of Company B or Client C.

The remainder of this opinion assumes that the unforeseen change of circumstances does result in a concurrent conflict within the purview of DR 5-105.

**B. General rule requiring withdrawal where a consentable conflict of interest exists between concurrent clients, and one or both clients will not consent to the conflict**

Under the Code, a lawyer may not take on or continue the concurrent representation of multiple clients if the representation would “involve the lawyer in representing differing interests” or if “the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected,” unless the lawyer obtains the consent of each
client affected by the conflict. DR 5-105. It is well settled that this means a lawyer may not oppose a current client in any matter, even if the matter is totally unrelated to the firm’s representation of the client, without consent from both clients. See e.g. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976) (“[w]here the relationship [with a client] is a continuing one, adverse representation is prima facie improper, and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of representation”) (internal citation omitted); *IBM v. Levin*, 579 F.2d 271, 280 (3rd Cir. 1978) (it is “likely that some ‘adverse effect’ on an attorney’s exercise of his independent judgment on behalf of a client may result from the attorney’s adversary posture toward that client in another legal matter). See also N.Y. City Eth. Op. 2003-03. When faced with a thrust upon conflict under DR 5-105, therefore, a lawyer would be unable to continue representing both clients without violating the disciplinary rule, if the lawyer is unable to obtain consent. Pursuant to DR 2-110(B)(2), a lawyer must withdraw from representing a client where the representation would violate a disciplinary rule. Therefore, ordinarily, when two clients will not consent to a conflict of interest, and the conflict requires consent, the law firm must withdraw from representation of at least one of the clients.

The New York disciplinary rules do not, on their face, indicate whether an attorney must withdraw from both representations in conflict situations, or whether the attorney may withdraw from representing only one client, and if so, which one. The disciplinary rule that governs withdrawal, DR 2-110(B)(2), merely states that a lawyer shall withdraw from employment if (“[t]he lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule.” It sheds no light on situations where the withdrawal to avoid violation of a disciplinary rule involves more than one client.

Previous ethics opinions that have addressed withdrawal have similarly shed little light on how an attorney should withdraw from representation when a conflict has arisen that involves two current clients in the contexts that we address. A few ethics opinions construing the New York Code have mandated withdrawal from representation of more than one client, but all are distinguishable. These situations generally involved joint representation of clients with divergent interests on the same side of a matter, or situations where attorney knowledge of confidential information affected the attorney’s ability to continue representing both clients. See, e.g., N.Y. City Eth. Op. 1990-1 (if a non-waivable conflict develops during the course of joint representation of two clients, the attorney may
be forced to withdraw from both representations); N.Y.S. Eth. Op. 761 (2003) (if a lawyer receives relevant confidential information from one co-client that the lawyer is unable to share with the other co-client in joint representation, the lawyer must withdraw from representing both clients); N.Y. County Eth. Op. 707 (1995) (lawyer who represents two clients on the same side of a matter should withdraw from both representations if the lawyer learned confidential information of the dropped client that is material to the proposed remaining client's representation); N.Y.S. Eth. Op. 592 (1988) (lawyer must withdraw from representing two clients in separate criminal cases, where the lawyer obtained confidential information that materially affected both representations).

The New York disciplinary rules governing former client conflicts also do not directly state whether a lawyer may, in order to avoid a material conflict between two current clients, withdraw from representing one client (thereby creating a “former client”) and continue to represent the other. Under DR 5-108(A), a lawyer may not represent a client adverse to a former client without consent in the same or substantially related matter, where the current client's interests are materially adverse to the interests of the former client. If the matters are not substantially related, however, the lawyer may continue to represent a client even if that client is directly adverse to a former client, as long as the representation does not violate the lawyer’s duty of confidentiality to the former client.

C. Determining which matter to withdraw from

Since the ethics rules do not instruct lawyers how to determine from which client to withdraw when faced with a current client conflict that violates DR 5-105, lawyers confronting this situation must be guided by the duties of confidentiality and loyalty to the client. Under the Code, the duty of confidentiality extends to both current and former clients. DR 4-101(B); DR 5-108(A)(2). If the conflict of interest between two current clients arises because the lawyer possesses confidential information, and consent cannot be obtained, the lawyer normally must withdraw from the affected representation. See generally N.Y. City Eth. Op. 2005-02 (discussing duty of confidentiality). In circumstances where material confidential information is involved, or there is a substantial relationship between the two matters, a lawyer probably cannot solve the conflict merely by withdrawing from representing one client and continuing to represent the other, because the continuing representation would most likely still violate the rules regarding former client conflicts.

The duty of loyalty is also central to the ethical rules in Canon 5
prohibiting a lawyer from representing multiple clients with differing interests. “Maintaining the independence of professional judgment required of a lawyer precludes acceptance or continuation of employment that will adversely affect the lawyer’s judgment on behalf of or dilute the lawyer’s loyalty to the client.” EC 5-14. And as explained by EC 5-1, “[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer’s personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer’s loyalty to the client.” See also ABA Formal Op. No. 92-367 (1992) (“[u]nderlying the ethical prohibition [of Model Rule 1.7(a)] is the precept that the lawyer’s duty of loyalty demands that a client not be concerned with whether the lawyer may subconsciously be influenced by the differing interests of another”); Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976) (EC 5-1 and EC 5-14 “provide that the professional judgment of a lawyer must be exercised solely for the benefit of his client, free of compromising influences and loyalties, and this precludes his acceptance of employment that will adversely affect his judgment or dilute his loyalty”). Concurrent representation in particular “presents the risk of divided loyalty to each client, portending constrained vigor and impeding independent judgment on the lawyer’s part.” ABA Annotated Model Rules of Professional Conduct 1.7 (5th ed. 2003) at 116.

While the Code may not expressly prevent a lawyer from dropping one client in order to represent another, it is well-settled that the duty of loyalty prevents an attorney from doing so opportunistically. For example, under the so-called “hot-potato” rule, a lawyer or law firm should not ordinarily be permitted to abandon one client in order to take on the representation of a more lucrative client, where representing both would create a conflict of interest. This approach has been followed in several court cases involving attorney disqualification motions, where courts have articulated the need to protect confidential client information, as well as to protect the disfavored client from being “cut adrift” simply because a more lucrative client comes along with a claim against it. See, e.g., Hartford Accident and Indemnity Co. v. RJR Nabisco, Inc., 721 F. Supp. 534, 540 (S.D.N.Y. 1989) (finding against disqualification, but discussing rule: “Clearly, no court should condone such conduct [dropping the disfavored client in attempt to avoid disqualification motion]; it smacks of disloyalty where loyalty is owed, and notwithstanding the apparent elimination of the conflict, there remains the possibility that former client confidences will be abused’’); In re Wingspread Corp., 152 B.R. 861, 864 (S.D.N.Y. 1993) (rul-
The “hot potato” rule prohibiting the abandonment of a current client to take on a more lucrative representation is a salutary one, but it is not commanded by the text of the Code or the ABA Model Rules and should not apply to situations where its underlying rationale would not be served. The rule condemns affirmative self-interested acts of disloyalty by an attorney to an existing client in order to switch allegiance to a new one. In circumstances where an attorney is representing two clients, and an unforeseeable conflict between the two arises during the ongoing representation of both, concerns about opportunistic attorney activity are less evident: by definition, the problem was “thrust upon” the lawyer.

Many courts have also found that the duty of loyalty concerns underpinning the “hot potato” rule are not present in the “thrust upon” situation where the lawyer has not instigated the conflict or deliberately sought to abandon a client. In addition, in the current business climate, corporate mergers and acquisitions occur with sufficient regularity that conflicts of interests between two clients will often arise unexpectedly and through no fault of the lawyer, creating conflict situations that are not governed by the “hot potato” rule. Consequently, many courts have applied a flexible approach to “thrust upon” situations that focuses on balancing the interests of all affected parties rather than mechanically applying the “hot potato” rule to prevent a lawyer from withdrawing from one client in order to continue representing the other. See, e.g., Installation Software Technologies, v. Wise Solutions, 2004 WL 524829 at *4 (N.D. Ill. 2004) (applying a flexible approach to the resolution of a conflict arising out of a corporate acquisition, balancing several factors including (i) prejudice, (ii) cost, (iii) the complexity of the case, and (iv) the origin of the conflict); Eastman Kodak Co. v. Sony Corp., 2004 WL 2984297 at *7 (W.D.N.Y. 2004) (holding that “the ‘flexible approach’ provides a far more practical framework to disqualification issues generated by mergers and acquisitions than the rigid ‘hot potato’ rule,” but balancing the interests in favor of disqualification); Hartford Accident and Indemnity Co., 721 F. Supp. at 541 (where a conflict arose because the plaintiff’s law firm’s former partner represented the defendant, the court held that where there is no threat of actual prejudice, only a “wooden application” of the disciplinary canons would support disqualification); AmSouth Bank, 589 So. 2d at
722 (where the law firm did not play a role originally in creating the conflict, the court followed a “common sense” approach and found that the law firm may avoid disqualification by “moving swiftly to withdraw from its representation” to minimize prejudice to each client concerned); Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1126-27 (N.D. Ohio 1990) (applying balanced approach in ruling against disqualification in situation where the conflict of interest was created by an acquisition of the client, and not by the law firm).

Nothing in the Code bars an attorney from employing similar reasoning in carrying out the obligations of Canons 2 and 5. When confronted with a “thrust upon” concurrent client conflict, lawyers should balance several factors in deciding whether they may withdraw from one representation and continue the other, and if so, which client to continue representing. Of course, absent consent, an attorney should not simply withdraw from a representation and continue an adverse one where doing so would compromise material confidences and secrets of what would become the former client. See DR 5-108. Because thrust upon conflicts typically involve totally unrelated matters, however, the requirement of protecting confidences of an ex-client will not always command a particular result. Where confidences will not be placed at risk, the overriding factor should be the prejudice the withdrawal or continued representation will cause the parties, including whether representation of one client over the other would give an unfair advantage to a client. The lawyer must also consider other factors, for example, the origin of the conflict (i.e., which client’s action caused the conflict to arise); whether one client has manipulated the conflict to try to force a lawyer off the matter and is using the conflict as leverage; the costs and inconvenience to the party being required to obtain new counsel, including the complexity of the representation; whether the choice would diminish the lawyer’s vigor of representation toward the remaining client; and, the lawyer’s overall relationship to each client.

The commentary to the Model Rules supports this approach. As under the New York Code, the ABA Model Rules generally prohibit a lawyer from continuing to represent a client where that representation would be directly adverse to another client, or where a significant risk exists that the representation would be materially limited by the lawyer’s responsibilities to the other client. Model Rule 1.7(a). However, the commentary

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3. Model Rule 1.7 states: “(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;
to Model Rule 1.7 suggests that in cases in which a conflict arises during the course of representation, and where the conflict was the result of “[u]nforeseeable developments, such as changes in corporate and other organizational affiliations,” the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. Model Rule 1.7 Comment [5]. The District of Columbia ethics rules, which are based on the Model Rules, have taken this one step further and adopted an express “thrust upon” exception to the general prohibition against simultaneously representing two clients whose interests are directly adverse. DC Rule 1.7(d) provides that where certain concurrent conflicts are not reasonably foreseeable at the outset of representation, a lawyer should seek the opposing party’s consent to the conflict, but if such consent is not given by the opposing party, the lawyer need not withdraw despite the opposing party’s objection. See D.C. Eth. Op. 292 (1999) (interpreting Rule 1.7(d)).

The Restatement also supports a lawyer’s ability to withdraw “in order to continue an adverse representation against a theretofore existing client when the matter giving rise to the conflict and requiring withdrawal comes about through initiative of the clients” so long as the situation causing the conflict was not “reasonably foreseeable” by the lawyer when the lawyer first undertook the representation of the client. Restatement (Third) of the Law Governing Lawyers § 132 cmt. j.

The application of this approach is illustrated by the court cases cited above. In Installation Software Technologies, 2004 WL 524829, for example, a conflict of interest arose when a current client of the law firm representing the plaintiff acquired the defendant and then refused to consent to the dual representation. The plaintiff’s law firm sought guidance from the court by moving for permission to withdraw or for “other relief.” The court denied the motion to withdraw after balancing (i) the prejudice to the non-consenting client, including whether its confidential information was at risk if the law firm stayed in the case; (ii) the financial costs to the plaintiff if it was forced to retain new counsel in the matter (iii) the complexity of the matter, and (iv) the origin of the conflict so as to ensure that the “‘conflict by acquisition’ . . . [did] not become a means for [the defendant] to strategically disadvantage [the plaintiff].” 2004 WL 524829 at *6.

\[\text{or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: ... (4) each affected client gives informed consent, confirmed in writing.}\]
Another example is *Gould, Inc. v. Mitsui Mining & Smelting Co.* In *Gould*, a conflict of interest for plaintiff’s counsel arose several years after litigation had commenced, when the defendant acquired a company, IGT, that plaintiff’s counsel represented in unrelated matters. The defendant moved to disqualify plaintiff’s counsel, but the court rejected the motion. In doing so, the court refused to mechanically apply the “hot potato” rule, and took a more flexible approach that balanced the various interests involved. First, the court found that the defendant had not been prejudiced because confidential information had not passed to the plaintiff as a result of plaintiff’s firm’s representation of IGT. Second, disqualifying plaintiff’s firm would cost plaintiff a great deal of time and money in retaining new counsel and would significantly delay the progress of the case, which involved complex technological issues. Finally, the court found that the conflict was created by defendant’s acquisition of IGT several years after the current litigation commenced, and not by any affirmative act of plaintiff’s law firm. *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121, 1126-27 (N.D. Ohio 1990); see also *University of Rochester v. G.D. Searle & Co.*, 2000 WL 1922271 (W.D.N.Y. 2000) (ruling against disqualification); *Carlyle Towers Condominium Association, Inc. v. Crossland Savings, FSB*, 944 F. Supp. 341 (D.N.J. 1996) (ruling against disqualification); *AmSouth Bank, N.A. v. Drummond Co.*, 589 So. 2d 715, 722 (Ala. 1991) (ruling against disqualification).

The scenarios set forth at the outset of this opinion illustrate how these factors may be applied in specific situations. Scenarios 1 and 2 involve situations where a current client has, through a merger or acquisition, become adverse to another client that is a member of the same corporate family. Depending on, among other things, the relationship between Company B and Client C in Scenario 1, and Company C and Client A in Scenario 2, the adversary may or may not be considered a “client” for conflicts purposes. See cases cited *supra.* on when a corporate affiliate becomes a client for conflicts purposes.

Assuming that a conflict does exist between the clients, however, the law firm would need to balance the factors outlined above in determining which client to represent. For example, in Scenario 1, the law firm would first need to determine who would be most prejudiced by the withdrawal. This would depend in part on the complexity of the breach of contract suit against B and how close to trial the suit is. The closer the suit is to trial, the more Client A would be prejudiced if the law firm withdrew from representation. In contrast, if the law firm had only recently been retained to represent Client A in the breach of contract suit
and had yet to engage in extensive discovery, the prejudice to Client A from withdrawal would not be as great. Other factors that would determine which client would be most prejudiced involve, for example, the financial costs to each and whether the lawyer has acquired material confidential information that could be used against the client from whom the lawyer withdraws. In addition, because Client C created the conflict, the law firm should question whether Client C is seeking to use the conflict as leverage to force the law firm off the case involving Client A. As noted in *Installation Software*, a “conflict by acquisition” should not give the acquiring client a means to strategically disadvantage Client A, who is in effect an innocent bystander with respect to Client C’s acquisition of Client A’s adversary (Company B). More broadly, we believe that it will generally appear fairer and more understandable to a client whose lawyer withdraws because of a conflict if the client’s action gave rise to the conflict in the first place.

At the same time, if Client C is a large, important client of the firm, the law firm must be wary in applying the balancing test that it is not motivated by purely economic factors to retain Client C. After weighing all of the factors, if the law firm decides that the balancing test favors Client C, it should inform Client A that due to a conflict of interest it must withdraw from representing that client in the law suit against Company B. If the law firm concludes that the factors weigh in favor of Client A, it should inform Client C that it will not withdraw from representing Client A in the breach of contract suit. At that point, it will be up to Client C to decide whether it wishes to consent to the conflict after all, or terminate its relationship with the law firm.

**D. Limitations to Opinion**

This opinion is not intended to apply other than in cases of a “thrust upon” conflict as defined above.

First, the conflict must truly be unforeseeable. This requirement will often be satisfied in the merger and acquisitions context, as in Scenarios 1 and 2, as long as the law firm represented both clients before the corporate transaction occurred or before the law firm knew it was under consideration. It could be satisfied in other contexts when, for example, a current client unexpectedly appears in an adverse capacity in a government investigation.

Second, the conflict must truly be no fault of the lawyer. So, for example, if the conflict arose because the lawyer did an inadequate conflicts check originally by, for example, failing to check necessary individuals or entities, failing to spell the names of the clients accurately when
putting information into a database or by other conduct that is negligent, this opinion does not apply. *See, e.g.*, N.Y. City Eth. Op. 2003-03 (describing what records a law firm must keep and what policies and systems the firm must implement in order to do adequate conflicts checks).

Third, the conflict must be between concurrent clients. The rules governing when a current client becomes a former client for conflicts purposes are beyond the scope of this opinion but in determining whether this opinion applies the lawyer must consider whether even a client for whom the lawyer has done no work for a significant period of time is, in fact, a current client under the conflicts rules. This analysis involves a delicate fact-specific inquiry. *See, e.g.*, *International Business Machines Corp. v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978) ("[a]lthough CBM had no specific assignment from IBM on hand on the day the antitrust complaint was filed . . . the pattern of repeated retainers, both before and after the filing of the complaint, supports the finding of a continuous relationship"); *Oxford Systems, Inc. v. CellPro, Inc.* 45 F. Supp. 2d 1055, 1060 (W.D. Wash. 1999) (law firm that represented a client intermittently from 1985 to May 1997 deemed still to represent that client in April 1998 though no matters were then currently pending); *S.W.S. Financial Fund A v. Salomon Bros., Inc.*, 790 F. Supp. 1392, 1398 (N.D. Ill. 1992) ("once established, a lawyer-client relationship does not terminate easily," quoting the comment to ABA M.R. 1.3); *Shearing v. Allergan, Inc.*, 1994 WL 382450 (D. Nev. 1994) (client represented by law firm intermittently over 13 years but which had not given work to firm for more than a year was still a current client for conflict purposes); *See also* D.C. Bar Ethics Opinion 292 (1999) (where a law firm represents a client on an ongoing basis on a discrete legal issue that may be raised in multiple proceedings and involves common facts, legal theories, parties, claims and defenses, the representation begins when the law firm first begins to provide these legal services, not when the particular matter that led to the conflict began).

Of course, attorneys must keep in mind that the continued representation of one client after withdrawing from the other must still satisfy DR 5-108, the rule governing former client conflicts. See DR 5-108; Restatement (Third) of the Law Governing Lawyers § 132 cmt. j (continuing an adverse representation against a theretofore existing client "must be otherwise consistent with the former-client conflict rules"). In particular, the confidences and secrets of the former client must be protected, and no attorney may continue an adverse representation, without court approval, even in a "thrust upon" situation, in which material confidences and secrets of either client (or former client) will be placed at risk.
Finally, implementation of the balancing test for thrust upon conflicts must be performed in good faith. Where the attorney’s decision regarding withdrawal appears opportunistic, for example the retained client generates significantly more fees than the dropped client and there are no other factors that weigh in favor of retaining that client, any insistence that the conflict was thrust upon the lawyer, or protestations of prejudice to the major client, may be viewed skeptically. On the other hand, a lawyer who does balance the relevant considerations in good faith should not be subject to discipline for getting it wrong in hindsight.

E. Prophylactic Measures

Lawyers may take several steps to anticipate and potentially avoid concurrent client conflicts. In particular, some conflicts may be avoided by obtaining advance consents from clients to waive conflicts that may come up in the future. Of course, the fact that “thrust upon” conflicts by definition are not reasonably foreseeable may make it particularly difficult in some cases to obtain enforceable advance waivers. Nonetheless, in appropriate instances clients can give informed and therefore effective waivers in advance to a sufficiently described set of circumstances without necessarily knowing all details or the identity of the other client. See N.Y. City Eth. Op. 2004-02 (the lawyer seeking an advance waiver should be as specific as possible regarding the types of possible future adverse representations, the types of matters that might present conflicts, and at least the class of potentially conflicted clients); see also N.Y. County Eth. Op. 724 (1998); ABA Formal Op. No. 93-372 (1993).

In addition, attorneys may be able to draft the letter of engagement to avoid uncertainty as to whether the representation is ongoing or not, and who is the client. For example, the lawyer could clarify that he or she only represents the client in a particular area or for a particular matter, and representation in any other matter would necessitate a separate agreement. Similarly, the lawyer could clarify that he or she represents only specified entities within the corporate family, and not current or future affiliates.

4. For a more in-depth discussion of the circumstances in which a conflict of interest may be avoided by limiting the scope of a lawyer’s representation of a client, see N.Y. City Eth. Op. 2001-3 (the scope of a lawyer’s representation of a client may be limited in order to avoid a potential future conflict, provided that the client consents to a limited engagement after full disclosure, and the limitation does not render the lawyer’s counsel inadequate or diminish the zeal of representation).
4. CONCLUSION

When, in the course of continuing representation of multiple clients, a conflict arises through no fault of the lawyer that was not reasonably foreseeable at the outset of the representation, does not involve the exposure of material confidential information, and that cannot be resolved by the consent of the clients, a lawyer is not invariably required to withdraw from representing a client in the matter in which the conflict has arisen. The lawyer should be guided by the factors identified in this opinion in deciding from which representation to withdraw. In reaching this decision, the overarching factor should be which client will suffer the most prejudice as a consequence of withdrawal. In addition, the attorney should consider the origin of the conflict, including the extent of opportunistic maneuvering by one of the clients, the effect of withdrawal on the lawyer’s vigor of representation for the remaining client, and other factors mentioned in this opinion.

June 2005

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Formal Opinion 2005-06

Retired Attorney’s Use of Professional Letterhead and Special Disclosure Obligations to Clients and Prospective Clients

The Committee on Professional and Judicial Ethics

**TOPIC:** Retired attorneys’ use of professional letterhead and special disclosure obligations to clients and prospective clients.

**CODE SECTIONS:** DR 1-102, DR 2-101, DR 2-102, DR 6-101, EC 6-1, and EC 6-2.

**QUESTION:** When an attorney who is retired from the practice of law nonetheless wishes to continue performing legal services (a) may that attorney use professional letterhead and (b) must that attorney make any special disclosures to clients and prospective clients?

**DISCUSSION**

Unlike in several other states, where retired attorneys are precluded from practicing law, in New York a retired attorney may continue to prac-
practice law, but that attorney may not charge a fee.\textsuperscript{1} N.Y. Comp. Codes R. & Regs. tit. 22, § 118.1(g) (2003) provides, in part:

No [biennial registration] fee shall be required from an attorney who certifies that he or she has retired from the practice of law. For purposes of this section, the “practice of law” shall mean the giving of legal advice or counsel to, or providing legal representation for, a particular body or individual in a particular situation in either the public or private sector in the State of New York or elsewhere, it shall include the appearance as an attorney before any court or administrative agency. An attorney is “retired” from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law.

In New York, attorneys who certify that they are retired from the practice of law are also exempt from continuing legal education (“CLE”) requirements. N.Y. Comp. Codes R. & Regs. tit. 22, § 1500.5(b)(4) (2005). Under these rules, retired attorneys may still practice law, albeit without compensation, and they are exempt from the biennial fee and from CLE requirements. But the rules do not address whether retired attorneys (a) may use professional letterhead and (b) should disclose to clients and prospective clients that they are retired and what that status entails.

**Retired Attorneys’ Use of Professional Letterhead**

As a threshold matter, New York allows attorneys to use professional letterhead if doing so does not “violate any statute or court rule,” DR 2-102(A), and is not “false, deceptive, or misleading,” DR 2-101(A). See also Model Rules of Prof’l Conduct R.7.1 & 7.5 (2004) (prohibiting the use of letterhead that is false or misleading).

\textsuperscript{1} See, e.g., UT Eth. Op. 00-02, 2000 WL 347377 (Utah St.Bar) (“In all jurisdictions surveyed by the Committee for purposes of this opinion, lawyers on inactive status are precluded from engaging in the practice of law”); OH Adv. Op. 92-4, 1992 WL 739414 (Ohio Bd.Com.Griev.Disp.) (“An attorney granted ‘inactive’ or ‘retired’ registration status shall not be entitled to practice law in Ohio . . . The language of the current rule sweeps broadly with a restrictive intent . . . [A]torneys with ‘inactive’ or ‘retired’ registration status may not perform the duties [even] of a paralegal or student law clerk because of the express requirement of the Supreme Court of Ohio that these attorneys [also] may not ‘render any legal service for an attorney granted active status.’”); People v. Newman, 925 P.2d 783, 784 (Colo. 1996) (lawyer publicly censured for inter alia implying “that he was licensed to practice law in Colorado even though he was on inactive status”).
New York allows only those who are licensed and admitted to practice law to hold themselves out as “attorneys-at-law.” See N.Y. Judiciary Law § 478 (McKinney 2004). Thus, so long as a retired attorney remains licensed and admitted in New York, there is no statute or court rule prohibiting that retired attorney from using professional letterhead. Nor is it otherwise false, deceptive, or misleading for that retired attorney to use professional letterhead stating that he or she is an “attorney-at-law.”

Under the Code of Professional Responsibility, there is also no requirement that the attorney disclose on professional letterhead that he or she is retired. See DR 2-102(A)(4) ( “A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members.”).

We therefore conclude that a retired attorney may use professional letterhead and may, but is not required to, disclose on that letterhead that he or she is retired.

Retired Attorneys’ Disclosure Obligations to Clients and Prospective Clients

We turn next to the question whether retired attorneys have any special disclosure obligations to clients and prospective clients.

DR 1-102(A)(4) provides, “A lawyer or law firm shall not: Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” Thus, a retired attorney is prohibited from misleading a client or potential client about the retired attorney’s ability to charge a fee or satisfaction of CLE requirements.

Separately, DR 6-101(A) provides that an attorney must handle a matter competently and with adequate preparation: “A lawyer shall not: 1. Handle a legal matter which the lawyer believes or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it” and “2. Handle a legal matter without preparation adequate in the circumstances.”

There is no reason to believe that retired attorneys are less conscientious than other members of the Bar about conforming their conduct to the Code. Thus, there is no need for any special requirement that a retired

2. See also EC 6-1 (“The lawyer should strive to become and remain proficient in his or her practice and should accept employment only in matters which he or she is or intends to become competent to handle.”); EC 6-2 (“A lawyer is aided in attaining and maintaining competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means.”).
attorney reflexively disclose to every client or prospective client that the
retired attorney cannot charge a fee or is exempt from CLE requirements.
Furthermore, with respect to CLE, DR 6-101(A) nonetheless applies with
full force to retired attorneys, who must—regardless of any CLE exemp-
tion—handle the matters that they undertake competently and with ade-
equate preparation. To that end, retired lawyers who practice would be
well advised to maintain their skill and knowledge, whether through CLE
programs, self-study, or otherwise.

CONCLUSION

Attorneys who are retired from the practice of law (a) may use profes-
sional letterhead; (b) may, but are not required to, disclose on that letter-
head that they are retired; and (c) are not obligated to specially disclose
to clients or prospective clients that they (i) may not charge a fee or (ii)
are exempt from the CLE requirements that are mandatory for all other
New York attorneys.

October 2005
Formal Opinion 2006-01

Multiple Representations; Informed Consent; Waiver of Conflicts

The Committee on Professional and Judicial Ethics

**TOPIC:** Multiple Representations; Informed Consent; Waiver of Conflicts

**DIGEST:** A law firm may ethically request a client to waive future conflicts if (a) the law firm makes appropriate disclosure of, and the client is in a position to understand, the relevant implications, advantages, and risks, so that the client may make an informed decision whether to consent, and (b) a disinterested lawyer would believe that the law firm can competently represent the interests of all affected clients. See DR 5-105(C). “Blanket” or “open-ended” advance waivers, and advance waivers that permit the law firm to act adversely to the client on matters substantially related to the law firm’s representation of the client should be limited to sophisticated clients, and the latter advance waiver also conditioned on meeting
the tests articulated in ABCNY Formal Opinion 2001-2, including that (a) the waiver be limited to transac-
tional matters that are not starkly disputed and (b) client confidences and secrets be safeguarded.

**CODE:** DR 4-101; EC 4-1; EC 4-2; EC 4-4; EC 4-5; EC 4-6; DR 5-105; DR 5-108; EC 5-1; EC 5-14; EC 5-15; EC 5-16.

**QUESTION**
Under what circumstances may a law firm ethically request that a client prospectively waive objection to the law firm’s subsequent representation of another client adversely to the first client?

**OPINION**
When a law firm agrees to represent a client in a particular matter, it may ethically request that the client waive future conflicts of interest, including that the client consent to allow the law firm to bring adverse litigation on behalf of another current client, if (a) the law firm appro-
riately discloses the implications, advantages, and risks involved and if the client can make an informed decision whether to consent; and (b) a disinterested lawyer would believe that the lawyer can competently repre-
sent the interests of all affected clients. See DR 5-105(C).

At least for a sophisticated client, blanket advance waivers and ad-
ance waivers that include substantially related matters (with adequate protection for client confidences and secrets) also are ethically permitted.

These conclusions are consistent with the opinions of other bar asso-
ciations and with prior opinions of this Committee. For example, both the New York County Lawyers’ Association Committee on Professional Ethics and the American Bar Association have recognized the permissibil-
ity of advance waivers. See NYCLA Ethics Opinion No. 724 (approving advance waiver if future representation gives rise to consentable conflict and if attorney makes adequate disclosure to client or prospective client); ABA Formal Opinion 05-436 (noting that comment to Model Rules sup-
ports “likely validity of an ‘open-ended’ informed consent if the client is

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1. As used in this opinion, a sophisticated client is one that readily appreciates the implications of conflicts and waivers. This would include, but not be limited to, clients that regularly engage outside counsel for legal services, or that have access to independent or inside counsel for advice on conflicts.
an experienced user of legal services”); see also NYSBA Committee on Standards of Attorney Conduct, Proposed New York Rules of Professional Conduct Rule 1.7, Comment 22A (Sept. 30, 2005) ("A client may agree in advance to waive potential conflicts that have not yet ripened into actual conflicts. The nature of the disclosure necessary to ensure that the client’s advance consent is ‘informed’ will depend on various factors."); Restatement 3d of Law Governing Lawyers § 122, Comment d (“[T]he gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client.”); ABCNY Formal Opinion 2004-02 (approving the use of advance waiver for potential conflicts of interest in multiple representation of a corporation and its constituents in governmental investigation).

Furthermore, this Committee has approved, under certain circumstances, the representation of multiple clients with differing interests in the same transaction, see ABCNY Formal Opinion 2001-2, and a similar analysis applies in assessing advance waivers of conflicts of interest that involve substantially related matters.

The Need for Advance Conflict Waivers

In *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976), the Court of Appeals for the Second Circuit held that the “substantial relationship” test does not apply to conflicts between current clients. Rather, the Court of Appeals held that, “[w]here the relationship is a continuing one, adverse representation is prime facie improper, and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation.” *Id.* at 1387 (citation omitted). Although the Court explicitly held open the possibility that this presumption of diminished zealous representation may be rebutted, as one leading commentator has observed, after *Cinema 5 Ltd.*, “it has become axiomatic that a law firm’s representation of a client in a matter adverse to another current client of the firm is almost always improper, even though the two matters are entirely unrelated.” Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 Hofstra Law Review 971, 973 (2001) (“Lerner”).

In the 30 years since *Cinema 5, Ltd.* was decided, the market for legal services has changed drastically, with many clients, especially large corporations, increasingly abandoning their previous practice of retaining a single law firm for all their legal needs and instead now engaging differ-
ent lawyers for different matters. See Leah Epstein, Comment, A Balanced Approach to Mandamus Review of Attorney Disqualification Orders, 72 U. Chi. L. Rev. 667, 673-74 (2005) (citations omitted). These clients, many of which have multiple businesses, myriad affiliates, and substantial in-house legal staffs, have become more sophisticated and more demanding in retaining counsel. As a result, today these same clients often hire different law firms in different jurisdictions and in different areas of law. See, e.g., Neil Rosenbaum, Cast a Wide—and Optimistic—Net, Nat’l L.J., Feb. 17, 2003, at C4 (noting survey of 131 Fortune 250 companies retaining multiple law firms of varying sizes for intellectual-property work). In today’s legal world, the paradigm of a lawyer serving all the legal needs of the client and being a friend “for all purposes” no longer applies to the relationships between many lawyers and clients.

Unfortunately, the resulting increase in the number of potential lawyer-client conflicts has been accompanied by an increase in tactical disqualification motions. See Armstrong v. McAlpin, 625 F.2d 433, 437 (2d Cir. 1980) (en banc) (recognizing “proliferation of disqualification motions and the use of such motions for purely tactical reasons”), vacated on other grounds, 449 U.S. 1106 (1981); Cerqueira v. Clivilles, 623 N.Y.S.2d 580, 580 (App. Div. 1995) (“[W]e are not unmindful that disqualification motions are frequently used as a litigation tactic.”); see also Sports Med. Serv. of Gramercy Park v. Perez, 657 N.Y.S.2d 314, 315-16 (Civ. Ct. 1997) (“Disqualification motions have become a cottage industry. All too frequently attorneys bring such motions as a litigation tactic. Even where the situation presented seems to implicate a disciplinary rule if read literally, the court must be wary to prevent its misuse, particularly when it is unnecessarily detrimental to the adverse party’s rights.”).

Given these realities, an overly broad interpretation of the duty of loyalty can strip even a long-standing client of the right to counsel of its choice, thereby perversely depriving the client of the very benefit which that ethical duty is designed to secure—the law firm's loyalty: “[T]his extremely rigid prohibition on all adverse concurrent representation can preclude a client that has relied on a law firm for many years from continuing to utilize its services if the law firm happens to represent the client’s adversary in another matter, even though the other engagement is entirely unrelated to the controversy and there is no conceivable risk that any diminution of loyalty to, or zealousness in representing, the other client would occur.” Lerner at 974.

A client’s choice of counsel is a fundamental right that the New York Court of Appeals recognized in Levine v. Levine, 56 N.Y.2d 42 (1982), in
which the Court approved a single lawyer representing potentially adverse parties to a marital separation agreement. In *Levine*, the Court of Appeals held that the potentially adverse parties had the absolute right to retain the same lawyer as long as “there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity.” *Id.* at 48; see also *Cerqueira*, 623 N.Y.S.2d at 580 (“A civil litigant has a fundamental right to the legal counsel of choice . . . .”); *Drury v. Tucker*, 621 N.Y.S.2d 822, 823 (App. Div. 1994) (“[A] disqualification motion must be ‘carefully scrutinized’ because it ‘denies a party’s right to representation by the attorney of [his] choice.’”) (citations omitted).

An overly broad interpretation of the duty of loyalty also visits significant injury on law firms of all sizes. Thus, for example, a small firm whose core practice is representing insureds in insurance litigation may be constrained to reject an engagement for an insurer because that engagement could preclude the firm from representing any insured adversely to the insurer. Likewise, a “mega” firm, which maintains offices in several cities, may be precluded from defending a long-standing client in “bet-the-company” litigation because another of the firm’s offices, thousand of miles away and staffed by different lawyers, is representing the plaintiff in an unrelated and minor transaction.

In response, law firms and their clients have increasingly turned to advance waivers, by which they and their clients seek to create their own ethical “default,” so that both the law firm and the client establish clear rules of the road at the inception of the relationship—a time when both sides can determine whether to proceed with the representation. This, in turn, raises the question when advance waivers are ethically permissible.

**DR 5-105**

The validity of an advance waiver must be measured against DR 5-105, which expressly allows clients to consent to conflicts under certain circumstances. DR 5-105 prohibits a lawyer from undertaking or continuing multiple representations “if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected” or “if it would be likely to involve the lawyer in representing differing

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2. See, e.g., *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, No. 78 Civ. 1295, slip op. at 6-7 (S.D.N.Y. Apr. 11, 1978) (“Quite clearly, Skadden, Arps, a burgeoning law firm, was unwilling to close its doors to future clients by risking disqualification in its field of specialty merely because Curtiss-Wright [a “one shot client”] might set its sights on some company which happened then to be a client of Skadden, Arps.”) (upholding advance waiver).
interests.” DR 5-105(A)-(B). The Code broadly defines “differing interests” to “include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.” 22 N.Y.C.R.R. § 1200.1(a).

Significantly, the prohibitions in DR 5-105(A)-(B) are qualified by DR 5-105(C), which provides:

[A] lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages or risks involved.

DR 5-105(C). For a law firm to enforce an advance waiver, that waiver must thus pass two tests: (a) the “disinterested lawyer” test and (b) the “informed consent” test, i.e., consent after full disclosure of the relevant implications, advantages, and risks.

A. The Disinterested Lawyer Test

A disinterested lawyer is a lawyer “whose only aim would be to give the client the best advice possible about whether the client should consent to a conflict” or potential conflict. See Simon’s New York Code of Prof’l Responsibility Ann. 554-55 (2003), quoted in ABCNY Formal Op. 2004-02. If a disinterested lawyer “would conclude that any of the affected clients should not agree to the [multiple] representation under the circumstances, the lawyer involved should not ask” for the advance waiver. EC 5-16. For example, a disinterested lawyer would disapprove seeking a waiver to simultaneously represent two significantly adverse parties in the same matter:

Lawyer has been asked by Buyer and Seller to represent both of them in negotiating and documenting a complex real-estate transaction. The parties are in sharp disagreement on several important terms of the transaction. Given such differences, Lawyer would be unable to provide adequate representation to both clients.

Restatement 3d of Law Governing Lawyers § 122, Illustration 10.

The disinterested lawyer test should be applied both when the advance waiver is given and again when the subsequent adverse matter arises. In the first instance, the lawyer examines the type of representation and prospective client that is anticipated and the potential adversity of inter-
ests. In the second instance, the lawyer examines the actual client and matter and the actual adversity that has developed. If the actual conflict is materially different from the conflict envisioned by the waiver, the waiver will be ineffective. If the actual conflict is not materially different, the waiver will also be ineffective if the actual conflict is nonconsentable. For an analysis of the considerations involved in the “disinterested lawyer” test, see ABCNY Formal Opinion 2004-02.

B. The Informed Consent Test

DR 5-105(C) also requires each client to “consent[ ] to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.” But “it frequently will be more difficult for an attorney to make ‘full disclosure’ to the same extent as in connection with a concurrent waiver.” ABCNY Formal Opinion 2004-02. Although disclosure of the nature of the matter that would likely cause the conflict and the name of the potential adverse party, if known, may readily meet the disclosure requirement, see St. Barnabas Hosp. v. New York City Health and Hosps. Corp., 775 N.Y.S.2d 9 (App. Div. 2004) (enforcing advance conflict waiver when the waiver named the potential future adverse party), this information is typically not known at the time the advance waiver is sought.

The “adequacy of disclosure and consent” will depend upon the circumstances of each case. See Wolfram, Modern Legal Ethics § 7.2.4 at 343 (1986); NYCLA Ethics Opinion No. 724. We agree with NYCLA Ethics Opinion No. 724 that, in general, “the client or prospective client should be advised of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients or matters that may present such conflicts.”

Some opinions have emphasized the sophistication of the client in judging the degree of required disclosure, see NYCLA Ethics Opinion No. 724; ABA Model Rule 1.7, Comment 22, and this too is an important consideration. Sophisticated clients need less disclosure of the “implications,” “advantages,” and “risks” of advance waivers before being able to provide informed consent. Similarly, Comment 22 to ABA Model Rule 1.7, with which we also agree, observes that the effectiveness of advance waivers is determined “by the extent to which the client reasonably understands the material risk that the waiver entails,” placing the emphasis, for the sophisticated client, on the client’s understanding of risks rather than detailed disclosure by the lawyer. For the sophisticated clients described above, blanket or open-ended advance waivers that are accompanied by
relatively limited disclosure about the prospective conflicting matters should nevertheless be enforceable. 3

Advance Waivers That Include Substantially Related Matters

The discussion of advance conflict waivers in bar association opinions and in law review articles has largely focused on when the law firm’s present engagement for Client A and future engagement for Client B adverse to Client A are not substantially related. To be sure, when the waiver applies to two engagements that are substantially related, another consideration must be added to the analysis—the need to safeguard each client’s confidences and secrets and to ensure that those confidences and secrets are not used to the respective client’s disadvantage. See DR 4-101. Still, we believe that under the circumstances described below, an advance waiver ethically may apply to substantially related matters.

In ABCNY Formal Opinion 2001-2, we discussed at length a law firm representing multiple clients with actually or potentially differing interests in unrelated matters or in the same matter. In a single litigation, a lawyer cannot ethically represent both sides. Similarly, in a transactional setting in which the parties’ interests are inherently antagonistic, such as when one party is a hostile bidder and the other an unwilling target in a corporate takeover, or when lawyers in the same law firm would be required to negotiate substantive business terms head-to-head, simultaneous representation generally will be ethically prohibited. But in transactional settings in which the adversity between clients is less stark, the application of DR 5-105 is more relaxed and nuanced. We also observed in Formal Opinion 2001-2 that many law firms service clients that insist the firm simultaneously represent multiple clients with differing interests in a single negotiated transaction—an observation that has even more force today.

In Formal Opinion 2001-2, we articulated a number of factors that a lawyer should consider in determining whether the lawyer can represent multiple clients with differing interests in unrelated matters or in the same matter: (a) the nature of the conflict and the possibility of an adverse

3. The sophistication of the client also bears in other ways on the scope of the permissible waiver. For example, there are a few cases suggesting that a client cannot consent to have his or her own lawyer bring claims against the client charging fraud. See, e.g., Rosen v. Rosen, N.Y.L.J. Jan. 31, 2003 (Sup. Ct. Suffolk Cty. 2003) ("this Court simply cannot conceive of a knowing waiver by a client of such significant interests," when one client accused the other of submitting a false court filing). These cases are best understood as reflecting skepticism about whether the client understood and consented to the waiver. They have little relevance to waivers by sophisticated clients, particularly when the client is a large institution and the claims of misconduct involve personnel not involved in the representation of that client.
effect on the exercise of the lawyer’s independent professional judgment; (b) the likelihood that client confidences or secrets in one matter will be relevant to the other representation; (c) the ability of the lawyer or law firm to ensure that confidential information of the affected clients will be preserved, including through screening and other information-control devices; (d) the sophistication of the client and the client’s ability to understand the reasonably foreseeable risks of the conflict; and (e) if the firm is still representing the waiving client when the conflict arises, whether the lawyer’s relationship with the clients is such that the lawyer is likely to favor one client over another. These same factors also help determine whether an advance waiver passes muster when that waiver includes substantially related matters in a transactional setting.

We conclude here that a law firm may ethically request an advance waiver that includes substantially related matters if the following conditions are met: (a) the client is sophisticated; (b) the waiver is not applied to opposite sides of the same litigation and opposite sides in a starkly disputed transactional matter; (c) the law firm is able to ensure that the confidences and secrets of one client are not shared with, or used for the advantage of, another client; (d) the conflict is consentable under the tests of DR 5-105(C); and (e) special consideration is given to the other factors described in Formal Opinion 2001-2.

**Drafting Advance Waivers**

An advance waiver need not be in writing if informed consent can be found under the circumstances. Nevertheless, under most circumstances a written confirmation of the advance waiver is salutary because it may avoid disputes over the nature and extent of the waiver.

Given this, we believe it useful to provide guidance regarding the drafting of an advance waiver. To that end, we have attached two examples, A and B, of blanket waivers and one example, C, of an advance waiver covering substantially related matters. These are merely examples of the many forms that a workable advance waiver might take. But it bears emphasis, as this opinion concludes, that an advance waiver must be tailored to the specific situation at hand.

In this vein, because a waiver is more likely to be enforced the more specifically it refers to a conflict that eventually arises, it is advisable to supplement the general language of these examples with non-exclusive reference to particular clients or circumstances which may then present foreseeable conflicts. This is particularly true of an advance waiver with respect to substantially related matters.
Conflicts Waiver: EXAMPLE A
(Blanket Advance Waiver Not Including Substantially Related Matters)

Other lawyers in the Firm currently do [XXX] work for [existing client] and its affiliates, and expect to continue to do such work. In order to avoid any misunderstanding in the future, we ask that you confirm that the Company agrees to waive any conflict of interest which may be deemed to arise as a result of such representation. Please also confirm that neither the Company nor any of its affiliates will seek to disqualify our Firm from representing [existing client] or its affiliates in existing or future [XXX] or other matters.

Our agreement to represent you is conditioned upon the understanding that we are free to represent any clients (including your adversaries) and to take positions adverse to either the company or an affiliate in any matters (whether involving the same substantive area(s) of law for which you have retained us or some other unrelated area(s), and whether involving business transactions, counseling, litigation or other matters), that are not substantially related to the matters for which you have retained us or may hereafter retain us. In this connection, you should be aware that we provide services on a wide variety of legal subjects, to a large number of clients both in the United States and internationally, some of whom are or may in the future operate in the same area(s) of business in which you are operating or may operate. (A summary of our current practice areas and the industries in which we represent clients can be found on our web site at www.XXX.com.) You acknowledge that you have had the opportunity to consult with your company’s counsel [if client does not have in-house counsel, substitute: “with other counsel”] about the consequences of this waiver. In this regard, we have discussed with you and you are aware that we render services to others in the area(s) of business in which you currently engage.

Conflicts Waiver: EXAMPLE B
(Same Type of Advance Waiver as A)

This firm is a general service law firm that [insert client name here] recognizes has represented, now represents, and will continue to represent numerous clients (including without limitation [the client's] or its affiliates’ debtors, creditors, and direct competitors), nationally and internationally, over a wide range of industries and businesses and in a wide variety of matters. Given this, without a binding conflicts waiver, conflicts of interest might arise that could deprive [the client] or other clients of the right to select this firm as their counsel.
Thus, as an integral part of the engagement, [the client] agrees that this firm may, now or in the future, represent other entities or persons, including in litigation, adversely to [the client] or any affiliate on matters that are not substantially related to (a) the legal services that [this firm] has rendered, is rendering, or in the future will render to [the client] under the engagement and (b) other legal services that this firm has rendered, is rendering, or in the future will render to [the client] or any affiliate (an “Allowed Adverse Representation”).

[The client] also agrees that it will not, for itself or any other entity or person, assert that either (a) this firm’s representation of [the client] or any affiliate in any past, present, or future matter or (b) this firm’s actual, or possible, possession of confidential information belonging to [the client] or any affiliate is a basis to disqualify this firm from representing another entity or person in any Allowed Adverse Representation. [The client] further agrees that any Allowed Adverse Representation does not breach any duty that this firm owes to [the client] or any affiliate.

Conflicts Waiver: EXAMPLE C
(Advance Waiver Including Substantially Related Matters)

You also agree that this firm may now or in the future represent another client or clients with actually or potentially differing interests in the same negotiated transaction in which the firm represents you. In particular, and without waiving the generality of the previous sentence, you agree that we may represent [to the extent practicable, describe the particular adverse representations that are envisioned, such as “other bidders for the same asset” or “the lenders or parties providing financing to the eventual buyer of the asset”].

This waiver is effective only if this firm concludes in our professional judgment that the tests of DR 5-105 are satisfied. In performing our analysis, we will also consider the factors articulated in ABCNY Formal Opinion 2001-2, including (a) the nature of any conflict; (b) our ability to ensure that the confidences and secrets of all involved clients will be preserved; and (c) our relationship with each client. In examining our ability to ensure that the confidences and secrets of all involved clients will be preserved, we will establish an ethical screen or other information-control device whenever appropriate, and we otherwise agree that different teams of lawyers will represent you and the party adverse to you in the transaction.

February 2006

4. 22 NYCRR § 1200.24(c).
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