Supreme Court of the State of New York
Appellate Division: Second Judicial Department

ORIENTATION TO THE PROFESSION

Program Materials

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ORIENTATION TO THE PROFESSION

I. The Oath of Office

Judiciary Law § 466, entitled "Attorney's oath of office," states in relevant part that:

> Each person, admitted as prescribed in this chapter must, upon his [or her] admission, take the constitutional oath of office in open court, and subscribe the same in a roll or book, to be kept in the office of the clerk of the appellate division of the supreme court for that purpose.

The text of the oath is set forth in § 1 of Article XIII of the New York State Constitution, as follows:

> I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of [attorney and counselor-at-law], according to the best of my ability.

The deceptively simple 47 words of the attorney's oath contain a pledge of such gravity and importance that the Legislature has seen fit to require that it be administered orally in a public court proceeding and to provide that the taking of the oath and the assumption of its obligations be evidenced by the newly admitted attorney's signature in a book specially kept for that purpose. The administration of the oath takes less than one minute, but its obligations endure for the life of the attorney's career at the bar. For that reason it is appropriate, on the eve of a candidate's admission, to examine in greater detail the nature of the obligations that he or she assumes by taking the constitutional oath of office.

Usually administered under circumstances intended to impress the person who takes it with the importance of the occasion, an oath of office is a solemn declaration, accompanied by a swearing to God, that he or she will be bound to a promise. The person making the oath implicitly invites punishment if the promise is broken (Black's Law Dictionary [8th ed 2004], at 1101 [hereinafter Black's]). An affirmation is a pledge equivalent to an oath but without reference to a supreme being or to "swearing"; it is a solemn declaration made under penalty of perjury, but without an oath (Black's, at 64).

Upon taking the oath, an applicant becomes an officer of the courts of the State of New York. The formal title of the office is "Attorney and Counselor-at-Law." An office, in this sense, is a position of duty, trust, and authority, conferred by governmental authority for a public purpose (Black's, at 1115). In his or her role as an attorney, the officer is one who is designated to transact business for another (Black's, at 138) and as a counselor-at-law, his or her role is to give legal advice (Shorter Oxford English Dictionary [5th ed 2002], at 532).

Thus, the admission ceremony is a solemn occasion during which a candidate for admission to the bar assumes a public office, the office of Attorney and Counselor-at-Law, by taking an oath or making an affirmation. The terms of that oath or affirmation require the individual to uphold and maintain the authority of the constitutions and laws of the federal and state governments and, in taking on the cares and legal concerns of his or her clients, to give sound legal advice and to loyally and conscientiously fulfill all the tasks associated with the transaction of their legal business. The measure of the energy and application that the lawyer

must put into those tasks is the superlative; he or she must give the best in his or her capacity to maintain professional competence, to carefully and zealously represent the client while yet being a peacemaker, to be courteous to and cooperative with fellow lawyers, judges, and court personnel, and to support and improve our laws and government.

II. The Lawyer's Code of Professional Responsibility

The primary standard for measuring attorney misconduct is The Lawyer's Code of Professional Responsibility adopted by the New York State Bar Association. The Code is comprised of three interrelated parts: Canons, defined as general concepts or axiomatic norms; Ethical Considerations (ECs), defined as aspirational in character; and Disciplinary Rules (DRs), that are mandatory in character and state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. These DRs have been formally adopted by each of the four Appellate Divisions as court rules (22 NYCRR part 1200). While other codes and published standards may offer guidance (e.g., ABA Model Rules, ABA Standards Relating to the Defense Functions, etc.), they do not supersede the DRs that are binding upon all licensed attorneys who practice in New York.

III. Fees and Agreements

1. Statement of Client's Rights

22 NYCRR 1210.1 requires every attorney with a New York office to post a Statement of Client's Rights in a manner visible to clients.

B. Arrangements that must be memorialized in writing

1. Domestic relations matters

The Uniform Rules of Procedure for Attorneys in Domestic Relations Matters (*see* 22 NYCRR part 1400), require the use of a written retainer agreement signed by the lawyer and client (*see* 22 NYCRR 1400.3). This requirement applies to all claims, actions, or proceedings, in either Supreme or Family Court, or in any appellate court, for divorce, separation, annulment, custody, visitation, maintenance, child or spousal support, or to enforce or modify a judgment or order in connection with any such claims, actions, or proceedings.

The fee agreement must include the 13 mandated provisions set forth in 22 NYCRR 1400.3, one of which provides that the client receive an itemized bill every 60 days (*see also* NY State Bar Assn Comm on Prof Ethics Op 719 [1999]).

Failure to comply with the rules regarding the mandatory written agreement may cause the attorney to forfeit the right to recover unpaid fees (*see McMahon v Evans*, 169 Misc 2d 509 [Sup Ct, Broome County 1996]), or lead to disciplinary sanctions (*see Matter of Hantman*, 236 AD2d 75 [2nd Dept 1997]).

The Uniform Rules also mandate that the attorney provide a prospective client with, and obtain a signed copy of, a Statement of Client's Rights and Responsibilities at the initial conference, prior to the signing of a written retainer agreement. By signing the statement, the client is merely acknowledging receipt of a copy of the statement. If the attorney is not charging a fee, the signed

statement is still required, but the fee provisions may be deleted (*see* 22 NYCRR 1400.2 and Code of Professional Responsibility DR 2-106[f] [22 NYCRR 1200.11(f)]).

2. Contingent fees

Contingent fees of any kind must be memorialized in writing (*see* Code of Professional Responsibility DR 2-106[d] [22 NYCRR 1200.11(d)]).

A contingent fee in a criminal case is prohibited (*see* Code of Professional Responsibility DR 2-106[c][1] [22 NYCRR 1200.11(c)(1)]).

A contingent fee in a domestic relations matter is prohibited, except under extremely narrow circumstances (*see* Code of Professional Responsibility DR 2-106[c][2] [22 NYCRR 1200.11(c)(2)]).

Taking a personal injury case on a contingent fee basis requires the attorney to file retainer and closing statements with the Office of Court Administration (*see* 22 NYCRR 691.20).

3. Any matter where the fee is expected to be $3,000 or greater

Representation in any matter where the fee to be charged is expected to be $3,000 or greater must be memorialized in a written letter of engagement or written fee agreement (*see* 22 NYCRR part 1215).

C. Non-refundable fees prohibited

Fixed or flat fees, fees based on hourly rates, and advanced retainers are permissible if reasonable, but may not be characterized or labeled as "non-refundable." Use of the term "minimum fee" is permissible, so long as it serves only as a forecast of the minimum amount the client will have to pay for completion of a particular service. Upon discharge, any portion of any fee paid in advance that remains unearned must be refunded promptly, on a quantum meruit basis (*see Matter of Cooperman*, 187 AD2d 56 [2nd Dept 1993], *affd* 83 NY2d 465 [1994]; *see also* 22 NYCRR 1400.4; Code of Professional Responsibility DR 2-110[a][3] [22 NYCRR 1200.15(a)(3)]). Failure to return the unearned portion of fee risks discipline (*see Matter of Brenner*, 201 AD2d 100 [2nd Dept 1994]). A pattern of "fee gouging" warranted a five-year suspension (*see Matter of Heller*, 195 AD2d 134 [1st Dept 1994]).

D. Fee sharing (referral fees)

New York does not permit payment of a pure "referral fee," that is, a fee for merely referring a client to another attorney. The governing rule, Code of Professional Responsibility DR 2-107(a) (22 NYCRR 1200.12[a]), requires that the referring attorney must either perform services or assume joint responsibility for the representation, stating:

DR 2-107 Division of Fees Among Lawyers

A. A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm, unless:

1. The client consents to employment of the other lawyer after full disclosure that a division of fees will be made.

2. The division is made in proportion to the services performed by each lawyer or, by a writing given the client, each lawyer assumes joint responsibility for the representation.

3. The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.

The term "joint responsibility" is not defined in the Code and the question of its precise meaning remains unsettled. There is agreement among the commentators that the term entails at least financial accountability and malpractice liability for the representation, but there is disagreement as to whether the term includes "supervision" by the referring attorney of the receiving attorney's work (*see Aiello v Adar,* 193 Misc 2d 649 [Sup Ct, Bronx County, 2002]).

E. Mandatory Fee Dispute Resolution Program - 22 NYCRR part 137

Subject to the exceptions discussed below, New York requires that an attorney who has commenced representation of a client on or after January 1, 2002, must resolve an ensuing fee dispute through the mandatory fee arbitration process governed by 22 NYCRR part 137.

1. Exceptions

The following matters are excepted from the part 137 program (*see* 22 NYCRR 137.1[b]):

a. representation in criminal matters;

b. sums in dispute of less than $1,000 and more than $50,000 unless the parties consent;

c. claims involving substantial legal questions, including professional malpractice or misconduct;

d. claims for damages or other affirmative relief disputes where the fee is fixed by statute, rule, or court;

e. disputes where no attorney services have been rendered for more than two years;

f. disputes where the attorney has no New York office or where no material portion of the services was performed in New York;

g. requests by non-clients.

2. Required notice

Where the attorney and client cannot agree as to the attorney's fee, 22 NYCRR part 137 requires the attorney to forward a written notice to the client entitled "Notice of Client's Right to Arbitrate" by certified mail or by personal service (22 NYCRR 137.6[a][1]). The Notice shall:

a. advise the client that he, she, or it has 30 days from receipt of the notice to elect fee arbitration;

b. include written instructions and procedures for fee arbitration explaining how to commence a fee arbitration proceeding unless the client has agreed in advance to submit fee disputes to arbitration;

c. include a copy of the request for fee arbitration form.

3. Commencement of a legal action to recover a fee

If a client fails to file a request for fee arbitration form within 30 days after the notice was received or served, the attorney may commence an action to recover the fee. The attorney must allege in the complaint that the client received notice of the right to arbitrate and did not file a timely request for the same.

F. Liens and other security devices

1. Retaining lien

The common-law retaining lien may be asserted to secure an attorney's right to just compensation for legal services rendered to a client. Such a lien is not limited to cases in which lienable items (money, property, papers) come into the lawyer's possession, but may be asserted with respect to any general balance due from the client. An attorney must take reasonable steps to avoid foreseeable prejudice to the rights of the client. For a good discussion of retaining liens, see NY County Lawyers' Op 678 (1990). The retaining lien is vitiated if the attorney is discharged for cause, but remains effective unless and until discharge for cause is judicially determined (*see Teichner v W & J Holsteins,* 64 NY2d 977 [1985]; *Artim v Artim,* 109 AD2d 811 [2nd Dept 1985]).

Caveat: It is impermissible to assert a lien against property or money that comes into an attorney's possession as a trustee or escrow agent. Asserting a lien against such property or money risks discipline (*see* Bar Assn of Nassau County Comm on Prof Ethics Op 85-7 [1985]; *U.S. v J.H.W. & Gitlitz Deli & Bar,* 499 F Supp 1010 [US Dist Ct, SDNY 1980]; *Matter of Hodes,* 97 AD2d 308 [1st Dept 1983]; *Matter of Einhorn,* 88 AD2d 95 [1st Dept 1982]; *Matter of Stella,* 90 AD2d 372 [2nd Dept 1982]; *Marsano v State Bank of Albany,* 27 AD2d 411 [3rd Dept 1967]).

2. Mortgage or deed

Accepting a mortgage as security for legal fees is permissible, subject to strict limitations, but accepting a deed as security is prohibited (*see* NY State Bar Assn Comm on Prof Ethics Op 550 [1983]).

3. Confession of judgment

It is not improper per se to obtain a confession of judgment from a client, subject to following limitations:

a. it is accepted as security for the payment of fees and not as payment, and it is understood that it will be filed only if the agreed-upon fees are not paid;

b. it is obtained *after* services have been rendered;

c. the amount is agreed upon and commensurate with the value of the services rendered, or to be fixed by a court;

d. full disclosure is made to the client about the effect of the confession of judgment, which would include its effect upon the client's credit standing.

(*See* NY State Bar Assn Comm on Prof Ethics Op 474 [1974].) Failure to observe the restrictions risks discipline (*see Matter of Jacobs*, 188 AD2d 228 [2nd Dept, 1993]; *Matter of Kauffman*, 99 AD2d 640 [3rd Dept 1984].)

4. Domestic relations matters

Securing fees in domestic relations matters, including the use of a mortgage, confession of judgment, or other security devices, are subject to court approval and other restrictions governed by special rules (*see* Code of Professional Responsibility DR 2-106[c] [22 NYCRR 1200.11(c)]; 22 NYCRR part 1400).

5. Bail assignments

It is generally held that there is no prohibition against accepting an assignment of bail as payment of a fee, although an opinion of the Nassau County Bar Association would limit the permissible use of a bail assignment as security for payment of the fee to avoid potential conflicts (*see* Bar Assn of Nassau County Comm on Prof Ethics Op 89-12 [1989]).

IV. Communication

A. With clients and other counsel

A lawyer has a duty to fully and promptly inform clients of material developments in the client's case and to promptly respond to the client's inquiries (*see* Code of Professional Responsibility EC 6-4, EC 9-2; NY State Bar Assn Comm on Prof Ethics Op 396 [1975]). The decision to accept or reject a settlement offer is for the client, not the lawyer (*see* Code of Professional Responsibility EC 7-7). Regardless of whether the attorney has been retained or assigned, the failure to properly communicate with the client constitutes misconduct (*see Matter of Wachs,* 225 AD2d 23 [1st Dept 1996]; *Matter of Rossbach,* 180 AD2d 92 [2nd Dept 1992]). An attorney is equally obligated to respond to inquiries from fellow members of the bar (*see* NY State Bar Assn Comm on Prof Ethics Op 407 [1975]).

A lawyer has an affirmative duty to advise a client of his or her failure to act and of a possible claim that the client may have for damages against the lawyer (*see* NY State Bar Assn Comm on Prof Ethics Op 275 [1972]). Failure to do so risks discipline (*see Matter of Strauss,* 135 AD2d 71 [2nd Dept 1988]; *Matter of Tallon,* 86 AD2d 897 [3rd Dept 1982]).

B. With adverse party

1. Disciplinary rule

Code of Professional Responsibility DR 7-104(a)(1) (22 NYCRR 1200.35[a][1]) states:

> During the course of the representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

An exception is permitted under Code of Professional Responsibility DR 7-104(b) (22 NYCRR 1200.35[b]) that allows the lawyer to cause a *client* to communicate with a represented party so long as the lawyer gives "reasonable advance notice" to the other party's counsel.

2. Criminal cases

Prosecuting attorneys who violate Code of Professional Responsibility DR 7-104, even at the direction of a supervisor, are subject to discipline (*see Matter of Howes*, 123 NM 311, 940 P2d 159; *United States v Ferrara*, 847 F Supp 964 [US Dist Ct, 1993 D DC], *affd* 54 F3d 825 [DC Cir 1995]; *Matter of John Doe*, 801 F Supp 478 [US Dist Ct, D NM] 1992). Criminal defense lawyers may contact a complaining witness for the prosecution without consent of the prosecutor; however, the defense lawyer must guard against violating other disciplinary rules, including the ban on advising or causing a person to hide or leave the jurisdiction (*see* NY County Lawyers' Assn Op 711 [1996]).

3. Corporations

The term "a party the lawyer knows to be represented by a lawyer," as used in Code of Professional Responsibility DR 7-104 (22 NYCRR 1200.35), includes corporate-party employees whose acts or omissions under inquiry are binding on the corporation or imputed to the corporation for purposes of liability and includes employees implementing advice of counsel; all other employees may be interviewed (*see Niesig v TEAM I*, 76 NY2d 363 [1990]; *but see* NY County Lawyers' Assn Op 705 [1995] [a lawyer employed by a corporation as an officer in the personnel department, and not functioning as a lawyer, may communicate with an employee suspected of wrongdoing who has hired a lawyer without the consent of employee's lawyer]).

C. Ex parte communications

Code of Professional Responsibility DR 7-110(b) (22 NYCRR 1200.41[b]) states:

> In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

1. in the course of official proceedings in the cause;

2. in writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to an adverse party who is not represented by a lawyer;

3. orally upon adequate notice to opposing counsel or to an adverse party who is not represented by a lawyer; or

4. as otherwise authorized by law, or by the Code of Judicial Conduct.

The Rules of Judicial Conduct governing judges prohibit ex parte communications except, inter alia, those made "for scheduling or administrative purposes . . . that do not affect a substantial right of any party" (22 NYCRR 100.3[B][6][a]) Those rules also permit a judge to confer separately with the parties, with their consent (*see* 22 NYCRR 100.3[B][6][d]).

Sending ex parte letters to a judge explaining a client's default and inquiring about procedure to reopen a matter warrants discipline (*see Matter of Abbot*, 167 AD2d 617 [3rd Dept 1990]).

A new trial was ordered where a trial judge improperly considered an ex parte conversation with the plaintiff's attorney prior to issuing a supplemental order which resolved substantive issues in the prior trial (*see Antoci v Antoci*, 113 AD2d 857 [2nd Dept 1985]).

One ethics committee has interpreted Code of Professional Responsibility DR 7-110(b) as requiring equivalent service on both the court and the adversary, i.e., if a communication is hand-delivered to a court, a "cc" by mail to the adversary is not permitted (*see* Assn of Bar of City of NY Op 1987-6 [1987]).

D. Threatening criminal prosecution

Code of Professional Responsibility DR 7-105 (22 NYCRR 1200.36) provides that a lawyer "shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Lawyers must be extremely vigilant in the observance of this rule when contemplating any communication that might be characterized as a "threat," including the use of a "demand" letter. The rule has been interpreted as excluding administrative or disciplinary charges that may be threatened or presented (for a thorough discussion, *see* NY State Bar Assn Comm on Prof Ethics Op 772 [2003]).

E. Tape recording conversations

Although legal, the secret recording by a lawyer of conversations with another lawyer or other persons is widely considered to be unethical and dangerous, exposing the lawyer to possible discipline. However, a limited exception is recognized for the secret recording of witnesses in criminal matters.

Until September 1993 the practice of surreptitious tape recording of conversations by lawyers was widely condemned as unethical, and constituting conduct involving "dishonesty, fraud, deceit, or misrepresentation" in violation of Code of Professional

Responsibility DR 1-102(a)(4) (22 NYCRR 1200.3[a][4]) (*see* ABA Comm on Ethics and Prof Responsibility, Formal Op 337 [1974]; NY State Bar Assn Comm on Prof Ethics Op 328 [1974]; *see also Matter of Wittner*, 264 App Div 576 [1st Dept 1942], *affd* 291 NY 574 [1943] [lawyer suspended for two years after he "bugged" adversary's hotel room]).

The authorities declaring the practice unethical did recognize a limited exception under "extraordinary circumstances" where law enforcement officials might ethically use secret recordings if acting within express statutory or judicial authority (*see* ABA Comm on Ethics and Prof Responsibility, Formal Op 337 [1974]; NY State Bar Assn Comm on Prof Ethics Op 328 [1974]). In 1980 the Association of the Bar of the City of New York extended the limited exception to defense lawyers in criminal cases with respect to witnesses, but it continued to endorse the view that secretly recording conversations with other lawyers or clients is improper in any context, criminal or civil (*see* Assn of Bar of City of NY Op 80-95 [1980]).

In September 1993 the New York County Lawyers' Association published Opinion No. 696 finding that the secret tape recording of a telephone conversation was not deceitful per se, and that a lawyer may secretly record telephone conversations with third parties provided one party consents and no other ethical rule is violated. The opinion met with widespread adverse comment (*see* Schwartz, Taping Telephone Calls: *It's Legal, But is it Ethical?*, NY State Bar Journal, Feb 1994, at 32; Arkin, *Attorneys, Tape Recorders, and Perfidy*, NYLJ, Apr. 14, 1994, at 3, col 1). Association of the Bar of the City of NY Op 1995-10 (1995), expressly rejected New York County Lawyers' Association Opinion No. 696, and reaffirmed the Association's long-held opposition to unfettered secret recording by attorneys.

In 2001 the American Bar Association, in Opinion No. 01-442, modified its general prohibition enunciated in its earlier Opinion No. 337, instead holding that where the nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules of Professional Conduct merely by recording a conversation without the consent of the other parties to the conversation. The applicability of this opinion remains unclear in New York, which is not a Model Rules state (*see* Cohen, Outside Counsel, *ABA Changes Course on Taping Conversations*, NYLJ, Dec. 13, 2001, at 1, col 1).

There is no prohibition against a lawyer, in response to a client's request for advice, counseling the client concerning the recording of a conversation between the client and a third party (*see* NY State Bar Assn Comm on Prof Ethics Op 515 [1979]; *Mena v Key Food Stores Cooperative*, 195 Misc 2d 402 [Sup Ct, Kings County 2003]).

V. Civility and Professionalism

A. The Standards of Civility – 22 NYCRR part 1200, Appendix A

New York has promulgated a set of Standards of Civility to guide the conduct of all participants in the operation of the legal system. The thrust of the Standards is succinctly captured in this statement from its preamble:

> As lawyers, judges and court employees, we are all essential participants in the judicial process. That process cannot work effectively to serve the public unless we first treat each others with courtesy, respect and civility.

The preamble explains that the Standards are aspirational in nature. They are not intended as rules to be enforced by sanction or disciplinary action. However, attorneys must be aware that similar standards are stated as Disciplinary Rules in the Code of Professional Responsibility (*see* Canon 7 of the Code of Professional Responsibility and the disciplinary rules contained therein). The Standards are not intended to supplement or modify the Code of Judicial Conduct, the Code of Professional Responsibility and its disciplinary rules, or any other applicable rule or requirement governing conduct. They are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

B. What does civility mean?

The Standards of Civility (22 NYCRR part 1200, Appendix A) encourage all lawyers to foster civility by:

- avoiding antagonistic or acrimonious behavior, including vulgar language, disparaging personal remarks, or acrimony towards opposing counsel, parties, or witnesses;
- supervising employees to ensure that they conduct themselves with courtesy and civility;
- promptly returning telephone calls and answering correspondence reasonably requiring a response;
- avoiding unnecessary motion practice or other judicial intervention through negotiation and agreement wherever practicable—this includes ensuring that the timing and manner of service of papers is not designed to cause disadvantage to the party receiving them;
- respecting the schedule and commitments of opposing counsel, consistent with the protection of the client's interests;
- allowing sufficient time to resolve disputes or disagreements by communicating with the adversary's counsel and imposing reasonable and meaningful deadlines;
- avoiding the use of any aspect of the litigation process, including discovery and motion practice, as a means of harassment or as a vehicle to unnecessarily prolong the length or costs of litigation;
- conducting oneself with dignity and refraining from engaging in acts of rudeness and disrespect in depositions, negotiations, and other proceedings;

- striving to uphold the honor and dignity of the profession, avoiding disorder and disruption in the courtroom, and maintaining a respectful attitude toward the court; and
- treating court personnel with courtesy and respect at all times.

C. Special rules of court decorum - Second Department

The Appellate Division, Second Department, has promulgated its own rules designed to foster proper courtroom behavior (*see* 22 NYCRR part 700). Similar rules exist for the Appellate Division, First Department (*see* 22 NYCRR part 604). The rules are designed to supplement, but not supersede, the Code of Professional Responsibility. Lawyers should familiarize themselves with these rules as they are applicable to all actions and proceedings subject to the jurisdiction of the Appellate Division. Section 700.4 of the rules, set forth in full below, details the obligations of an attorney as both an officer of the court and an advocate. Special note should be made of subdivision (f) of section 700.4, which mandates that no lawyer who has entered an appearance may withdraw from a case without the permission of the court.

§ 700.4 Obligations of the Attorney

(a) The attorney is both an officer of the court and an advocate. It is his [or her] professional obligation to conduct his [or her] case courageously, vigorously, and with all the skill and knowledge he [or she] possesses. It is also his [or her] obligation to uphold the honor and maintain the dignity of the profession. He [or she] must avoid disorder or disruption in the courtroom and he [or she] must maintain a respectful attitude toward the court. In all respects the attorney is bound, in court and out, by the provisions of the Code of Professional Responsibility.

(b) The attorney shall use his [or her] best efforts to dissuade his [or her] client and witnesses from causing disorder or disruption in the courtroom.

(c) The attorney shall not engage in any examination which is intended merely to harass, annoy or humiliate the witness.

(d) No attorney shall argue in support of or against an objection without permission from the court; nor shall any attorney argue with respect to a ruling of the court on any objection without such permission. However, an attorney may make a concise statement of the particular grounds for an objection or exception, not otherwise apparent, where it is necessary to do so in order to call the court's attention thereto, or to preserve an issue for appellate review. If an attorney believes in good faith that the court has wrongly made an adverse ruling, he [or she] may respectfully request reconsideration thereof.

(e) The attorney has neither the right nor duty to execute any directive of a client which is not consistent with professional standards of conduct. Nor may the attorney advise another to do any act or to engage in any conduct in any manner contrary to these rules.

(f) Once a client has employed an attorney who has entered an appearance, the attorney shall not withdraw or abandon the case without:

(1) justifiable cause,

(2) reasonable notice to the client, and

(3) permission of the court.

(g) The attorney is not relieved of these obligations by what he [or she] may regard as a deficiency in the conduct or ruling of a judge or in the system of justice; nor is he [or she] relieved of these obligations by what he [or she] believes to be the moral, political, social, or ideological merits of the cause of any client.

D. Cases on civility

1. Court papers

Submitting an affidavit to the court from a client containing numerous accusations of perjury, subornation of perjury, and other charges against opposing counsel resulted in a three-month suspension (*see Matter of Wilson,* 248 App Div 388 [1st Dept 1936]).

Unjustified suggestions in motion papers that opposing counsel had ties to organized crime warranted public censure (*see Matter of Kavanagh,* 189 AD2d 521 [1st Dept 1993]).

An unprofessional and vituperative personal attack against an Assistant District Attorney in court documents warranted suspension from practice (*see Matter of Raskin*, 217 AD2d 187 [2nd Dept 1995]).

2. Depositions

The use of vulgar, obscene and sexist epithets concerning an opposing counsel's anatomy and gender during a deposition warranted censure (*see Matter of Schiff,* 190 AD2d 293 [1st Dept 1993]).

An attorney's rude, uncooperative, and harassing behavior while being deposed as the party-plaintiff in a civil action was so lacking in professionalism and civility that dismissal of the action was the only appropriate remedy (*see Corsini v U-Haul Intl.,* 212 AD2d 288 [1st Dept 1995]).

An attorney was suspended for six months for (1) making abusive, obscene, and insulting statements during the course of an examination before trial in the presence of witnesses, both to and about his opposing counsel, (2) striking his opponent, and (3) preparing an affidavit for his client's signature in support of a motion containing serious and scandalous charges that were wholly irrelevant (*see Matter of Simon,* 32 AD2d 362 [1st Dept 1969]).

3. Criminal contempt

Conviction of an attorney for criminal contempt of court and engaging in undignified and discourteous conduct which was degrading to a tribunal in a criminal case warranted a public censure (*see Matter of Giampa,* 211 AD2d 212

[2nd Dept 1995]; *Matter of Werlin*, 170 AD2d 77 [2nd Dept 1991]; *Matter of Kunstler*, 194 AD2d 233 [1st Dept 1994]; *Matter of Castellano*, 46 AD2d 792 [2nd Dept 1974]).

A conviction of criminal contempt based upon an attorney's extrajudicial statement warranted a suspension from practice (*see Matter of Cutler*, 227 AD2d 8 [1st Dept 1996]).

4. Miscellaneous

An attorney was censured for assaulting opposing counsel (*see Matter of Clark*, 193 AD2d 116 [2nd Dept 1993]).

An attorney's harassment of a former girlfriend in her personal and professional life resulted in a six-month suspension (*see Matter of Muller*, 231 AD2d 296 [1st Dept, 1997]).

E. Sanctions - 22 NYCRR 130-1.1

Monetary sanctions may be imposed upon attorneys who engage in "frivolous conduct" and can be assessed in an amount up to $10,000 for each incident. In addition, costs and attorney's fees can be awarded to an adversary in the form of reimbursement for actual expenses reasonably incurred, where frivolous conduct occurs.

Conduct is frivolous if it (1) is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law; (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it involves the assertion of material factual statements that are false (22 NYCRR 130-1.1[c]).

In the case of *Principe v Assay Partners* (154 Misc 2d 702 [Sup Ct, NY County 1992]) the plaintiff's counsel made abusive and insulting remarks, accompanied by disparaging gestures, to a female attorney during the discovery phase of litigation. The trial court found that counsel's conduct constituted frivolous conduct undertaken primarily to harass or maliciously injure another. "[T]he words used here are a paradigm of rudeness, and condescend, disparage, and degrade a colleague upon the basis that she is female" (*Principe v Assay Partners, supra* at 704).

F. Criticism of the judiciary

Criticism of the judiciary by attorneys is not an unfettered right, and a false accusation may have consequences (*see* Code of Professional Responsibility DR 8-102[a] [22 NYCRR 1200.43[a] [a lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office]; Code of Professional Responsibility DR 8-102[b] [22 NYCRR 1200.43(b)] [a lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer]).

A lawyer may make public criticism of a judge that is well founded, provided the action is no longer pending, the lawyer is not knowingly making a false accusation, and strives to voice criticism in a temperate and dignified manner (*see* Association of the Bar of the City of NY Op 1996-1 [1996]).

Cases regarding criticism of the judiciary

An attorney's comments that were designed to inflame and arouse contempt for a federal court by alleging that the judge had engaged in corrupt action resulted in his censure (*see Matter of Markewich*, 192 App Div 243, [1st Dept 1920]).

The filing of affidavits containing unwarranted and irresponsible attacks accusing a Surrogate of prejudice, and also attacks on opposing counsel's firm that were made with knowledge of falsity, with reckless disregard of the truth, and that were malicious in their intent and purpose warranted a six-month suspension (*see Matter of Baker v Monroe County Bar Assn.*, 34 AD2d 229 [4th Dept 1970]), *affd* 28 NY2d 977 [1971]).

An unprofessional and vituperative personal attack against a judge warranted public censure (*see Matter of Herman*, 37 AD2d 315 [2nd Dept 1971]).

A false, public allegation made by a District Attorney, accusing a judge of wrongdoing, resulted in discipline. The "actual malice" standard applicable to press coverage did not apply. The test is not subjective, but objective, i.e., what a "reasonable attorney" would believe in similar circumstances (*see Matter of Holtzman*, 78 NY2d 184 [1991]).

An attorney was publicly censured for making reckless statements to a judge which were unprofessional, discourteous, and degrading to the judge (*see Matter of Golub*, 190 AD2d 110 [1st Dept 1993]).

An attorney's unsubstantiated claims against a judge, his law secretary, and the defense counsel that they had conspired to fix the case, and other accusations of illegality made against another judge, resulted in a six-month suspension (*see Matter of Mordofsky*, 232 AD2d 863 [1st Dept 1996]).

Calling a judge "corrupt" during a telephone status conference was derogatory, undignified, and inexcusable, warranting a three-month suspension from practice (*see Matter of Dinhofer*, 257 AD2d 326 [1st Dept 1999]).

Accusing a judge of dismissing an action in the judge's self-interest, and "bullying litigants with threats of irrational behavior" resulted in a censure (*see Matter of Delio*, 290 AD2d 61 [1st Dept 2001]).

VI. Confidentiality

Lawyers confronted with issues regarding client confidentiality must bear in mind that the controlling rules are derived from two separate sources: (1) the law of attorney-client privilege governed by statute in CPLR 4503(a), and (2) the rules governing the "Preservation of Confidences and Secrets of a Client," set forth under Canon 4 of the Code of Professional Responsibility (*see* Code of Professional Responsibility DR 4-101 [22 NYCRR 1200.19]). The provisions of Canon 4 are much broader than the more narrow CPLR 4503(a). They may apply without regard to the nature and source of the information, even to information already in the public domain or shared with others.

CPLR 4503-a	DR 4-101
• Narrow protection	• Broader protection
• Derived from the law of evidence	• Based on fiduciary obligations
• Relates to confidential communications directly between lawyer and client for purpose of obtaining legal advice	• Can relate to all information obtained in course of representation
• Protects compelled disclosure in litigation	• Disclosure may be compelled if outside the privilege

A. Exceptions to confidentiality

This subject matter has been the subject of great debate among ethics experts for so long that it is difficult to identify bright-line rules to guide attorney conduct. Even the Court of Appeals has cited Wigmore's observation that "'much ought to depend on the circumstance of each case,'" when wrestling with exceptions to the rules on confidentiality (*Matter of Kaplan*, 8 NY2d 214, 219 [1960], quoting 8 Wigmore, Evidence § 2313, at 609 [5th ed]). Because of the difficult ethical dilemma in these kinds of situations, the Code of Professional Responsibility has been amended through the years to relieve some of the pressure on lawyers faced with the question of whether or not to breach confidentiality. EC 4-7, added in September 1990, expressly confirmed that a lawyer's decision to disclose or not disclose the confidences and secrets of a client regarding the intent to commit a crime is an absolute exercise of discretion, and was designed to serve as an admonition to the grievance committees and courts that lawyers may not be disciplined for exercising that discretion (*see* Gross, *Amendment to NYS Code of Professional Responsibility*, NYLJ, Mar. 9, 1990, at 27, col 6).

1. Client perjury

The cases and opinions dealing with the problems presented by client perjury involve the interplay between the disciplinary rules within Canon 4 and those within Canon 7 of the Code of Professional Responsibility. The outcomes of the cases and the opinions as to whether conduct is appropriate or inappropriate are generally based upon whether the lawyer knows of the client's perjury in advance of or after the fact.

(a) In advance: A lawyer who learns in advance of his client's intent to commit perjury is vested with absolute discretion in deciding whether or not to reveal such intent, without fear of discipline. Code of Professional Responsibility DR 4-101(c)(3) (22 NYCRR 1200.19[c][3]) states that a lawyer may reveal a client's intention to commit a crime and the information necessary to prevent it. As amplified by EC 4-7, lawyers will not be disciplined for choosing to reveal or not reveal such intention or information. However, while vested with the discretion not to reveal the client's intended perjury, a lawyer is absolutely barred from using the perjured testimony, creating or preserving such testimony, or counseling or assisting the client in such testimony (*see* Code of Professional Responsibility DR 7-102[a][4], [6], [7] [22 NYCRR 1200.33(a)(4), (6) and (7)]).

(b) After the fact: A lawyer who discovers after the fact that the client has committed perjury is governed by Code of Professional Responsibility DR 7-102(b) (22 NYCRR 1200.33[b] which provides:

> A lawyer who receives information clearly establishing that:
>
> 1. The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.
>
> 2. A person other than the client has perpetrated a fraud upon a tribunal shall reveal the fraud to the tribunal.

If the information received by the lawyer regarding the client's perjury is in the form of a protected confidence or secret of the client, then the lawyer is within the exception to Code of Professional Responsibility DR 7-102(b)(1) (22 NYCRR 1200.33[b][1]) and is prohibited from revealing the perjury under Code of Professional Responsibility DR 4-101 (22 NYCRR 1200.19). The lawyer still has the obligation to call upon the client to "rectify" the fraud. The term "information clearly establishing" has been interpreted to mean "actual knowledge" on the part of the lawyer (*Grievance Comm of U.S. Dist. Ct. of Connecticut v Doe*, 847 F2d 57 [2nd Cir 1988]).

In cases where the lawyer has information clearly establishing perjury or fraud committed by a person other than a client (Code of Professional Responsibility DR 7-102[b][2] [22 NYCRR 1200.33(b)(2)]), there is a disagreement in New York as to whether the lawyer is obligated to reveal the fraud even if it requires the disclosure of client confidences and secrets. The New York State Bar Association construes Code of Professional Responsibility DR 7-102(b)(2) (22 NYCRR 1200.33[b][2]) to contain "by necessary implication" the same exception as Code of Professional Responsibility DR 7-102(b)(1) (22 NYCRR 1200.33[b][1]) for the protection of client confidences and secrets (*see* NY State Bar Assn Comm on Prof Ethics Op 523 [1980]). The Nassau County Bar Association, while acknowledging the apparent inconsistency, stands by the clear text of the rule, and opines that the fraud of a person other than the client must be reported irrespective of whether the information has been learned as a "confidence or secret" (Bar Assn of Nassau County Comm on Prof Ethics Op 94-13 [1994]).

Cases regarding client perjury

A criminal defendant's privilege to testify in his own behalf does not include a right to commit perjury (*see Harris v New York*, 401 US 222 [1971]).

The Sixth Amendment right to counsel is not violated when a lawyer refuses to cooperate with a defendant in presenting perjured testimony. A lawyer's threat to disclose client perjury and withdraw did not deprive the

defendant of the effective assistance of counsel (*see Nix v Whiteside*, 475 US 157 [1986]).

A defendant was not deprived of the right to counsel when a lawyer attempted to avoid assisting the defendant in the presentation of perjured testimony by moving to withdraw for "professional" reasons (*see United States v Henkel,* 799 F2d 369 [7th Cir 1986]).

A defendant's right to counsel was not violated when his lawyer refused to assist the defendant with his expressed intent to perjure himself in taking a plea, urged the defendant to fire him if he wished to take plea, and attempted to negotiate an *Alford* plea (*see North Carolina v Alford,* 400 US 25 [1970]) so that the defendant would avoid perjurious admissions (*see People v Appel*, 120 AD2d 319 [3rd Dept 1986]).

The defendant was not deprived of the effective assistance of counsel when a lawyer allowed the defendant to testify in narrative form to avoid eliciting perjured testimony (*see Benedict v Henderson,* 721 F Supp 1560 [US Dist Ct, NDNY 1989]).

During a jury trial, defense counsel acted in accordance with ethical obligations when he first sought to dissuade the defendant from testifying falsely and, when the defendant insisted on testifying and committed perjury, in properly notifying the court in an ex parte fashion (*see People v DePallo,* 96 NY2d 437 [2001]).

During a suppression hearing, defense counsel's disclosure to the court, which was open to the inference that his client intended to perjure himself upon taking the stand, did not deprive the defendant of the effective assistance of counsel (*see People v Andrades,* 4 NY3d 355 [2005]).

2. Concealment of evidence

The cases and opinions addressing the subject of the concealment of evidence generally make a distinction between the passive possession of information versus affirmative action to conceal evidence or further criminal conduct. The following general guidelines may be gleaned from the cases and opinions excerpted below:

> Under no circumstances may a lawyer engage in illegal conduct.
>
> If a lawyer comes into possession of real evidence and has a legal obligation to turn over the property to authorities, the lawyer must do so according to law or otherwise in a manner least prejudicial to the interest of the client.
>
> A lawyer has no duty to reveal the confidences or secrets of a client.
>
> If directed to dispose of or turn over property by court order, the lawyer must comply.

Cases and ethics opinions regarding concealment of evidence

It is improper for a lawyer representing a client charged with larceny to divulge to the authorities confidential information obtained from the client as to the location of the stolen property (*see* NY State Bar Assn Comm on Prof Ethics Op 405 [1975]).

A lawyer is not required, after withdrawal from representation, to disclose a fraud previously revealed by the client that the client concealed assets from a bankruptcy trustee (*see* NY State Bar Assn Comm on Prof Ethics Op 454 [1976]).

A lawyer may not accept proceeds of a crime from a client for safekeeping, and should not reveal the client's proffer (*see Matter of Ryder*, 263 F Supp 360 [US Dist Ct, ED Va 1967], *affd* 381 F 2d 713 [4th Cir 1967]; NY State Bar Assn Comm on Prof Ethics Op 466 [1977], citing NY State Bar Assn Comm on Prof Ethics Op 405 [1975]).

A lawyer has no duty to reveal the location of a murder victim revealed by a client (*see People v Belge*, 83 Misc 2d 186 [County Ct, Onandaga County 1975], *affd* 50 AD2d 1088 [4th Dept 1975], *affd* 41 NY2d 60 [1976] [the Garrow case]; NY State Bar Assn Comm on Prof Ethics Op 479 [1978]).

Whenever a lawyer has a legal duty to turn over evidence, he or she also has an ethical obligation to do so. If a legal obligation attaches, then a lawyer must turn over the evidence in the manner provided by law or otherwise in a manner least prejudicial to the client (*see* NY State Bar Assn Comm on Prof Ethics Op 530 [1981]).

The fruits and instrumentalities of a crime, as opposed to verbal communications between the lawyer and the client, are not privileged or otherwise protected from revelation (*see* Assn of Bar of City of NY Op 81-99 [1981], and cases cited therein).

Destroying evidence and counseling a client to hide evidence and give untruthful answers to law enforcement authorities warranted disbarment (*see Matter of Backal*, 219 AD2d 1 [1st Dept, 1996]).

3. Disclosure to defend against accusation

The issue of whether a lawyer is permitted to disclose a confidential communication is related to the attorney-client privilege and is governed by case law and the Code of Professional Responsibility. It is well settled that the privilege is deemed to be impliedly waived if necessary to defend against an accusation of wrongful conduct:

> A client who voluntarily testifies to a privileged matter, who publicly discloses such matter, or who permits his attorney to testify regarding the matter is deemed to have impliedly waived the privilege. A waiver may also be found where the client places the subject matter of the privileged communication in issue or where invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would

> deprive the adversary of vital information (*Jakobleff v Cerrato, Sweeney and Cohn*, 97 AD2d 834, 835 [2nd Dept 1983] [citations omitted]).

Code of Professional Responsibility DR 4-101(c)(4) (22 NYCRR 1200.19[c][4]) expressly permits a lawyer to reveal confidences and secrets of a client "necessary . . . to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct." Ethical Consideration 4-7, which amplifies DR 4-101, states:

> The lawyer's exercise of discretion to disclose confidences and secrets requires consideration of a wide range of factors and should not be subject to reexamination . . . . In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

This exception to the attorney-client privilege has been interpreted as not requiring that the accusations be made in a pending proceeding, but only that the accusations be made in such a manner that a reasonable lawyer would conclude that a formal claim is imminent (*see* NY County Lawyers' Assn Comm on Prof Ethics, Op 722 [1997]). The exception also has been construed as extending beyond accusations made only by the client, and applying to third-party actions against the attorney (*see Meyerhofer v Empire Fire and Marine Ins. Co.*, 497 F2d 1190, 1194-1195 [2nd Cir., 1974], *cert denied* 419 US 998 [1975]).

The question of how much disclosure is "'necessary' is determined on a case-by-case basis . . . . A lawyer is not entitled to disclose confidential information that embarrasses or harms the client but does not meet the substance of the accusation of wrongful conduct head on" (Simon, *Simon's New York Code of Professional Responsibility Annotated*, at 548 [2005 ed]). This limitation has also been interpreted as requiring the disclosure to be "material and relevant" to the claim (*see* Bar Assn of Nassau County Comm on Prof Ethics, Op 96-8 [1996]).

4. Suicide

A lawyer may take appropriate action to prevent suicide, including disclosure of the client's intention (*see NY State* Bar Assn Comm on Prof Ethics Op 486 [1978]; *see also People v Fentress*, 103 Misc 2d 179 [County Ct, Dutchess County 1980]).

5. Client identity and whereabouts

As a general rule, information about a client's identity and whereabouts is not privileged, but narrow exceptions may permit a lawyer to refuse disclosure. A good discussion of applicable cases can be found in Carlucci, *Your Client's Identity: Is It Protected by Attorney/Client Privilege?* (New York Bar Journal, Dec 1994, at 10) as well as in *Matter of Jacqueline F.* (47 NY2d 215 [1979]) and *D'Alessio v Gilberg* (205 AD2d 8 [2nd Dept 1994]).

6. Fee agreements

Fee information is generally not privileged (*see Priest v Hennessy*, 51 NY2d 62 [1980]; *In Re Shargel*, 742 F2d 61 [2nd Cir 1984]).

VII. Conflicts of Interest

A. General considerations

Conflicts of interest issues are addressed under Canon 5 of the Code of Professional Responsibility. The guiding principle underpinning all conflict issues is stated in EC 5-1:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desire of third persons should be permitted to dilute the lawyer's loyalty to the client.

The Code instructs that many conflicts of interest may be vitiated with client consent after the making of "full disclosure" (Code of Professional Responsibility DR 5-101[a] [22 NYCRR 1200.20(a)], DR 5-104 [22 NYCRR 1200.23], DR 5-105[c] [22 NYCRR 1200.24(c)], DR 5-106 [22 NYCRR 1200.25], DR 5-107 [22 NYCRR 1200.26], DR 5-108 [22 NYCRR 1200.27]). Although the term "full disclosure" is not specifically defined within the Code, its parameters should be measured on an objective basis in view of the prevailing circumstances. EC 5-16 prescribes this degree of disclosure in the case of a lawyer representing multiple clients:

> [B]efore a lawyer may represent multiple clients the lawyer should explain fully to each client the implications of the common representation and otherwise provide to each client information reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict, and should accept or continue employment only if each client consents, preferably in writing (Code of Professional Responsibility EC 5-16).

Caveat: Case law makes clear that, even in the face of consent and full disclosure, some conflicts may be so "profound" that representation is not permitted "under any circumstances" (*Matter of Kelly*, 23 NY2d 368, 378 [1968]; *see Greene v Greene*, 47 NY2d 447 [1979]).

Lawyers associated in a law firm must bear in mind that, in certain conflict situations, none of them may accept or continue employment when any one of them practicing alone would be prohibited from doing so (*see* Code of Professional Responsibility DR 5-105(d) (22 NYCRR 1200.24[d]).

All law firms are required to maintain a "conflicts check" system and records by which proposed engagements are checked against current and previous engagements (*see* Code of Professional Responsibility DR 5-105[e] [22 NYCRR 1200.24(e)]).

B. Real estate conflicts

1. Seller and purchaser

Ethics opinions have consistently held that while it is not improper per se to represent both parties to a real estate transaction, it should be practiced only in exceptionally limited circumstances:

> [D]ual representation should be practiced sparingly and only when it is clear that neither party will suffer any disadvantage from it. It is difficult to justify, except in unusual and very limited circumstances, and only after complete disclosure and consent, with a clear understanding by both parties of its possible effect on their respective interests. In real estate transactions it is not always true, even in relatively simple ones, that representation of both buyer and seller involves nothing but computations of adjustments and preparation of the deed.

(NY State Bar Assn Comm on Prof Ethics Op 162 [1970]; *see* NY State Bar Assn Comm on Prof Ethics Ops 8 [1965] and 38 [1966].) Abuse risks discipline (*see Matter of Ford*, 287 AD2d 870 [3rd Dept 2001]; *see also Matter of Stella*, 193 AD2d 235 [2nd Dept 1993]).

2. Broker and attorney

A lawyer may not act as a real estate or mortgage broker and as an attorney for a party in the same transaction. The rationale for this prohibition is set forth in Bar Assn of Nassau County Comm on Prof Ethics Op 11-87 (1987):

> The attorney's independent judgment and full loyalty to the buyer or seller client, even to the extent of aborting the transaction if that will best serve the client's interests necessarily runs counter to the attorney/broker's incentive to close the transaction and thereby to earn the brokerage commission. Other problems, of preservation of confidences and secrets, similarly may arise when the same individual seeks to exercise both functions.

(S*ee also* NY State Bar Assn Comm on Prof Ethics Ops 208 [1971], 244 [1972], 291 [1973], 340 [1974], 493 [1978], 753 [2002]; Bar Assn of Nassau County Comm on Prof Ethics Ops 41-87 [1987], 89-46 [1989], 90-20 [1990].)

A lawyer who acts as a real estate broker and an attorney for a party in the same transaction risks discipline (*see Matter of Tems*, 238 AD2d 65 [2nd Dept 1997]; *Matter of Viggiano*, 211 AD2d 1 [2d Dept 1995]; *Matter of Pine*, 194 AD2d 156 [2nd Dept 1993]).

3. Title company and attorney

A lawyer may not act for a title abstract company and as an attorney for a party in the same transaction, except for purely ministerial purposes. The rationale underlying this prohibition is set forth in NY State Bar Assn Comm on Prof Ethics Op 595 [1988]:

> We believe that, in situations where the abstract company performs services in addition to mere title searching, a prohibited conflict of interest arises that may not be cured by the consent of those concerned with the transaction. Typically this conflict occurs when the lawyer-owned abstract company prepares a title report or serves as an agent for the title underwriter. In either of these situations, the dual roles are improper because they require a law firm, which as a principal in the abstract company prepares a title report showing exceptions in title and recommending whether a title insurance policy will be issued, negotiate these issues, as counsel for a party in the underlying transaction, with itself.
>
> Moreover, if the abstract company discovers defects in title, it and the purchaser or lender client have manifestly differing interests in the negotiating process . . . . Indeed, if the transaction is closed in such a case, and a serious defect in the title is discovered, the law firm's client may wish to learn whether the abstract company in which the lawyers are principals were negligent in the performance of the title search, [which is] contrary to the lawyer-owned abstract company's interest in such an event.

(*See also* NY State Bar Assn Comm on Prof Ethics Ops 753 [2002], 731 [2000], 621 [1991], 576 [1986].)

4. Mortgagee and mortgagor

The New York State Bar Association has consistently held that so long as there is full disclosure and express consent by both clients, it is *not* per se improper, under Code of Professional Responsibility DR 5-105 (22 NYCRR 1200.24), for an attorney to represent a mortgagor and a mortgagee in the same transaction (*see* NY State Bar Assn Comm on Prof Ethics Ops 694 [1997], 438 [1976], 199 [1971], 162 [1970], 8 [1965]). The Bar Association of Nassau County disagrees, however, and views the conflict as one that is per se improper because, just as in the attorney-broker scenario, payment of the fee is often contingent on closing and "[t]here is a strong possibility that the attorney will represent the [purchaser's] interest less zealously . . . in order to insure a successful closing of the mortgage transaction" (*see* Bar Assn of Nassau County Comm on Prof Ethics Op 98-10 [1998]).

5. Referral fees from third parties

It is not improper, per se, to accept a referral fee from a termite inspection company or a mortgage broker under limited circumstances, but an attorney may have to tender that fee to the client, if requested (*see* Bar Assn of Nassau County Comm on Prof Ethics Op 01-10 [2001]; NY State Bar Assn Comm on Prof Ethics Op 667 [1994]).

C. Matrimonial conflicts

1. Representing both husband and wife

It is improper for a lawyer to represent both husband and wife at any stage of a marital problem, even with full disclosure and the informed consent of both parties (*see* NY State Bar Assn Comm on Prof Ethics Op 258 [1972]; accord Bar Assn of Nassau County Comm on Prof Ethics Ops 90-35 [1990], 86-4 [1986]). Dual representation per se does not necessarily require automatic nullification of agreements, as a matter of law, but the absence of independent representation remains a "significant factor" in determining alleged overreaching (*see Levine v Levine,* 56 NY2d 42 [1982]; *Amiel v Amiel*, 239 AD2d 532 [2nd Dept 1997]; *Warren v Rabinowitz,* 228 AD2d 492 [2nd Dept 1996]; *Jaus v Jaus,* 168 AD2d 487 [2nd Dept 1990]; *Paruch v Paruch,* 140 AD2d 418 [2nd Dept 1988]; *Juliani v Juliani,* 143 AD2d 72 [2nd Dept 1988].

2. Divorce mediation

Lawyers who serve as mediators between spouses in domestic relations matters may not thereafter represent the parties as joint clients, even for the mere drafting and filing of papers, except under extremely narrow circumstances (*see* NY State Bar Assn Comm on Prof Ethics Op 736 [2001] [an attorney-mediator may prepare divorce documents incorporating a mutually acceptable separation agreement and represent both parties only in those cases where mediation has proven entirely successful, the parties are fully informed, no contested issues remain, and the attorney-mediator satisfies the "disinterested lawyer" test of Code of Professional Responsibility DR 5-105[c] [22 NYCRR 1200.24(c)]).

3. Other conflicts

A lawyer may not represent one spouse in a matrimonial action where he or she represents both spouses in a pending unrelated action (*see* NY State Bar Assn Comm on Prof Ethics Ops 436 [1976], 329 [1974], 139 [1970], 156 [1970]). A lawyer who previously represented a spouse in a proposed matrimonial action against the other spouse may not represent the other spouse in a subsequent divorce action (*see* Bar Assn of Nassau County Comm on Prof Ethics Op 92-19 [1992]).

D. Sexual relations with client

New York's Code of Professional Responsibility has long been interpreted as prohibiting inappropriate sexual behavior affecting the lawyer-client relationship (*see Matter of Weinstock,* 241 AD2d 1 [2nd Dept 1998]; *Matter of Romano,* 231 AD2d 299 [1st Dept 1997]; *Matter of Feinman,* 225 AD2d 200 [4th Dept 1996]; *Matter of Gilbert,* 194 AD2d 262 [4th Dept 1993]; *Matter of Rudnick,* 177 AD2d 121 [2nd Dept 1992]; *see also Matter of Gould*, 207 AD2d 98 [2nd Dept 1995] [lawyer who represented both husband and wife with regard to a separation agreement, and then wife in an uncontested divorce action, while conducting intimate sexual relationship with wife without husband's knowledge, was suspended for two years]).

In 1999 the Code of Professional Responsibility was amended to include new DR 5-111 (22 NYCRR 1200.29-a), designed specifically to address conduct involving sexual

relations with clients. Subdivision (a) of the rule broadly defines "sexual relations" to include "the touching of an intimate part of another." A close reading of the rule reveals that it does not ban sexual relations with clients in all circumstances. Practitioners must remain mindful of other code sections that may result in consequences for engaging in the type of conduct reflected in the cases cited above, especially of Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7] [conduct that adversely reflects on the lawyer's fitness as a lawyer]), and Code of Professional Responsibility DR 5-101(a) (22 NYCRR 1200.20[a] [lawyer's exercise of professional judgment on behalf of the client affected by the lawyer's personal interest]).

VIII. Fiduciary Obligations and Recordkeeping Requirements

A. An escrow agent is a fiduciary

An attorney who comes into possession of funds or property of a client or a third party is a fiduciary and must safeguard the funds or property. All lawyers are obligated to be familiar with the provisions of Code of Professional Responsibility DR 9-102 (22 NYCRR 1200.46), and, in fact, must so certify every time they sign and submit their biennial attorney registration statement.

1. Things a fiduciary MUST DO

- notify a client or third party whenever the lawyer receives any funds or property on their behalf;
- promptly deposit funds payable to a client or third party into an attorney escrow account in a banking institution which agrees to provide dishonored check reports to the New York Lawyers' Fund for Client Protection;
- timely provide the client or third party with complete accountings of trust money or property;
- maintain accurate and contemporaneous records of all deposits and disbursements;
- maintain the required records for seven years;
- make certain that the correlating deposit has cleared the payor's bank prior to disbursal;
- promptly disburse all funds and property to the client or third party;
- make all withdrawals payable to named payees;
- promptly withdraw earned fees.

Caveat: Even an unintentional failure to preserve escrow funds may result in discipline. An improper invasion of funds occurs whenever the balance in the escrow account is less than the client's or third party's interest in that account.

2. Things a fiduciary MUST NOT DO

- commingle the client's or third party's funds with the attorney's own business or personal funds;
- use an escrow account to pay personal debts or as a shelter from creditors or taxing authorities—however, an attorney may maintain funds in the escrow account sufficient to pay bank charges on that account;
- misappropriate the funds or property belonging to a client or third party;
- make cash withdrawals, including ATM withdrawals.

B. Mandatory account maintenance

Escrow funds must be maintained in a special account in the name of the attorney or law firm entitled "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and checks and deposit slips should bear that name (*see* Code of Professional Responsibility DR 9-102[b][1] [22 NYCRR 1200.46(b)(1)]).

The escrow account must be maintained in a banking institution that agrees to provide dishonored check reports to the New York Lawyers' Fund for Client Protection in accordance with part 1300 of the joint rules of the Appellate Divisions (*see* 22 NYCRR 1300.1[a]; Code of Professional Responsibility DR 9-102[b][1] [22 NYCRR 1200.46(b)(1)]). The account may not carry overdraft privileges and may not be linked with any other account for the purpose of covering an overdraft.

The attorney must maintain the escrow account separate from any business or personal account in a New York bank that agrees to comply with the dishonored check rule (*see* Code of Professional Responsibility DR 9-102[b][1] [22 NYCRR 1200.46(b)(1)]). Either a single account for all clients, or individual accounts for specific clients or third parties, may be maintained.

All signatories on escrow accounts must be lawyers licensed to practice law in New York State (*see* Code of Professional Responsibility DR 9-102[e] [22 NYCRR 1200.46(e)]).

Unless escrow funds are to generate interest for the benefit of the parties, they must be deposited into an IOLA account.

C. IOLA accounts - Judiciary Law § 497

IOLA is an acronym for "interest on lawyer's account." The interest generated on IOLA accounts is used to fund non-profit organizations that provide legal services for the poor and programs to improve the administration of justice. Funds held for a relatively short period of time and which are not expected to generate significant interest must be deposited into an IOLA account. If a deposit is expected to earn approximately $150 or more in interest, the attorney should consult with his client and any other interested party to determine whether the funds should be deposited into an individual interest-bearing account or an IOLA account (*see* 21 NYCRR 7000.10; *see also* NY State Bar Assn Comm on Prof Ethics Op 764 [2003]).

D. Interest-bearing accounts

A lawyer may not retain the interest on an escrow account. All interest generated on an escrow account belongs to the interested parties to the escrow. A lawyer may charge a reasonable fee for administering the special account (*see* NY State Bar Assn Comm on Prof Ethics Ops 582 [1987], 532 [1981]; Association of the Bar of the City NY Op 81-68 [1981]).

E. Attorney fees

Funds in which the lawyer and the client have a present or potential shared interest also are required to be deposited into an escrow account. The lawyer's share of the funds should be withdrawn from the account as soon as it is earned or due, unless the client disputes the withdrawal. In that event, the disputed portion of the funds should be left intact in the escrow account until the dispute is resolved (*see* Code of Professional Responsibility DR9-102[b][4] [22 NYCRR 1200.46(b)(4)]).

New York does not require an advance payment of an attorney's fee to be treated as client funds absent an agreement with the client to the contrary (*see* NY State Bar Assn Comm on Prof Ethics Op 570 [1985]).

F. Dishonored check reporting rule - 22 NYCRR part 1300

Pursuant to 22 NYCRR 1300.1, the special accounts required by Code of Professional Responsibility DR 9-102 (22 NYCRR 1200.46) shall be maintained only in banking institutions that have agreed to provide dishonored check reports to the New York Lawyers' Fund for Client Protection. If a check presented against an attorney special, trust, or escrow account is dishonored for insufficient available funds, the banking institution is required to generate a "dishonored check report" to the New York Lawyers' Fund for Client Protection. The Fund is required to wait 10 business days to enable the bank to withdraw a mistaken report before taking further action. If the Fund does not receive a notice of mistake within 10 business days, it is required to forward the dishonored check report to the attorney disciplinary committee having jurisdiction over the account holder.

G. Required bank and bookkeeping records

All lawyers in New York are bound to abide by the recordkeeping requirements set forth in Code of Professional Responsibility DR 9-102 (22 NYCRR 1200.46). In addition to escrow records, the rule applies to any other bank account that concerns or affects a lawyer's practice of law, including the office business account. Records of all financial transactions must be accurate and are to be made at or near the time of the events recorded. Code of Professional Responsibility DR 9-102(d) (22 NYCRR 1200.46[d]) mandates that lawyers make accurate entries and maintain *for seven years after the events which they record*, the following:

1. detailed records for any special account (escrow) or "any other bank account which records the operations of the lawyer's practice," i.e., a business or operating account (Code of Professional Responsibility DR 9-102[d][1] [22 NYCRR 1200.46(d)(1)]), specifically identifying the date, source, and description of each item deposited, withdrawn, or disbursed;

2. copies of all retainer and compensation agreements;

3. copies of all statements to clients or others showing disbursements;

4. copies of all bills to clients;

5. copies of all records showing payments to lawyers, investigators, or other persons not in the lawyer's regular employ, for services performed;

6. copies of all retainer and closing statements filed with the Office of Court Administration;

7. o*riginals* of all check books, check stubs, bank statements, pre-numbered cancelled checks and duplicate deposit slips.

Note: The use of the word “copies” contemplates technological advances and includes microfilm, optical imaging, and "any other medium that preserves an image of the document that cannot be altered without detection" (Code of Professional Responsibility DR 9-102[d][10] [22 NYCRR 1200.46(d)(10)]); however, this does not obviate any rule mandating the preservation of original records.

H. Reconciliation and supervision

Duties regarding escrow accounts may be delegated; however, lawyers remain ultimately responsible to ensure that escrow accounts are properly maintained. Lawyers should train and supervise all employees appropriately and should regularly review and reconcile all bank accounts. Paralegals, office managers, or other non-attorneys may not sign escrow checks (*see* Code of Professional Responsibility DR 9-102[e] [22 NYCRR 1200.46(e)]).

I. Third-party liens

A lawyer entrusted with funds in which third-party lienors have an interest is a fiduciary and must comply with the fiduciary obligations contained in Code of Professional Responsibility DR 9-102 (22 NYCRR 1200.46). The pertinent rules are as follows:

Code of Professional Responsibility DR 9-102(c) (22 NYCRR 1200.46[c]) states:

> Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property. A lawyer shall:
>
> 1. promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;
>
> * * *
>
> 4. promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive.

NY State Bar Assn Comm on Prof Ethics Op 717 (1999) and Bar Assn of Nassau County Comm on Prof Ethics Op 96-13 (1996), found that a lawyer’s failure to properly discharge his or her responsibilities regarding a valid third-party lien constitutes a

violation of Code of Professional Responsibility DR 9-102(c) (22 NYCRR 1200.46[c]). In short, these opinions require that an attorney:

- notify the client and the holders of valid liens and assignments when a recovery is received (Code of Professional Responsibility DR 9-102[c][1] [22 NYCRR 1200.46(c)(1)]);
- pay the lien holder if the lien is not disputed by the client (Code of Professional Responsibility DR 9-102[c][4] [22 NYCRR 1200.46(c)(4)]);
- remit any undisputed portion of the funds to the lien holder and, if the client disputes the lien, hold any disputed portion in escrow pending resolution of the dispute.

The Court of Appeals has cautioned that a lawyer may be liable for failing to honor a lien or assignment (*see Leon v Martinez,* 84 NY2d 83 [1994]).

J. File preservation and disposition

A lawyer's fiduciary responsibilities extend to the preservation and disposition of client files. The length of time a lawyer is required to preserve client files on closed matters generally is not prescribed by the Code of Professional Responsibility. A specific rule does exist for personal injury matters and condemnation or change of grade proceedings; an extensive array of records and documents related to such matters must be preserved for seven years after the matter is concluded (*see* 22 NYCRR 691.20[f]). In other kinds of matters, the commentators suggest that lawyers are bound to exercise reasonable, sound judgment regarding the preservation of client files, including consideration of the foreseeable needs of the client (*see NY State* Bar Assn Comm on Prof Ethics Ops 690 [1996], 623 [1991]; NY County Lawyers' Assn Op 725 [1998]).

Unless otherwise governed by agreement between the lawyer and client, a client is presumptively entitled to the entire file upon request. The lawyer may impose a reasonable charge for assembling and delivering the file, but bears the expense of retaining copies for his or her own file (*see Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn*, 91 NY2d 30 [1997]; NY State Bar Assn Comm on Prof Ethics Ops 780 [2004], 766 [2003]).

K. Attorney registration certification

Each time a lawyer files a biennial registration statement with the Office of Court Administration, he or she affirms on the registration form that he or she has read Code of Professional Responsibility DR 9-102 (22 NYCRR 1200.46) and is in compliance therewith. Failure to maintain the records mandated by that section may subject the attorney to discipline (*see* Code of Professional Responsibility DR 9-102[j] [22 NYCRR 1200.46[j]).

L. Lawyers' Fund for Client Protection

Established in 1982, the Lawyers' Fund for Client Protection is authorized to reimburse law clients for money or property misappropriated by a member of the New York bar. The Fund is financed by a share of each lawyer's biennial registration fee. To qualify for reimbursement, the loss must involve the misuse of a client's money or

property in the practice of law. The Fund cannot settle fee disputes, nor compensate clients for a lawyer's malpractice or neglect.

No attorney shall charge a fee or accept compensation for representation of a claimant against the Fund except as approved by the trustees of the Fund (*see* 22 NYCRR 691.24).

Information, forms, and materials published by the Lawyer's Fund for Client Protection may be accessed at www.nylawfund.org.

IX. Duties as a Notary

A. Generally

An attorney admitted to practice law in New York State may be appointed a notary public without an examination by submitting an application to the New York Department of State, Division of Licensing Services. General information, an application form, and a publication entitled *Notary Public License Law* published by the New York Department of State, Division of Licensing Services, may be found at www.dos.state.ny.us/lcns/notary1.htm.

> A notary public who is an attorney at law regularly admitted to practice in this State may, in his [or her] discretion, administer an oath or affirmation to or take the affidavit or acknowledgment of his [or her] client in respect of any matter, claim, action or proceeding (Executive Law § 135).

B. Acknowledgments and affidavits

"Technically, an *'acknowledgment'* is the declaration of a person described in and who has executed a written instrument, that he [or she] executed the same." (NY State Dept of State, Div of Licensing Servs, *Notary Public License Law* www.dos.state.ny.us/lcns/lawbooks/notary.html [last updated Feb 2004], at 19 [hereinafter *Notary Law*]). A notary must not take an acknowledgment unless he or she knows or has satisfactory evidence that the person making it is the person described in and who executed the instrument (*Notary Law* at 19). The instrument need not be signed in the presence of the notary (*Notary Law* at 19).

An affidavit is a signed statement, duly sworn to, by the maker thereof, before a notary public or other officer authorized to administer oaths (*Notary Law* at 20).

> The distinction between . . . an acknowledgment and an affidavit must be clearly understood. In the case of an acknowledgment, the notary public certifies as to the identity and execution of a document; the affidavit involves the administration of an oath to the affiant (*Notary Law* at 20).
>
> For an oath or affirmation to be valid, whatever form is adopted, it is necessary that: first, the person swearing or affirming must personally be in the presence of the notary public; secondly, that the person unequivocally swears or affirms that what he [or she] states is true; thirdly, that he [or she] swears or affirms as of that time; and lastly, that the person

conscientiously takes upon himself [or herself] the obligation of an oath (*Notary Law* at 23).

C. Notary misconduct

"Use of the office of notary in other than the specific, step-by-step procedure required is viewed as a serious offense by the Secretary of State. The practice of taking acknowledgments and affidavits over the telephone, or otherwise, without the actual, personal appearance of the individual making the acknowledgment or affidavit before the officiating notary, is illegal" (*Notary Law* at 3). Falsely notarizing an affidavit or acknowledgment is a violation of Executive Law § 135-a(2), which provides that "[a] notary public . . . who in the exercise of the powers, or in the performance of the duties of such office shall practice any fraud or deceit . . . shall be guilty of a misdemeanor."

An attorney who falsely certified that a subscribing witness to a will had appeared before him was publicly censured, even though his conduct was found not to be deliberate or intentional (*see Matter of Caiazza*, 36 AD2d 297 [2nd Dept 1971]).

An attorney who falsely certified, as a notary, the date on which a separation agreement was signed by the parties received a six month suspension, notwithstanding his "good intentions" to accommodate the wishes of his clients to end their marriage (*Matter of Insognia*, 113 AD2d 988 [3rd Dept 1985]).

X. Pro Bono Work

While there is no mandatory requirement that attorneys perform pro bono work, all are encouraged to do so. Pro bono work is an important part of carrying out an attorney's responsibility to society at large and to the profession. In addition, as a practical matter, pro bono service may offer a newly admitted attorney an opportunity to obtain valuable, hands-on experience not otherwise available. Opportunities for pro bono work are plentiful, as there are many non-profit agencies that can utilize pro bono services. Bar associations maintain many programs of this type and have information on other pro bono opportunities.

Certain pro bono programs may also be approved Continuing Legal Education (CLE) providers. An approved CLE provider can award pro bono CLE credit to New York attorneys who perform uncompensated legal service to individuals unable to afford counsel. For example, the New York State Bar Association and the City Bar Justice Center of the Association of the Bar of the City of New York, have various pro bono programs that provide CLE credit to volunteers. For more information on these programs go to www.nysba.org and/or www.abcny.org. Contact local bar associations to determine if similar CLE credits for their pro bono programs are available.

While engaging in pro bono work is important and is encouraged, attorneys must still be mindful of the Code of Professional Responsibility. Even though attorneys are not paid for their pro bono work, they must not handle legal matters that they are not competent to handle or neglect legal matters. They must insure that they adequately prepare for the legal matters that they undertake (*see* Code of Professional Responsibility DR 6-101[a] [22 NYCRR 1200.30(a)]).

Ghostwriting is the practice, by an attorney, of preparing legal documents for pro se litigants when the document does not identify the attorney as the author. This situation may arise when an attorney is asked by a friend, family member, or other individual for assistance in a

legal matter and/or drafting a legal document. Absent disclosure to the court and opposing counsel that the party appearing pro se is receiving advice and help from an attorney, the practice of ghostwriting has been found to be unethical by both the New York State Bar Association and the Association of the Bar of the City of New York (*see* NY State Bar Assn Comm on Prof Ethics Op 613 [1990]; Assn of Bar of City of NY Op 1987-2 [1987]). The practice of ghostwriting pleadings for pro se litigants has been condemned by the federal courts as well (*see e.g. Klein v H.N. Whitney, Goadby & Co.*, 341 F Supp 699, 702 [US Dist Ct, SD NY 1971]; *Klein v Spear, Leads & Kellogg*, 309 F Supp 341, 343 [US Dist Ct, SD NY 1970]).

XI. Duty to Register Biennially with the Office of Court Administration

Every attorney admitted to the bar in New York, even if retired, must register with the Office of Court Administration every two years (Judiciary Law § 468-a; 22 NYCRR 118.1). Failure to register constitutes conduct prejudicial to the administration of justice and exposes the attorney to possible disciplinary action (Judiciary Law § 468-a[5]). It is the duty of the lawyer to notify the Office of Court Administration within 30 days of any change in previously provided information, e.g., a new office address or residence.

A New Jersey prosecutor, licensed to practice law in New York, was temporarily suspended and finally censured for failing to properly register as an attorney in New York (*see Matter of Ryan*, 230 AD2d 322 [2d Dept 1997]).

An attorney who is delinquent in registering and paying the fee required by law is not entitled to the issuance of a certificate of good standing by the clerk of the Department of the Appellate Division in which he or she was admitted to the practice of law (Judiciary Law § 264[4]).

XII. Need to Maintain Office for the Practice of Law in New York

Judiciary Law § 470 states:

> "A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state."

This section has been interpreted to mean that a nonresident attorney admitted to the bar of New York may not practice law here unless he or she maintains a bona fide office in this state (*see Lichtenstein v Emerson*, 251 AD2d 64 [1st Dept., 1998]). The reason for the rule is that New York has an interest in ensuring that a lawyer practicing within its boundaries is amenable to the service of legal papers and to contact by his or her client as well as opposing and other interested parties. Accordingly the State may reasonably require an attorney, as a condition of practicing within its jurisdiction, to maintain some genuine physical presence in New York (*see Lichtenstein v Emerson, supra*; *Cheshire Academy v Lee*, 112 Misc 2d 1076 [Civil Court, Bronx County, 1982]). An attorney admitted to the New York bar loses his or her right to practice in the New York courts by giving up his or her New York office and changing residence to another jurisdiction (*see Matter of Fordan's Estate*, 5 Misc 2d 372, 374-375 [Surrogate's Court, NY County, 1956]).

XIII. Attorney Discipline

A. Jurisdiction and Venue

New York State is unusual in that it is the only jurisdiction in the country that assigns the power to license and discipline attorneys to an intermediate, rather than its highest, court. Judiciary Law § 90(2) authorizes the Appellate Division of the Supreme Court in each of New York's four judicial departments "to censure, suspend from practice, or remove from office" any attorney who is guilty of misconduct. In pursuit of the statutory mandate, each of the four Appellate Divisions have promulgated rules governing the conduct of attorneys who practice, reside, or commit acts therein (*see* 22 NYCRR part 603 [1st Dept]; 22 NYCRR part 691 [2nd Dept]; 22 NYCRR part 806 [3rd Dept]; 22 NYCRR part 1022 [4th Dept]). Although there are some procedural differences among the four judicial departments, all of them administer the disciplinary system through the use of local disciplinary committees. Eight separate committees operate throughout the State, three of which are located within the Second Judicial Department. Assigning venue among the committees for the processing of complaints is generally based upon the business address from which the accused attorney is registered to practice law.

The disciplinary committees consist of both lawyers and lay persons appointed by the court, and who serve without compensation. Each committee also has a full-time, paid legal staff, also appointed by the court that serves as legal counsel to the committee, processes complaints, conducts investigations, and prosecutes hearings.

B. Misconduct defined: professional and personal

Both professional and *personal* misconduct by lawyers is subject to discipline in New York. Judiciary Law § 90(2) expressly permits the Appellate Divisions to discipline for acts beyond mere "professional misconduct," stating:

> [T]he Appellate Division . . . is authorized to censure, suspend from practice or remove from office any attorney . . . who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice.

Although only the Rules of the First and Second Departments expressly define professional misconduct to include acts of a "personal" nature (22 NYCRR 603.2[a]; 691.2), it is "well and abundantly settled" in New York that an attorney may be disciplined for misconduct committed "outside of and not part of his professional acts" (*Matter of Dolphin,* 240 NY 89, 92-93 [1925]). This concept is so rigidly in place that even a lawyer who commits misconduct in his capacity as the President of the United States is not shielded from the powers of the lawyer disciplinary process (*see Matter of Nixon,* 53 AD2d 178 [1st Dept 1976]). Former President Richard M. Nixon was subjected to disciplinary proceedings for acts committed in connection with the Watergate scandal. In ordering his disbarment, the Appellate Division observed (*id.* at 181-182):

> We note that while Mr. Nixon was holding public office he was not acting in his capacity as an attorney. However, the power of the court to discipline an attorney extends to misconduct other than professional

malfeasance when such conduct reflects adversely upon the legal profession and is not in accordance with the high standards imposed upon members of the Bar (*Matter of Dolphin*, 240 NY 89, 92-93, *Matter of Kaufman*, 29 AD2d 298).

In the Second Department, the definition of "professional misconduct" includes not only violations of the Code of Professional Responsibility but also the violation of any rule of the Appellate Division governing the conduct of attorneys (*see* 22 NYCRR 691.2).

Misconduct is measured on an objective, rather than a subjective, basis. The courts employ an objective standard of what a "reasonable attorney" would do in similar circumstances. It is the reasonableness of the belief, not the state of mind of the attorney, that is determinative (*see Matter of Holtzman*, 78 NY2d 184, 193 [1991]).

C. Grievance procedure – Second Department (22 NYCRR Part 691)

1. Processing of complaints

Most complaints are usually filed by a current or former client, although it is also not uncommon for the committee to receive complaints from other attorneys or judges. A valid complaint must be in writing and signed by the complainant. The committees also have the power to commence a complaint *sua sponte*. Criminal convictions, improper advertisements, and delinquency in complying with the biennial attorney registration requirements are the most frequent sources of these inquiries.

Upon receipt of a complaint, a rigorous screening process is employed which may result in it being rejected for failing to state a complaint. Frequently these are inquiries seeking legal advice or legal remedies, or matters intertwined with pending litigation that are more properly within the purview of the court in the first instance. Some complaints may also be referred to other agencies more suitably designed to address the complaint, such as fee arbitration panels. In the case of minor allegations of misconduct, such as a failure to respond to client inquiries, the complaint may be referred to a local bar association grievance committee or a mediation panel (*see* 22 NYCRR 691.1[b] and Part 1220).

If the complaint is retained for investigation, an acknowledgment is sent to the complainant. A copy of the complaint is then furnished to the accused attorney, referred to as the "respondent," requesting his or her answer to the allegations. Generally, a copy of the answer is provided to the complainant who may be invited to submit a reply. Should the complainant request that the complaint be withdrawn or otherwise refuse to cooperate further, it does not constitute a bar to further investigation or disposition of the complaint.

In many cases the written submissions of the complainant and respondent are sufficient to resolve the factual issues. If further investigation is necessary, Staff Counsel may seek additional information from the complainant, respondent, or other witnesses, either in writing, through interviews, or by examination under oath. Testimony and the production of documents may be compelled by subpoena (*see* 22 NYCRR 691.5).

At the conclusion of the investigation, Staff Counsel submits a comprehensive report to the Committee. This is an internal, confidential document, and is not provided to the complainant or respondent. It details the respective positions and supporting evidence of both the complainant and respondent, the results of any further investigation, and an analysis of the issues and applicable legal authorities. It also recommends the possible dispositions available to the Committee based on its findings (see discussion, *infra*). The Committee then considers the matter at one of its regular meetings, and renders a determination based upon a majority vote of the full Committee. In reaching its determination, the Committee may take into consideration any prior disciplinary history of the respondent. If the matter is disposed of without a referral to the Appellate Division, the respondent is notified of the determination by letter. The complainant is separately advised in writing of the outcome; however, since the attorney has the right to request a hearing within 30 days of receiving a committee sanction, the complainant is not notified until the determination has become final or is no longer subject to further review.

2. Duty of cooperation and candor

A lawyer has a duty to respond promptly to an inquiry from a disciplinary committee. The failure to do so constitutes misconduct independent of the merits of the complaint and exposes the lawyer to possible immediate suspension (*see* 22 NYCRR 691.4[l]; NY St Bar Assn Comm on Prof Ethics Op 348 [1974]). A lawyer has a duty of candor and frankness in making a defense to a disciplinary proceeding, and his lack thereof is a factor to be considered by the court (*see Matter of Kassner,* 93 AD2d 87 [1st Dept 1983]; *Matter of Ushkow,* 34 AD2d 159 [2nd Dept 1970]; *Matter of Schildhaus,* 23 AD2d 152 [1st Dept 1965]).

It is improper for an attorney to charge a client for time spent complying with the independent obligation of responding to a grievance complaint (*see Matter of Napolitano,* 232 AD2d 51 [2nd Dept 1997]).

Complaints filed with a disciplinary committee are absolutely privileged and are not a proper basis for an action sounding in defamation. A lawyer who commences such action risks discipline (*see Wiener v Weintraub,* 22 NY2d 330 [1968]; NY St Bar Assn Comm on Prof Ethics Op 456 [1977]).

Conditioning the settlement of a legal matter on withdrawing a complaint pending before a disciplinary committee constitutes professional misconduct (*see Matter of Napolitano,* 282 AD2d 130 [2nd Dept 2001]; *Matter of Pobiner,* 240 AD2d 67 [2nd Dept 1998]; *Matter of Rosenberg,* 189 AD2d 546 [2nd Dept 1993]; *Matter of Smith,* 146 AD2d 430 [2nd Dept 1989])

3. Permissible committee-level dispositions

a. Dismissal (no breach of Code or other misconduct found);

b. Letter of Caution (not discipline, but used for "behavior requiring comment"; lawyer may request a hearing);

c. Letter of Admonition (considered discipline; letter must cite specific rule violated; lawyer may request hearing to contest);

d. Letter of Reprimand (equivalent of an admonition but is discipline imposed after a subcommittee hearing);

e. Referral to Appellate Division with a recommendation for the institution of a formal disciplinary proceeding (where there is probable cause to believe the attorney has engaged in serious misconduct).

4. Committee-level hearings and appeals

Hearings at the committee-level may be convened for either of two purposes: (1) an attorney who has been issued a Letter of Admonition or Letter of Caution may seek review by requesting a hearing, and (2) the Committee itself may authorize a hearing for the purpose of receiving testimony and obtaining other evidence before rendering its final disposition of the complaint. In either case, hearings are convened before a subcommittee appointed by the chair of the full committee, consisting of three members, at least two of which must be attorneys. Formal pleadings are served and a stenographic record of the proceeding is made. The respondent is afforded full due process, including the right to be represented by counsel, to call and confront witnesses, and present evidence. At the conclusion of the hearing, the subcommittee reports its findings and recommendations to the full committee which may then "take such steps as it deems advisable." (22 NYCRR 691.6[a]). The full committee is not bound by its earlier determination, if any, and may dismiss the matter, issue a Letter of Caution, a Letter of Reprimand, or recommend to the Appellate Division that a formal disciplinary proceeding be instituted. If a Reprimand is issued, the respondent may, within 30 days, petition the Appellate Division for review, at the conclusion of which the court may take such action "as the record may warrant" (22 NYCRR 691.6[a]).

5. Formal proceedings before the Appellate Division

A recommendation to the court for the institution of a formal disciplinary proceeding is made ex-parte by the committee in the form of a written application with a proposed petition attached. If the Appellate Division accepts the recommendation, it will issue an order authorizing the proceeding. Formal disciplinary proceedings are civil in nature, and the petitioner-disciplinary committee bears the burden of establishing the charges in the petition based upon a fair preponderance of the credible evidence and the reasonable inferences to be drawn therefrom (*see Matter of Capoccia*, 59 NY2d 549 [1983]; *Matter of Feola*, 37 AD2d 789 [3rd Dept 1971]). The process is akin to a Special Proceeding under CPLR article 4 including: service of charges by notice of petition and petition; filing of an answer; limited discovery on motion; a hearing before a Special

Referee who renders a report with findings; and motions by both sides to the Appellate Division to confirm/disaffirm the Referee's Report. Charges sustained by the Appellate Division may result in public censure, suspension, or disbarment of the accused attorney.

6. Automatic discipline from the Appellate Division

Attorney misconduct is subject to review and intervention directly by the Appellate Division in one of several ways detailed below. In these instances, it may not be necessary for the disciplinary committee to review and dispose of the matter as in the case of ordinary complaints.

a. Criminal Conviction

Pursuant to Judiciary Law § 90, a lawyer convicted of a crime is subject to automatic discipline directly from the Appellate Division and proceedings before the grievance committees are by-passed.

A lawyer convicted of a New York felony or a foreign or federal felony that is determined to be "essentially similar" to a New York felony, ipso facto, ceases to be a lawyer at the moment of the plea or verdict, regardless of whether it is a *Serrano* or *Alford* plea (*see People v Serrano*, 15 NY2d 304 [1965]; *North Carolina v Alford*, 400 US 25 [1970]), or nolo contendere. The grievance committee will submit a motion to strike the attorney's name from the Roll of Attorneys and Counselors-at-Law, which is a ministerial formality recording the existing fact of disbarment (*see Matter of Barash*, 20 NY2d 154 [1967]; *Matter of Ginsberg*, 1 NY2d 144 [1956]; 22 NYCRR 691.7[a]).

A lawyer convicted of any other crime that is not classified as a New York felony or is not a felony that is "essentially similar" thereto, is entitled to a hearing before final discipline may be imposed. At the hearing, a lawyer is not permitted to relitigate, only to mitigate, his guilt (*see Matter of Levy*, 37 NY2d 279 [1975]; 22 NYCRR 691.7[c]).

A lawyer convicted of a "serious crime," as defined by the law and the court rules, may be immediately suspended from practice, pending a hearing (*see* Judiciary Law § 90[4]; 22 NYCRR 691.7).

b. Interim Suspension - 22 NYCRR 691.4(l).

A lawyer is subject to immediate suspension, upon notice, if found to have engaged in conduct constituting an "immediate threat to the public interest." The court must make specific findings based upon either (1) admissions or other uncontroverted evidence of serious misconduct (e.g. theft of client funds) or (2) failure to cooperate with a grievance committee investigation (*see Matter of Russakoff*, 79 NY2d 520 [1992]; *Matter of Padilla*, 67 NY2d 440 [1986]).

c. Resignation under Investigation - 22 NYCRR 691.9

A lawyer under investigation for misconduct may tender his or her resignation from the bar. The resignation must include an admission that

he or she cannot successfully defend himself on the merits against specified charges. A resignation accepted by the court under such circumstances results in disbarment.

d. Reciprocal Discipline - 22 NYCRR 691.3.

A lawyer publicly disciplined in a foreign jurisdiction is subject to discipline in New York based upon the findings made in the other forum unless he or she establishes either a lack of due process or an infirmity of proof establishing the misconduct, or that the imposition of discipline would be unjust.

7. Confidentiality - Judiciary Law § 90(10); 22 NYCRR 691.4(j)

Attorney disciplinary investigations, proceedings, and records are sealed, and deemed private and confidential unless ordered unsealed by the Appellate Division for good cause shown. However, if charges are sustained after a formal disciplinary proceeding, the records and documents in relation thereto are deemed "public records."

XIV. Links to Additional Information

These course materials contain citations to authorities beyond case law, such as ethics opinions and disciplinary rules that are not necessarily reproduced in full here. Such authorities may be fully accessed via the links provided below.

For Ethics Opinions:

Association of the Bar of the City of New York (Phone: 212-382-6600) www.abcny.org

Nassau County Bar Association (Phone: 516-747-4070) www.nassaubar.org

New York County Lawyers' Association (Phone: 212-267-6646) www.nycla.org

New York State Bar Association (Phone: 518-463-3200) www.nysba.org

For Disciplinary Rules

The Lawyer's Code of Professional Responsibility may be accessed through the "For Attorneys" menu on the website of the New York State Bar Association at www.nysba.org.

For Lawyers' Fund Information

Materials published by the New York Lawyers' Fund for Client Protection (Phone: 800-442-3863) may be accessed at www.nylawfund.org.

For Membership Information in Local Bar Associations:

The Association of the Bar of the City of New York
(212) 382-6600
www.nycbar.org

Brooklyn Bar Association
(718) 624-0675
www.brooklynbar.org

Dutchess County Bar Association
(845) 473-2488
www.dutchesscountybar.org

Nassau County Bar Association
(516) 747-4070
www.nassaubar.org

New York County Lawyers' Association
(212) 267-6646
www.nycla.org

Orange County Bar Association
(845) 294-8222
www.orangelaw.org

Putnam County Bar Association
(845) 225-4904
(no website)

Queens County Bar Association
(718) 291-4500
www.qcba.com

Richmond County Bar Association
(718) 422-4500
www.richmondcountybar.org

Rockland County Bar Association
(845) 634-2149
www.rocklandbar.org

Suffolk County Bar Association
(631) 234-5511
www.scba.org

Westchester County Bar Association
(914) 761-3707
www.wcbany.org

Assistance Resources

Lawyer Assistance Programs

Patricia Spataro, Director NYSBA LAP	1-800-255-0569 or 518-487-5685
Eileen Travis, Director New York City LAP	212-302-5787
Peter J. Schweitzer, Director Nassau County LAP	888-408-6222

Lawyer Assistance Committees

Sallie Krauss, Chair NYSBA Committee	347-296-1533
John Urban, Brooklyn County	718-624-4001
Katherine S. Bifaro, Erie County	716-852-8687
John Crowe, Monroe County	585-234-1950
Carol Hoffman, Nassau County	516-393-8270
James Hyde, Oneida County	315-797-8300
Timothy D. Foley, Oneida County	315-369-3544
William R. Morgan, Onondaga County	315-476-2945
Jacqueline Torchin, Queens County	718-545-1433
Benjamin Selig, Rockland County	845-942-2222
Hon. Vincent Reilly, Schenectady County	518-285-8425
Richard Reid, Suffolk County	631-286-3560
Richard Wallace, Tompkins County	607-272-2102
John Keegan, Jr., Westchester County	914-949-7227

Facts About Alcoholism, Drug Abuse, Depression and Stress

- Alcoholism is a treatable disease.
- Alcohol is a depressant, not a stimulant. It is similar in effect to either, valium, librium or phenobarbital.
- Marijuana affects memory and concentration.
- Early intervention with substance abuse problems most often leads to recovery.
- Addiction may be arrested (not cured) by treatment.
- More than half the car accidents in the U.S. are related to alcohol and other drug abuse.
- Depression affects mood, thought, body and behavior.
- Unmanaged stress can be deadly.
- Attorneys can and do suffer from substance abuse problems and depression.

Judiciary Law

Section 499. Lawyer Assistance Committees
Chapter 327 of the Laws of 1993

1. Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation which has furnished information to the committee.

2. Immunity from liability. Any person, firm or corporation in good faith providing information to, or in any other way participating in the affairs of any of the committees referred to in subdivision one of this section shall be immune from civil liability that might otherwise result by reason of such conduct. For the purpose of any proceeding, the good faith of any such person, firm or corporation shall be presumed.

Section 499 of the Judiciary Law waives Disciplinary Rule DR1-103 "snitch rule" for the purpose of assisting attorneys suffering from substance abuse.

NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207

1.800.255.0569 or 518.487.5685 fax 518.487.5699

lap@nysba.org

Lawyer Assistance Program

Confidential Helpline

1-800-255-0569
518-487-5685

email: lap@nysba.org

All LAP services are confidential and protected under Section 499 of the Judiciary Law as amended by Chapter 327 of the Laws of 1993

NEW YORK STATE BAR ASSOCIATION

LAP Services

Statement of Purpose

The purpose of the NYSBA Lawyer Assistance Program (LAP) is to assist attorneys, judges, non lawyer judges and law school students who are affected by alcoholism, drug abuse, stress or depression and to provide collateral services to immediate family members. Its goal is to prevent health, family and work related problems that will develop as a result of alcoholism and drug abuse.

LAP services include:

- Early identification of impairment.
- Intervention and motivation of attorneys to seek help.
- Assessment, evaluation and development of an appropriate treatment plan.
- Referral to appropriate community resources, self-help groups, outpatient counseling, detoxification and rehabilitation services.
- Information and referral for depression and stress.
- Training programs on alcoholism, drug abuse and stress management.
- Attorney Sobriety Monitoring Program — Referrals from Appellate Courts or Grievance Committees.
- All LAP services are confidential and protected under Section 499 of the Judiciary Law as amended by Chapter 327 of the Laws of 1993.

LAP is guided by the NYSBA Committee on Lawyer Alcoholism and Drug Abuse.

LAP services are voluntary and available to all attorneys and judges in New York State and their immediate family members, whether or not the attorney or judge is a member of the New York State Bar Association.

The Treatable Illness

Alcoholism or drug addiction is not a moral issue. It is a treatable illness. The stigma is not in having this illness; the stigma is in failing to seek treatment.

Medical authorities have established that addiction is a disease in which there is a preoccupation with alcohol or other drugs, coupled with a loss of control over their consumption.

Addiction may be arrested (not cured) by treatment. It is perfectly acceptable social behavior to seek treatment; it is anti-social to continue the denial.

Some symptoms of addiction are:

- The inability to guarantee one's actions after starting to drink or use drugs.
- Deteriorating health accompanying a pattern of heavy drinking or drug use, impaired ability to work and concentrate.
- Disrupted personal relationships, denial that drinking or drug use is a problem when it is obvious to others.
- Defiance, impatience, intolerance or impulsiveness associated with heavy drinking or drug use.

Addiction is a progressive disease; without treatment it only gets worse, never better.

In the makeup of the person suffering from an active addiction, there exists a condition relieved only by a drink or a drug and which, once relieved, sets up the body's demand for more.

The repetitious use of alcohol or other drugs as a medication for stress firmly establishes this progressive addiction. When the person with an addiction starts using alcohol or other drugs again after a period of "being on the wagon," the condition is as bad or worse in no time at all.

Contact LAP Today for Free, Confidential Support

Self Diagnosis

(Answer these questions to yourself as honestly as you possibly can)

	Yes	No
1. Are my associates, clients or others alleging that my drinking/drug use is interfering with my work?	☐	☐
2. Do I plan my office routine or appointments around my drinking/drug use?	☐	☐
3. Do I ever feel that I need a drink/drug to face certain situations?	☐	☐
4. Have I ever had a loss of memory when apparently functioning (e.g., a blackout) because of my drinking/drugging?	☐	☐
5. Do I ever drink or use drugs before a meeting or court appearance to calm my nerves, gain courage or improve my performance?	☐	☐
6. Have I missed or adjourned closings, court appearances or other appointments because of my drinking/drugging?	☐	☐
7. Because of my drinking/drugging, have I ever felt any of the following: fear, remorse, guilt, real loneliness, depression, severe anxiety, terror or a feeling of impending doom?	☐	☐
8. Is drinking/drugging making me careless of my family's welfare or other personal responsibilities?	☐	☐
9. Have I ever neglected my office administration or misused funds because of my drinking/drugging?	☐	☐
10. Am I becoming increasingly reluctant to face my clients and colleagues in order to hide the effects of my drinking/drugging?	☐	☐
11. Have I ever had the shakes, the sweats or hallucinations as the result of my drinking/drugging?	☐	☐
12. Have I ever been hospitalized or treated by a doctor directly or indirectly as a result of my drinking/drugging?	☐	☐

If you have answered YES to one or more of the above questions, then you owe it to yourself, your family, your profession and your clients to contact the LAP.