

SCALISE HAMILTON & SHERIDAN, LLP
670 White Plains Road
Suite 325
Scarsdale, NY 10583
(914) 725-2801
Fax (914) 931-2112

ETHICALLY DEALING WITH CLIENTS, WITNESSES AND ATTORNEYS WITH DIMINISHED CAPACITY

Deborah A. Scalise¹

It is no secret that attorneys are obligated to protect the legal interests of their clients. However, they are very often faced with a dilemma when they encounter clients, witnesses and/or attorneys with diminished capacity. Should they inform anyone of the person's diminished capacity? If so, who? How do they do so without causing harm to the client, while still heeding their ethical obligations as officers of the Court? Using references to the New York Rules of Professional Conduct; the New York Rules of Court; Bar Association Advisory Opinions (Eth. Ops.); and precedent, this outline examines an attorney's ethical obligations in dealing with: 1) impaired witnesses and clients and 2) impaired legal professionals.

¹SCALISE HAMILTON & SHERIDAN, LLP, focuses its practice on the representation of professionals (lawyers, judges, accountants, doctors, dentists, pharmacists, social workers, and government employees) in professional responsibility and ethics matters, and white-collar criminal matters.

Deborah A. Scalise is the Chair of the New York State Bar Association's Continuing Legal Education Committee; a Past President of the White Plains Bar; a Past President of the Westchester Women's Bar Association; and has served as Vice President of the Women's Bar Association of the State of New York (WBASNY), where she also serves as the Co-Chair of the Professional Ethics Committee. She is a former Deputy Chief Counsel to the Departmental Disciplinary Committee for the First Judicial Department.

1. IMPAIRED WITNESSES AND CLIENTS

As of April 1, 2009, New York's Rules of Conduct were enacted and replaced the New York Rules of Professional Conduct. Among the significant changes was a new rule that permits a lawyer to seek assistance when they encounter a client with diminished capacity. It appears that the rule was enacted to avoid a lawyer having to take a paternalistic role in dealing with clients who lack capacity, and thereby have others step into the client's shoes to make decisions when it comes to legal issues. The rule provides a roadmap as to how a lawyer should deal with the client in such situations.

- **22 N.Y.C.R.R. §1200 RULE 1.14 provides:**

CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

- **22 N.Y.C.R.R. §1200(?) RULE 1.6 provides:**

CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

- (1) the client gives informed consent, as defined in Rule 1.0(j);
- (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
- (3) the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

- (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime;
 - (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
 - (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s firm or the law firm;
 - (5) (i) to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct; or
(ii) to establish or collect a fee; or
 - (6) when permitted or required under these Rules or to comply with other law or court order.
- (c) A lawyer shall exercise reasonable care to prevent the lawyer’s employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

Notably, Rule 1.6(c)(4) is also a new addition to the rules which allows a lawyer to seek legal advice from another lawyer with regard to compliance with the Rules of Conduct. Thus, when faced with a client who lacks capacity, the lawyer can freely seek help from a colleague.

As this is a fairly new rule, research did not disclose any precedent that cited it. However, there is one bar association advisory opinion (N.Y.S.B.A. Eth. Op.) which, although rendered prior to the enactment of the above cited rules, is instructive as to dealing with an incapacitated client. Specifically, New York State Bar N.Y.S.B.A. Eth. Op. 775 (05/04/2004) advises: “when a possibly incapacitated former client asks a lawyer to return the client’s original will, the lawyer may communicate with the former client and others to ascertain the former client’s condition and wishes.”

For further guidance when dealing with incapacitated clients, we recommend that the lawyer carefully review the Commentary to Rule 1.14.

ETHICS OPINIONS:

- **N.Y. City Bar Eth. Op. 1995-6 (April 5, 1995)**

Topic: Client Funds; Incompetent Client; Interest on Trust Accounts.

Digest: A lawyer who has (a) successfully negotiated a settlement of a lawsuit on behalf of an incompetent client, (b) received the settlement proceeds and (c) is holding those proceeds in a trust account, but who cannot release the proceeds to the client without delivering a general release to the defendant should take steps necessary to obtain a valid release or measures that would permit him to dispense with the requirement that a release be delivered. Although the Code does not specifically require that lawyers hold client funds in interest-bearing accounts, the failure to invest client funds, taking into account the amount of funds held for a specific client and the expected holding period, may in some circumstances constitute neglect.

Rules: CODE: DRs 6-101(A), 9-102, 9-102(F).

- **N.Y. City Bar Eth. Op. 1997-2 (March 1997)**

Topics: Confidentiality of information concerning child abuse or mistreatment; preservation of confidences within a social services agency; advanced consent to the disclosure of client confidences and secrets

Digest: A lawyer employed by a social services agency generally must preserve confidences and secrets relating to the abuse or mistreatment of a minor client unless the client consents to disclosure. The lawyer may make disclosure without the minor client's consent, however, if: (a) disclosure is required by law; (b) disclosure is necessary to protect the client from being killed or maimed by another; (c) disclosure is necessary to prevent the client from killing or maiming himself or another; or (d) the client is unable to make a reasoned decision about whether or not to make disclosure and the lawyer concludes upon analysis that disclosure would be in the client's best interest. Without client consent, the lawyer may not disclose client confidences or secrets to others employed by the agency unless the lawyer determines that the agency employees would preserve the confidentiality of the disclosures. Subject to limitations, the minor client may consent in advance to the lawyer's disclosure of information concerning abuse or mistreatment; however, the client is entitled to withdraw such consent thereafter.

Rules: Code Canons 4, 5, 6 & 7; DRs 2-110, 4-101 & 5-107(B); ECs 4-2, 4-7, 7-11 & 7-12.

- **N. Y. S. ETHICS COMMISSION Eth. Op. 746 (7/18/2001)**

Topic: Representing incapacitated client; petitioning for appointment of guardian; attorney-in-fact under durable power of attorney; representation of oneself as attorney-in-fact/petitioner

Digest: Lawyer serving as client's attorney-in-fact may not petition for appointment of guardian without client's consent unless lawyer determines that client is incapacitated, that there is no practical alternative through use of power of attorney or otherwise to protect client's best interests, and that no one else is available to serve as petitioner. Subject to conflict of interest restrictions, lawyer may represent self in proceeding if client does not oppose petition and lawyer will not be a witness.

Rules: Code DR 4-101, DR 5-101, DR 5-102(A), DR 5-105(A), DR 5-108(A), EC 7-11, EC 7-12

- **N.Y.S.B.A. Eth. Op. 836 (2/25/2010)**

TOPIC: Dual representation of Guardian and incapacitated person in a proceeding to terminate the guardianship.

DIGEST: Lawyer who previously represented incapacitated Client in connection with the appointment of a Guardian for Client may later undertake dual representation of both Client and Guardian in a proceeding to terminate the guardianship, provided (a) Lawyer reasonably believes that Lawyer will be able to competently and diligently represent both clients, and (b) Lawyer obtains informed consent from each client, confirmed in writing.

RULES: 1.0(e); 1.0(j); 1.7; 1.14

COMMENTS: Comment 28 to Rule 1.7

- **N.Y.S.B.A. Eth. Op. 986 (October 25, 2013)**

Topic: Whether it is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position

Digest: It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

Rules: 1.7, 1.14

- **N.Y.S.B.A. Eth. Op. 1046 (January 8, 2015)**

Topic: Representing incapacitated client; conflict of interest

Digest: A lawyer may accept court appointments to serve as Court Evaluator or Guardian for an Alleged Incapacitated Person in a guardianship proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility represented by the law firm in matters unrelated to AIP. The lawyer does not represent the AIP as counsel and Rule 1.7(a) is not implicated. Whether a lawyer may accept a court appointment to serve as counsel for the AIP in a guardianship proceeding in which the petitioner is the health care facility depends on (1) whether the interests of the AIP and the health care facility are "differing interests" and whether the lawyer has a disabling personal interest, which are questions of fact beyond the jurisdiction of this Committee, and (2) whether the lawyer can obtain

consent to the potential conflict, which requires a careful assessment by the lawyer of whether the AIP is capable of giving informed consent.

Rules: 1.0(f), 1.7(a) & (b), 1.14(a)

2. IMPAIRED LEGAL PROFESSIONALS.

Each of the four Appellate Divisions provides rules and procedures for dealing with incapacitated lawyers. However, there are no corresponding rules or procedures when it comes to dealing with members of the judiciary who exhibit signs of incapacity. While three of the Four Departments provide a Diversion Program, it appears that the disciplinary authorities and Courts in the First and Second Departments are more likely to use the rules and procedures when a lawyer is incapacitated and that the Decisions by the Court are likely to include more detail about the lawyer's incapacity. Thus, it would not only be wise, but helpful to assist lawyers who show signs of diminished capacity to avoid involvement by the disciplinary authorities. Below we set forth an outline as to the relevant rules, case law and advisory Opinions to assist with these issues.

FIRST DEPARTMENT

RULES:²

- **22 N.Y.C.R.R. §603.16 Proceedings Where Attorney is Declared Incompetent or Alleged to Be Incapacitated**
 - (a) Suspension Upon Judicial Determination of Incompetency or on Involuntary Commitment.
 - (b) Proceeding to Determine Alleged Incapacity and Suspension Upon Such Determination.
 - (c) – Procedure When Respondent Claims Disability During Course of Proceeding.
 - (d) – Appointment of Attorney to Protect Clients' and Suspended Attorney's Interests.

CASE LAW:

² The First Department does not have a rule providing for a formal Diversion Program.

- *Matter of Falls*, 121 A.D.3d 83 (1st Dep't 2014) [indefinite suspension due to lawyer's admissions and consent, and her psychiatrist's letters to the Committee, which support the conclusion that respondent is currently incapacitated from practicing law due to mental illness].
- *Matter of Schwartz*, 121 A.D.3d 292(1st Dep't 2014) [Lawyer initially suspended due to failure to pay attorney registration fees but later suspended indefinitely when she admitted a long period of incapacity, prior treatment, and present efforts at rehabilitation; although she provided medical documentation in support of her rehabilitation the Court decided that her rehabilitation was, at best, incomplete because she conceded that she was not presently fit to practice law and that her suspension is warranted].
- *Matter of Velez*, 123 A.D.3d 231(1st Dep't 2014) [Attorney indefinitely suspended based on findings of North Carolina Superior Court that he was declared an incompetent person; that a guardian of the person was judicially appointed to protect his interests and rights consented to the motion and that evidence from the medical director of the medical treatment center where he resides stating that he is suffering from incurable chronic and progressive dementia and is incapable of practicing law or assisting in his defense against charges of professional misconduct].
- *Matter of Platt*, 113 A.D.3d 68(1st Dep't 2013)[an attorney was suspended from the practice of law and all disciplinary proceedings against him were held in abeyance until he provided sufficient evidence to establish that he was no longer incapacitated because the attorney's treating physician's assessment of the attorney's condition, as well as the attorney's agreement with that assessment, demonstrated that he was not physically or mentally fit to practice law and that disability also would prevent the attorney from being able to defend himself in the pending proceedings].
- *Matter of Serpe*, 106 A.D.3d 112; (1st Dep't 2013) [indefinite suspension due to lawyer's admission of depression and neglect of client matters and his treating psychiatrist, established that his condition rendered him incapable of practicing law].

- *Matter of Segreti*, 105 A.D.3d 49 (1st Dep't 2013) [Attorney filed a motion requesting her own suspension from the practice of law based on her incapacity, a stay of the committee's investigation, and a quashing of a subpoena directing her to testify at a deposition; the committee filed a cross-motion to suspend the attorney or for an evaluation of her alleged infirmities; the court found, inter alia, that the attorney's contention that her medical disability prevented her from adequately defending herself in proceedings required her immediate suspension from the practice of law and although the attorney's medical evidence constituted some evidence of her general incapacity, further examination by qualified physicians was necessary]
- *Matter of Stewart*, 91 A.D.3d 195 (1st Dep't 2011) [suspended attorney's failure to answer charges and appear at a disciplinary hearing, although deemed admitted, did not warrant disbarment because her misconduct was non-venal, limited to one client, and did not constitute a pattern of serious misconduct; attorney's mental health issues arising from physical and emotional abuse supported mitigation of sanctions].
- *Matter of Farinella*, 91 A.D.3d 35 (1st Dep't 2011) [petition to impose reciprocal discipline on a suspended attorney was stayed due to mental infirmity, and attorney remained suspended until proven that attorney's disability no longer exists].
- *Matter of Conrad*, 80 A.D.3d 168 (1st Dep't 2010) [attorney's suspension based on her alcohol dependency, which she acknowledged was connected to her underlying conduct and failure to cooperate with the Departmental Disciplinary Committee, was granted *nunc pro tunc*; however, attorney's motion to vacate her suspension and for immediate reinstatement, due to her year-long sobriety, was denied due to her failure to provide an expert evaluation attesting to her fitness to practice law].
- *Matter of Kalina*, 78 A.D.3d 92 (1st Dep't 2010) [indefinite suspension due to mental illness arising from a diagnosis of Alzheimer's disease that rendered him incapacitated to practice law and unable to defend himself against three complaints of misconduct].

- *Matter of Salo*, 77 A.D.3d 30 (1st Dep't 2010) [one-year suspension for misappropriation and conversion of escrow funds because Court found that the misappropriation was inadvertent due to the attorney's Post-Traumatic Stress Disorder and his belief that he was taking earned fees].
- *Matter of Goldstein*, 65 A.D.3d 354 (1st Dep't 2009) [attorney who suffered a disabling physical disability as a result of a serious automobile accident was unable to participate in disciplinary proceeding and thus suspended until he is physically and mentally able to participate in the proceeding against him].
- *Matter of Kaplan*, 65 A.D.3d 287, 883 N.Y.S.2d 182 (1st Dep't 2009) [80-year old attorney suspended indefinitely due to physical and mental deterioration from cerebral vascular disease which rendered him incapable of participating in his disciplinary proceeding].
- *Matter of Horakh*, 61 A.D.3d 24 (1st Dep't 2009) [indefinite suspension based on unrefuted evidence of his incapacity, including attorney's extended hospitalization and his concession of current unfitness to practice law; disciplinary proceeding was held in abeyance until further court order].
- *Matter of Scher*, 59 A.D.3d 47 (1st Dep't 2008) [indefinite medical suspension after three psychiatrists concluded the attorney was temporarily disabled, unable to resume his professional duties, and unable to participate in his disciplinary proceeding; court granted attorney's request to seal his file].
- *Matter of Schwartz*, 56 A.D.3d 87 1 (1st Dep't 2008) [indefinite suspension based on attorney's inability to participate in pending disciplinary proceeding as a result of debilitating effects of a stroke].
- *Matter of Stickel*, 34 A.D.3d 139 (1st Dep't 2006) [indefinite suspension based on physical infirmity arising from a stroke suffered during investigation of professional misconduct].
- *Matter of Broydes*, 29 A.D.3d 247 (1st Dep't 2006) [indefinite suspension due to physical infirmity for attorney who was diagnosed

with cancer and underwent surgery (with repeated hospitalizations) during his disciplinary proceeding and was thus unable to defend himself during the proceeding].

- *Matter of Hirshon*, 21 A.D.3d 102 (1st Dep't 2005) [indefinite suspension due to mental illness which rendered attorney unable to continue practicing law or defend himself in his disciplinary proceeding].
- *Matter of Fusco*, 18 A.D.3d 81 (1st Dep't 2005) [indefinite suspension due to physical and mental incapacity resulting from Alzheimer's disease, moderate-severe dementia, and the effects of multiple ministrokes].
- *Matter of Wolf*, 298 A.D.2d 39 (1st Dep't 2002) [acknowledging no provision for resignation from the practice of law due to physical or mental infirmity, the attorney was suspended indefinitely due to physical and mental incapacity, which predated the disciplinary proceeding and was attested to "with unqualified medical certainty" by his physicians].
- *Matter of Eubank*, 293 A.D.2d 41 (1st Dep't 2002) [indefinite suspension based on diagnosis of "major depression" with prognosis of full recovery in 3-6 months].
- *Matter of Factor*, 292 A.D.2d 103 (1st Dep't 2002) [suspension ordered due to failure to cooperate with disciplinary investigation, but Court noted the grounds could be changed to mental disability pending the results of a court-ordered medical examination].
- *Matter of Birman*, 286 A.D.2d 22 (1st Dep't 2001) [continuing indefinite suspension on grounds of mental incapacity arising from major depression with no clear remission in symptoms].
- *Matter of Miller*, 280 A.D.2d 129 (1st Dep't 2001) [indefinite suspension on grounds of mental incapacity following conviction and imprisonment for a serious crime arising from harassment of a judge].

- *Matter of Feuerstein*, 274 A.D.2d 223 (1st Dep't 2000) [indefinite suspension on grounds of physical incapacity arising from attorney's cardiac disease, among other medical problems, and his cardiologist's recommendation that the attorney stop working entirely].
- *Matter of Grant*, 263 A.D.2d 133 (1st Dep't 1999) [indefinite suspension on grounds of mental incapacity based on Connecticut court's determination of mental incompetency to stand trial].
- *Matter of Wolin*, 258 A.D.2d 37 (1st Dep't 1999) [indefinite suspension based on mental incapacity due to diagnosis of clinical depression with bipolar disorder with a guarded prognosis].
- *Matter of Walker*, 244 A.D.2d 3 (1st Dep't 1998) [indefinite suspension based on physical and mental incapacity due to head injuries sustained by attorney in a car accident, but court denied attorney's request not to publish the suspension order].
- *Matter of Spring*, 241 A.D.2d 26 (1st Dep't 1998) [indefinite suspension based on mental incapacity].
- *Matter of Sullivan*, 239 A.D.2d 65 (1st Dep't 1998) [indefinite suspension based on physical incapacity due to attorney's heart condition and his doctor's recommendation that the attorney stop practicing law].
- *Matter of Zukowski*, 236 A.D.2d 6 (1st Dep't 1997) [indefinite suspension based on physical incapacity due to attorney's intensive care hospitalization; and ordering the appointment of an attorney to inventory the attorney's files and take action to protect clients' interests].
- *Matter of Moid*, 235 A.D.2d 39 (1st Dep't 1997) [indefinite suspension based on physical incapacity arising from bypass surgery due to coronary artery disease].
- *Matter of Podell*, 231 A.D.2d 264 (1st Dep't 1997) [indefinite suspension based on physical and mental incapacity arising from intensive treatment for drug and alcohol addiction].

- *Matter of Schwartzstein*, 230 A.D.2d 409 (1st Dep't 1997) [indefinite suspension based on incapacity due to diabetes, glaucoma, and other debilitating illnesses, as well as recent extensive surgery].
- *Matter of Hsu*, 224 A.D.2d 104 (1st Dep't 1996) [indefinite suspension based on incapacity due to attorney's cocaine addiction].
- *Matter of Archer*, 219 A.D.2d 305 (1st Dep't 1996) [indefinite suspension based on mental incapacity due to serious depression and fatigue which impaired attorney's insight and judgment].
- *Matter of Fischman*, 219 A.D.2d 108 (1st Dep't 1996) [indefinite suspension based on physical incapacity due to attorney's serious and progressive debilitating illness, with severe neurological symptoms].
- *Matter of Marrin*, 215 A.D.2d 47 (1st Dep't 1995) [indefinite suspension based on mental incapacity due to mild manic depression and alcohol abuse].
- *Matter of Brady*, 208 A.D.2d 137 (1st Dep't 1995) [indefinite suspension based on mental incapacity and alcohol addiction].
- *Matter of Hartman*, 208 A.D.2d 154 (1st Dep't 1995) [indefinite suspension based on mental incapacity due to depression].
- *Matter of Jordon*, 202 A.D.2d 141 (1st Dep't 1994) [indefinite suspension based on mental incapacity due to severe chronic depression].
- *Matter of Moy*, 197 A.D.2d 312 (1st Dep't 1994) [indefinite suspension based on mental incapacity].
- *Matter of Dickson*, 196 A.D.2d 399 (1st Dep't 1994)[indefinite suspension based on order by a Minnesota court declaring attorney mentally ill and dangerous to the public and directing his commitment to a hospital for treatment, as well as a clinical psychologist's diagnosis of delusional (paranoid) disorder].

- *Matter of Jarvis*, 196 A.D.2d 271 (1st Dep't 1994) [suspension based on mental incapacity arising from inability to make court appearances and prepare motion papers, as well as inability to comprehend court's instructions].
- *Matter of Colp*, 185 A.D.2d 43 (1st Dept 1993) [indefinite suspension based on complaints against the attorney about his tendency to suspect the existence of plots and conspiracies against him; an allegation that a judge had conspired to commit murder; the attorney was diagnosed with a delusional disorder, paranoid type with signs of consistent paranoia, suspiciousness, and persecutory delusions with symptoms that had the potential to interfere with the attorney's ability to practice. The court held that, based on the psychiatric evaluation, and the attorney's erratic behavior, there was substantial evidence that the attorney suffered from a mental illness].
- *Matter of Ellis M. Deull*, 180 A.D.2d 366(1st Dept 1992) [indefinite suspension based on attorney's affidavit and psychiatrist's report that he suffered from depression for several years and could not subject himself to stressful situations and thereby consented to the Committee's petition and was found incapacitated by reason of mental infirmity].
- *Matter of Chasen*, 181 A.D.2d 167 (1st Dept. 1992) [Attorney initially charged with failing to safeguard escrow funds, the hearing was adjourned when the attorney fell ill with a degenerative disease of the central nervous system and the Court found that the illness caused significant mental and physical debilitation, rendering respondent incompetent to practice law or to testify in his own behalf].
- *Matter of Eugene P. Edwinn*, 183 A.D.2d 377 (1st Dept. 1992) [*attorney suspended indefinitely after he charged with failing to failing to* account for and deliver escrow funds suffered a severe stroke, rendering him incapacitated; was declared by the Surrogate's Court to ~~be~~ judicially ~~be judicially~~ incompetent; mentally unfit to practice law and unable to respond to the serious allegations of professional misconduct lodged against him].

- *Matter of Courtney*, 165 A.D.2d 136(1st Dept. 1992) [attorney suspended indefinitely after the Committee instituted a proceeding after it began receiving unsolicited writings from the attorney consisting of letters, articles, and poems that were rambling, incoherent, and vulgar and contained racist remarks and lewd references; was examined by an independent psychiatrist, who concluded that his ability to function as an attorney was compromised by a pervasive mood disorder and the Court held, based upon the psychiatric reports, the affidavits, and the attorney's behavior as evidenced by his writings, that he was unable to carry on the practice of law in any meaningful way].
- *Matter of Bodner*, 160 A.D.2d 75 (1st Dep't 1990) [attorney charged with conversion of funds indefinitely suspended when his counsel indicated that the attorney was suffering from serious emotional and mental illness and provided the committee with evidence confirming that the attorney had been confined to a hospital following two attempts at suicide and remained seriously impaired].

SECOND DEPARTMENT

RULES:

- **22 N.Y.C.R.R. §691.4(m) Diversion Program** (for Alcoholism or Substance abuse)
- **22 N.Y.C.R.R. §691.4 (n) Medical and Psychological Evidence**
- **22 N.Y.C.R.R. §691.13 Proceedings Where Attorney Is Declared Incompetent or Alleged to Be Incapacitated**
 - (a) Suspension Upon Judicial Determination of Incompetency or on Involuntary Commitment.
 - (b) Proceeding to Determine Alleged Incapacity and Suspension Upon Such Determination.
 - (c) Procedure When Respondent Claims Disability During Course of Proceeding.
 - (d) Appointment of Attorney to Protect Client's and Suspended Attorney's Interest.

CASE LAW:

- *Matter of Efrain Ramos, Jr.*, -- A/d.3d -- 2015 N.Y. App. Div. LEXIS 6019, (2nd Dept, 2015) [attorney publicly censured for failing to cooperate with the Grievance Committee by failing to submit written answers to four complaints of professional misconduct against him and by failing to submit timely answers to others; Court took into consideration evidence submitted in mitigation consisting of the attorney's failing health beginning in 2010 and documented serious medical condition which rendered him disabled, commencing in 2011, all of which were found to be credible by the Special Referee].
- *Matter of Delgado*, 76 A.D.3d 64(2d Dep't 2010 [Lawyer was disbarred on default pursuant to [Judiciary Law § 90](#) because she failed to cooperate in scheduling and attending an ordered medical exam, failed to respond to grievance committee's inquiries regarding same, and neither answered petition nor asked for extension to serve an answer to the motion for order adjudicating her in default].
- *Matter of Brodsky*, 65 A.D.3d 248 (2d Dep't 2009) [three-year suspension for attorney's repeated and contumacious failures to comply with the demands of the Court and the Grievance Committee regarding examination by a qualified medical expert].
- *Matter of Shichman*, 20 A.D.3d 111 (2d Dep't 2005) [attorney's DWI conviction, along with his failure to report his conviction to the Court, constitutes conduct that adversely reflects upon his fitness as a lawyer].
- *Matter of Chisena*, 5 A.D.3d 79 (2d Dep't 2004) [two-year suspension for pattern of failing to cooperate with the Grievance Committee's investigation of attorney's professional misconduct; attorney offered evidence of his coronary artery disease in mitigation].
- *Matter of Dolin*, 281 A.D.2d 74 (2d Dep't 2001) [attorney censured for her conviction for forgery and failure to report the conviction; in

mitigation, the Court considered her long-term battle with depression, a severe endocrinological disorder, and her resulting addiction to prescription drugs].

- *Matter of Martin*, 242 A.D.2d 143 (2d Dep't 1998) [attorney disbarred for failure to cooperate with the Grievance Committee's investigation and failure to submit to examination by a qualified medical expert to determine incapacity].
- *Matter of Rowe*, 73 N.Y.2d 336 (1989) [reversing Second Department's order of indefinite suspension due to mental disability and allowing attorney to seek reinstatement to the practice of law because attorney had shown, by clear and convincing evidence, that mental disability had been removed].
- *Matter of Gottlieb*, 112 A.D.2d 334 (2d Dep't 1985) [indefinite suspension due to incapacity arising from cocaine addiction and appointing another attorney to inventory respondent attorney's files and protect his clients' interests].
- *Matter of Goldenberg*, 92 A.D.2d 925 (2d Dep't 1983) [indefinite suspension based on attorney's medical report, ordering physical examination by court-appointed physician, and holding disciplinary proceedings in abeyance].
- *Matter of Brutton*, 96 A.D.2d 1070 (2d Dep't 1983) [indefinite suspension on grounds of mental disability].
- *Matter of Garis*, 94 A.D.2d 753 (2d Dep't 1983) [indefinite suspension due to incapacity and ordering examination by court-appointed physician].
- *Matter of D'Antonio*, 84 A.D.2d 770 (2d Dep't 1981) [indefinite suspension due to physical and mental incapacity and holding disciplinary proceeding in abeyance].

THIRD DEPARTMENT

RULES:

- **22 N.Y.C.R.R. §806.4(g) Diversion Program** (for Alcoholism or Substance abuse)
- **22 N.Y.C.R.R. §806.10 Mental Incapacity of Attorney; Protect of Clients of Disbarred and Suspended Attorneys**
 - (a) Proceeding to Determine Alleged Incapacity of Attorney.
 - (b) Procedure When Respondent Claims Disability During Course of Disciplinary Proceeding.

CASE LAW:

- *Matter of Learned*, 83 A.D.3d 1283 (3d Dep't 2011) [indefinite suspension based on "satisfactory evidence" of incapacity and holding disciplinary proceedings in abeyance].
- *Matter of Hornbeck*, 61 A.D.3d 1268 (3d Dep't 2009) [indefinite suspension on grounds of mental incapacity based on Tennessee court's suspension order finding that attorney posed a threat of substantial harm to the public].
- *Matter of Witlin*, 57 A.D.3d 1205 (3d Dep't 2008) [indefinite suspension on grounds of mental incapacity based on Connecticut court's suspension order, finding that attorney posed substantial threat of irreparable harm to his clients and after attorney was committed to a psychiatric hospital].
- *Matter of Roosa*, 51 A.D.3d 1333 (3d Dep't 2008) [indefinite suspension due to incapacity following medical examination of attorney].
- *Matter of Sissman*, 34 A.D.3d 978 (3d Dep't 2006) [one-year suspension for misconduct after attorney who was suspended due to

incapacity neglected a client matter and failed to withdraw from employment].

- *Matter of Deleo*, 21 A.D.3d 641(3d Dep't 2005) [indefinite suspension on grounds of mental incapacity based on Connecticut court's order transferring attorney to disability inactive status due to drug dependency].
- *Matter of Markel*, 296 A.D.2d 653 (3d Dep't 2002) [indefinite suspension on grounds of mental incapacity based on Nevada court's order transferring attorney to disability inactive status].
- *Matter of Realbuto*, 288 A.D.2d 610 (3d Dep't 2001) [indefinite suspension due to mental incapacity].
- *Matter of Dworsky*, 287 A.D.2d 780 (3d Dep't 2001) [indefinite suspension due to incapacity arising from attorney's alcoholism and failure to comply with the Court's prior order directing attorney's medical examination].
- *Matter of Taylor*, 276 A.D.2d 821 (3d Dep't 2000) [indefinite suspension due to mental incapacity].
- *Matter of Donohue*, 29 A.D.3d 1212(3d Dep't 2006) [Lawyer suspended in 2000 indefinitely due to mental incapacity, but the Court's decision permitted the attorney to apply for reinstatement once he could demonstrate that he was no longer incapacitated. Upon his application for reinstatement, the Court found that he had substantially complied with the order of suspension, as well as the court's rules regarding the conduct of suspended attorneys and that he possessed the character and general fitness to resume the practice of law, but conditioned his reinstatement by providing that he submit for the next two years semiannual reports from his treating mental health provider assessing his continuing capacity to practice law. *See also*, *Matter of Donohue*, 275 A.D.2d 803 (3d Dep't 2000) []].
- *Matter of Hobbs*, 240 A.D.2d 817 (3d Dep't 1997) [indefinite suspension based on New Jersey court's order placing attorney on disability inactive status due to psychiatric disability].

- *Matter of Werbalowsky*, 287 A.D.2d 942 (3d Dep't 2001) [indefinite suspension based on mental incapacity arising from attorney's hospitalization for mental illness].
- *Matter of Apollo*, 237 A.D.2d 731 (3d Dep't 1997) [indefinite suspension due to mental incapacity and recovery from surgery based on New Jersey court's temporary suspension order].
- *Matter of Filippone*, 213 A.D.2d 849 (3d Dep't 1995) [two-year suspension for unauthorized resumption of the practice of law after submitting favorable psychiatric reports indicating fitness to practice law; attorney failed to comply with attorney registration requirements and failed to answer the Grievance Committee's inquiry regarding the same].
- *Matter of Burke*, 201 A.D.2d 862 (3d Dep't 1994) [indefinite suspension based on incapacity].
- *Matter of Mine*, 201 A.D.2d 753 (3d Dep't 1994) [three-year suspension for professional misconduct, applied *nunc pro tunc* to attorney's original suspension for physical and mental incapacity arising from severe depression and alcoholism].
- *Matter of Cokely*, 174 A.D.2d 835 (3d Dep't 1991) [indefinite suspension based on incapacity].
- *Matter of Wunderlich*, 141 A.D.2d 971 (3d Dep't 1988) [indefinite suspension based on mental incapacity arising from diagnosis of major depressive disorder without psychosis].
- *Matter of McDonald*, 75 A.D.2d 918 (3d Dep't 1980) [indefinite suspension based on mental incapacity].

FOURTH DEPARTMENT

RULES:

- **22 N.Y.C.R.R. §1022.20(d)(3) Diversion Program** (for Alcoholism or Substance abuse)
- **22 N.Y.C.R.R. §1022.23 Incompetency or Incapacity of Attorney**
- **22 N.Y.C.R.R. §1022.24 Appointment of Attorney to Protect Clients of Suspended, Disbarred, Incapacitated, or Deceased Attorney**

CASE LAW:

- *Matter of Morrison*, 279 A.D.2d 246 (4th Dep't 2000) [two-year suspension for professional misconduct, including conversion, commingling of funds, and neglect; Court denied attorney's request for suspension due to mental incapacity because he did not establish incapacity from practicing law, only that he found the practice of law stressful and wanted to pursue an alternate career].
- *Matter of Kiley*, 218 A.D.2d 114 (4th Dep't 1995) [upon ordering a suspension due to incapacity based on medical evidence, the Court found it unnecessary to address the underlying charges of the attorney's misconduct].
- *Matter of Marriott*, 196 A.D.2d 41 (4th Dep't 1994) [indefinite suspension due to mental incapacity].
- *Matter of Gaylord*, 155 A.D.2d 1 (4th Dep't 1990) [indefinite suspension based on mental incapacity and stay of disciplinary proceedings].
- *Matter of Hahn*, 131 A.D.2d 164 (4th Dep't 1987) [indefinite suspension based on mental incapacity].
- *Matter of Fritz*, 113 A.D.2d 366 (4th Dep't 1985) [suspension due to incapacity].

- *Matter of Hogan*, 75 A.D.2d 395 (4th Dep't 1980) [during his suspension for commingling funds and neglect, attorney was treated for acute and chronic alcoholism; consequently, the Court was satisfied with evidence of his rehabilitation and satisfactory conduct during his suspension and ordered suspension already served of two years].

The following Fourth Department cases involve suspensions ordered pursuant to 22 N.Y.C.R.R. §1022.23(b), without details regarding the incapacity:

- *Matter of Iocolano*, 79 A.D.3d 1830 (4th Dep't 2010).
- *Matter of Ryan*, 57 A.D.3d 1529 (4th Dep't 2008).
- *Matter of Barker*, 37 A.D.3d 1206 (4th Dep't 2007).
- *Matter of Calli*, 37 A.D.3d 1206 (4th Dep't 2007).
- *Matter of St. George*, 35 A.D.3d 1293 (4th Dep't 2006).
- *Matter of Small*, 34 A.D.3d 1369 (4th Dep't 2006).
- *Matter of Murray*, 294 A.D.2d 961 (4th Dep't 2002).
- *Matter of Baumgarten*, 255 A.D.2d 1013 (4th Dep't 1998).
- *Matter of McDonald*, 241 A.D.2d 982 (4th Dep't 1997).
- *Matter of Adelman*, 231 A.D.2d 964 (4th Dep't 1996).
- *Matter of Wood*, 213 A.D.2d 1083 (4th Dep't 1995).
- *Matter of Marriott*, 196 A.D.2d 41 (4th Dep't 1994)
- *In re Fritz*, 113 A.D.2d 366 (4th Dep't 1985)
- *Matter of Pilittere*, 81 A.D.2d 1043 (4th Dep't 1981).
- *Matter of Gorecki*, 81 A.D.2d 1043 (4th Dep't 1981).

CASES FROM OTHER NEW YORK COURTS:

- *Roosa v. Ochs*, 2010 U.S. Dist. LEXIS 69250 (N.D.N.Y. July 12, 2010) [attorney's tort claims against state entities arising from his indefinite suspension for mental incapacity was barred by the Eleventh Amendment, judicial and quasi-judicial immunities, and ADA provisions, among other grounds, and thus dismissed].
- *People v. Lopez*, 298 A.D.2d 114, 747 N.Y.S.2d 498 (1st Dep't 2002) [attorney's suspension due to mental disability does not establish *per se* that representation of client was necessarily ineffective, when attorney's representation is viewed in totality of the circumstances].

- *Amari v. Molloy*, 180 Misc.2d, 690 N.Y.S.2d 882 (Kings Cty. 1999) [CPLR §321(c), which allows an attorney's withdrawal as counsel upon death, removal or disability and also stays proceedings with leave of court, held inapplicable to cases in which the attorney withdraws with leave of court, with the client's consent, or upon discharge by a client].
- *Klapper v. Guria*, 153 Misc.2d 726, 582 N.Y.S.2d 892 (N.Y. Cty. 1992) [attorney, who was the subject of a Departmental Disciplinary Committee petition for suspension based on mental incapacity, sued the Committee's attorneys and psychiatrist for malicious prosecution and abuse of process; the Court granted defendants summary judgment and dismissed the complaint because the defendants' actions constituted discretionary conduct of a quasi-judicial nature and were covered by absolute immunity].

ETHICS OPINIONS:

- **N.Y.C.L.A. Eth. Op. 728 (1999)**

Topic: Publicity; Partner withdrawal from firm partnership

Digest: Conditions under which a law firm should notify clients of a partner's withdrawal from firm partnership and when representation should be discontinued.

Rules : Code_DR 2-102, 2-107, 2-110, 6-101

- **N.Y.C. Bar Eth. Op. 1995-5 (April 5, 1995)**

Topic: Duty to Report Misconduct; Mental Incapacity.

Digest: A lawyer has an obligation to report a former partner to appropriate disciplinary authorities upon obtaining knowledge that the former partner engaged in a pattern of neglect of matters or in the mismanagement or conversion of client or firm funds, subject to the limitation that client confidences or secrets should not be revealed without the clients' consent. If the lawyer concludes that the former partner is impaired or may even be unfit to practice based on mental incapacity, the appropriate disciplinary body should be informed.

Rules: Code DRs 1-103(A), 4-101(A), 6-101(A)(2), 6-101(A)(3), 7-102(B), 9-102(C); EC 1-4.

THE PROPOSED CARETAKER RULE

In 2012, the NYSBA proposed the adoption of a Uniform Court Rule 22 N.Y.C.R.R. Part 1250 to provide for protection of clients via a caretaker in the event of a lawyer's voluntary or involuntary cessation of practice. The proposal recognizes that the disciplinary authorities have rules to deal with appointments of receivers when a lawyer is suspended or disbarred from practice but provides directives for what to do when a lawyer, who is not the subject of discipline, needs help. This rule provides, *inter alia*, for procedures as to where to seek help, the duties and compensation the caretaker attorney and bar association involvement. For additional information on the proposed Caretaker Rule, go to:

<http://www.nysba.org/Content/NavigationMenu57/REPORTS/proposedcaretakerrulesupportmemJan06.pdf>.

3. WINDING DOWN A PRACTICE

As demonstrated above, an unforeseen crisis be difficult to manage and can jeopardize your law practice. Planning ahead is essential to providing competent representation and preventing disciplinary problems. Most law firms know they need a disaster recovery plan, but don't have one. Maybe your firm has started its emergency planning procedures, but how can you be certain it is comprehensive or that you are not overlooking important functions, contingencies and considerations? Without an effective and customized plan, your firm is at risk. The relevant rules and bar advisory (Eth. Ops.) are listed below to assist you in making a plan.

RULES:

NY RULES OF CONDUCT

- 22 N.Y.C.R.R. §1200 Rule 1.5 Fees
- 22 N.Y.C.R.R. §1200 Rule 1.6 Confidentiality Of Information
- 22 N.Y.C.R.R. §1200 Rule 1.14 Client With Diminished Capacity
- 22 N.Y.C.R.R. §1200 Rule 1.15 Preserving Identity of Funds (Safekeeping Property)
- 22 N.Y.C.R.R. §1200 Rule 1.16 Declining or Terminating Representation
- 22 N.Y.C.R.R. §1200 Rule 1.17 Sale Of Law Practice

- 22 N.Y.C.R.R. §1200 Rule 5.1 Responsibilities of Law Firm Partners Managers & Supervisory Lawyers
- 22 N.Y.C.R.R. §1200 Rule 5.2 Responsibilities of a Subordinate Lawyer
- 22 N.Y.C.R.R. §1200 Rule 5.3 Responsibilities for Conduct of Nonlawyers
- 22 N.Y.C.R.R. §1200 Rule 5.4 Professional Independence of a Lawyer
- 22 N.Y.C.R.R. §1200 Rule 5.5 Unauthorized Practice of Law
- 22 N.Y.C.R.R. §1200 Rule 5.6 Restrictions on Right to Practice
- 22 N.Y.C.R.R. §1200 Rule 5.4 Professional Independence of a Lawyer

REGISTRATION AND CLE REQUIREMENTS UPON RETIREMENT

- Judiciary Law 468-A
- N.Y.C.R.R. § 118 (g) Registration (defines retirement)
- N.Y.C.R.R. § 1500.5(b)(4)

ETHICS OPINIONS:

- **N.Y.S.B.A. Eth. Op. 341 (05/30/1974)**

Topic: Notice to clients whose Wills lawyer holds when he retires

Digest: Neither a lawyer nor his partners need notify a client whose Will the firm holds of the lawyer's retirement, provided the client knows of the partnership.

Rules: Code Canon 4; EC 4-2; EC 4-6

- **N.Y.S.B.A. Eth. Op. 382 (03/27/1975)**

Topic: Announcements

Digest: Announcement that a law firm is 'successor' to a lawyer who has retired from the practice of law to assume the position of a judge is improper.

Code: Canon 9; EC 2-9; 4-6; DR 2-101(A), (B)

- **N.Y.S.B.A. Eth. Op. 460 (02/28/1977)**

Topic: Preservation of closed files

Digest: Circumstances under which lawyers may dispose of closed files

Rules: Code EC 1-5, 4-6, 7-1, 7-8, 7-11, 7-12; DR 1-102(5), 4-101

- **N.Y.S.B.A. Eth. Op. 570 (06/07/1985)**

NOTE: Clarifies N.Y. State 532 (1981)

Topic: Fee for legal services, advance payment; client, funds of; trust account

Digest: Fees paid to lawyer in advance of services, refundable to the extent not earned, are not client funds and need not be deposited in trust account; any interest earned on fee advances may be retained by lawyer; upon termination of employment, lawyer must promptly return to client unearned portion of fee paid in advance.

Rules: Code: DR 2-110(A); DR 9-102

- **N.Y.S.B.A. Eth. Op. 622 (09/10/1991)**

Topic: Firm name; deceased partner; successor firm

Digest: One of two law partnerships (but not both) resulting from dissolution of law firm may use in its firm name the name of a deceased founding partner of its predecessor firm if (1) there is sufficient continuity of membership, clientele and professional practice between the new firm and the original firm such that the new firm can reasonably and justifiably claim to be next in a continuing line of succession, (2) the new firm is authorized by law or by contract to do so, and (3) such usage would not be otherwise misleading to the public.

Rules: Code DR 2-102(B); EC 2-11

- **N.Y.S.B.A. Eth. Op. 623 (11/07/1991)**

Topic: Closed files; disposition procedures; dissolution of law firm

Digest: Procedures for disposing of closed files; partners' ethical obligations are joint and several notwithstanding dissolution

Rules: Code DR 1-102(A)(5), 4-101(B)(1), 4-101(D), 9-102(B), 9-102(D), 9-102 (G); EC 1-5, 4-4, 4-6, 7-1, 7-8, 7-11, 7-12

- **N.Y.S.B.A. Eth. Op. 641 (02/16/1993)**

Topic: Files; disposition procedures; compliance with recycling regulations

Digest: A lawyer must comply with an ordinance that requires recycling of all office paper. Confidences and secrets of clients must be given appropriate protection.

Rules: Code Canon 4, DR 4-101(A), DR 4-101(B), DR 4-101(C)(1), DR 4-101(C)(2), EC 4-6

- **N.Y.S.B.A. Eth. Op. 680 (01/10/1996)**

Topic: Record Retention By Electronic Means

Digest: Lawyers may retain some records in the form of computer images, but certain records must be retained in original form.

Rules: Code DR 9-102(D), 9-102(H)

- **N.Y.S.B.A. Eth. Op. 699 (01/23/1998)**

Topic: Sale of law practice by newly-elected judge.

Digest: Purchase price of law practice of newly-elected judge may not be contingent upon future success of acquiring firm in attracting and retaining work from existing clients.

Rules: Code DR 2-111; Code of Judicial Conduct: Canon 2; 4(D) (1)

- **N.Y.S.B.A. Eth. Op. 707 (09/15/1998)**

Topic: Sale of portion of law practice

Digest: A lawyer may not sell a portion of a law practice

Rules: Code DR 2-111; EC 4-6

- **N.Y.S.B.A. Eth. Op. 710 (11/06/1998)**

Topic: Lawyer as escrow agent; Release of funds in escrow to client

Digest: Absent authorization by all parties, lawyer who serves as escrow agent may not release funds to client except as provided in the escrow agreement; while lawyer may resign as escrow agent, provision must be made to protect funds in escrow.

Rules: Code DR 9-102

- **N.Y.S.B.A. Eth. Op. 724 (11/30/1999)**

Topic: Wills; obligations of law firm in regard to wills in its custody

Digest: A lawyer who drafts a client's will should agree in advance whether the lawyer will maintain the original will for safekeeping and, if so, what obligations the lawyer will thereby assume. At least absent agreement to the contrary, if the lawyer has maintained the client's original will, after the client's death the lawyer must assure that the executor and/or beneficiaries are aware of its existence, unless the lawyer knows of a later valid will. Absent agreement, the lawyer has no obligation to take steps to learn of the client's death or to file the original will with an appropriate court. However, the lawyer should clarify in advance whether or not the lawyer is to undertake these or other additional obligations and must comply with whatever agreement is made.

Rules: Code DR 2-103(A), 4-101; EC 2-3, 4-6

- **N.Y.S.B.A. Eth. Op. 733 (10/05/2000)**

Topic: Sharing legal fees with non-lawyer employees

Digest: Non-lawyers may be compensated based on a profit sharing arrangement but may not be paid a percentage of profits or fees attributable to particular client matters referred by the employee.

Rules: Code DR 2-103(B); DR 3-102(A) (3); EC 3-8

- **N.Y.S.B.A. Eth. Op. 758 (12/10/2002)**

NOTE: *Modifies* N.Y. State 680 (1996)

Topic: Retention of Original Trust Account Documents

Digest: Trust account documents required to be retained in original form should be retained as paper copies where available to lawyer in

the ordinary course of business; otherwise, these documents may be retained in electronic form.

Rules: Code DR 9-102(D);

N.Y.S.B.A. Eth. Op. 766 (09/10/2003)

NOTE: *Overrules* N.Y. State 398 (1975)

Topic: Disposition of files of former client

Digest: Former client and/or successor counsel is presumptively entitled to access all attorney files.

Rules: Code DR 2-106(A); DR 9-102(C)

- **N.Y.S.B.A. Eth. Op. 775 (05/04/2004)**

Topic: Incapacitated client; safeguarding wills; client property

Digest: When a possibly incapacitated former client asks a lawyer to return the client's original will, the lawyer may communicate with the former client and others to ascertain the former client's condition and wishes.

Rules: Code DR 2-103; DR 7-104(A) (1); DR 9-102(C) (4); EC 7-11; EC 7-12

- **N.Y.S.B.A. Eth. Op. 780 (12/08/2004)**

Topic: Retaining copies of client's file over client's objection; limitation of attorney liability.

Digest: Generally proper for a lawyer to retain copies of a client's file; proper to require a release of malpractice liability as a condition of returning the file without retaining copies.

Rules: Code DR 2-110(A)(2), 4-101(C)(4), 6-102(A), 9-102(C)(4); EC 4-6.

- **N.Y.S.B.A. Eth. Op. 842 (09/10/2010)**

Topic: Using an outside online storage provider to store client confidential information.

Digest: A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege to ensure that storing the information online will not cause loss or waiver of any privilege.

Rules: 1.4, 1.6(a), 1.6(c)

- **N.Y.S.B.A. Eth. Op. 850 (01/19/2011)**

Topic: Law firm name – former partner

Digest: A law firm may not use the name of a former partner in the firm name if the former partner continues to practice law elsewhere.

Rules: 7.5(b), 8.4(d)

- **N.Y.S.B.A. Eth. Op. 853 (3/1/11)**

Topic: Law firm name including name of partner who becomes inside counsel to a corporation.

Digest: A name partner who becomes inside counsel to a corporation will not be "retired" under Rule 7.5(b) so as to allow the firm to retain the partner's name in the firm's name. The firm also may not retain the partner's name in the firm's name if the partner's time working as inside counsel is considered an open-ended leave of absence, or if the partner becomes of counsel to the firm and minimizes his participation in the firm while working as inside counsel. Finally, if the partner is simultaneously associated with both the law firm and the corporation's legal department, the conflicts of one may be imputed to the other.

Rules: 1.7(a), 1.10(a)&(e), 5.1, 7.5(a)&(b).