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Inside

The Ethical and Practical Considerations of Removing an Incapacitated Trustee

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I. Introduction

In the State of New York, the process of removing a trustee with diminished capacity presents unique challenges. The removal statutes under the Surrogate's Court Procedure Act do not expressly refer to incapacity, whether physical or mental, as a basis for removing a trustee, and the definitions of incapacity and incompetence under the general provisions of the SCPA do not clearly apply to fiduciary removal.[1] Rather, in the case of a testamentary trustee, the standards for removal under the SCPA are purposefully broad, somewhat vague, and therefore may lack the protections provided under other relevant statutes, most notably, Article 81 of the New York Mental Hygiene Law.[2] *Inter vivos* trusts, which customarily may be administered without court supervision, may also require court intervention if the trust instrument fails to provide specific definitions and procedures for removing a trustee who is believed to be incapacitated.[3] The related question of whether there is a duty to remove an incapacitated trustee similarly raises prudence issues among co-trustees and ethical considerations for lawyers representing one or more fiduciaries under the recently adopted New York Rules of Professional Conduct.[4]

This article discusses the current rules and standards governing judicial removal of incapacitated trustees and raises the issue of whether the New York legislature should establish a more specific standard for determining the incapacity of a trustee. The article also suggests drafting considerations for *inter vivos* trusts and procedures in the case of suspected trustee incapacity, with an eye toward avoiding court intervention. Finally, the article discusses the duties among co-trustees to address an incapacity among their ranks and the related ethical responsibilities of a lawyer in the case of multiple or separate fiduciary representation where diminished capacity becomes an issue.

II. Judicial Removal of Incapacitated Trustees

A trustee may be judicially removed with notice to all interested parties under SCPA 711.[5] SCPA 711(1)-(9) enumerates several specific grounds for removing fiduciaries to whom letters of authority issue from the court. In addition, SCPA 711(10) and SCPA 711(11), respectively provide separate catchall grounds for removing testamentary trustees and lifetime trustees.[6]

Removal on the grounds of trustee incapacity is addressed in two specific sections of SCPA 711, albeit somewhat vaguely. SCPA 711(2) authorizes the Surrogate to remove a trustee upon a showing that he or she is unfit for the execution of the office of trustee by reason of a want of understanding. Similarly, SCPA 711(8) provides that a trustee may be removed "where he or she does not possess the qualifications required of a fiduciary by reason of want of understanding, or who is otherwise unfit for the execution of the office."[7] In addition to these specific grounds, the Surrogate may also consider incapacity as grounds for removal of a testamentary trustee under SCPA 711(10) or a lifetime trustee under SCPA 711(11) where it is shown that the trustee is unsuitable to execute the trust.

In New York, a person's competency is presumed[8] and the party alleging incapacity bears the burden of proving lack of capacity by clear and convincing evidence.[9] This is in keeping with the general rule that the burden of proof in removal proceedings is on the party seeking to revoke the fiduciary's appointment.[10] Similarly, removal proceedings under SCPA 711 may be brought, with notice to the allegedly incapacitated trustee, by a co-trustee, creditor, beneficiary, or a person on behalf of a minor or a surety on a trustee's bond.[11]

Courts have historically construed want of understanding under SCPA 711 to mean that the person fails to possess the requisite understanding of the duties and responsibilities of a trustee.[12] Although well-settled case law provides that want of understanding does not imply an entire lack of mental capacity,[13] it remains a slightly elusive and anachronistic formulation to apply, with the result that modern courts have tended to favor the broader, alternative standard of "otherwise unfit to serve" under SCPA 711(8) as grounds for removal in the case of alleged trustee incapacity.[14]

However, the "otherwise unfit to serve" standard, while purposefully broad,[15] is also somewhat vague and may operate, in certain cases, to deprive the allegedly incapacitated trustee of the opportunity to be evaluated in light of more developed standards and protections currently available under New York law in particular, those under Article 81 of the MHL.[16] Incapacity determinations based on clear statutory standards are particularly desirable in fiduciary removal proceedings since courts have typically granted the relief sparingly in deference

to the testator's or grantor's expressed wishes as to fiduciary appointments.[17]

Moreover, the question of whether a trustee no longer has the requisite capacity to administer a trust is similar to the question of whether a person is in need of a guardian for property management under Article 81 of the MHL.[18] Accordingly, courts should be encouraged to consider and apply the same functional criteria for determining trustee incapacity in removal proceedings. Although a detailed discussion of the provisions of Article 81 of the MHL is beyond the scope of this article, it is noted that in determining whether a person is incapacitated for purposes of needing a guardian for property management under Article 81, a court is directed to give primary consideration to a person's functional level, defined in MHL § 81.03(b) as the ability of the person with respect to property management. The court is similarly directed to consider the person's functional limitations, defined in MHL § 81.03(c) as the behavior or conditions of a person which impair the ability to provide for property management, and assess "the nature and extent of the person's property and financial affairs and his or her ability to manage them…including the extent of the demands placed on the person…by the nature and extent of that person's property and financial affairs."[19]

In order to encourage courts to consider the framework adopted in MHL Article 81 for determining the functional abilities and limitations of the trustee, the New York State Legislature might consider modifying SCPA 711 to provide an additional express basis for removing a trustee who is substantially unable to manage the trust's financial resources or is otherwise substantially unable to execute the duties of a trustee. Such a determination would be predicated upon a consideration by the court of the functional criteria for determining the trustee's ability to manage trust property as set out in Article 81.[20]

III. Reminders for Drafting Trustee Incapacity Provisions in Lifetime Trusts

Unlike testamentary trusts, properly drafted lifetime trusts need never see the inside of a courthouse in order to be properly administered. This desirable state of affairs can be seriously disrupted if the draftsperson has not given adequate consideration to setting out in the trust instrument the precise mechanisms and procedures for removing a trustee who is believed to be incapacitated.[21] The following drafting suggestions are offered to assist the practitioner in developing workable procedures:

1. Provide Specific Definition of Trustee Incapacity

Trust instruments sometimes contain a legal definition of legal disability or a definition of mental incapacity, or both, which typically govern the trust for all purposes, including determinations of whether a beneficiary is entitled to receive trust property in his or her own right, exercise certain powers of appointment, or possesses sufficient capacity to appoint or, in some cases remove, trustees under the trust instrument. Given the specialized rights and duties of the trustee, it may be preferable to have the trust instrument contain a separate definition or standard for determining trustee capacity. One possible formulation could be a determination that the trustee has suffered a clinically significant impairment of mental function that may interfere with his or her ability to make decisions concerning the proper administration of the trust in the best interest of the beneficiaries. Another possible formulation, patterned on the California statute discussed in footnote 20 above, could be a determination that the trustee is substantially unable to manage the trust's financial resources or is otherwise substantially unable to execute properly the duties of the office.[22]

2. Mechanisms for Determining Incapacity

Since the removal of a trustee on the grounds of incapacity presents both substantive and procedural challenges, with possibly stigmatizing consequences for the affected trustee and potential bottleneck issues for the efficient administration of the trust, the trust instrument should contain mechanisms which (a) give written notice to the affected trustee or certain of his or her family members that such trustee's capacity is being determined by a majority of the other trustees, (b) establish means for the affected trustee or such trustee's family members to identify for the other trustees, within a relatively short period of time after having received the notice described in subparagraph (a) above (within 5 to 10 days), one or more qualified physicians who will certify whether or not the alleged affected trustee is incapacitated, (c) provide channels for reporting determinations of incapacity to the other trustees and (d) provide for the automatic or deemed resignation of an affected trustee if a physician is unwilling to provide an incapacity certification or if the affected trustee for any reason refuses an examination for purposes of the certification or refuses to make the results of a certification known to the other trustees within a defined period of time (within 30

days) after having received the notice described in subparagraph (a) above.

One clear advantage of having an automatic resignation provision is to prevent gridlock in the administration of the trust if an affected trustee is unwilling to obtain the incapacity certification described above or if a physician is unwilling to provide such a certification because of privacy concerns under the Health Insurance Portability and Accountability Act (HIPAA)[23] One method to address potential HIPAA concerns is to have a trustee sign a HIPAA waiver as a requirement of serving as trustee. However, obtaining such a waiver may not be practical in all cases and will not cover the case of an affected trustee who refuses to be examined or to make the results of an examination known to his or her co-trustees. In such a circumstance, an automatic resignation provision would be a preferable alternative to commencing a costly and perhaps uncertain court proceeding to remove the affected trustee.

IV. Fiduciary and Ethical Duties

Although SCPA 711 expressly authorizes a trustee to petition for the removal of such trustee's co-fiduciary, it is not clear whether, in all instances, a trustee has an affirmative duty to seek the removal of a co-trustee who he or she believes is incapacitated. Rather, the question of whether there is such a duty appears to turn on the number of trustees serving and the potential or actual loss to be suffered by the trust if the allegedly incapacitated trustee is not removed.

EPTL 10-10.7 governs decision making among multiple fiduciaries, and requires that fiduciaries act by majority rule in discretionary (as opposed to ministerial) matters.[24] Thus, unless otherwise provided in the trust instrument, where two trustees are serving, they must generally act unanimously as to most matters of importance in the life of the trust. Under these circumstances, where the administration of the trust would come to a halt in the event of the incapacity of one of the two trustees, the other trustee has been held to have an affirmative duty to seek the removal of his co-trustee.[25] The duty to seek the removal of a co-trustee in the case of two trustees is similarly supported by SCPA 2309, which provides that in the case of two trustees, each is entitled to receive a full statutory commission service as a trustee. Even without other evidence of loss in the administration of the trust, the payment of compensation to a trustee during the period of his or her incapacity could properly be viewed as an avoidable loss to the trust, which the co-trustee with capacity arguably has a duty to prevent.

Where more than two trustees are serving, the law is not as clear that co-trustees have an unqualified duty to seek the removal of one of their number who is allegedly incapacitated.[26] In the absence of negligence in the handling of the trust estate or other loss to the trust, courts have been reluctant to find such a duty.[27] A lesser duty to seek removal in the case of more than two trustees is similarly supported by SCPA 2313, which provides that in the case of more than two trustees, generally no more than two commissions are allowed. The two commissions thus payable are to be apportioned among the trustees according to their respective efforts unless they otherwise agree in writing to a different allocation, provided that no trustee is entitled to receive more than one full commission.[28] Since the multiple commissions statute provides for the payment of two commissions whenever there are more than two trustees serving, the question of whether the incapacitated co-trustee is entitled to receive any portion thereof has been held to be an internal matter among the trustees and does not involve loss to the trust or negligence to the beneficiaries.[29]

Trustee incapacity and the potential need for removal also present ethical considerations for a lawyer representing one or more trustees. In the case of multiple representation, if one of the trustees shows signs of incapacity during the period of trust administration, it would likely not be ethically permissible for the lawyer to represent one client-fiduciary in a proceeding to remove the other and, if undertaken, would likely result in the lawyer's disqualification.[30] In order to avoid even the appearance of so-called "turncoat" representation, the lawyer is required in such a circumstance to withdraw from the dual representation under established ethical rules.[31] Although the current body of law interpreting the rules of attorney conduct in case of multiple representation of fiduciaries was largely developed under the prior New York Code of Professional Responsibility, the corresponding provisions of the recently adopted New York Rules of Professional Conduct (New York Rules), which took effect in April 2009, do not meaningfully depart from the established principles of the prior law.[32]

Where a lawyer represents a sole trustee or one of several trustees, other ethical considerations are presented under Rule 1.14 of the New York Rules, which provides a new substantive rule regarding a lawyer's representation of a client with diminished capacity.[33] Under the new rule, a client is considered as having diminished capacity when he or she is unable to make "adequately considered decisions in connection with a representation" due to "mental impairment or for some other reason."[34] If the lawyer "reasonably believes"[35] the client to have diminished capacity, the lawyer has a duty to maintain a conventional relationship with the client as far as reasonably possible. However, when the lawyer reasonably believes that the client is at risk of suffering substantial financial or other harm unless action is taken and the client cannot adequately act to protect his or her own interest, the lawyer may take reasonably necessary protective action to protect the client.[36] Protective action includes consulting with individuals or entities that have the ability to take action to protect the client.[37]

Although the general rules of confidentiality and attorney-client privilege apply in connection with the representation of a client with diminished capacity, Rule 1.14 (c) of the New York Rules contemplates the disclosure of certain information regarding the client's impairment in order to take appropriate protective action in a given circumstance.[38] Arguably, a client with diminished capacity who is serving as a trustee may suffer substantial personal liability in the form of surcharge by continuing in office and may not appreciate the necessity for his resignation or removal. Although the diminished capacity rule does not directly address the point, a lawyer's protective action in such a situation might properly include discussions with one or more interested parties, such as a co-trustee or beneficiary, to determine the timing and manner for seeking the client's resignation or removal from office.

V. Conclusion

Determining when an individual should be called upon to resign as a fiduciary is not always easy, particularly in the case of capacity, which is often on a continuum. The New York State legislature recognized this continuum with the dramatic revamping of its guardianship law in the mid-90s. However, the statutes under the SCPA governing fiduciary eligibility and removal have not been clearly harmonized with the provisions of Article 81 of the MHL, resulting in a lack of clarity as to the precise standards for making capacity determinations warranting removal. Accordingly, this article suggests that the legislature consider amending SCPA 711 to provide additional grounds for removing a trustee based upon the court's determination that the trustee is substantially unable to manage and invest the trust's financial resources or is otherwise substantially unable to execute the duties of a trustee. The court's determination would be premised upon a consideration of the transactional approach adopted by Article 81 of the MHL by focusing on the functional abilities and limitations of the affected trustee with respect to property management. Amending SCPA 711 along the lines proposed would have a dual benefit. It would focus the court's inquiry on the trustee's unique responsibilities and duties in administering the trust. In addition, the consideration of the trustee's functional abilities and limitations within an established statutory framework would provide a more consistent method for assessing whether those abilities have been compromised to the point where his or her removal is warranted.

Endnotes

1. The definitions section of the Surrogate's Court Procedure Act ("SCPA") provides that when used in the act, an "incapacitated person" means "any person who for any cause is incapable adequately to protect his or her rights, including a person for whom a guardian has been appointed pursuant to article 81 of the mental hygiene law." (SCPA 103(25)). Similarly, an "incompetent" is defined as "any person judicially declared incompetent to manage his affairs."(SCPA 103(26)). The definition and continued use of the term "incompetent" under the SCPA presents particular interpretive difficulties in view of the repeal, effective April 1, 1993, of Articles 77 and 78 of the Mental Hygiene Law ("MHL") (the former conservatorship and committee statutes) and their replacement with guardianships for personal and property management needs of the person under Article 81 of the MHL. Thus, while adjudications of incompetence under Article 78 (and the appointment of committees) are no longer made in New York, the SCPA continues to refer to incompetence as grounds for ineligibility for a person to receive letters initially (SCPA 707(1)(b)) and for his or her *ex parte* removal as a fiduciary (SCPA 719(6)). Article 81 of the MHL attempts to avoid some of these construction issues by providing that "[w]henever a statute uses the terms conservators or committees, such statute shall be construed to include the term guardian notwithstanding the provision of such article unless the context otherwise requires." (MHL § 81.01).
2. The SCPA contains two procedures for removing fiduciaries, including testamentary and lifetime trustees. SCPA 711 permits removal of a trustee on notice to all interested parties. SCPA 719, on the other hand, permits the Surrogate to remove a trustee *ex parte*, without notice to the allegedly incapacitated trustee. Under SCPA 719(6), a trustee can be removed *ex parte* where he or she has been judicially committed or has been declared an incompetent. New York commitment statutes are contained in Article 9 of the MHL. In particular, MHL Sections 9.13- 9.31 govern involuntary commitment. Involuntary commitment requires that "it must be demonstrated by clear and convincing evidence that the patient is mentally ill and in need of continued, supervised care and treatment, and that the patient poses a substantial threat of physical harm to himself and/or others." New York Health and Hospitals Corp. v. Brian H., 51 A.D.3d 412, 415, 857 N.Y.S.2d 530, 533 (1st Dep't 2008). Since the repeal of Article 78 of the MHL effective April 1, 1993, it is unclear whether the standard for *ex parte* removal under SCPA 719(6) should be construed to be a determination of incapacity under Article 81 of the MHL rather than a determination of incompetence under repealed Article 78 of the MHL (pre-1993 adjudications of incompetency, for instance, continue to have full force and effect). In addition, SCPA 711(10) provides for an *ex parte* removal of a fiduciary where any of the facts provided in SCPA 711 are brought to the attention of the court.
3. 7-2.6 of the New York Estates Powers and Trusts Law ("EPTL") governs removal of trustees of lifetime trusts in the Supreme Court. It provides that on application of any person interested in the trust estate, the court may remove a trustee who for any reason is unsuitable to execute the trust. The Surrogate's Court has concurrent jurisdiction with the Supreme Court in matters relating to express trusts and in particular in removing lifetime trustees (EPTL 711(11)).
4. 22 NYCRR Part 1200. Effective April 1, 2009, the Appellate Division of the New York State Supreme Court replaced the prior New York Code of Professional Responsibility with the New York Rules of Professional Conduct, published as Part 1200 of the Joint Rules of the Appellate Division.
5. SCPA 711 (McKinney's 1994 & 2010 Supp.).
6. As mentioned above, the jurisdiction of the Surrogate's Court is concurrent with the New York Supreme Court in matters relating to express trusts.
7. SCPA 711(8) (McKinney's 1994 & 2010 Supp.).
8. Bender's New York Evidence-CPLR, § 11.13 [1] (2009) (citing People v. Silver, 33 N.Y.2d 475, 354 N.Y.S.2d 915, 310 N.E.2d 520 (1974), *In re* Nealon, 57 A.D.3d 1325, 870 N.Y.S.2d 578 (3d Dep't 2008) and People v. Gelikkaya, 197 A.D.2d 405, 602 N.Y.S.2d 372 (1st Dep't 1993)).
9. See, Warren's Heaton on Surrogate's Court Practice § 117.05[1][b] (Seventh Edition) ('Warren's Heaton").
10. Warren's Heaton § 117.05 [1] [a] (citing *In re* Krum, 86 A.D.2d 689, 486 N.Y.S.2d 522 (3d Dep't 1982)).

11. SCPA 711 (McKinney's 1994 and Supp. 2010).

12. *In re* Leland, 219 N.Y. 387, 114 N.E. 854 (1916).

13. *Id.* ("The Surrogate's Court should not…grant letters to an unadjudged incompetent, nor to one unable, by reason of incurable bodily disease, to understand the duties of a given trust sufficiently to safeguard the interest of the living." *Id.* at 394, 114 N.E. at 856.); *In re* Dolansky's Estate, 92 N.Y.S. 2d 678 (Sur. Ct. Schenectady Co. 1949) (quoting *In re* Phyfe's Estate, 115 Misc. 699, 703, 182 N.Y.S. 729, 731 (Sur. Ct. New York Co. 1920) ("'want of understanding'…is not a finding that the widow is insane, or a lunatic, or that she is generally incompetent. It is a ruling that [she] has not the requisite understanding of the duties and responsibilities that she would be called upon to exercise in administering an estate worth $150,000.").

14. *In re* Witkin, N.Y.L.J., Jan. 3, 2008 at 35, col.6 (Sur. Ct. N.Y. Co.) (severe dementia); *In re* Faust, N.Y.L.J, March 5, 2007 at 31, col. 3 (Sur. Ct. N.Y. Co.) (undenied allegations of Alzheimer's disease).

15. Warren's Heaton § 33.02 [6][e] (citing *In re* Piterniak, N.Y.L.J., Nov. 8, 2000, at 25 (Sur. Ct. Richmond Co.)).

16. As mentioned above, New York's guardianship law was entirely revamped by the enactment of Article 81 of the Mental Hygiene Law, made effective April 1, 1993. The legislation sets forth functional tests and criteria for determining incapacity, provides enhanced protections of the due process rights of an alleged incapacitated person and introduces the concept of the least restrictive form of intervention.

17. Warren's Heaton § 117.05[1][a] (citing *In re* Farber, 98 A.D.2d 720, 469 N.Y.S.2d 126 (2d Dep't 1983); *In re* Vermilye, 101 A.D.2d 865, 475 N.Y.S.2d 888 (2d Dep't 1984)).

18. Under MHL § 81.03(g), the term "property management" as used in MHL Article 81, means "taking actions to obtain, administer, protect, and dispose of real and personal property, intangible property, business property, benefits, and income and to deal with financial affairs."

19. MHL § 81.02(c)(4). As described by a leading elder law commentator, for an individual to be incapacitated within the meaning of the statute, "the individual must be unable to provide for the personal needs and/or property management needs at issue and not adequately understand and appreciate the nature and consequences of that inability." Elder Law and Guardianship in New York, § 11:7 (2005 Thomson/West).

20. California amended its Probate Code relatively recently along similar lines. In 2006, § 15642 of the California Probate Code was amended to provide that in addition to removal on the grounds of a trustee being otherwise unfit to administer the trust (Cal. Prob. Code § 15642(b)(2)), removal may be directed:

> If, as determined under Part 17 (commencing with Section 810) of Division 2, the trustee is substantially unable to manage the trust's financial resources or is otherwise substantially unable to execute properly the duties of the office. When the trustee holds the power to revoke the trust, substantial inability to manage the trust's financial resources or otherwise execute properly the duties of the office may not be proved solely by isolated incidents of negligence or improvidence. Cal. Prob. Code §15642(b)(2) (West 1991 & 2010 Supp.)

21. Of course, a trust instrument often contains a provision authorizing the grantor, during his or her lifetime, or some other person or class of persons after the grantor's death (such as special Committee or Protector) to remove trustees for any reason, either with or without cause.

22. Cal. Prob. Code § 15642(b)(2) (West 1991 & 2010 Supp.).

23. Pub. L. 1104-91, 110 Stat. 1936.

24. Although EPTL 10-10.7 provides that a surviving trustee can generally act alone, the statute presupposes the prior death, resignation or removal of his or her co-trustee(s). EPTL 10-10.7 similarly provides in relevant part that "[a] fiduciary who fails to act through…disability…shall not be liable for the consequences of any majority decision, provided that the liability for failure to join in administering the estate or trust or to prevent a breach of trust may not thus be avoided." *Id.*

25. *In re* Julliard, 171 Misc. 661, 13 N.Y.S.2d 315 (Sur. Ct. Orange Co. 1939) (citing, *In re* Julliard, 169 Misc. 270, 7 N.Y.S.2d (Sur. Ct. Orange Co. 1938; Bascom v. Weed, 53 Misc. 496, 105 N.Y.S. 459 (Sup. Ct. Essex Co. 1907)); See, *In re* Faust, *supra*, and *In re* Witkin, *supra*.

26. *In re* Julliard, 171 Misc. 661, 13 N.Y.S.2d 315 (Sur. Ct. Orange Co. 1939), *supra*.

27. *Id.* ("A fiduciary should not be placed in the position of determining in every case at his peril the mental competency of his associate and be surcharged for ordinary and justifiable losses if it should be subsequently determined that his associate was mentally incompetent." *Id.* at 665).

28. SCPA 2313.

29. See, *id.* ("It is said that the estate of Trustee Julliard is not entitled to any commissions at all for the reason that he rendered no services…Whether any part of the commissions should be paid to the estate of the deceased [mentally incapacitated] trustee is a matter to be determined among the trustees themselves and does not concern the estate beneficiaries." *Id.* at 666).

30. *In re* Harris, 21Misc.3d 239, 862 N.Y.S.2d 898 (Sur. Ct. Bronx Co. 2008) (SCPA 711 proceeding to revoke letters testamentary); See, *In re* Hof, 102 A.D.2d 591, 478 N.Y.S.2d 39 (2d Dep't 1984) (action to disqualify an attorney who previously represented two co-fiduciaries, citing the Committee on Professional Ethics of the New York State Bar Association which "concluded that an attorney for two co-executors may not represent either of them in an accounting or other adversarial proceeding against the other and any departure from neutrality would require his withdrawal from further representation in connection with the estate." *Id.* at 596).

31. NYSBA Op. No. 512 (1979) (lawyer for two co-executors may not institute a proceeding to compel and accounting or otherwise represent one executor against the other). The Opinion cites former DR5-105 (a lawyer should not accept or continue multiple employment if the interests of one client may impair the exercise of his independent professional judgment on behalf of another), DR 5-107(A) (a lawyer shall represent his client with undivided loyalty) and DR2-110(B)(2) (implicitly requiring a lawyer to withdraw from employment where it appears that he can no longer serve a client with undivided loyalty).

32. See footnote 4, *supra*. Thus, the substance of DR5-105, DR5-107(A) and DR2-110(B)(2) are now generally respectively contained in Rules 1.7, 1.8 and 1.16(b)(1) of the New York Rules.

33. Rule 1.14 of the New York Rules.

34. Rule 1.14 (a) of the New York Rules.

35. Defined under Rule 1.0 of the New York Rules as denoting that the "lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."

36. Rule 1.14 (a) and (b) of the New York Rules.

37. Rule 1.14 (b) of the New York Rules.

38. "When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) [relating to confidentiality of information] to reveal information about the client, but only to the extent reasonably necessary to protect the client's interest." Rule 1.14 (c) of the New York Rules.

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