4. ETHICAL ISSUES: FEES, RETAINERS, ESCROW ACCOUNTS, ADVERTISING AND WEBSITES
This outline is submitted to briefly describe and deal with current topics of interest in ethics and professionalism. Note that this outline contains references to the Judiciary Law, Rules of Conduct in the Rules of Professional Conduct and its predecessor the Disciplinary Rules (“DR”) in the Lawyer’s Code of Professional Responsibility (the Code), The Rules of Judicial Conduct, case law, bar association advisory opinions, and Judicial Advisory Opinions. However, this is not an exhaustive list of every case or rule in each area discussed, but merely a basis for discussion!

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The Rules of Conduct were enacted on April 1, 2009 and can be found at 22 N.Y.C.R.R. §1200 or at the website of the Office of Court Administration at www.courts.us.state.ny. Prior to that time, the predecessor to the Rules, the Code of Professional Responsibility was in effect. Thus, this outline discussed both because most of the Disciplinary Rules were adopted as Rules and the applicable case law in some instances was also used to promulgate Rules. The Rules of Judicial Conduct can be found at rules 22 N.Y.C.R.R. §100 or at the website of the Office of Court Administration at www.courts.us.state.ny. The bar association advisory opinions can be found at the website of the bar association cited and the Judicial Advisory Opinions can be found at the website of the Advisory Committee on Judicial Ethics at www.nycourts.gov/ip/ethics/index.
I. **Filing, Accounting and Recordkeeping Requirements**

1. **Attorney Registration**

   22 New York Court Rules and Regulations ("N.Y.C.R.R.") § 118 requires a biannual registration statement to be filed with the Office of Court Administration ("OCA"). Along with the statement, the attorney must file an affidavit that he/she has read **NY Rule 1.15** (formerly DR 9-102) and that they have taken the required courses in Continuing Legal Education ("CLE"). Attorneys are required to notify OCA of any changes such as employment or home address information.

2. **Files and Recordkeeping**

   i. **CLE.** 22 N.Y.C.R.R. § 1500.13 requires an attorney to retain certificates of Attendance for each course for four (4) years.

   ii. **Recordkeeping- NY Rule 1.15** (formerly DR 9-102(D)) **requires** that accurate and contemporaneous records which are to be maintained for seven(7) years after the transaction including:

      ▪ bank account records for all IOLA, escrow, or special accounts including checkbook registers, checkbook stubs, canceled checks, deposit items and transfer items;

      ▪ retainer and compensation agreements;

      ▪ disbursement of funds documents;

      ▪ closing statements;

      ▪ OCA Retainer and Closing Statements (discussed below);

      ▪ billing records; and,

      ▪ any other records pertaining to financial transactions.

   iii. **Escrow Rules**

   Judiciary Law § 497 and 22 N.Y.C.R.R. § 1200.46 **NY Rule 1.15** (formerly DR 9-102) set forth the specifics for maintenance of escrow and IOLA accounts. They also provide the rules for acting in a fiduciary capacity as
escrow agents when holding the funds of clients and/or third parties.

- **Prohibition Against Commingling.** **NY Rule 1.15** (formerly DR 9-102(A)) provides that a lawyer must separate their own funds from client funds.

- **Disputed funds.** **NY Rule 1.15** (formerly DR 9-102(B)(4)) requires a lawyer to maintain disputed funds for a client or a third party until dispute is settled - no self help!

- **Client Property & Rendering of Accounts.** **NY Rule 1.15** (formerly DR 9-102(C)) requires the lawyer to return client property or render an accounting to a client upon the client’s request.

**Case Law**

- **Matter of Galasso,** ___ A.D.3d ___ (2d Dep’t 2012) [Attorney suspended for two years for transferring over $4 million from a client’s escrow account to his firm’s accounts for the firm’s use.]

- **Matter of Dalnoky,** 90 A.D.3d 1 (1st Dep’t 2011) [Attorney suspended for three years for using his escrow account as his personal bank account in order to avoid creditors.]

- **Matter of Schacht,** 80 A.D.3d 157 (2d Dep’t 2010) [Attorney suspended for one year for converting client funds, improperly borrowing money from a client, using his attorney escrow account for purposes unrelated to the practice of law, commingling funds entrusted to him as a fiduciary, and failing to maintain the requisite records on his escrow account.]

**iv. Related Escrow Rules**

- **The “Bounced Check Rule”**. 22 N.Y.C.R.R. § 1300 provides that when a check issued by a lawyer on an IOLA or escrow account is dishonored, the bank is required to send notification of the bounced check to the Lawyer’s Fund for Client Protection which acts as a clearinghouse for all bounced check notifications. The lawyer has ten (10) days to demonstrate that the check was returned due to bank error. If there is no error, the notification is automatically sent to the grievance authorities in the department where the lawyer maintains an office. Thereafter, an investigation is initiated and the
grievance authorities will subpoena the lawyer’s bank account records for at least six months prior to the bounced check. Sanction will depend on a number of factors including, *inter alia*, whether the funds were converted, whether there was harm to a client and the lawyer’s disciplinary history.

- **Random Audits.** 22 N.Y.C.R.R. § 603.15 [1st Dept.]; 22 N.Y.C.R.R. § 691.12 [2nd Dept.] provide that the disciplinary authorities have the power to issue a subpoena and review a lawyer’s or law firm’s financial books and records. A complaint is not required as a basis for initiation of the investigation.

- **Conduct which constitutes dishonesty, fraud, deceit, or misrepresentation and which adversely reflects on their fitness to practice law.** NY RULE 8.4 (b)-(d) (formerly DR 1-102(A) (4) & (8).

  a. **Conversion.** In addition to the foregoing, DR 9-102 violations, attorneys who convert client funds to their own use will be charged with conduct which constitutes dishonesty, fraud, deceit, or misrepresentation and which adversely reflects on their fitness to practice law which may result in disbarment.

**Case Law**

- **Matter of Squitieri,** 88 A.D.3d 380 (1st Dep’t 2011). [Attorney disbarred for commingling his own funds with client funds and for misappropriating client funds for his own use. The Court found an insufficient causal connection between the attorney’s psychiatric disorders and alcoholism and his knowing conversion of client funds.]

- **Matter of Ligos,** 75 A.D.3d 78 (1st Dep’t 2010). [Attorney reciprocally disbarred for knowing and admitted misappropriation of client trust, escrow, and fiduciary funds.]

- **Matter of Crescenzi,** 51 A.D.3d 230 (1st Dep’t 2008). [Attorney disbarred for conversion of client funds despite attempted mitigation of drug addiction since addiction was not causally related to the conversion.]
But see, Matter of Salo, 77 A.D.3d 30 (1st Dep’t 2010). [Attorney suspended for one year for misappropriating escrow funds because Court found that misappropriation was inadvertent due to his Post Traumatic Stress Syndrome and his belief that he was taking earned fees.]

See also, Matter of Larsen, 50 A.D.3d 41 (2d Dep’t 2008). [Attorney suspended for two and a half years for taking client funds to which she believed she was entitled.]

Matter of Oswold, 46 A.D.3d 1327 (3d Dep’t 2007). [Attorney disbarred because, inter alia, he converted client funds.]

See also, Matter of Ponzini, et al., 259 A.D.2d 142 (2d Dep’t 1999), rearg. granted, 268 A.D.2d 478 (2d Dep’t 2000). [Attorneys initially disbarred for unintentional conversion, but upon reargument, sanction was modified to a one-year suspension.]

Matter of Gilbert, 268 A.D.2d 67 (1st Dep’t 2000). [In a reciprocal discipline proceeding, the attorney was suspended for six months for failing to return a third party’s funds, wrongfully placing a lien on those funds, and failing to notify New York authorities of his prior public reprimand in New Jersey for negligent misappropriation of trust accounts, commingling of personal and trust funds, and failure to comply with record-keeping rules.]

b. Misuse of IOLA or Trust Accounts. An attorney cannot use IOLA account for personal purposes even if there are no client funds in the account.

Case Law


Matter of Silva, 28 A.D.3d 11 (1st Dep’t 2006). [Attorney suspended for keeping personal funds in escrow account to conceal them from IRS.]
- **Matter of Goldstein**, 10 A.D.3d 174 (1st Dep’t 2004). [Attorney suspended for two years for, *inter alia*, opening and maintaining two escrow accounts to use solely for his personal and business affairs to avoid IRS tax liens.]

- **Matter of Liddy**, 276 A.D.2d 100 (2d Dep’t 2000). [Attorney suspended for two years for, *inter alia*, opening and maintaining two escrow accounts to use solely for his personal and business affairs to avoid creditors.]


- **Matter of Slavin**, 208 A.D.2d 86 (1st Dep’t 1995). [Attorney suspended for two years for, *inter alia*, opening and maintaining two escrow accounts to use solely for his personal and business affairs and keeping interest generated by client funds.]

### II. Division of Legal Fees

1. **Rules**

   22 NYCRR §1200.12 **NY RULE 1.5(g)** (formerly DR 2-107) sets forth rules governing the division of fees among lawyers. Except for specific professions, set forth in the rules, an attorney may not divide fees with a non attorney. Essentially, a lawyer may divide fees with another lawyer who is not an associate or partner in the same firm only if the division is proportionate to the services performed or the lawyers both assume joint responsibility for the legal services; the client’s consent to the retention of both lawyers and to the proportion of fees each lawyer receives is confirmed in writing, and the total fee does not exceed reasonable compensation for all services.

2. **Case Law**

   - **Matter of Harrison**, 282 A.D.2d 176 (2d Dep’t 2001). [Attorney suspended for one year for, *inter alia*, falsely holding himself out as a partner with another lawyer and for improperly dividing fees with another lawyer.]

3. Ethics Opinions

- NYSBA Op. 806 (2007) New York lawyers may share fees with foreign lawyers where educational, training and ethical standards are comparable and the firms comply with NY Rule 1.5 (g) (formerly DR 2-107.)


- NYSBA Op. 651 (1993) Legal referral service offered by bar association may require lawyers to remit a percentage of fees earned from referrals.

- NYSBA 864 (2011) A lawyer is ethically permitted to work on a personal injury case with an out-of-state lawyer and share legal fees with that lawyer if the arrangement complies with Rule 1.5(g), governing fee-sharing.

III. Ethics and Legal Writing

Legal writing is more than just making a winning argument. In fact, lawyers must raise adverse authority in papers presented before the court. Also, any lack of civility in papers is not only frowned upon, but may have adverse results for the client, as well as the lawyer. Notwithstanding the foregoing, lawyers are often surprised to learn that a failure to set forth their argument in an ethical and professional manner will not only incur the wrath of the court they are before, but may result in disciplinary sanctions as well.

Sanctions for uncivil conduct before the Court are not limited to the spoken word or oral argument. In fact, lawyers who have the temerity to insult opposing counsel and/or a judge via written submissions find that an apology does not negate their acts, but is merely considered a mitigating factor.

New York lawyers are required to sign every pleading, motion or document served upon another party or filed with the Court and a failure to do so may require the pleading to be stricken. By doing so they are certifying that the contentions in the document are not frivolous. See 22 NYCRR §130-1.1. The rule further provides that absent good cause shown, the Court shall strike any unsigned paper if the omission of the signature is not corrected promptly after being called to the attention of the attorney or party. Indeed, a request to strike the pleadings will assert that the Court may draw an inference that a lawyer’s failure to affix a signature to a Pro Se pleading demonstrates that the lawyer could not certify the contentions asserted by the litigant, and thereby, “they are completely without merit in law…are undertaken primarily to delay or prolong
the resolution of the litigation or merely to harass or injure another…or assert material factual statements that are false.” See 22 NYCRR §130-1.1(c);

Moreover, although at least one bar association has opined that ghostwriting under new Rule 1.2(c), appears to be permitted as a “limited engagement” (See NYCLA Opinion 742, 2010), 22 NYCRR §130-1.1, discussed above, may prohibit the filing of ghostwritten documents. Also, it appears that some Courts allow a “Pro Se” litigant greater latitude to level the playing field due to the belief that a Pro Se litigant lacks legal sophistication and knowledge of procedural rule. As a result, when a Pro Se litigant fails to reveal a lawyer’s involvement to the Court, the litigant may very well unfairly benefit from such leniency. See also, Citibank (S.D.) N.A. v. Howley, 31 Misc.3d 1216A (Richmond Cty. 2011) (acknowledging that while ghostwritten documents may be permitted under Rule 1.2(c), there was no disclosure of this fact in the subject pleading, no notice to the court or opposing counsel, and no indication of any “informed consent” by the client).

1. Rules

- **NY RULE 8.4 (b);(d)** (formerly DR1-102 (A)(5)) [prohibits conduct that prejudicial to the administration of justice]
- **NY Rule 8.4 (h)** (formerly DR1-102 (A) (7) and (8)) [prohibits conduct that reflects adversely on fitness to practice]
- **NY Rule 5.2(a)** (formerly DR[1-104 (e)] [prohibits lawyer’s claim that he/she acted at the direction of another person]
- **NY Rule 1.1(c) (1) & 1.2 (a)** (formerly DR 7-101 (A)(1)) [lawyer can seek lawful objectives of client but should be courteous and considerate to all persons involved in the legal process]
- **NY Rule 3.1 (a) & 3.1 (b) (2)** (formerly DR 7-102 (A)(1)) [lawyer cannot file a suit or assert a claim merely to maliciously harass or injure another]
- **NY Rule 3.1 (b) (1)** (formerly DR 7-102 (A)(2)) [lawyer cannot advance a claim or defense that is unwarranted under existing law unless it can be supported by a good faith argument]
- **No replacement NY Rule referenced. ( DR 7-102 (A)(3))** [lawyer cannot conceal or fail to disclose that which he/she is required to reveal by law]
- **NY Rule 3.3 (a) (3)** (formerly DR 7-102 (A)(4)) [lawyer cannot knowingly use perjured testimony or false evidence]
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- **NY Rule 4.1 & 3.1 (b) (3) (formerly DR 7-102 (A)(5))** [lawyer cannot knowingly make a false statement of law or fact]

- **(No NY Rule replacement referenced.) (DR 7-102 (A)(6))** [lawyer cannot create or preserve false evidence]

- **(No NY Rule replacement referenced.) (DR 7-102 (A)(8))** [lawyer cannot engage in other illegal conduct or conduct contrary to a disciplinary rule]

- **NY Rule 3.4 (c) & 3.6 (a) & (d) & (e) (formerly DR7-106 (a))** [lawyer shall not disregard or advise his client to disregard a standing rule or ruling of a tribunal]

- **NY Rule 3.3 (a) (2) & 3.6 (b) (formerly DR 7-106 (b)(1))** [lawyer must disclose adverse controlling legal authority]

- **NY Rule 3.3 (e) (formerly DR 7-106 (b)(2))** [lawyer must disclose identities of clients and persons who employed the lawyer]

- **NY Rule 3.4 (d) & 3.4 (c) (formerly DR 7-106 (c)(2))** [lawyer can’t ask irrelevant questions intended to degrade a witness or other person]

- **NY Rule 3.4 (d) & 3.6 (c) (formerly DR 7-106 (c)(3))** [lawyer can’t assert personal knowledge unless he is testifying as a witness]

- **NY Rule 3.4 (d) & 3.6 (c) (formerly DR 7-106 (c)(4))** [lawyer can’t assert personal opinion about a case]

- **NY Rule 3.3 (f) (1)-(3) (formerly DR7-106 (c)(5))** [lawyer must comply with local customs of courtesy or practice]

- **NY Rule 3.3 (f) (1) – (3) (formerly DR 7-106 (c)(6))** [lawyer can’t engage in undignified or discourteous conduct before a tribunal]

See also, **22 NYCRR §1200 Appendix A - Standards of Civility**

2. **Case Law**

   **Federal**

   - **Revson v. Cinque & Cinque**, 70 F. Supp.2d 415 (S.D.N.Y. 1999), *rev’d in part, vacated in part*, 221 F.3d 71 (2d Cir. 2000). An attorney was initially fined $50,000 and plaintiff was ordered to pay costs of $3,279.42 due to
litigation which should not have been brought. The attorney was held to have engaged in “Rambo” tactics by repeatedly making inappropriate remarks to intimidate and harass the defendant. The attorney threatened to tarnish the defendant’s reputation, to “subject him to the equivalent of a proctology exam”, served overly broad subpoenas for banking and personal records, threatened to interfere with the defendant’s clients, threatened to add a RICO charge and engaged in unfair trial tactics. However, the sanctions were reversed because the attorney’s conduct was not sanctionable since some of the frauds claims were colorable and the attorney also apologized for using inappropriate language.

- Schlaifer Nance & Co. et al v. The Estate of Andy Warhol, et al., 194 F3d 323 (2d Cir. 1999). Despite district court’s lack of subject matter jurisdiction on an underlying action it can still impose sanctions arising from the underlying case if the challenged claim is without colorable basis and was brought in bad faith. A claim “lacks a colorable basis when it is utterly devoid of legal or factual basis.”

- Bartel v. Renard, (J. Martin S.D.N.Y.) New York Law Journal, November 3, 1999. Concerted conduct where a party acted “vexatiously, wantonly or for oppressive reasons” to “deliberately” prevent the execution of a court order warranted a joint and several sanction for one of the parties and its counsel. “While judges are often reluctant to impose sanctions on members of the legal profession, it is important to remind ourselves that the inappropriate conduct of a lawyer may impose substantial costs on a litigant...If we are to retain society’s respect for the administration of justice, sanctions must be imposed on lawyers when their inappropriate conduct causes excess costs to an adversary.”

New York State

- Corsini v. U-Haul Int’l, 212 A.D.2d 288 (1st Dep’t 2005). The attorney’s conduct at his own deposition was so lacking in professionalism and civility that the court ordered dismissal of his pro se action as “the only appropriate remedy.” “Discovery abuse, in the form of extreme incivility by an attorney, is not to be tolerated. . . . CPLR §3126 provides various sanctions for such misconduct, the most drastic of which is dismissal of the offending party’s pleading.”

• Forstman v. Arluck, 149 Misc.2d 929 (Sup. Ct. Suffolk Co. 1991). Sanctions were imposed due to meritless allegations and the continuation of the medical malpractice action without an expert opinion to support the claim.

• Jalor v. Universal, 183 Misc.2d 294 (N.Y. County Civil Court 2000), aff’d., 193 Misc.2d 76 (1st Dep’t 2002). Court granted motion on sanctions and ordered hearing as to amount to be awarded pursuant to 22 N.Y.C.R.R. § 130 for frivolous actions due to attorney’s assertion that he was a former prosecutor “designed to harass plaintiff into folding its litigation hand.”

Disciplinary

• Matter of Tavon, 66 A.D.3d 61 (2d Dep’t 2009). [Lawyer was disbarred for, inter alia, submitting misleading documents to a Village Justice Court.]

• Matter of Weinstein, 4 A.D.3d 29, 2004 NY App. Div. LEXIS 1866 (1st Dep’t 2004), rearg. denied, 2004 N.Y. App. Div. LEXIS 6673 (1st Dep’t 2004); lv. denied, 3 N.Y.3d 608 (2004). [Attorney disbarred for, inter alia, conversion of client funds; drafting and filing false and recklessly inaccurate petitions and affidavits; improper solicitation of clients; impermissible contacts with represented parties; false statements to the disciplinary authorities and the Court; failure to comply with local custom by failing to give notice to opposing counsel; ex parte contacts with the court; and false and excessive billing.]

• Matter of Brandes, 292 A.D.2d 129 (2d Dep’t 2002), lv. denied, 99 N.Y.2d 506 (2003). [Attorney disbarred for, inter alia, fraud, multiple conflicts of interest, for representing ex-wife in revoking matrimonial stipulation and acting as her counsel for appeals against him without disclosing his role to the court.]

• Matter of Kramer, 247 A.D.2d 81 (1st Dep’t 1998). [Attorney disbarred for pattern of misconduct that included receipt of 38 sanctions, criticisms and other forms of professional discipline over 11 years because he willfully disobeyed discovery orders, made false statements in affidavits, refused to accept being fired by clients, and filed frivolous claims.]
• Matter of Yao, 250 A.D.2d 221 (1st Dept. 1998). [Attorney disbarred for, *inter alia*, his misdemeanor conviction for aggravated harassment, for committing extortion and for commencing a lawsuit to merely harass or injure another and knowingly advancing an unwarranted claim by suing his former for payment to refrain from publishing embarrassing information about the relationship.]

• Matter of Chiofalo, 78 A.D.3d 9 (1st Dep't 2010). [Attorney was suspended for two years for, *inter alia*, filing a meritless federal lawsuit against at least 29 defendants during his divorce action, including his former wife, her mother, the wife's contemporary and prior attorneys, the judge presiding over the divorce action, three supervising judges, the American Bar Association, and the brokers who assisted with the sale of the marital home. The attorney asserted he did not "merely" intend to harass these parties, but rather wished to bring attention to issues of parental alienation, and subsequently sought, unsuccessfully, to dismiss the lawsuit. The Court found that this assertion effectively conceded that the attorney had no expectation of gaining any type of judicial relief and offered no excuse for his indiscriminate naming of defendants.]

• Matter of Shapiro, 55 A.D. 3d 291 (2d Dep't 2008). [Attorney suspended for six months because he filed court documents which did not have his true signature.]

• Matter of Cohen, 40 A.D.3d 61 (1st Dep't 2007). [Attorney suspended for backdating document submitted to government agencies and for failing to acknowledge wrongful conduct.]

• Matter of Wisehart, 281 A.D.2d 23 (1st Dept. 2001). [Attorney suspended for two years for, *inter alia*, use of privileged documents stolen by his client in an attempt to extract a settlement; failing to advise the court and his adversary that the client had stolen the documents; making reckless accusations against the court; and, disregarding the ruling of a tribunal by using documents in contravention of a court directive.]

• Matter of Babigian, 247 A.D.2d 817 (3d Dept. 1998). [Attorney suspended for six months for bringing a lawsuit in the U.S. District of Columbia against the Chief Justice of the U.S. Supreme Court and 60 other parties which was frivolous and served merely to harass or maliciously injure another and knowingly advancing claims he knew were unwarranted under existing law because the case had been dismissed by the Second Circuit Court of Appeals. The attorney filed the suit claiming that it was an
“amended complaint” however the court found that it was a carbon copy of the previous suit. The court noted that the attorney filed the suit despite the fact that he had been warned that further prosecution of his claims would be frivolous and futile and might be met with costs and sanctions.

IV. Civility, Discovery & Evidentiary Issues

One of the most notorious topics in the field of professional ethics today has to do with discovery and evidentiary abuses including lawyer incivility and improper demeanor by judges. The case law indicates that lawyers and judges will be sanctioned for intemperate conduct in an effort to deter such behavior in the future. An unfortunate result of such behavior is that it also encourages a lack of respect for the legal system from the public. The Rules and case law cited below deal with how lawyers and judges should behave professionally on, off and before the bench.

1. Rules

   - **NY Rule 8.4 (b) – (d) [formerly DR 1-102 (A)(4)&(5)]** [prohibits conduct that constitutes dishonesty, fraud, deceit or misrepresentation]

   - **NY Rule 8.4 (h) [formerly DR1-102 (A) (7)(formerly (8)]** [prohibits conduct that reflects adversely on fitness to practice]

   - **NY Rule 5.2 (a) [formerly DR[1-104 (e)] [prohibits lawyer’s claim that he/she acted at the direction of another person]

   - **NY Rule 1.16 [formerly DR 2-109]** [prohibits lawyer from bringing taking a case or asserting a claim in bad faith]

   - **NY Rule 1.2 (e), (g) [formerly DR 7-101 (A)(1)]** [lawyer can seek lawful objectives of client but should be courteous and considerate to all persons involved in the legal process]

   - **NY Rule 3.1 (a) & 3.1 (b) (2) [formerly DR 7-102 (A)(1)]** [lawyer cannot file a suit or assert a claim merely to maliciously harass or injure another]

   - **NY Rule 3.1 (b) (1) [formerly DR 7-102 (A)(2)]** [lawyer cannot advance a claim or defense that is unwarranted under existing law unless it can be supported by a good faith argument]
- **NY Rule 3.3 (a) (3) [formerly DR 7-102 (A)(4)]** [lawyer cannot knowingly use perjured testimony or false evidence]

- **NY Rule 4.1 & 3.1(b)(3) & 3.3(a)(1) [formerly DR 7-102 (A)(5)]** [lawyer cannot knowingly make a false statement of law or fact]

- **NY Rule 1.2 (d) [formerly DR 7-102 (A)(7)]** [lawyer cannot counsel the client to engage in illegal or fraudulent conduct]

- **NY Rule 1.2 (e) & 4.2 (b) & 3.3 (a) (3) & 3.3 (c) [formerly DR7-102 (B)]** [lawyer must promptly reveal fraud to tribunal by his client or another person unless the information is protected as a confidence or secret]

- **NY Rule 3.4 (c) & 3.6 (a) & (d) & (e) [formerly DR7-106 (a)]** [lawyer shall not disregard or advise his client to disregard a standing rule or ruling of a tribunal]

- **NY Rule 3.3 (a) (2) & 3.6 (b) [formerly DR 7-106 (b)(1)]** [lawyer must disclose adverse controlling legal authority]

- **NY Rule 3.3 (e) [formerly DR 7-106 (b)(2)]** [lawyer must disclose identities of clients and persons who employed the lawyer]

- **NY Rule 3.4 (d) & 3.6 (c) [formerly DR 7-106 (c)(1)]** [lawyer can’t allude to any matter that he/she has no reasonable basis to believe is relevant or that will not be supported by evidence]

- **NY Rule 3.4 (d) & 3.6 (c) [formerly DR 7-106 (c)(2)]** [lawyer can’t ask irrelevant questions intended to degrade a witness or other person]

- **NY Rule 3.4 (d) & 3.6 (c) [formerly DR 7-106 (c)(3)]** [lawyer can’t assert personal knowledge unless he is testifying as a witness]

- **NY Rule 3.4 (d) & 3.6 (c) [formerly DR 7-106 (c)(4)]** [lawyer can’t assert personal opinion about a case]

- **NY Rule 3.3 (f) (1) – (3) [formerly DR7-106 (c)(5)]** [lawyer must comply with local customs of courtesy or practice]

- **NY Rule 3.3 (f) (1) – (3) [formerly DR 7-106 (c)(6)]** [lawyer can’t engage in undignified or discourteous conduct before a tribunal]

- **NY Rule 3.3 (f) (1) – (3) [formerly DR 7-106(c)(7)]** [lawyer can’t intentionally violate an established rule of procedure or evidence]
See also, 22 NYCRR §1200 Appendix A - Standards of Civility

2. Case law

Federal

- Cunningham v. Hamilton County, Ohio, 119 S.Ct. 1915 (1999). Rule 37 sanctions imposed on attorney are not final orders from which an appeal can lie. Discovery abuse case based on attorney’s failure to follow magistrate’s discovery order, missed deadlines, failure to give full and complete responses.


- United States v. Seltzer, 127 F.Supp.2d 172 200 U.S. Dist. LEXIS 18706 (E.D.N.Y. 2000). Attorney initially sanctioned by the trial court for “impeding the orderly and expeditious conduct of the proceeding by keeping the court, twelve jurors, three or four defendants, their lawyers. . .the Assistant United States Attorney. . . waiting for twenty-five minutes.” Without conceding that it was wrong, the Court vacated the sanction because it did not want to continue to delay its calendar due to the Court of Appeal’s remand which directed that the attorney be given “specific notice of the sanctionable conduct.


- Bartel v. Renard, (J. Martin S.D.N.Y.) New York Law Journal, November 3, 1999. Concerted conduct where a party acted “vexatiously, wantonly or for oppressive reasons” to “deliberately” prevent the execution of a court order warranted a joint and several sanction for one of the parties and its counsel. “While judges are often reluctant to impose sanctions on members of the legal profession, it is important to remind ourselves that the inappropriate conduct of a lawyer may impose substantial costs on a litigant...If we are to retain society’s respect for the administration of justice, sanctions must be imposed on lawyers when their inappropriate conduct causes excess costs to an adversary.”
**New York State**

- **Sholes v. Meagher**, 98 N.Y.2d 754 (2002). On procedural grounds, the Court denied leave to appeal on that portion of a case where an attorney was sanctioned and a mistrial granted due to the attorney’s lack of decorum by looks of disbelief, sneering, shaking of [her] head and various expressions designed to indicate to [the Court] [her] displeasure.

- **Heller v. Provenzano**, 257 A.D.2d 378 (1st Dep’t 1999). Sanctions were awarded against plaintiff, an attorney, and his counsel because of improper conduct both before and during a trial. Plaintiff entered the jury selection room and spoke with jurors without either attorney present, ignored the trial judges warnings not to wander around the courtroom during trial and not to mention another fatal accident which occurred in the same elevator and referred to the fact that his wife was Hispanic and that he spoke Spanish fluently in an effort to influence Hispanic jury members. Plaintiff’s attorney was sanctioned because he asked disparaging questions of an expert without a factual basis.

- **Dwyer v. Nicholson et al.**, 193 A.D.2d 70 (2d Dep’t 1993), appeal dismissed, 220 A.D.2d 555 (2d Dep’t 1995) appeal denied, 87 N.Y.2d 808 (1996), rearg. denied, 88 N.Y.2d 963 (1996). A new trial was ordered based, in part, on counsel’s “sarcastic, rude, vulgar, pompous and intemperate utterances on hundreds of pages of the transcript” which were found to be “grossly disrespectful to the court and a violation of accepted and proper courtroom decorum.”

- **Sanchez v. Manhattan & Bronx Surface Transit Authority**, 170 A.D.2d 402 (1st Dep’t 1991). In a personal injury action the jury verdict was set aside and a new trial ordered based upon improperly admitted hearsay evidence and on improper prejudicial assertions by defense counsel which placed her own credibility on the side of her client making her an unsworn witness.

- **Principe et al. v. Assay Partners et al.**, 154 Misc.2d 702 (Sup. Ct. N.Y. Co. 1992). Sanctions were imposed due to counsel’s repeated abusive, inappropriate, and sexist remarks accompanied by gestures were a “paradigm of rudeness, and condescend, disparage and degrade a colleague on the basis that she is female.”

- **Forstman v. Arluck**, 149 Misc.2d 929 (Sup. Ct. Suffolk Co. 1991). Sanctions were imposed due to meritless allegations and
the continuation of the medical malpractice action without an expert opinion to support the claim.

Disciplinary Lawyers

- **Matter of Muscatello, 87 A.D.3d 156 (2d Dep’t 2011)** [Attorney, who was an Assistant District Attorney, was suspended for one year for misrepresenting and altering evidence presented to a Grand Jury by altering a blank in a Chemical Test Analysis form during a criminal proceeding.]

- **Matter of Dear, 91 A.D.3d 111 (1st Dep’t 2011)** [Attorney suspended for six months for making false accusations against a state trooper concerning his conduct during a traffic stop and later failing to refute his allegations during a telephone interview concerning the trooper’s conduct.]

- **Matter of Chiofalo, 78 A.D.3d 9 (1st Dep’t 2010)** [Attorney suspended for two years for using obscene, insulting, sexist, anti-Semitic language, ethnic slurs, and threats in correspondence to his former wife’s attorneys and others involved in his matrimonial action. The attorney also filed a meritless federal lawsuit against 29 defendants, including his former wife, her attorneys, judges, and others. The attorney continued to send derogatory and sexist e-mail correspondence to his former wife’s attorneys during the pendency of his disciplinary proceeding, indicating a pattern of offensive behavior and a failure to appreciate the seriousness of his actions.]

- **Matter of Pu, 37 A.D.3d 56 (1st Dep’t 2006)** [Attorney who was suspended from Federal Court for advancing a theory in litigation and for making a representation to the Court that he knew was false, was reciprocally disciplined and suspended for one year.]

- **Matter of Kahn, 16 A.D.3d 7 (1st Dep’t 2005)** [Attorney suspended for engaging in a pattern of offensive remarks, including abusive, vulgar and demeaning comments, to female adversaries, and about juvenile client.]

- **Matter of Heller, 9 A.D.3d 221 (1st Dep’t 2004)** [Attorney suspended for multiple instances of unprofessional conduct over a 24 year history.]
- **Matter of Brecker**, 309 A.D.2d 77 (2d Dep’t 2003). [Attorney suspended for two years based on his use of “crude, vulgar and abusive language” in multiple telephone calls and messages to a client and a court examiner over the course of a few hours. The attorney had also been convicted of criminal contempt and had a prior admonition.]

- **Matter of Kramer**, 247 A.D.2d 81 (1st Dep’t 1998). [Attorney disbarred for pattern of misconduct that included receipt of 38 sanctions, criticisms and other forms of professional discipline over 11 years because he willfully disobeyed discovery orders, made false statements in affidavits, refused to accept being fired by clients, and filed frivolous claims.]

- **Matter of Yao**, 250 A.D.2d 221 (1st Dep’t 1998). [Attorney disbarred for, *inter alia*, his misdemeanor conviction for aggravated harassment, for committing extortion and for commencing a lawsuit to merely harass or injure another and knowingly advancing an unwarranted claim by suing his former for payment to refrain from publishing embarrassing information about the relationship.]

- **Matter of Pollack**, 238 A.D.2d 1 (1st Dep’t 1997). [Attorney disbarred for, *inter alia*, federal conspiracy conviction, failure to produce clients for depositions, ignoring court directives, failure to satisfy judgments based on Federal Rule 11 sanctions, conversion of client funds, solicitation of and failure to repay a personal loan from a client without disclosing the extent of his financial difficulties, discourteous comments to an adversary in during a discussion in the courthouse hallway and misrepresentations to the Disciplinary Committee.]

- **Matter of Supino**, 23 A.D.3d 11 (1st Dep’t 2005). [Attorney reciprocally suspended for three months in New York based on his New Jersey suspension for his actions during a contentious divorce with his former wife wherein he filed nine criminal complaints against his former wife, all but one of which were dismissed; filed at least 30 criminal complaints against seven different police officers, which were either withdrawn or dismissed; left several telephone messages with police officers, including a captain, stating that he would violate a restraining order and knock the captain on his butt; on at least eight occasions, informed various judges of his intent to file complaints against them; and left threatening messages with a court administrator, accusing her of being an idiot and doctoring evidence.]
Matter of Wisehart, 281 A.D.2d 23 (1st Dep’t 2001). [Attorney suspended for two years for, *inter alia*, use of privileged documents stolen by his client in an attempt to extract a settlement; failing to advise the court and his adversary that the client had stolen the documents; making reckless accusations against the court; and, disregarding the ruling of a tribunal by using documents in contravention of a court directive. The Court stated “It is tragic that respondent now finds himself the subject of disciplinary action based on actions taken and words used by him on behalf of his client/employee during the course of a litigation which, upon discovery of the privileged documents, if fairly and properly utilized, he was poised to win. But it is even more tragic that in the pursuit of victory in litigation, respondent, an attorney for nearly 50 years, apparently lost sight of his moral, ethical and legal obligations to the Court, the public, and his opposing counsels [sic], and saw fit to use any and every means and avenue available to him in his efforts to win.”]

Matter of Dinhofer, 257 A.D.2d 326 (1st Dep’t 1999). [Attorney suspended for three months for comments to a Federal District Judge during a conference call which were “derogatory, undignified and inexcusable.” Note however that the Federal District Court only imposed a Censure based on the very same behavior!]

Matter of Babigian, 247 A.D.2d 817 (3d Dep’t 1998). [Attorney suspended for six months for bringing a lawsuit in the U.S. District of Columbia against the Chief Justice of the U.S. Supreme Court and 60 other parties which was frivolous and served merely to harass or maliciously injure another and knowingly advancing claims he knew were unwarranted under existing law because the case had been dismissed by the Second Circuit Court of Appeals. The attorney filed the suit claiming that it was an ”amended complaint” however the Court found that it was a carbon copy of the previous suit. The Court noted that the attorney filed the suit despite the fact that he had been warned that further prosecution of his claims would be frivolous and futile and might be met with costs and sanctions].

Matter of Muller, 231 A.D.2d 296 (1st Dep’t 1997). [Attorney suspended for six months for making numerous harassing telephone calls to his former girlfriend over a period of time, and posing as a law clerk for a federal court judge in order to obtain information about her and harass her at her law school.]
Matter of Mordkofsky, 232 A.D.2d 863 (3d Dep’t 1996). [Attorney suspended for six months for making false accusations against judges of improper conduct and corruption, threatening a judge during a sidebar conversation, and taking legal action on his own behalf while he was represented by counsel. Noting that the attorney was unremitting, the Court observed that “by a combination of irresponsibility, malice, and unadulterated speculation, the respondent sees wrongdoing by judges and lawyers alike where there is none, and manufactures accusations with total recklessness.”]

Matter of Raskin, 257 A.D.2d 326 (2d Dep’t 1995). [Attorney suspended for one year for making multiple derogatory and insulting attacks on the physical attributes of opposing counsel in an affirmation filed with the court, and for knowingly aiding a disbarred attorney in the improper practice of law.]

Matter of Hayes, 7 A.D.3d 108 (1st Dep’t 2004). [Attorney publicly censured for accusing the court and its clerk of prejudice and racism, as well as making other insolent and disrespectful remarks, after receiving an unfavorable ruling in a landlord-tenant proceeding. Despite prior admonitions for similar misconduct and neglect, the Court considered the attorney’s advanced age and his sole practitioner status in imposing public censure.]

Matter of Delio, 290 A.D.2d 61 (1st Dep’t 2001). [Attorney censured for disregarding of court’s order and publicly challenging the authority of the court while appearing and in papers, and engaged in undignified and discourteous conduct.] Note: attorney later disbarred for unrelated misconduct. See In re Delio, 17 A.D.3d 69, (1st Dept. 2005).

Matter of McDonald, 241 A.D.2d 255 (2d Dep’t 1998). [Attorney censured for leaving five messages on an answering machine containing vulgar and threatening language while intoxicated.]

Matter of Schiff, 190 A.D.2d 293 (1st Dep’t 1993). [Attorney censured for abusive conduct towards opposing counsel including vulgar, obscene and sexist language because it reflected adversely on his fitness to practice. The language was used partly on and partly off the record.]

Matter of Kavanagh, 189 A.D.2d 521 (1st Dep’t 1993). [Attorney publicly censured for making unsupported and insulting allegations in motion papers suggesting that his opposing counsel had ties to organized crime.]
- Matter of Golub, 190 A.D.2d 110 (1st Dep’t 1993). [Attorney censured for reckless comments to the press about a Supreme Court Justice after an adverse decision against his client in a highly publicized case. The court characterized the comments as “unprofessional, undignified, discourteous and degrading to the Judge and the court.”]

- Matter of Mangiatordi, 123 A.D.2d 19 (1st Dep’t 1987). [Attorney censured for contumacious courtroom behavior after being found guilty of criminal contempt which constituted undignified or discourteous conduct degrading to a tribunal.]

But see, Matter of Isaac, 76 A.D.3d 48 (1st Dep’t 2010). [Attorney’s disrespectful comments about the Court, made in a private conversation, outside a court, were not subject to professional discipline.]

See also, In the Matter of the Justices of the Appellate Division v. Erdmann, 33 N.Y.2d 559 (1973). [Although attorney made several vulgar and insulting comments about the Appellate Division during a Life Magazine interview, his censure was overturned because it was merely an isolated instance of disrespect for the law “committed outside of the precincts of a court.”]

Lawyers and Assault

- Matter of Zulandt, 2012 N.Y. App. Div. LEXIS 908, N.Y. Slip Op. 917, 939 N.Y.S.2d 338 (1st Dep’t 2012) [Attorney suspended for three years for assaulting his former girlfriend and destroying her property over a prolonged period, for which he was convicted of a misdemeanor assault charge. The Court found a calculated pattern of cruelty that was not the product of the “intermittent explosive disorder” described by the attorney’s expert.]

- Matter of Leonov, 92 A.D.3d 50 (1st Dep’t 2011) [Attorney censured for assaulting a taxi cab driver, for which he was convicted of a misdemeanor assault charge. The Court weighed factors such as the aberrational nature of the incident, the attorney’s youth, his genuine remorse and acceptance of responsibility, his full cooperation with the Committee, and the fact that the misconduct did not involve the practice of law.]
V. Lawyers and Judges Working Together

Although lawyers and judges work together every day to accomplish the goals of the legal system, there are certain limitations on their relationships, especially when it comes to a lawyer’s participation and support of judges with respect to judicial campaigns; a lawyer’s representation of a judge in the judge’s own legal matters; and personal relationships between judges and lawyers. Although full disclosure of the relationship is not always mandated, it may be the best course of action to avoid needless litigation as well as disciplinary problems. Moreover, anything short of full disclosure negatively impacts the public perception of the legal system. The Rules, case law and advisory opinions cited below demonstrate how lawyers and judges should behave in such situations.

1. Rules of Professional Conduct

   - **NY Rule 3.5 (a) [formerly DR 7-108, 7-110]** [prohibits lawyers from seeking to influence a judge or employee of a tribunal and *ex parte* communications on the merits with a judge or employee of a tribunal]

2. Rules of Judicial Conduct

   - **Rule 100.1** [Judge should uphold the integrity and independence of judiciary by establishing, maintaining, enforcing and personally observing high standards of conduct]
   
   - **Rule 100.2(a)** [Judge shall respect and comply with the law and act in a manner that promotes confidence in the integrity and impartiality of the judiciary]
   
   - **Rule 100.3(B)(4)** [Judge shall perform duties without bias or prejudice to any person]
   
   - **Rule 100.3(B)(6)** [Judge should accord every person with interest in a legal proceeding the right to be heard according to the law, and shall not engage in *ex parte* communications except to:
     - schedule a proceeding;
     - seek advice of a disinterested expert on the applicable law;
     - consult with court personnel;
     - confer separately with the consent of the parties; and
     - consider *ex parte* communications when authorized by law]
   
   - **Rule 100.3 (c)(1)** [Judge shall diligently discharge administrative duties without bias or prejudice and maintain professional competence]
- Rule 100.3 (c)(2) [Judge shall require staff to diligently discharge administrative duties without bias or prejudice and maintain professional competence]

- Rule 100.3 (c)(3) [Judge shall not make unnecessary appointments based on favoritism and nepotism]

- Rule 100.3 (e)(1) [Judges shall disqualify themselves if:
  - they have personal bias, prejudice or knowledge of the proceedings;
  - they served as a lawyer in the matter;
  - they previously practiced law with the lawyer handling the matter;
  - they are a witness in the matter;
  - they or a family member has as fiduciary or other interest in the matter;
  - they or their spouse are related to a person in the matter within sixth degrees;
  - their spouse is a party, an officer, director or trustee of a matter, has an interest that could be affected by the proceeding;
  - they or their spouse are related to a lawyer in the matter within four degrees;
  - their spouse is a lawyer in the matter; and
  - they previously asserted a position as to an issue, party or controversy related to the matter while campaigning.]

3. Case law

New York

- Melnik v. Melnik, 499 N.Y.S.2d 470 (3d Dep’t 1986). In a matrimonial action, there was an assertion that plaintiff’s attorney managed the trial judge’s election campaign, but the judge did not recuse himself. Defendant-husband appealed, arguing it was reversible error for the Trial Judge not to disqualify himself from the case. The Appellate Division affirmed the trial court’s decision, holding that the record was devoid of any relationship between Trial Judge and plaintiff’s attorney, and that there was no showing of prejudice.

- Matter of Johnson v. Hornblass, 93 A.D.2d 732 (1st Dep’t 1983). There must be a violation of express statutory provisions, bias or
prejudice or unworthy motive on the part of a judge to force disqualification.

- **Oyster Bay Associates Limited Partnership and WPIX, INC, v. Town Board of the Town of Oyster Bay and The Town Environmental Quality Review Commission.** 15 Misc.3d 1147A (Supreme Court, Suffolk County June 11, 2007). This case explains the reasoning behind recusal and concisely sets forth the criteria for same.

**Judges**

- **Matter of Simeone, Determination of the Judicial Conduct Commission,** October 6, 2004. Judge censured due to his romantic relationship with a director of a residential youth facility who regularly appeared in his court with a law guardian on PINS petition matters. Although the judge’s paramour appeared on numerous cases over a seventeen month period, the judge failed to disclose the personal nature of the relationship and continued to preside over matters that she was involved in.

- **Matter of Thwaits, Determination of the Judicial Conduct Commission,** December 30, 2002. Judge censured for continually handling matters involving relatives and friends and having acted contrary to law to the benefit of certain family member and acquaintances.

- **Matter of Pennington, Determination of the Judicial Conduct Commission,** November 3, 2003. Judge censured for contacting and meeting with the district attorney to discuss the investigation and treatment of his son by the police, thereby intervening in a pending criminal matter and lending the prestige of his judicial status to advance his son’s private interest.

- **Matter of Canary, Determination of the Judicial Conduct Commission,** December 26, 2002. Judge censured due to his intervention on two separate occasions with cases involving his son. In the first instance, the judge contacted the arresting officer and disputed traffic tickets issued to his son calling the charges “ridiculous” and referenced instances where the officer had been incorrect about his estimations of vehicle speed in his court. The second episode occurred when the judge’s son was arrested; the judge confronted and pushed the arresting officer proclaiming that he would get the charges “thrown out” and also requested as a “favor” that the arrest be kept out of the papers.
Matter of Kolbert, *Determination of the Judicial Conduct Commission*, December 26, 2002. Judge censured for improper contact with the police department at the request of a friend and intervening in the execution of an arrest warrant because such misconduct was “a blatant assertion of influence for personal purposes.” As a result of his actions respondent received a censure.

Matter of Cipolla, *Determination of the Judicial Conduct Commission*, October 1, 2002. Judge censured because the judge intervened on behalf of his girlfriend in order to obtain special treatment in a traffic case by asking the presiding judge to “take care of the ticket” and personally paid the fine at the law office of the presiding judge prior to the scheduled court appearance and without a guilty plea. In considering the judge’s conduct the Commission took into account the brief time he had been on the bench.

Matter of DiBlasi, *Determination of the Judicial Conduct Commission*, November 19, 2001. Judge censured despite multiple violations including, *inter alia*, presiding over ten matters in which an attorney with whom had a romantic relationship appeared and interjecting himself into a conflict between the same attorney and her supervisor to advance the private interests of the attorney and himself.

Matter of Ohlig, *Determination of the Judicial Conduct Commission*, November 19, 2001. Judge admonished for intervening in a fee dispute between his wife and another attorney; having telephone discussions with the other attorney, personally going to the attorney’s office, summoning the attorney to his chambers and attending a settlement meeting with his wife over the fee dispute. The Commission recommended an admonition because the judge’s actions created the appearance that he was using the prestige of his judicial status to advance the private interests of his wife.

Matter of Young, *Determination of the Judicial Conduct Commission*, December 29, 2000. Judge censured for contacting a Family Court Hearing Examiner on behalf of a friend whose case was pending before the examiner resulting in the recusal of the Hearing Examiner. Recognizing that it “may be difficult to refuse the request of a close friend or relative to ‘make a call’ on his or her behalf” the Commission found that the judge’s misconduct warranted a Censure.
Matter of Warren C. DeLollo, Determination of the Judicial Conduct Commission, July 3, 1979. Judge censured for writing letters to two other part-time lawyer-judges seeking favorable dispositions for the defendants in two traffic cases and practicing law in a case presided over by his brother.

4. Advisory Opinions


  i) A lawyer who is asked to represent a client before a judge and is simultaneously representing that judge in an unrelated matter may, under Model Rule 1.7(b), undertake the representation only if he reasonably believes that he will be able to provide competent and diligent representation to both the litigant and the judge and they give their informed consent, confirmed in writing.

  ii) Pursuant to Model Code of Judicial Conduct Rule 2.11(A), the judge in such a situation must disqualify herself from the proceeding over which she is presiding if she maintains a bias or prejudice either in favor of or against her lawyer. This disqualification obligation also applies when it is another lawyer in her lawyer’s firm who is representing a litigant before her. However, absent such a bias or prejudice for or against her lawyer, under Judicial Code Rule 2.11(C), the judge may continue to participate in the proceeding if the judge discloses on the record that she is being represented in the other matter by one of the lawyers, and the parties and their lawyers all consider such disclosure, out of the presence of the judge and court personnel, and unanimously agree to waive the judge’s disqualification.

  iii) If a judge is obligated to make disclosures in compliance with Judicial Code Rule 2.11(C), refuses to do so, and insists upon presiding over the matter in question, the lawyer’s obligation of confidentiality under Model Rule 1.6 ordinarily would prohibit his disclosing to his other client his representation of the judge without the judge’s consent, rendering it impossible to obtain the client’s consent to the dual representation, as required by Model Rule 1.7(b). The lawyer’s continued representation of the judge in such a circumstance constitutes an affirmative act effectively
assisting the judge in her violation of the Judicial Code, and thereby, violates Model Rule 8.4(f). The lawyer (or another lawyer in the lawyer’s firm), in that circumstance, is obligated to withdraw from the representation of the judge under Model Rule 1.16.

iv) The duty of confidentiality that the lawyer owes to the judge as a client prohibits his disclosing the judge’s violation of the Judicial Code to the appropriate disciplinary agency, as would otherwise be required under Model Rule 8.3.


i) Whether the judge should recuse depends upon whether their impartiality may reasonably be questioned, which in turn, depends upon the circumstances of the prior representation and the amount of time that has passed. In those circumstances where recusal would otherwise be indicated, it further depends upon whether the parties may, after disclosure of the reasons for recusal, agree in writing that the judge’s former relationship is immaterial.

ii) Canon 3C(1) of the Code of Judicial Conduct provides for an enumerated list of situations where a judge should disqualify himself. However, whether a judge’s impartiality might reasonably be questioned in situations not expressly described by Canon 3C(1)(a) – (d) is a fact question in each case. In such a situation, where the judge determines his impartiality is not affected, N.Y. believes the following general principles are appropriate:

1) If the prior representation of the judge was of a character where the judge’s personal integrity was at issue or involved a highly emotional situation (i.e.: bitterly contested matrimonial matter), the judge should disqualify himself, irrespective of consent from the parties, for several years.
2) If the representation was (a) of a routine and economic character or (b) in the course of official duties or (c) provided by an insurer with respect to a fully insured claim, it is not necessary for either the judge to disqualify himself or for remittal under Canon 3D to be obtained. Prior representation should be disclosed.
(3) Cases falling between these two situations, where there are no other special circumstances, and in cases otherwise falling into paragraph (2) where the representation was in repeated instances, the judge should disqualify himself for a period of years unless the parties remit the disqualification.

It should be noted that it is impossible to fix a specific number of years to the disqualification. The length will depend on whether an objective observer would question the judge’s impartiality.


  i) A judge who is a judicial candidate within his/her window period may ask attorneys who regularly appear before him/her to attend a reception and speak to attendees about their experience appearing before the judge, as long as he/she takes care to avoid any appearance of undue pressure.

  ii) This opinion defines “active conduct” as that which involves a leadership role in the candidate's campaign committee, such as “campaign manager, campaign coordinator, finance chair or treasurer” (Opinion 02-108). By contrast, the fact that a lawyer merely attends a judicial candidate's event (Opinion 04-106), that a lawyer "voluntarily submitted [his/her] name[] to be used by the committee" (Opinion 90-182 [Vol. VI]), or that a lawyer obtains signatures on a petition (see Opinion 90-196 [Vol. VI]) would not, standing alone, trigger any recusal obligations on the candidate's part, as long as the candidate believes he/she can be fair and impartial (Opinion 07-26; 22 NYCRR 100.3[E]).

  The committee believes that an attorney's support of a judge's candidacy by speaking publicly about the judge at one fund-raiser, at the judge's request, does not reach the level of active campaign involvement that requires disclosure or recusal, provided the judge believes he/she can be fair and impartial (22 NYCRR 100.3[E]).

- **N.Y. Jud. Adv. Op. 07-26 (June 7, 2007).** Recusal or Disclosure Where Attorney Appearing Before Judge was Political Supporter or Contributor.
During Judge’s Campaign for Non-Judicial Office

i) Whether a judge must exercise recusal when a previous supporter or contributor to the judge’s prior campaigns for elective non-judicial office appears before him or her depends on the level of the supporters or contributor’s involvement in these campaigns.

ii) Where the appearing party was the judge’s campaign manager, for a period of two years following the campaign’s end, a judge must recuse from any matters. Thereafter, the judge need not recuse, but must disclose the person’s role in the campaign.


Where the social relationship between the judge and an attorney is sufficiently close, the judge should disclose and possibly recuse in matters in which the attorney appears. Such recusal is subject to remittal unless a party is self-represented, in which event remittal is not available.


i) Where the judge’s personal attorney plans to share office space and clerical staff in exchange for a fixed percentage of the fees he/she charges, appear in the judge’s court, the judge is not disqualified when the sharing attorneys appear before the judge.

ii) This Opinion discusses several prior opinions, when an attorney who appears in the judge’s court is associated in some way with another attorney who represents or has represented the judge or who is related to the judge.

- Opinion 95-35 (Vol. XIII), “the Committee advised that a judge is disqualified in cases involving appearances by a law firm, where the judge’s lawyer/spouse has a continuing relationship with the law firm, evidenced by shared letterhead or other indicia, as opposed to a mere retainer interest in occasional, separate, discrete cases”;

- Opinion 99-146 (XVIII), “the Committee advised that an appellate judge is not disqualified when a law firm that has employed the judge’s spouse on an occasional, part-time, per diem basis, appears in the judge’s court”; and
Opinion 06-22, the Committee advised that where a judge’s former campaign manager and personal attorney is “counsel” to a law firm, whether the judge is disqualified from presiding when an attorney from the law firm appears in the judge’s court depends on the nature of the “counsel” relationship.

  i) A newly-elected full-time judge must recuse because he referred contingency fee cases to attorneys who appear before the judge at a time when the judge was practicing law;
  ii) Judge should disclose and offer to recuse where attorneys who appear before the judge are renting office space in a building owned by the judge’s spouse
  iii) Judge need not disclose that the judge’s spouse owns stock in a subsidiary of a corporate party.

  i) Judge need not recuse if they believe that he/she can be impartial is not disqualified in a proceeding solely because an attorney filed a complaint against the judge with the Commission on Judicial Conduct.
  ii) Judge may serve on the Historic Landmarks Commission for the municipality in which the judge presides, but is disqualified in any proceeding that the municipality’s building department commences in the judge’s court on the Commission’s behalf, subject to remittal.

**VI. Duty To Report Fraud**

What is a lawyer or judge obligated to do when he/she learns of fraud or perjury by a lawyer, a client or a witness? Although the disciplinary rules as well as the case law give guidance to the lawyer in such situations, there is tension between the lawyer’s obligation to preserve client confidences and the lawyer’s obligation as an officer of the court to preserve the integrity of the legal system. Moreover, when it comes to reporting misconduct by another lawyer, the rule is subjective and fails to define what constitutes “knowledge” of a “substantial question as to another lawyer’s honesty, trustworthiness or fitness” and therefore it can be confusing as to what facts need be present to trigger the reporting requirement. In addition, the new rules require a lawyer to correct false
testimony before a tribunal. This section will give an overview as to the current state of the rules, case law and advisory onions for dealing with these issues.

A. Lawyer’s Fraud

1. Rules

   - **NY Rule 8.3 [formerly DR 1-103]** [Requires a lawyer who knows of another lawyer’s misconduct to report it to a tribunal or other investigative entity and requires a lawyer to cooperate with grievance or judicial conduct investigations. Note: Does not include duty to report judicial misconduct as in ABA Model rule]

2. Rules of Judicial Conduct

   - **Rule 100.3 (d)(1)** [Judge who receives information that indicates a substantial likelihood of another judge’s or a lawyer’s misconduct shall take appropriate action]

3. Case Law

   - **Wieder v. Skala**, 80 N.Y.2d 628 (1992). Attorney allowed to sue his former law firm after being fired for reporting another attorney pursuant to DR 1-103 despite the fact that New York is an employment-at-will state.

   - **Connolly v. Napoli, Kaiser & Bern, LLP et al.** 12 Misc.3d 530 (S.Ct. NY Co. 2006). Associate allowed to sue law firm for wrongful termination, despite being an employee at will, for refusing to cover up wrongful acts of other lawyers in firm.


   - **Matter of Dowd and Pennisi**, 160 A.D.2d 78 (2d Dep’t 1990). Attorneys involved in parking violations scandal suspended for five years due to participation in and failure to report other attorneys’ involvement in illegal kickback scheme.
4. Advisory Opinions


  Where a judge believes that attorney has attempted to influence the judge’s decisions and acted extremely unprofessionally, the judge should report the attorney to the disciplinary authorities especially since the judge’s attempts to remediate have been unsuccessful. Judge should also recuse in all matters. See also *N.Y. Jud. Adv. Op. 04-74 (June 3, 2004).*


  Where a town justice has evidence that court personnel may have engaged in corrupt behavior within the court itself, they must report all such to their administrative judge and may, report the misconduct to any other authority, including the district attorney, other municipal officials or the police.


  Judges are not required to report self to Judicial Conduct Commission if they discover that they have violated a rule in the Code of Judicial Conduct or are the subject of an Article 78 Proceeding by the local District Attorney.

- **N.Y. Jud. Adv. Op. 93-71.** Part-Time Judge Appearing in Court in Same County; Reporting Another Judge for Ethical Violations

  i) Pursuant to 22 N.Y.C.R.R. 100.5(f), it is improper for a part-time judge who is an attorney to personally appear in a court in the same county in which he or she is a judge, but presided over by another judge, although another attorney from the same firm may appear.

  ii) The presiding judge also must report conduct of another justice, which apparently violates this rule, to the Judicial Conduct Commission if he or she considers it to constitute “substantial” violation of judicial ethics. The judge has the discretion whether to report such conduct if the judge concludes it is not a “substantial” violation. If the inquiring judge determines the conduct should be reported, then it should be reported immediately but the judge is not
required to recuse himself or herself from the case in which the conduct occurred.

B. Client Fraud or Perjury

1. Rules

- **NY Rule 8.4 (b)-(d) [formerly DR 1-102(A)(4)]** [prohibits conduct that constitutes dishonesty, fraud, deceit or misrepresentation]

- **NY Rule 8.4 (b)-(d) [formerly DR 1-102(A)(5)]** [prohibits conduct that is prejudicial to the administration of justice]

- **NY Rule 8.4 (h) [formerly DR 1-102(A)(7)] [formerly (8)]** [prohibits conduct that reflects adversely on fitness to practice]

- **NY Rule 5.2 (a) [formerly DR 1-104(e)]** [prohibits lawyer’s claim that he/she acted at the direction of another person]

- **NY Rule 1.16 9a) [formerly DR 2-109]** [prohibits lawyer from bringing a case or asserting a claim in bad faith]

- **NY Rule 1.6 (a)(1) & 1.6 (b) [formerly DR 4-101(c)(5)]** [lawyer may reveal confidences or secrets to extent necessary to withdraw a written or oral opinion he/she previously gave once the lawyer learns that the opinion or representation was based on materially inaccurate information or is being used in furtherance of a crime or fraud]

- **NY Rule 3.1() & 3.1 (b)(2) [formerly DR 7-102(A)(1)]** [lawyer cannot file a suit or assert a claim merely to maliciously harass or injure another]

- **NY Rule 3.1 (b) (1) [formerly DR 7-102(A)(2)]** [lawyer cannot advance a claim or defense that is unwarranted under existing law unless it can be supported by a good faith argument]

- **NY Rule 3.3 (a) (3) [formerly DR 7-102(A)(4)]** [lawyer cannot knowingly use perjured testimony or false evidence]

- **NY Rule 4.1 & 3.1 (b)(3) & 3.3 (a)(1) [formerly DR 7-102(A)(5)]** [lawyer cannot knowingly make a false statement of law or fact]

- **NY Rule 1.2 (d) [formerly DR 7-102(A)(7)]** [lawyer cannot counsel the client to engage in illegal or fraudulent conduct]
NY Rule 1.2 (e) & 4.2(b) & 3.3(a)(3) second sentence & 3.3 (c) [formerly DR 7-102(B)] [lawyer must promptly reveal fraud to tribunal by his client or another person unless the information is protected as a confidence or secret]

NY Rule 3.4 (c) & 3.6 (a) & (d) & (e) [formerly DR 7-106(a)] [lawyer shall not disregard or advise his client to disregard a standing rule or ruling of a tribunal]

NY Rule 3.4 (d) & 3.6 (c) [formerly DR 7-106(c)(1)] [lawyer cannot allude to any matter that he/she has no reasonable basis to believe is relevant or that will not be supported by evidence]

NY Rule 3.4 (d) & 3.6 (c) [formerly DR 7-106(c)(3)] [lawyer cannot assert personal knowledge unless he is testifying as a witness]

NY Rule 3.4 (d) & 3.6 (c) [formerly DR 7-106(c)(4)] [lawyer cannot assert personal opinion about a case]

NY Rule 3.3 (f)(1)-(3) [formerly DR 7-106(c)(7)] [lawyer cannot intentionally violate an established rule of procedure or evidence]

2. Case Law

Federal

Nix v. Whiteside, 475 U.S. 157 (1986). An attorney was not guilty of ineffective assistance of counsel for advising his client, a criminal defendant, to testify truthfully to avoid perjuring himself, and that if the client perjured himself the attorney would withdraw from the representation. The Supreme Court stated, “[a]lthough counsel must take all reasonable lawful means to attain the lawful objectives of the client, counsel is precluded from taking false steps or in any way assisting the client in presenting false evidence or otherwise violating the law. . . . An attorney’s duty of confidentiality which totally covers the client’s admission of guilt, does not extend to a client’s announced plan to engage in future criminal conduct.... In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard.”

Resolution Trust v. Bright, 6 F.3d 336 (5th Cir. 1993). Attorneys initially disbarred when they attempted to persuade a witness to
sign an affidavit with statements the witness had not made. However, the Court of Appeals reversed because it was unclear that the attorneys were attempting to induce the witness to give false testimony.

- **Grievance Committee v. Doe**, 847 F.2d 57 (2d Cir. 1988). Attorney who received information that his adversary’s witness lied at a deposition and failed to disclose that information to the court had to have had actual knowledge of fraud not just a mere suspicion of the perjury to be required to report such information to the court.

**State**

- **People v. DePallo**, 96 N.Y.2d 437 (2001). In a case where a criminal defendant was convicted of, *inter alia*, second degree murder, robbery and burglary, the defendant unsuccessfully appealed claiming that his attorney was guilty of ineffective assistance of counsel because he advised his client that he could not participate in perjury of any kind, advised his client he had to testify truthfully and allowed his client to testify in narrative form. In addition, after the client testified, the attorney advised the judge that his client had admitted his involvement in the crime despite the fact that neither the client, nor opposing counsel was present for the conversation. Citing Nix v. Whiteside, the Court of Appeals held that “an attorney’s duty to zealously represent a client is circumscribed by an equally solemn duty to comply with the law and standards of professional conduct.... to prevent and disclose frauds upon the court ... and an attorney’s revelation of his clients perjury to the court is a professionally responsible and acceptable response.” (475 U.S. at 168-169, 170). The Court also noted that counsel’s withdrawal from the case “would do little to resolve the problem and might, in fact, have facilitated any fraud the defendant wished to perpetrate on the court.”

- **People v. Darrett**, 2 A.D. 3d 16, 2003 N.Y. App. Div. LEXIS 12935 (1st Dep’t 2003), lv. denied, 4 N.Y.3d 830 (2005). Defendant appealed his murder conviction and claimed ineffective assistance of counsel based on the fact that his attorney had repeated *ex parte*, off the record conversations with the judge that her client might commit perjury (the client never did) which were later referred to by the Judge during the sentencing hearing. The Court explicitly set forth the road map as to the obligations for an attorney in such situations; advise the client against the perjury; advise the client to testify truthfully; memorialize such conversations; try to dissuade the client against the perjury; and, make every effort to limit the amount of information provided to the fact finder in such
circumstances.

- **Callaghan v. Callaghan**, (Westchester County Supreme Court 2002) N.Y.L.J. February 20, 2004. In a proceeding for *quantum meruit* where the attorney asserted a retaining lien against the client’s file, the attorney’s request for $28,000.00 in legal fees was denied because he drafted a false affidavit for his client claiming that her husband had abused their child, and later submitted a second affidavit recanting the first. When the attorney attempted to have the client sign a third affidavit recanting the recantation, he was fired! A Special Referee found that the submission of the second (recanting) affidavit to the Court “assisted the client in the commission of the class E felony of Perjury in the Second Degree.”

**Disciplinary**

- **Matter of Weinstein**, 4 A.D. 3d 29 (1st Dep’t 2004). [Attorney disbarred for, among other things, failure to ensure the accuracy of the details of a petition for guardianship which he drafted.]

- **Matter of Harris**, 259 A.D.2d 170 (2d Dep’t 1999). [Attorney disbarred for, *inter alia*, submission of false affidavits to police department to obtain a license to carry a concealed weapon, excessive fees, failure to return unearned retainer and escrow funds, demanding referral fees without the client’s consent, conversion of client funds, and *ex parte* communications with represented parties.]

- **Matter of Geoghan**, 253 A.D.2d 205 (2d Dep’t 1999). [Attorney disbarred for, *inter alia*, filing criminal charges to gain leverage to resolve a civil lawsuit, misrepresenting the extent of his client’s injuries to his adversary in an effort to obtain a settlement and indicating that once the settlement was paid he would instruct his client to give false and misleading testimony before the grand jury.]

- **Matter of Friedman**, 196 A.D.2d 280 (1st Dep’t 1994), appeal dismissed, *mot. dismissed*, 83 N.Y.2d 888 (1994), *cert. denied*, 513 U.S. 820 (1994). [Attorney disbarred for pattern of misconduct constituting intentional acts of dishonesty over a ten year period, including, knowingly filing a false affidavit, giving false testimony at a hearing before a federal judge, soliciting false testimony from a witness, failing to supervise his investigator, failing to disclose information that he was required to reveal by law, and failing to disclose to the court that a witness gave false testimony.]

- **Matter of Ballinger**, 211 A.D.2d 6 (1st Dep’t 1995). [Attorney
convicted in federal court of making false statements in support of a loan application would normally have been suspended. However, the attorney was disbarred because he deliberately engaged in a series of fraudulent acts with a business associate who the attorney had reason to believe was involved in criminal conduct.]

- **Matter of Janoff**, 242 A.D.2d 27 (1st Dep’t 1998). [Attorney suspended for four years based on his conviction for insurance fraud for knowingly allowing clients to give false information to doctors, failing to correct clients’ false deposition testimony, submission of false bills of particulars and submission of false medical reports. The foregoing misconduct constituted conduct involving fraud, deceit, dishonesty or misrepresentation; participation in the creation of false evidence; intentionally assisting the client in illegal or fraudulent conduct; and, conduct reflecting adversely on his fitness to practice.]

- **Matter of Lessoff**, 231 A.D.2d 229 (1st Dep’t 1997). [Attorney suspended for three years based on his guilty plea for falsifying business records and additional evidence of a pattern of falsifying insurance reports, thereby engaging in conduct involving fraud, deceit, dishonesty or misrepresentation and reflecting adversely on his fitness to practice.]

- **Matter of Van Riper**, 290 A.D.2d 572 (3d Dep’t 2002). [Attorney suspended for one year based on misdemeanor conviction of offering a false instrument for filing for causing a backdated, forged document to be filed in Surrogate’s Court.]

- **Matter of Wisehart**, 281 A.D.2d 23 (1st Dep’t 2001). [Attorney suspended for two years for, *inter alia*, use of privileged documents stolen by his client in an attempt to extract a settlement; failing to advise the court and his adversary that the client had stolen the documents; making reckless accusations against the court; and, disregarding the ruling of a tribunal by using documents in contravention of a court directive. The Court stated “It is tragic that respondent now finds himself the subject of disciplinary action based on actions taken and words used by him on behalf of his client/employee during the course of a litigation which, upon discovery of the privileged documents, if fairly and properly utilized, he was poised to win. But it is even more tragic that in the pursuit of victory in litigation, respondent, an attorney for nearly 50 years, apparently lost sight of his moral, ethical and legal obligations to the Court, the public, and his opposing counsels [sic], and saw fit to use any and every means and avenue available to him in his efforts to win.”]
• Matter of Babigian, 247 A.D.2d 817 (3d Dep’t 1998). [Attorney suspended for six months for bringing a lawsuit in the U.S. District of Columbia against the Chief Justice of the U.S. Supreme Court and 60 other parties which was frivolous and served merely to harass or maliciously injure another and knowingly advancing claims he knew were unwarranted under existing law because the case had been dismissed by the Second Circuit Court of Appeals. The attorney filed the suit claiming that it was an “amended complaint” however the court found that it was a carbon copy of the previous suit. The court noted that the attorney filed the suit despite the fact that he had been warned that further prosecution of his claims would be frivolous and futile and might be met with costs and sanctions.]

• Matter of Glotzer, 191 A.D.2d 112 (1st Dep’t 1993). [Attorney suspended for six months for filing a forged document with the court and falsely swearing that the signature was genuine.]

3. Advisory Opinions


A lawyer is required to correct client’s false sworn testimony during an arbitration about a forged document which was admitted as evidence or at a civil deposition even though the lawyer learned of it after the fact or as . As an officer of the court the lawyer must take remedial measures to correct the false information and is required to remonstrate with the client before making disclosure. If remedial measures less harmful than disclosure are available such as a withdrawal of the evidence [See Rule 1.6(b)(3)] without revealing the fraud, the lawyer can take such measures.
Ethics Resources 2012

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

Rules of Professional Conduct (effective April 1, 2009)/Lawyer's Code of Professional Responsibility (prior to April 1, 2009)

- Judiciary Law Section 90 (Case comments)
- 22 NYCRR Section 1200
- Lexis and Westlaw

Judiciary Law

- Judiciary Law Section 90
- Judiciary Law Section 264(4)
- Judiciary Law Sections 467-499
- CPLR Section 9407 and 9701

Attorney Admissions

- Judiciary Law Section 53
- Judiciary Law Section 56
- Judiciary Law Section 90(1)
- Judiciary Law Section 460-466
- CPLR 9401-9406
- General Obligations Law 3-503
- 22 NYCRR Section 520
- 22 NYCRR Section 602 (1st Dept.)
- 22 NYCRR Section 690 (2nd Dept.)
- 22 NYCRR Section 805 (3rd Dept.)
- 22 NYCRR Section 1022.34 (4th Dept.)

Other Applicable Rules

- 22 NYCRR § 1200 Appendix A Standards of Civility (Aspirational)
- 22 NYCRR § 1205 Cooperative Business Arrangements between lawyers and non-legal Professionals (“Multidisciplinary Practice”)
- 22 NYCRR § 1210 Statement of Client’s Rights
22 NYCRR § 1215 Written Letter of Engagement
22 NYCRR § 1220 Mediation of Attorney-Client Disputes
22 NYCRR § 118 Registration of Attorneys
22 NYCRR § 130 Costs and Sanctions
22 NYCRR § 137 Fee Dispute Arbitration
22 NYCRR § 1300 Dishonored Check Rule
22 NYCRR § 1400 Procedure in Domestic Relations Matters
22 NYCRR § 1500 Continuing Legal Education

**Attorney Disciplinary Procedures**
- Judiciary Law Section 90
- 22 NYCRR §§ 603 & 605 (First Department)
- 22 NYCRR §§ 690 & 691 (Second Department)
- 22 NYCRR § 806 (Third Department)
- 22 NYCRR § 1022 (Fourth Department)

**Disciplinary Case Law**
- Appellate Division Reporters (for attorneys)
- Court of Appeals and Judicial Conduct Committee (for judges)
- Non-Disciplinary Case Law
- All other courts

**Judicial Conduct**
- 22 NYCRR § 100 Judicial Conduct
- 22 NYCRR § 101 Advisory Committee on Judicial Ethics
- 22 NYCRR § 7000 State Commission on Judicial Conduct – Procedural Rules
- 22 NYCRR § 7100 Judicial Nomination Commission
- 22 NYCRR § 7400 Ethics Commission for the Unified Court System

**Formal and Informal Ethics Opinions**
- ABA
- NYSBA
- Association of the Bar of the City of New York
- NY County Lawyers Association
- Nassau County Bar Association
- ABA/BNA Manual

**Other Resources and Periodicals**
- Annotated Code and Model Rules
- ABA Standards on Imposing Lawyer Sanctions
• The New York Code of Professional Responsibility: Opinions, Commentary and Caselaw (Oceana Publications 2010) New York County Lawyer's Ethics Institute
• Simon's New York Rules of Professional Conduct Annotated (Thomson West 2009)
• Modern Legal Ethics Charles Wolfram (West Publishing)
• Legal Ethics: The Lawyers Deskbook on Professional Responsibility, Ronald D. Rotunda, American Bar Association Center on Professional Responsibility (Thomson West 2010)
• Attorney Escrow Accounts, Rules, Regulations and Related Topics (New York State Bar Association 2010) Peter Coffey and Anne Reynolds Copps, Editors
• New York Law Journal

Telephone Hotlines
• Association of the Bar of the City of New York (212) 382-6600 Ext. 8
• Association of the Bar of the City of New York LAP (212) 302-5787
• NY County Lawyers' Association (212) 267-6646
• NY State Bar Association (800) 342-3661
• NY State Bar Association LAP 1-800-255-0569
• American Bar Association (800) 285-2221 or e-mail ethicsearch@abanet.org
• American Bar Association CoLAP 1-866-LAW-LAPS(529-5277)
• American Bar Association Judicial Assistance 1-800-219-6474

Websites
• ABA Center for Professional Responsibility (www.abanet.org/cpr/home.html)
• American Legal Ethics Library/Cornell Legal Information Institute (www.secure.lawcornell.edu/ethics)
• American Judicature Society (www.ajs.org)
• Association of Professional Responsibility Lawyers (www.aprl.net)
• National Organization of Bar Counsel (www.nobc.org)
• The New York State Lawyers Assistance Trust (NYLAT) (www.nylat.org)
Dealing With an Ethical Dilemma
Submitted by Deborah A. Scalise, Esq.¹

In today's legal world every practitioner encounters ethical issues ranging from obligations to be fulfilled in the practice of law, (such as Continuing Legal Education and biannual registration), to issues arising from client representation, (such as conflicts and client fraud). Somehow a lawyer must find a way to deal with such issues and to do so in compliance with the New York Rules of Professional Conduct, as well as a multitude of other rules in the Judiciary Law; and the Rules of Court. In addition, where the rules are not specific, lawyers may look to bar association advisory opinions or case law for guidance. As a result, it can be difficult to deal with issues on behalf of a client, while maintaining and protecting our licenses to earn a living. This article will give a brief practical overview as to what to do if an ethics and professional responsibility issue arises and what to do when facing disciplinary authorities conducting a grievance investigation.

1. What can a lawyer do when faced with an ethical dilemma?

If taking an action on behalf of a client feels wrong but you are unable to pinpoint the problem - follow your instinct; don't do it, or ask for time to research the issue (see Resources Outline). If you are pressed for time due to a trial or court appearance, a brief discussion with the judge or law secretary as to a pending “ethics issue” (without disclosing harmful facts) will usually result in a short adjournment to allow you to make a telephone call to consult with a colleague or a supervisory attorney. If you are unable to reach someone, contact one of the bar association ethics hotlines. You will find that most issues have arisen before and someone will either have an answer or give you guidance as to a rule, case or advisory opinion.

2. What can a lawyer do when faced with an allegation of ethical misconduct?

22 NYCRR § 1200.57 [Rule 8.3] (formerly 22 NYCRR § 1200.4 [DR 1-103]) provides that a lawyer may report another lawyer's misconduct to either “a tribunal or other authority empowered to investigate or act upon such violation.” Notwithstanding the rule, even if the allegations are only made to the court in which you are appearing, the

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grievance committee can still initiate an investigation! Thus, you may be subject to financial sanctions by the court, as well as disciplinary sanctions by disciplinary authorities. As a result, once there is any allegation of ethical misconduct a lawyer should act carefully and try to resolve the issues so as not to risk a negative Opinion by a Court.

- **Consider obtaining counsel.**

Representing yourself is not a good idea because you are too close to the issues. In addition, practitioners in the field know the grievance procedures, rules and staff and will be able to shepherd you through the system. If you cannot afford to hire someone, at the very least have a respected colleague look over your documents before you submit them to the court or the grievance authorities to give your answer a dispassionate review.

- **Cooperate with the court’s or grievance committee’s requests.**

Any delay in the submission of your response may negatively impact on the investigation. Moreover, a failure to respond may result in an interim suspension pending a final hearing. See 22 N.Y.C.R.R. § 603.4(e)(1)(1st Dept.); § 691.4(l)(1) (2d Dept.); §806.4(f)(1)(3rd Dept.) and § 1022.19(f)(1)(4th Dept.).

- **All statements can and will be used against you.**

Do not make any “off the cuff” statements about your conduct to the court, clients, colleagues and opposing counsel. Moreover, if you contact staff for the grievance committee, keep the conversation to a minimum. Most important, do not misrepresent the facts because the grievance authorities will find out if you do. As a result, you could be subject to additional charges for lying to the committee during the investigation.

- **Written responses.**

When providing a written response to a grievance, consult the client’s files and your records before responding. Focus on an explanation of your conduct. Do not blame the client, the court or your supervisors unless you can back-up your claims. Note: 22 NYCRR § 1200.6(b) [Rule 1.6(b)] (formerly 22 NYCRR § 1200.19(c) [DR 1-103 (c)]) permits a lawyer to reveal client confidences or secrets in order to defend the lawyer or the lawyer’s employees against an accusation of wrongful conduct.
Aggravating and mitigating circumstances.

If you find yourself the target of a disciplinary investigation there are certain factors, which may be presented as aggravating or mitigating circumstances which can affect the sanction imposed upon a finding of misconduct. Aggravating circumstances which considered by the grievance committees when sanctioning a lawyer include, *inter alia*, failure to cooperate with the committee, lying to the committee, lack of remorse, prior disciplinary history and untreated substance abuse. Mitigating circumstances include, *inter alia*, character references, pro bono activities, community service and treatment for substance abuse.

Substance Abuse.

Lawyers Assistance Programs (“LAP”) are available to members of the legal community with alcohol or substance problems. The New York State Lawyers Assistance Trust (NYLAT) has a website which provides invaluable information about resources to deal with these issues at www.nylat.org. NYLAT works hand in hand with local LAPs including those established by the New York State Bar Association and the Association of the Bar of the City of New York.

Each LAP offers free, confidential assistance to lawyers, judges, law students and their families in addressing their problem, identifying appropriate resources and beginning the recovery process. These programs work together to assist lawyers in need and their services are confidential pursuant to §499 of the Judiciary Law as amended by Chapter 327 of the Laws of 1993 and Federal Regulation 42 CFR Part 2. There are national, statewide and local LAP programs and they that can be reached as follows:

- New York State Bar Association LAP - Pat Spataro (800)255-0569
- New York City Bar Association LAP - Eileen Travis (212)302-5787
- Brooklyn Bar Association LAP - (718)624-4001
- Nassau County Bar Association LAP - Peter Schweitzer(888)408-6222
- ABA Co-LAP - Leigh Stewart-1-800-238-2667 or 1-866-LAW-LAPS(1-866-529-5277)
- ABA Judicial Assistance - Ann Foster- 1-800-219-6474

If you, or any lawyer you know is experiencing a problem, don't wait until a grievance is filed, call LAP, they can help!