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The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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DEAR FORUM,

I am a solo practitioner and planning to retire (or at least semi-retire) sometime next year. My plan has always been to sell my practice and ride off into the sunset. Now that the time to close shop is impending, however, I don't think I am quite ready to hang up my spurs altogether. I am planning to move to the south where I have a vacation home and am admitted to practice. I think I might do some part-time private practice work there or possibly even volunteer for some not-for-profit legal service groups.

Since my plans are changing from complete retirement to only partial retirement, I am trying to figure out how to navigate my ethical responsibilities to my current clients as well as my ethical obligations as a semi-retired member of the New York State bar. At the same time, however, I also want to make sure that I have enough in my retirement savings to be financially stable in the future. For example, I drafted hundreds of wills over the years and have a regular flow of estate matters as a result. Is selling my practice the only option I have if I am not completely retiring, or do I have other options? If I do continue part-time private practice work in the south, can I continue to list my New York admission in my advertising even though I am shutting down my New York office? Any advice on how to handle semi-retirement issues would be appreciated.

Sincerely,
Hopalong Semi-Retiree

DEAR HOPALONG SEMI-RETIREE,

Your inquiry is an interesting one and raises issues that we have discussed over the years. Whether you decide to

formally retire or simply relocate, a number of ethical obligations under New York's Rules of Professional Conduct ("RPC") must be considered.

For starters, you should notify your clients that you intend to close your New York practice and relocate to the south. *See* Vincent J. Syracuse and Amy S. Beard, Attorney Professionalism Forum, N.Y. St. B.J., January 2012, Vol. 84, No. 1. You also need to consider formally terminating attorney-client relationships and your professional responsibilities regarding the disposition of the clients' files. We addressed this in our January 2017 *Forum*. *See* Vincent J. Syracuse, Maryann C. Stallone, & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., January 2017 Vol. 89, No. 1.

"Retirement" Options

Attorneys can take three paths when they decide to cease the active practice of law in New York. NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019). The first option is for the attorney to continue their biennial registration ("continued registration") by filing the required form, paying the required fee, and completing the mandatory CLE requirement. *Id.* This option allows the attorney to continue to undertake representation in New York, subject to additional ethical obligations discussed below. *Id.* A second option allows attorneys to change their registration status to "retired" under section 118.1(g) of the Rules of the Chief Administrative Judge, 22 N.Y.C.R.R. §118.1(g). *Id.* As stated in RPC 1.17(a), "[r]etirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted." An attorney choosing to retire as described in RPC 1.17(a) is exempt from payment of the biennial registration fee and from compliance with the mandatory CLE requirements, but is only permitted to render legal services in New York *pro bono*. *See*, NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019). The third and most restrictive option is to voluntarily resign by filing an amendment to the attorney's registration form withdrawing the registration. *Id.* This option completely bars an attorney from practicing law in New York regardless of whether they receive compensation for their services. *Id.*

Selling Your Law Practice

Attorneys who decide to "retire" from active practice in New York and sell their practice must satisfy certain ethical obligations. The sale of a law practice in New York is governed by RPC 1.17, which provides that "[a] lawyer retiring from a private practice of law . . . may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice." *See* RPC 1.17(a). Rule 1.17 requires that the seller's entire practice be sold so as to protect clients "whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee generating matters." *See* RPC 1.17 Comment [6].

Moreover, depending on how you structure the purchase and sale agreement, selling your practice is often a good way to ensure that you will have enough retirement savings to be financially stable in the future. For example, an attorney selling a practice is permitted to make the sale contingent upon receiving a percentage of legal fees collected by the purchaser if the payment is in proportion to the services performed by the selling lawyer prior to the sale or if the payment fairly represents the value of the "goodwill" of the retiring lawyer. *See* NYSBA Comm. on Prof'l Ethics, Op. 961 (2013). "Goodwill" refers to the "going value of a law practice" that arises from the reputation of a business and its relations with its clients. Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 870–71 (2019 ed.). In a law firm context, goodwill reflects, among other things, "the likelihood that satisfied existing clients will use the firm again when new matter arise" and "the likelihood that new clients will come to the lawyer or firm because of the firm's reputation." *Id.* at 870. The inclusion of "goodwill" in a sale of a law practice anticipates a likely income stream of future legal fees that the buyer is expecting to receive in the future. *Id.*

It is important to note that an attorney's duty to preserve confidential information remains in effect even after the representation concludes. *See* RPC 1.6. When engaging in preliminary negotiations regarding the sale of your practice, you should exercise caution to ensure that you do not violate attorney-client privilege. *Id.* RPC 1.17(b)(2), however, specifically allows a seller to provide a prospective buyer with information as to individual clients including the identity of the clients, the status and general nature of the matters, material available in public court files, and the financial terms and payment status of the clients' accounts. *See* RPC 1.17(b)(2). Absent the informed consent of the client, an attorney is prohibited from revealing any further confidential information that would violate the attorney-client privilege. *See* RPC 1.6, RPC 1.17(b)(1), (5).

One thing to consider in selling your law practice is that under RPC 1.17(a), the purchasing attorney may insist that you agree to a non-competition covenant thereby surrendering your ability to provide future legal services to your former clients. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 872 (2019 ed.). Rule 1.17(a) permits the purchasing attorney to negotiate "reasonable" restrictions on the selling attorney's ability to practice following the sale of the practice. *See* RPC

1.17(a). Based on the facts provided in your inquiry, a non-competition clause may not significantly affect your plans as such covenants are generally limited to restricting a lawyer's ability to service clients in the same geographic region as the practice to be sold. If the restrictive covenants are too broad in scope, however, they are less likely to be considered "reasonable." *Simon's New York Rules of Professional Conduct Annotated*, at 873 (2019 ed.). Moreover, RPC 1.17(a) governs an attorney's retirement from the private practice of law and does not apply where the attorney volunteers for a not-for-profit legal service group or obtains an in-house position. RPC 1.17 Comment [3].

Fee Sharing

Now we turn to the portion of your question regarding wills you previously drafted. If you do not wish to sell your entire practice, you have the option of asking another attorney whom you trust to maintain possession of your estate documents for the benefit of your clients so long as the client consents to such transfer or that the custodial attorney will only read the wills to the extent to notify the testators and ask for further instructions. *See* NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019), citing NYSBA Comm. on Prof'l Ethics, Op. 1035 (2014). Although the division of fees for legal services with another lawyer is generally prohibited under the RPC, Rule 1.5(g) offers an exception to the general prohibitions where: "(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation; (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and (3) the total fee is not excessive." *See* RPC 1.5(g).

In NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019), the New York State Bar Association Committee on Professional Ethics considered Rule 1.5(g) and discussed the factual circumstances under which a "retiring lawyer" is empowered to ask for or accept a referral fee from the custodial attorney safeguarding wills if holding the wills results in a new representation for the custodial attorney. The Committee concluded that such a referral fee to the retiring lawyer is only appropriate where the retiring lawyer assumes joint responsibility for the representation within the meaning of Rule 1.5(g). *See* NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019). Comment [7] to RPC 1.5 provides: "[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." *Id.*; *see also* NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019).

As noted above, a lawyer whose registration status is "retired" or has voluntarily resigned from the practice of law in New York is prohibited from providing legal services to a client for compensation. *Id.* As such, in NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019), the Committee opined that whether a retiring attorney could assume joint responsibility depended on whether the attorney maintained the ability to practice law for compensation. *Id.* Given that RPC 5.4(a) generally prohibits a lawyer from sharing legal fees with a non-lawyer, the Committee further opined that an attorney can assume joint responsibility for a representation *only* where the lawyer opts for continued registration upon retirement. *Id.*, citing RPC 1.5(g), 5.4(a). Similarly, in NYSBA Comm. on Prof'l Ethics, Op. 1160 (2019), the Committee noted that it is improper for a New York attorney to share fees with a lawyer who is not admitted to practice in New York if the sharing of fees as a matter of law would constitute the unauthorized practice of law. Accordingly, the Committee further opined that an attorney could satisfy the joint responsibility requirement of RPC 1.5(g)(1) if the attorney's status is "continued registration" at the time the custodial attorney provides services to the client. *See*, NYSBA Comm. on Prof'l Ethics, Op. 1172 (2019). Therefore, if you are going to consider a fee-sharing arrangement along these lines, you must continue to maintain your attorney registration.

New York Attorney Admission on Letterhead

A fundamental principle for all forms of attorney advertising and communications with the public is that they must not be "false, deceptive or misleading." RPC 7.1(a)(1). RPC 7.5(a) permits a lawyer to use letterhead and business cards so long as they "do not violate any statute or court rule and are in accordance with Rule 7.1." *See* RPC 7.5(a). In that respect, the NYSBA Committee on Professional Ethics opined that "a letterhead accurately stating that a lawyer is a 'Member of the Bars of [X State] and New York[']' is not engaged in false, deceptive or misleading conduct." *See* NYSBA Comm. on Prof'l Ethics, Op. 1173 (2019). The Committee, however, opined that a lawyer listing admission in New York on letterhead, but lacking an office located in the state, "must explain to prospective and existing clients the limits that the absence of a New York office imposes on the lawyer to engage in practice in New York." *See* NYSBA Comm. on Prof'l Ethics, Op. 1173 (2019). Attorney advertising listing an office address where attorneys cannot actually meet with clients for appointments is likely to be considered deceptive and misleading to potential clients under RPC 7.1(a)(1). *Id.*

Judiciary Law § 470 requires that a lawyer practicing in New York must have a physical office located within the

state and this requirement was upheld as constitutional by the Second Circuit Court of Appeals in *Schoenfeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016). Should you choose to continue practicing in New York in some form, as we discussed in a recent *Forum*, you may consider the option of operating your New York practice out of a "virtual law office" (VLO) if you want to relocate without selling your practice. *See* Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., August 2019 Vol. 91, No. 6; *see also* NYCBA Comm. On Prof'l and Jud. Ethics, Op. 2019-2 (2019). A VLO can be defined as "a facility that offers business services and meeting and work spaces to lawyers on an 'as needed' basis." *Id.*

Should you decide to continue your attorney registration in New York as part of the referral fee arrangement discussed above, you may be permitted to list the address of a VLO on your letterhead if the VLO qualifies as an "office" for the transaction of law business under the Judiciary Law § 470. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1501 (2019 ed.); *see also* Vincent J. Syracuse, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., August 2019 Vol. 91, No. 6; NYCBA Comm. On Prof'l and Jud. Ethics, Op. 2019-2 (2019). But since this is a rapidly evolving area of the law, you should make sure to stay current on this issue and ensure that any VLO you set up is in compliance with the law. *See Marina Dist. Dev. Co., LLC v. Toledano*, 174 A.D.3d 431, 432 (1st Dep't 2019) (Days after our August Forum went to press, the First Department held that an attorney did not sufficiently use a VLO program's services to meet the Judiciary Law § 470 requirement because there was no evidence that he used the physical New York office space and his letterhead directed replies to his Philadelphia office.)

Sincerely,
The Forum by
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UPDATE TO THE JULY/AUGUST 2018 FORUM ON MARIJUANA ETHICS FOR LAWYERS

We wanted to update you on a recent ethics opinion regarding our July/August 2018 *Forum* on Marijuana Ethics for Lawyers (Vincent J. Syracuse, David D. Holahan, Carl F. Regelmann & Alexandra Kamenetsky Shea, Attorney Professionalism Forum, N.Y. St. B.J., July/August 2018, Vol. 90, No. 6). In our July/August 2018 *Forum*, we discussed how the Department of Justice's (DOJ) 2018 rescission of a memo regarding enforcement of criminal marijuana laws created some ambiguity with respect to a 2014 NYSBA ethics opinion (NYSBA Comm. on Prof'l Ethics, Op. 1024 (2014)) that explicitly relied on the now rescinded memo. *Id.* The NYSBA Committee on Professional Ethics has now reaffirmed its 2014 opinion that a New York lawyer may ethically assist a client in conduct designed to comply with New York's medical marijuana law. *See* NYSBA Comm. on Prof'l Ethics, Op. 1177 (2019). The Committee opined that in light of the continued renewal of the congressional Rohrabacher-Farr amendment, which prohibits the DOJ from using congressionally appropriated funds to prevent states from implementing their own state medical marijuana laws, the Committee's 2014 conclusion is reaffirmed. *See id.* Stay tuned to this rapidly evolving area of the law.

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

DEAR FORUM,

I am a matrimonial attorney and represent a very wealthy client who is going through a messy divorce. We just received a motion to disqualify our firm because my client's spouse is represented by an attorney who previously worked at our firm and met briefly with our client's spouse years ago while an associate at our firm. No one currently at our firm has any recollection of meeting or communicating with our client's spouse and we don't have any of the spouse's records. Our client is furious with the spouse because a few other law firms were conflicted out from representing our client before we were engaged because the spouse evidently consulted with a number of prominent divorce attorneys in the area before finally engaging our former associate. Although our client's spouse likely won't admit to it, it seems like the consultations with so many prominent attorneys in this relatively niche high end divorce legal field was intended to prejudice our client.

Do we have a basis to oppose the disqualification motion? Are there any actions we should be taking to demonstrate to the court that our firm should not be disqualified? Are there any other factors we should be considering to protect our client's right to choose counsel?

Very truly yours,
Carmela S.