

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE: WORLD TRADE CENTER  
DISASTER SITE LITIGATION  
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Docket No.: 21 MC 100 (AKH)

THIS DOCUMENT APPLIES TO ALL  
WORLD TRADE CENTER DISASTER SITE  
LITIGATION  
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DECLARATION IN RESPONSE  
TO AUGUST 17, 2010 ORDER

DENISE A. RUBIN an attorney duly licensed to practice before the courts of the State of New York and a member of the bar of this Honorable Court, hereby declares under penalty of perjury:

1. I am associated with the law firm Worby Groner Edelman & Napoli Bern, LLP, Plaintiffs' Co-Liaison Counsel in the above-captioned matters. This Declaration is made upon my personal knowledge and a review of the files maintained by the law firm for the prosecution of the plaintiffs' claims herein.

#### **GENERAL BACKGROUND**

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2. This Declaration and its supporting exhibits are respectfully offered in response to the August 17 Order's request for information only; it should be read in conjunction with the Plaintiffs' Memorandum Responding to the Court's Sua Sponte Order of August 4, 2010 served and filed with this Court's ECF filing system on August 24, 2010.

3. Generally, the criteria for determining which expenses may be charged to clients and which must be absorbed by the firm arise from two provisions of the New York Rules of Professional Conduct ("New York Rules")(emphasis added):

- a. New York Rule 1.8(e)(3) states that a "a lawyer shall not advance or guarantee financial assistance to the client, except that ... a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the

action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action *may include an amount equal to such costs and expenses incurred.*";

- b. New York Rule 1.1(a) states that a lawyer "shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." New York Rule 1.1(b) further states that a lawyer "shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it."
4. In its August 17, 2010 *sua sponte* order, this Court requested information regarding expenses paid for, in whole or in part, using borrowed funds. *See* Order of August 17, 2010, Exhibit "A" to this Declaration, at ¶ 5(b).

**WORBY GRONER EDELMAN & NAPOLI BERN, LLP'S  
RESPONSES<sup>1</sup> TO THE QUERIES SET FORTH IN THIS  
COURT'S SUA SPONTE ORDER OF AUGUST 17, 2010**

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5. **Responding to question "1" on the August 17, 2010 Order:** Worby Groner Edelman & Napoli Bern, LLP does not utilize so-called "engagement letters". Rather, at the time a new client retains the firm and the firm accepts representation of that client in a client matter such as the *In re: World Trade Center Disaster Site Litigation*, we utilize a Contingency Fee Retainer Agreement that has been vetted by ethics counsel and reviewed and vetted by this Court's appointed Ethics Special Master, Professor Roy Simon. A copy of our "Ground Zero" Contingency Fee Retainer Agreement is annexed to this Declaration as Exhibit "B". Exhibits B1 through B4 represent other versions of this retainer agreement and our intake package. B1 is in Polish; B2 is in Spanish; B3 and B4 are joint intakes prepared for use with referred clients from two other law firms.

6. **Responding to question "2" on the August 17, 2010 Order:** Copies of redacted "short form" client disclosure letter approved by this Court and by this Court's appointed Ethics

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<sup>1</sup> This response is offered in our capacity as Plaintiffs' Counsel to individual plaintiffs where such response is appropriate and as Plaintiffs' Liaison Counsel in all other matters.

Special Master Professor Roy Simon, representing the letters sent to a client (redacted name) in each of Tiers 1 through 4, inclusive, are annexed to this Declaration as Exhibits “C”, “C2”, “C3” and “C4” respectively. A copy of the “long form” client disclosure letter approved by this Court and by this Court’s appointed Ethics Special Master Professor Roy Simon, is annexed to this Declaration as Exhibit “D”.

7. **Responding to question “3” on the August 17, 2010 Order:** The accounting practices used to connect interest expense payments were on a cash basis as expenses were incurred. I am advised by the firm accounting department that only after a case disbursement was incurred, an interest charge would be made based upon the date of the disbursement, the amount of the disbursement and interest rate at the time of the disbursement funding. If the loan’s variable interest rate changed, that rate change was also made to the interest charges at the case disbursement level at that time. Thus the interest is tracked on a disbursement by disbursement basis, and on a plaintiff specific basis. At no time is the interest charged to plaintiffs greater than the interest charged to the law firm. In practice the interest a plaintiff pays is actually 25% less than the amount the law firm exactly pays to the lending institution. That is the law firm is paying 25% of this costs under the present fee structure.

8. **Responding to question “4(a)” on the August 17, 2010 Order** Annexed to this Declaration as Exhibit “F”, we are submitting a spreadsheet detailing the number of borrowings by dates and amounts. Copies of the invoices showing the same are available for *in camera* inspection if this Court so requests, but are not submitted with this Declaration.

9. **Responding to question “4(b)” on the August 17, 2010 Order;** The borrowed funds were deposited into various bank accounts, those bank accounts are classified as either “general operating” or “case disbursement” accounts. The “Operating Account” was used only to

pay WGENB overhead expenses for which the clients are not charged (*i.e.*, they are neither charged a case disbursement nor an interest expense for these costs). The “Disbursement Account” is used to pay only case-specific disbursements for only the WGENB entity’s work in *In re: World Trade Center* – related cases. No other of the type of cases or other case costs are paid out of these accounts. This insures that the costs are related and separate for accounting purposes.

10. **Responding to question “5(a)” on the August 17, 2010 Order:** A list of these categories is annexed hereto as Exhibit “E”.

11. **Responding to question “5(b)” on the August 17, 2010 Order:** The criteria for determining which expenses may be charged to the clients follows the cases and bar opinions set out in New York and elsewhere. Expenses that are to be absorbed by the law firm as equivalent to work capable of being performed by lawyers on staff are determined under criteria based on the ABA Committee on Ethics and Professional Responsibility Formal Opinion 93-379 (1993), ABA Committee on Ethics and Professional Responsibility Formal Opinion 97-407 (1997) and ABA Committee on Ethics and Professional Responsibility Formal Opinion 00-420 (2000).

12. Opinion 93-379 distinguishes between (a) general office overhead, which *may not* be charged directly to clients but rather should be built into the lawyer’s hourly or contingent fee and (b) disbursements for non-legal services (such as photocopying) provided by non-law-firm personnel, *which may be billed to clients* as long as the law firm does not add a surcharge. *Id.* at 7-8. Opinion 00-420 takes the principle expressed in Opinion 93-379, extending that from non-legal services to legal services provided to a client which the lawyer had to purchase because they could not be provided in-house, such as so-called “contract attorneys”. According to Opinion 00-420, since “a lawyer may be required to engage a [legal] specialist to assure competent representation,” a lawyer may charge the client the cost of that lawyer as an expense. However, if it does so it may

not surcharge the client on top of the expenses actually incurred in hiring and utilizing that legal specialist. *See* Opinion 00-420. Therefore, according to Opinion 93-379 and Opinion 00-420, when a law firm must contract with third-party service providers to deliver legal services to clients in a particular representation, it is permissible to charge clients for those expenses.

13. **Responding to question “5(b)(i)” on the August 17, 2010 Order:** The services provided by paralegals, nurse technicians and other clerical and technical personnel employed by the law firm are generally not billed to the clients; these charges are absorbed as part of the legal services provided by the firm to its clients. There are some circumstances where these expenses would be permissible. In its Formal Opinion 93-379, the ABA’s Committee on Ethics and Professional Responsibility found that it is proper for a law firm to charge its clients for the provision of in-house services such as charges for photocopying, computer research, on-site meals, deliveries and other similar items. Like professional fees, the Committee found that lawyers may pass on *reasonable charges* for these services. Thus, the lawyer and the client may agree in advance that, for example, photocopying will be charged at \$.15 per page, or messenger services will be provided at \$5.00 per mile. However, Committee considered the question of what may be charged to the client, in the absence of a specific agreement to the contrary, when the client has simply been told that costs for these items will be charged to the client. The ABA Committee concluded that “under those circumstances the lawyer is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of a photocopy machine operator).” *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379 (December 6, 1993).

14. **Responding to question “5(b)(ii)” on the August 17, 2010 Order:** In this case, for example, the Napoli firm hired third-party service providers to provide expertise in insurance law, an highly specialized area of legal practice in which the Napoli attorneys lack expertise. These consultants/experts helped us understand the insurance policies and the underwriting procedures at both Lloyd’s of London and MetLife. As this Court knows both of these efforts resulted in a substantial benefit to the plaintiffs. The consultation we had with experienced Lloyd’s counsel resulted in a major settlement and addition to the WTC Captive, which in turn benefited the settlement. The consultant’s guidance and advice on MetLife helped result in the Metlife Disability Policy which is part of the SPA today. This cost was an expense that should not be absorbed by the Napoli firm because it was not work capable of being performed by lawyers on the Napoli firm’s staff. Our office has no insurance policy and practices experience, and have never been involved in the inner workings of the Lloyd’s market, which is part of what we need consultation in.

15. The Napoli firm also employed legal ethics specialists who consulted with the firm, initially, with respect to the proper notice to clients before entering into the aggregate settlement process, and later to insure that the design and presentation of the Amended Settlement Process Agreement was meeting all of the aggregate settlement rules. The cost of these consultants, whose work was necessary for the success of the settlement, is properly charged to the clients as disbursements.

16. According to Opinion 97-407, moreover, consultants, even if they are lawyers, do not have an attorney-client relationship with the clients of the retaining lawyer. Therefore it would be inappropriate to bill clients for their services *as legal fees*, as opposed to consultant expenses. Another expense that may be charged to the client is the fees for lawyers or other vendors appointed by this Court to serve a particular or specialized purpose, role or function. Such charges would

include the fees paid to Special Masters Aaron Twerski and James Henderson, Ethics Professor Roy Simon and Claims Neutral Matt Garretson. *See* New York Rule 2.4(b) (clarifying that lawyers who serve as third-party neutrals do not represent any of the parties in the matter). All of those persons are attorneys, but their services are clearly not properly absorbed by any of the plaintiffs' law firms as legal services that could have been provided by in-house attorney staff. These special masters and claims neutrals are analogous to arbitrators or mediators, the expenses of which are customarily paid for separately, not absorbed by the legal fees paid to counsel.

17. **Responding to Question “5(b)(iii)(1)” of the August 17, 2010 Order:** *See* paragraphs 14-16, *supra*.

18. **Responding to Question “5(b)(iii)(2)” of the August 17, 2010 Order:** The criteria used for this category are based on the ABA Committee on Ethics and Professional Responsibility Formal Opinion 93-379 (1993). Opinion 93-379 distinguishes between general office overhead, which may not be charged directly to clients which should be built into the lawyer's hourly or contingent fee and disbursements for non-legal services provided by non-law-firm personnel, which may be billed to clients as long as the law firm does not add a surcharge. *Id.* at 7-8. A non-exclusive list of expenses that presumptively may be charged to clients (provided the law firm does not add a surcharge), includes “charges for expert witnesses, investigators, and stenographers; transcriptions; photocopying costs . . .; messenger services; employee overtime; travel expenses . . .; meals; telephone calls; computer-assisted research; and typing/printing charges. ABA/BNA Lawyers' Manual on Professional Conduct ¶ 41:110 (2005 Supp.) (citing numerous state bar ethics opinions). A law firm will either have the capacity to provide certain legal services, or it will not. If it does not, it will have to expand to be able to provide those services by acquiring new office space and information technology resources, and the like. To the extent a law firm is investing in additional

capacity that will benefit future clients, beyond the scope of the present matter, these expenditures are “overhead,” as that term is meant in Opinion 93-379. There are no major expenses charged to the *In re: World Trade Center* clients reflecting a permanent enhancement of the capacity and capability of the Napoli firm.

- a. No significant purchases of computer hardware or software that will be used again in future cases is being charged to the clients in this case.
- b. No significant purchases of communications equipment that will be used again in future cases is being charged to the clients in this case.
- c. No significant leases of office space that will be used again in future cases is being charged to the clients in this case.

19. **Responding to Question “5(b)(iii)(3)” of the August 17, 2010 Order:** The criteria used for this category are based on the ABA Committee on Ethics and Professional Responsibility Formal Opinion 93-379 (1993). As the brief submitted to the Court on August 24, 2010 notes in the case of one typical client, Joseph Greco, the expenses in Mr. Greco’s case<sup>2</sup> fit squarely within the parameters set out in the non-exclusive list in the ABA/BNA Lawyers’ Manual on Professional Conduct. The 45 page list includes expenditures by the Napoli firm for overnight mail, transportation, court reporters, and the review of medical files. The expenses in the Greco case are fairly representative of the expenses charged to the clients in this case overall, and fit within the criteria set out by Opinion 93-379.

20. **Responding to Question “5(c)(i)” of the August 17, 2010 Order:** The firm determines whether charges incurred for work performed by consultants and experts engaged are allocated for:

- a. *All plaintiffs, including those not represented directly by WGENB*, when the work of that particular expert or vendor benefits the prosecution of the litigation as a whole, as opposed to benefiting a particular client’s individual case. Allocated expenses are

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<sup>2</sup> A copy of the 45-page long non-exhaustive disbursement statement for Mr. Greco was filed for *in camera* review by this court only; it was not included in the documents filed for public access on ECF/Pacer.

also commonly referred to as common-benefit or shared expenses, which may be defined as those expenses which are common to all clients' cases, and are shared among all the clients on a pro rata basis because they benefit all clients and help bring the defendant to the table for settlement purposes. Thus, a medical expert in the area of obstructive and restrictive lung disease who provides the peer-reviewed medical literature and defines criteria for classification of injury by type and severity level or evidence to support a claim that a particular illness type is WTC-related benefits the entire population of plaintiffs *as well as all of the clients of WGENB*. Other charges appropriately classified as common benefit to the entire client population as well as WGENB clients overall would be research and expert consultation related to OSHA or other labor-related standards such as the proper standard for respirator fit-testing, safe versus hazardous levels of toxicants or particulate matter in the work place/environment, and other non-legal research matters;

- b. *Those allocated to WGENB clients*-when the work can only be classified as benefiting our own clients as a group but not any particular plaintiff.
- c. *Individual plaintiffs represented by WGENB* – case specific expenses benefit a particular plaintiff directly. Such fees for case-specific work performed by consultants and experts engaged by the law firm include for example, the charges by a medical expert who reviews a particular individual client's medical records.

Therefore, the distinction between expense categories turns on an evaluation and determination of the recipient or recipients of the benefit. Equitably, the proximate recipient or recipients of the benefit should recompense the cost. The treatment of our office's expenses reflects this analysis and the comports with the applicable rules of professional conduct. Plaintiffs should and do understand that by allocating pooled, common benefit expenses between clients of the firm and other firms, attorneys are able to keep each client's expenses to a minimum, avoiding one client bearing a disproportionate share of the expenses which benefit each client.

21. A Memorandum to this Court prepared by Claims Neutral Matthew Garrettson is annexed to these papers at Exhibit "G".

22. The following exhibits are annexed to this Declaration for public access and filing on ECF/Pacer in response to this Court's *sua sponte* Order of August 17, 2010:

- A. August 17, 2010 *Sua Sponte* Order;
- B. \*WGENB Ground Zero Blank Contingency Retainer Agreement;<sup>3</sup>
- B1. \*WGENB Ground Zero Blank Polish Intake Package;
- B2. \*WGENB Ground Zero Blank Spanish Intake Package;
- B3. \*WGENB Ground Zero Blank Joint Brecher Client Intake Package;
- B4. \*WGENB Ground Zero Blank Joint Angiuli Client Intake Package;
- C. \*Redacted Short form client letter – Tier 1 Client;
- C2. \*Redacted Short form client letter – Tier 2 Client;
- C3. \*Redacted Short form client letter – Tier 3 Client;
- C4. \*Redacted Short form client letter – Tier 4 Client;
- D. Long form client letter;
- E. Table of Classification for Disbursements on Ground Zero matters.
- F. \*Table of Loans for Ground Zero matters by date and amount;
- G. Garretson Memorandum re: Interest Charges.

Dated: New York, New York  
August 26, 2010



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Denise A. Rubin (DR5591)

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<sup>3</sup>Those documents listed with an asterisk (\*) are filed with the court for *in camera* inspection only. These will not be filed on the Court's ECF system for public dissemination as they represent information or proprietary documents created by the firm for its own use and/or communication with its clients only.

**ATTORNEY'S DECLARATION/AFFIRMATION OF SERVICE**

Denise A. Rubin, an Attorney duly licensed to practice before the Courts of the State of New York, hereby affirms/declares the following under penalty of perjury:

I am associated with the law firm Worby Groner Edelman & Napoli Bern, LLP and as such represent the plaintiffs in the within action. On August 26, 2010, I duly served a true copy of the within Declaration of Denise A. Rubin with supporting Exhibits on the persons listed below by e-mail.

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Denise A. Rubin (DR5591)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE: WORLD TRADE CENTER  
DISASTER SITE LITIGATION

21 MC 100 (AKH)  
21 MC 102 (AKH)  
21 MC 103 (AKH)

X

WORBY GRONER EDELMAN & NAPOLI BERN LLP'S SUBMISSION RESPONDING TO SUA  
SPONTE ORDER OF AUGUST 17, 2010

**WORBY GRONER EDELMAN & NAPOLI BERN, LLP**

*Co-Liaison Counsel for* : Plaintiffs

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The undersigned attorney hereby certifies, pursuant to Fed. R. Civ. P. 11 and 22 NYCRR §130-1.1-a, that I have read the within papers and that to the best of my knowledge and belief they are not frivolous as that term is defined in 22 NYCRR § 130-1.1(c) and Fed. R. Civ. P. 11.

  
Attorney name: Denise A. RUBIN

PLEASE TAKE NOTICE:

NOTICE OF ENTRY

that the within is a (certified) true copy of an \_\_\_\_\_ duly entered in the \_\_\_\_\_ office of the clerk of the within named court on \_\_\_\_\_ 200\_\_.

NOTICE OF SETTLEMENT

that an order \_\_\_\_\_ of which the within is a true copy, will be presented for settlement to the HON. \_\_\_\_\_ one of the judges of the within named Court, at \_\_\_\_\_ on \_\_\_\_\_ 200\_\_ at \_\_\_\_\_ O'clock \_\_\_\_M.

Dated, \_\_\_\_\_

Yours, etc.

**WORBY GRONER EDELMAN & NAPOLI BERN, LLP**