



# **Ethical Considerations for Senior Lawyers**

(Meet, Greet and Learn)

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**Friday, October 12, 2018**  
11:00 a.m. – 2:00 p.m.

**New York State Bar Association**  
Albany

**1.5 MCLE Credits**  
1.5 Ethics

*Sponsored by the Senior Lawyers Section and the Committee on Continuing Legal  
Education of the New York State Bar Association*

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The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.



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## **Program Description**

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Ethical issues for senior lawyers, including a change in practice setting or retirement, and malpractice insurance considerations.



## Program Agenda

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10:30 a.m.	<b>Registration</b>
11:00 a.m. – 11:05 a.m.	<b>Welcome and Introductions</b>
11:05 a.m. – 12:20 p.m.	<b>Ethical Considerations for Senior Lawyers CLE Program</b>
12:20 p.m. – 2:00 p.m.	<b>Luncheon</b>
2:00 p.m.	<b>Adjournment</b>



## **Accessing the Online Course Materials**

Below is the link to the online course materials. These program materials are up-to-date and include supplemental materials that were not included in your course book.



**[www.nysba.org/EthicsForSeniorLawyers2018Materials](http://www.nysba.org/EthicsForSeniorLawyers2018Materials)**

All program materials are being distributed online, allowing you more flexibility in storing this information and allowing you to copy and paste relevant portions of the materials for specific use in your practice. WiFi access is available at this location however, we cannot guarantee connection speeds. This CLE Coursebook contains materials submitted prior to the program. Supplemental materials will be added to the online course materials link.





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# **New York Rules of Professional Conduct**

These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and amended on several occasions thereafter. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at [www.dos.ny.gov/info/nycrr.html](http://www.dos.ny.gov/info/nycrr.html) (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

**[http://nycourts.gov/rules/jointappellate/  
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# **Outline – Ethical Considerations for Senior Lawyers**

*Andrea E. Tomaino, Esq.*



**NEW YORK STATE BAR ASSOCIATION**  
**Senior Lawyers Section**

**ETHICS FOR SENIOR LAWYERS**

**October 12, 2018**

Andrea E. Tomaino  
Principal Counsel  
Attorney Grievance Committee for the Seventh Judicial District

**I. Sale of a Law Practice**

**A. Rule 1.17 of the Rules of Professional Conduct (“RPC”)**

1. Rule provides that a lawyer who is retiring, or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice.
2. A suspended or disbarred attorney may not sell his/her law practice after suspension or disbarment.
3. Not permissible to sell a portion of a law practice and continue to practice in the same geographic area. See NYSBA Ethics Opinion #707.
4. For a thorough discussion of RPC 1.17, see Simon’s New York Rules of Professional Conduct Annotated by Roy D. Simon, Distinguished Professor of Legal Ethics Emeritus, Hofstra University School of Law.

**B. Protection of Client Confidences**

1. Pursuant to RPC 1.17(b), a buyer or seller of a law practice must protect client confidences.
  - a. Seller may provide prospective buyers with any information not protected as confidential information under RPC 1.6.
  - b. Notwithstanding RPC 1.6, the seller may provide the prospective buyer with information as to individual clients:
    - concerning the status and general nature of the

- matter;
    - available in public court files; and
    - concerning the financial terms of the client-lawyer relationship and the payment status of the client's account.
  - c. If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information, the seller may not provide such information to prospective buyer without first advising client of prospective buyer's identity and obtaining client's consent to proposed disclosure.
- 2. Prior to making any disclosure of confidential information that may be permitted, the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists. If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless the seller shall have obtained the consent of the client.

C. Notice Requirements

RPC 1.17(c) - Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:

1. the client's right to retain other counsel or to take possession of the file;
2. the fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;
3. the fact that agreements between the seller and the seller's clients

4. as to fees will be honored by the buyer;  
proposed fee increases, if any permitted; and
5. the identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in New York State, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.

D. Waiver

RPC 1.17(d) - When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

E. Fees

RPC 1.17(e) - The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

**II. Termination of Law Practice by Disability or Death**

- A. Deceased or disabled lawyer's representative will be put in the position of having to close the practice.
- B. RPC 1.15(g) establishes procedure for designation of successor signatory when deceased attorney was sole signatory on trust account.
- C. 22 NYCRR §1240.21 - Appointment of Attorney to Protect Interests of Clients or Attorney.
- D. Record-keeping requirements set forth in RPC 1.15(d) apply to representative of deceased or disabled lawyer.

E. Division of Fees

RPC 5.4(a) - A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

1. an agreement by a lawyer with the lawyer's firm or another lawyer

associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

2. a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and
3. a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.

### **III. General Obligations Upon Dissolution of Law Firm**

#### **A. Clients**

1. Continue competent and diligent representation, and communication with clients during dissolution process.
2. Notify clients of the dissolution and provide clients with options; facilitate choice of new counsel by clients.

#### **B. Client Files and Property**

1. Proper transfer of client files, funds and other property that the client is entitled to receive.
2. Proper disposal of client files if appropriate.
3. RPC 1.15(h) provides that upon dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in RPC 1.15(d).

### **IV. Terminology**

- A. Retirement Pursuant to a Sale - retired only in the geographic area set forth in the terms of the sale agreement.
- B. Certification of Retirement - a retired attorney can avoid the \$375.00 bi-annual registration fee by certifying on the re-registration statement that he or she is retired. However, if you certify that you are retired from the



practice of law, you no longer can practice law for profit anywhere, whether it is in New York or any other state. You can practice law on a pro bono basis if you certify a retirement, but you can't receive any fees.

- C. Non-Disciplinary Resignation - Resignation for non-disciplinary reasons is governed by 22 NYCRR 1240.22(a). This type of resignation allows the attorney to practice in another state where admitted, without having to pay the New York attorney registration fees. Attorney must apply by submitting affidavit in the form contained in Appendix E.

## V. Common Ethical Problems

### A. Dishonesty, Fraud, Deceit, and Misrepresentation

- 1. Improper notarization - Avoid shortcuts such as backdating documents, signing another individual's name to a document (even with that party's permission), or notarizing a signature that was not signed in your presence.
- 2. False Documents/Statements
  - a. False statements and/or creation of false documents to conceal neglect of legal matters.
  - b. False statements in attorney affirmations have resulted from attorneys failing to take necessary steps to verify information provided by clients.

### B. Fiduciary Obligations to Third Persons

- 1. RPC 1.15(c)(4) requires lawyer to promptly pay or deliver to client or third person as requested by client or third person, funds or other property in possession of lawyer that client or third person is entitled to receive.
- 2. Many attorneys are not aware that their fiduciary duty to third persons may take precedence over the client's instructions regarding funds or property held in trust.

### C. Trust Account Irregularities

- 1. Client funds must be maintained and preserved in an attorney trust account. Stashing cash in a file or a safe violates a lawyer's

fiduciary responsibility.

2. Failure to preserve client funds in trust account - conversion is complete when the account in which the client's funds are deposited is overdrawn or when the balance of the account is less than the client's interest in it.
  - a. Reconcile your trust account monthly. Know your bank's procedures for making funds available. Do not issue checks for funds that are not yet on deposit and available.
  - b. No excuse that the improper handling of the funds is due to mismanagement rather than misconduct.
3. All withdrawals from attorney trust account must be made by check made out to a named payee and not to cash. ATM cash withdrawals from trust accounts are prohibited. Bank transfers, electronic funds transfers, wire transactions, etc., are prohibited unless there is prior written approval from the person entitled to receive the proceeds.
4. Only an attorney can be a signatory on attorney trust account.
  - a. Non-lawyer office staff may not be authorized signatories or be given "permission" to sign the attorney's name on trust account checks.
  - b. A lawyer may allow paralegal to use a signature stamp in limited circumstances so long as attorney closely supervises the delegated work and maintains complete professional responsibility for acts of the paralegal. *NYSBA Ethics Opinion #693*
5. Commingling - attorney is strictly prohibited from commingling personal funds with funds of clients or third persons.
  - a. Legal fees must be withdrawn promptly from trust account within a reasonable time after they have been earned, to avoid improper commingling of personal and client funds. Checks for withdrawal of fees should be clearly labeled as such and designate the client or transaction involved.

- b. Lawyer may not deposit personal funds into trust account as protection against deposited items not clearing immediately.
- c. Lawyer may not have a line of credit or other overdraft protection relating to attorney trust account due to prohibition against commingling.

6. Fees Paid in Advance By Client

- a. Advance payments of legal fees are not client funds and should not be placed in attorney trust account. *NYSBA Ethics Opinion #570*
  - i. Exception - attorney and client may agree to treat the advance fee as the client's funds, to be withdrawn when the fees are actually earned by the attorney. Then it would be appropriate to maintain the advance fees in the attorney trust account, provided that such arrangement is contained in a written retainer agreement.
  - ii. Advance payment of legal fees must be distinguished from prepayment of expenses or disbursements by client, which do not belong to the attorney.
- b. Regardless of whether the advance fee is to be treated as client funds, lawyer has obligation to promptly refund any unearned portion of fees upon completion of matter or withdrawal from representation.

7. "Advancing" Disbursements From Trust Account

- a. It is improper to issue a disbursement check from the attorney trust account on behalf of a client before funds to cover the check have been both deposited and cleared.
- b. Such an "advance" results in the check being paid out of funds belonging to other clients, which constitutes a conversion.

8. Technical Requirements

- a. Trust account must contain "Attorney Trust Account", "Attorney Escrow Account", or "Attorney Special Account" in its title. RPC 1.15(b)(2).
- b. Trust account must be opened/maintained at an approved banking institution. RPC 1.15(b)(1), 22 NYCRR §1300.1(a). Moreover, any "qualified funds" must be deposited into an IOLA account. Judiciary Law §497.4(a).
- c. "Qualified funds" are those received by the attorney in a fiduciary capacity which, in the judgment of the attorney are too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest to justify the expense of administering a segregated account. Judiciary Law §497.2

9. Required Bookkeeping Records - RPC 1.15(d)

- a. Attorney must make accurate record entries at or near the time of the events recorded and maintain same for seven years.
- b. No specific accounting system is prescribed under the Rules, but records must be kept as to the date, source, and description of each deposit item and the date, purpose and payee of each disbursement.
  - i. As a practical matter, individual client ledger sheets are the only way to keep track of each client's transactions and to demonstrate, if necessary, that the funds were properly maintained.
  - ii. Merely keeping monthly bank statements, canceled checks, and check stubs does not satisfy these requirements.
- c. Forms of record keeping and electronic storage
  - i. RPC 1.15(d)(3) - allows lawyer to maintain required "copies" by original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

- ii. However, note that RPC 1.15(d)(viii) specifying records such as checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips makes no reference to “copies”, and these must be maintained as original records. *NYSBA Ethics Opinion # 680*.
  - d. Failure to maintain the required bookkeeping records or to produce them upon demand of the Grievance Committee constitutes an independent basis for disciplinary action. RPC 1.15(l) and (j).
- 10. Interest on Lawyer Accounts Program (IOLA) alleviates the practical problem of attributing interest to numerous client deposits for relatively short periods of time. Judiciary Law §497.
  - a. IOLA accounts create no income tax consequences for the lawyer or client.
  - b. IOLA assumes the cost of bank service charges and fees relating to the account.
  - c. IOLA Fund is used for civil legal services for indigent and to improve administration of justice.

D. Transactions Between Lawyer and Client

- 1. RPC 1.8(a) - Transactions in which the attorney and client have differing interests and the client expects the lawyer to exercise professional judgment for the protection of the client.
  - a. Transaction must be fair and reasonable to the client, and the terms must be fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
  - b. Client must be informed in writing of the desirability of seeking the advice of independent counsel in the transaction, and must be given a reasonable opportunity to do so; and
  - c. Client must give informed consent, in a writing signed by the client, to the essential terms of the transaction and the

lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

2. Lawyer's duty may apply even if lawyer does not have an active legal matter pending with the client at the exact time of the transaction. If an attorney/client relationship existed prior to the transaction, the client may reasonably expect the lawyer to exercise professional judgment for the client's protection.
3. Business or financial sophistication of the client does not obviate the need for full disclosure.

E. Rules Governing Domestic Relations Matters

1. Rules apply to "divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions, or proceedings." 22 NYCRR §1400.1.
2. Attorney must provide and execute written retainer agreement and statement of client's rights and responsibilities containing the language prescribed in 22 NYCRR §§1400.2 and 1400.3. These documents must be executed prior to the commencement of any legal work.
3. Attorney must provide written, itemized billing statements to client at least every 60 days, regardless of whether retainer funds have been depleted.

F. Threatening Criminal Prosecution

1. RPC 3.4(e) - lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.
2. Also improper for lawyer to threaten to file a disciplinary complaint, as that is contrary to lawyer's duty to report misconduct pursuant to RPC 8.3(a).

G. Lawyer's Responsibility for Conduct of Others

1. RPC 5.1 - Responsibilities of law firms, partners, managers and supervisory lawyers.

Lawyers with management authority in the firm or direct supervisory authority over other lawyers are required to make reasonable efforts to set up internal policies and procedures designed to provide reasonable assurance that all lawyers will conform to these Rules.

2. RPC 5.2 - Responsibilities of a subordinate lawyer.

Although lawyer not relieved of responsibility for a violation by fact that lawyer acted at direction of a supervisor, that may be relevant in determining whether lawyer had knowledge required to render conduct a violation of these Rules.

3. RPC 5.3 - Lawyer's responsibility for conduct of nonlawyers.

- a. RPC 5.3(b) states that a lawyer shall be responsible for conduct of a nonlawyer employee that would be a Rule violation if engaged in by the lawyer, if the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it.
- b. Rule requires firm to ensure that work of nonlawyers is appropriately supervised, and lawyer with direct supervisory authority over work must adequately supervise those nonlawyers.
- c. Attorneys are obligated to oversee the trust account activities and bookkeeping practices of the law firm, and can be held responsible for the actions of other lawyers and non-lawyer employees of the firm.
  - i. Lawyer censured for failure to adequately supervise conduct of two secretaries who commingled client and non-client funds, failed to promptly remit client funds, and made unauthorized withdrawals of client funds. *In re Collins*, 196 AD2D 69 (4<sup>th</sup> Dept. 1994).
  - ii. Lawyers suspended for failure to supervise paralegal who converted client funds. *In re Bushorr*, 274 AD2d 107 (4<sup>th</sup> Dept. 2000); *In re Gaesser*, 290 AD2d 58 (4<sup>th</sup> Dept 2001).
- d. Confidentiality

RPC 1.6(c) requires a lawyer to exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client.

#### H. Legal Fees

1. Written Letter of Engagement or Written Retainer Agreement required when fee is expected to be over \$3,000.00. [22 NYCRR Part 1215].
2. Fee Dispute Resolution Program - Part 137 of the Rules of the Chief Administrator.
  - a. Fee arbitration is mandatory for the attorney if it is requested by the client in a civil matter.
  - b. Exceptions include criminal matters, disputes involving sums of less than \$1,000 or more than \$50,000, claims involving substantial legal questions including professional malpractice or misconduct, and others.
3. Contingent fee agreements.
  - a. In all personal injury matters involving contingent fees, attorney is required to have written contingent retainer agreement. RPC 1.5(c). 22 NYCRR §1015.15.
  - b. In every contingent fee matter, attorney must promptly provide client with a writing stating how the fee is to be determined and a written closing statement upon conclusion of the matter. RPC 1.5(c).
  - c. Contingent fees are prohibited for representing a defendant in a criminal matter RPC 1.5(d)(1).
4. Non-Refundable Retainer Fees
  - a. "Nonrefundable" fee agreements or special retainers wherein an attorney keeps an advance payment irrespective of whether the legal services contemplated are actually rendered have been ruled to be unethical. Matter of Cooperman, 83 NY2d 465, 611 NYS2d 465. Reasoning is



that such agreements improperly impair client's right to discharge lawyer for any reason or no reason.

- b. The Appellate Division in Cooperman distinguished "minimum fee" arrangements, which it defined as a forecast by the attorney of the minimum amount the client can expect to pay in order for the attorney to complete the matter and held these to be proper. Matter of Cooperman, 187 AD2d 56, 591 NYS2d 855 (2nd Dept. 1993).

## 5. Fee Splitting

- a. Attorney may not divide a legal fee with another attorney who is not a partner or associate in the attorney's law firm pursuant to RPC 1.5(g) unless the total fee is reasonable and:
  - i. The client consents to employment of the other lawyer after full disclosure that a division of fees will be made;
  - ii. The division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation; and
  - iii. The total fee is not excessive.

## I. Advertising and Solicitation

- 1. RPC 7.1(a) - A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that contains statements or claims that are false, deceptive or misleading, or violates a Rule.
- 2. RPC 7.1 forbids specific types of advertisements, including paid endorsements or testimonials absent disclosure that the portrayal is by a paid actor, or the use of a fictitious law firm.
- 3. RPC 7.1 permits certain types of advertising, including basic biographical information, legal fees charged and, with written consent, the names of clients regularly represented.
- 4. Advertising must be labeled "Attorney Advertising" and be retained by the law firm for a period of not less than three years for hard copies and one year for computer accessible communications.

5. RPC 7.3 - A lawyer shall not solicit professional employment from a prospective client by in-person or telephone contact unless the recipient is a close friend, relative, former client, or existing client.
6. Targeted direct mailings, written and recorded communications are permitted under RPC 7.3(a)(2) unless:
  - a. They are misleading pursuant to RPC 8.4(c);
  - b. Recipient has made it known to the lawyer a desire not to be solicited by the lawyer;
  - c. The solicitation involves coercion, duress, or harassment;
  - d. The lawyer knows or reasonably should know that the age or the physical, emotional, or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining an attorney; or
  - e. The lawyer intends or expects, but does not disclose, that the case will be handled primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.
7. RPC 7.4(c) defines conditions under which the word "specialist" may be used in advertising, with mandated disclaimers. Distinction is made between certification by a private organization approved by the American Bar Association and certification under authority of laws of another jurisdiction.
8. Use of terms such as "concentrating in" or "practice limited to" is permissible.
9. Social Media
  - a. LinkedIn profile does not constitute attorney advertising unless the profile's primary purpose is the retention of the lawyer for pecuniary gain. *See generally* N.Y. Cty. Formal Op. 748 (2013); NY City Formal Op. 2015-7
  - b. Profiles containing lawyers' background information is not considered advertising, but a profile including subjective statements about the attorney's skills, area of practice, endorsements and testimonials from clients or colleagues is likely to be considered advertising.
  - c. If content is reasonably likely to create an expectation of

results, or where it compares the lawyer's services with those of other lawyers, the attorney should label the page as "Attorney Advertising" and include the disclaimer "Prior results do not guarantee a similar outcome."

- d. Attorneys should periodically review the endorsements on their social media pages to ensure that statements posted by third parties are truthful and not misleading.

## **VI. Best Practices to Avoid Problems**

### **A. Communication with Clients**

1. RPC 1.4 states that a lawyer shall promptly inform the client of material developments in the matter, including settlement or plea offers; reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; and promptly comply with a client's reasonable requests for information.
2. Explanation at the outset. Client should be fully educated as to the relative merits of the case, the length of time it will take to complete the matter, and what it will cost in terms of the fee arrangement and expenses. Avoid creating unrealistic expectations by client.
3. Client should be kept advised of the status of the case, and client's inquiries/phone calls should be answered promptly.
  - a. Provide clients with copies of correspondence, documents, pleadings, etc., to keep them informed of the progress of their matters.
  - b. If nothing is happening in the matter, let the client know of that fact and the reasons for the delay and what next step will be.
  - c. Document non-written communications with clients and

unsuccessful attempts to respond to their phone calls.

d. Avoid even the appearance of procrastination.

4. Fee arrangements and billing procedures should be crystal clear to the client. Consider having a written fee agreement in all cases, even where not required by rules, to minimize potential fee complaints.
5. Regular billing - this will keep clients advised as to what you are doing and help prevent disputes over fees.

B. Client Selection

1. Exercise discretion in accepting employment that is likely to produce dissatisfaction based upon the nature of the client or the matter.
2. For example, the following types of prospective clients are more likely to be dissatisfied with you regardless of the quality of your services or the outcome - and are thus more likely to file a grievance:

- \* those who persist in unrealistic expectations despite your advice;
- \* those who are adamant about quick results;
- \* those who are not truthful with you;
- \* those who do not want you to talk with their previous counsel.

C. Conclusion of Representation

1. Consider a closing letter to client summarizing services completed and results achieved; thanking them for being your client; and making clear that the attorney-client relationship is concluded for that matter.
2. After matter is completed, client's inquiries should still be answered as a preventative measure. If the former client does not hear from you, they will turn to the Bar Association or Attorney Grievance Committee.

D. Law Office Procedures

1. Management of telephone and written communications (including return of calls by staff when attorney is not immediately available), calendaring, case review (tickler) systems, and conflicts checks systems.
2. Training of office staff to deal with clients in a professional manner and to enhance the attorney/client relationship.
3. Be fair to office staff - do not expect them to do dirty work of giving client bad news or to tell "white lies" (or worse) so you can avoid handling unpleasant situations yourself.

## **VII. Rules Governing Professional Conduct and Where to Find Them**

- A. Professional Misconduct is defined as a violation of any of the Rules of Professional Conduct, as set forth in 22 NYCRR Part 1200, including the violation of any rule or announced standard of the Appellate Division governing the personal or professional conduct of attorneys. 22 NYCRR §1240.2(a).
- B. The New York Rules of Professional Conduct - formally promulgated as joint rules of all four Appellate Divisions. 22 NYCRR §1200.
- C. Resources
  1. New York State Bar Association Committee on Professional Ethics provides advice, informal opinions, and published formal opinions. (518) 463-3200 or e-mail: ethics @nysba.org
  2. Publications
    - a. New York Law Journal - frequent articles on ethics and professionalism; publishes disciplinary decisions and ethics opinions in full.
    - b. Simon's New York Rules of Professional Conduct Annotated by Roy D. Simon, Distinguished Professor of Legal Ethics Emeritus, Hofstra University School of Law.



# **PowerPoint - Insurance Considerations**

*Mike Mooney, USI Affinity*





## 2018 NYSBA Risk Management Seminars – Insurance Considerations



**Mike Mooney, Senior Vice President**  
**USI Affinity**



## Insurance Considerations



Mike Mooney

Senior Vice President

Professional Liability Practice Leader

USI Affinity

2018 NYSBA Risk Management Seminars



## Agenda



- ☐ The Policy
- ☐ Purchasing the appropriate coverage
- ☐ The insurance application
- ☐ Selecting a Carrier
- ☐ Selecting a Policy
- ☐ Selecting a Broker



## Claims Made vs. Occurrence Policy



- ☐ An LPL policy generally provides coverage for demands made upon the policyholder for damages brought forth during the policy period resulting from an error or omission within the firms covered prior acts date.
- ☐ An “occurrence” policy (such as a homeowner’s policy) normally insures an unexpected event within the policy period that result in bodily injury or property damage.



## Prior Acts Coverage



- ☐ “Retroactive Date”
- ☐ The date continuous coverage was first obtained
- ☐ Claims triggered before this date are not covered
- ☐ Changing Carriers



◀ 5 ▶

## What is Covered?



- ☐ Professional Services
  - Title Agent
  - Notary Public
  - Activities as an Officer or Director
  - Author or Presenter
  - Investment Advice
  - Pro Bono
- ☐ Supplementary Coverages
  - Disciplinary Proceedings
  - Subpoena
  - Loss of Earning
  - Public Relations Expense
  - Breach Notification Expense



◀ 6 ▶

## Who is Insured?



- ☐ The Named Insured
- ☐ Is coverage provided to:
  - Shareholders or partners?
  - Employees?
  - Former employees?
  - “Of Counsel” lawyers?
  - Independent contractors?
  - The estate/heirs/executors/administrators of an insured?



## Common Exclusions



- ☐ Intentional Acts
  - Dishonesty
  - Fraudulent or Criminal Acts
- ☐ Bodily Injury / Property Damage
- ☐ Insured vs. Insured
  - Unless Attorney Client relationship exists and professional services are being rendered.
- ☐ Owned Equity
  - Normally greater than 10%-15%



## Proper and timely notice



- ☐ Report incidents or situations to your carrier immediately
- ☐ Provide written notice of claim
- ☐ These circumstances may be considered a claim:
  - A demand is received for money or services
  - Service of suit
  - Institution of alternative dispute resolution or arbitration proceedings
  - Disciplinary action is threatened or filed
  - Notice received by any insured that is the intention of a person or entity to hold the insured responsible for the consequences of an alleged wrongful act
  - Any request to waive a statute of limitations



## Extended reporting periods



- ☐ “ECRP or Tail Coverage”
- ☐ Available for attorneys who retire from the practice of law
- ☐ Provides coverage for claims arising from conduct within the policy period which would otherwise be covered by the policy but the claim is first made during the extended reporting period.
- ☐ Claim must have occurred while policy was in force.



## Are all insurance policies the same?



- ☐ Deductible Options (Per Claim vs. Aggregate)
- ☐ Expense Allowances (Inside Limits vs. Outside Limits)
- ☐ Definition of Professional Services
- ☐ Exclusions
- ☐ Supplementary Coverages



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## What is appropriate coverage?



- ☐ The dollar value of transactions or cases you work on
- ☐ The cost of defending a claim
- ☐ The value of assets you want to protect
- ☐ Potential billable hours lost



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## What can cause premiums to be high?



- ☐ Step Rating
- ☐ Area of Practice
- ☐ Dabbling
- ☐ Geographic Location
- ☐ Attorney to Staff Ratios
- ☐ Retainer Agreements
  - Engagement Letters
  - Disengagement Letters
  - No engagement Letters
- ☐ Docket Systems
- ☐ Fee Suits



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## The insurance application



The parts of an application:

- ☐ About the Firm
- ☐ Firm Coverage Information
- ☐ Attorney Information
- ☐ Areas of Practice
- ☐ Firm Operations & Management
- ☐ Claim/ Incident / Disciplinary Information
- ☐ Requested Coverage



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## Common Mistakes on an Application



- ☐ Area of Practice Grid
- ☐ Website Information
- ☐ Attorney Information
- ☐ Missing Supplements
- ☐ Letterhead



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## What features should I look for when selecting a Liability Carrier?



- ☐ Experience
- ☐ AM Best Rating
- ☐ Claims Handling
- ☐ Panel Counsel
- ☐ Distribution
- ☐ Risk Management Services
  - Website
  - Claims Hotline
  - CLE
  - Newsletter & Email Alerts



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## What Policy features should I look for on my Liability Policy?



### ☐ **Policy Features**

- Consent to settle Provision
- Liberalization Clause
- Extending Reporting Period Options
- Broad definition of legal services
- Limited Exclusions

### ☐ **Supplementary Coverages**

- Disciplinary Proceedings
- Subpoena
- Loss of Earnings
- Cyber Coverage



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## What features should I look for when selecting a broker?



### ☐ **Experience with Lawyers**

- Benchmarking
- Claims knowledge
- Advocacy

### ☐ **Endorsements**

### ☐ **Client Base**

### ☐ **Distribution**

### ☐ **Customer Service**

### ☐ **Full Service**



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Questions.....



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Thank you!



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# **Faculty Biographies**

*(In Alphabetical Order)*





## **Hon. Rachel Kretser**

Judge Rachel Kretser was appointed to the Albany City Criminal Court in December 2005, and was elected to that position in November, 2006, becoming the first woman ever to serve on a criminal court bench in the Third Judicial District. In 2016 she was appointed Acting County Court Judge for Domestic Violence matters. Since her retirement from the bench in January 2017, Judge Kretser has been an adjunct professor at Albany Law School.

Before her ascension to the bench, Judge Kretser was an Assistant Attorney General for more than twenty-five years, serving in the Litigation Bureau, as Deputy Bureau Chief of the Legislative Bureau, Bureau Chief of both the Albany Consumer Frauds Bureau and the Legal Education and Staff Development Bureau, and a member of the Attorney General's Executive Staff. Prior to joining the Attorney General's Office, Judge Kretser was associated with the Manhattan law firm of Weil, Gotshal & Manges.

Judge Kretser is active in numerous professional and community organizations. In 2016, she was elected to the Executive Committee of the National Conference of State Trial Judges. She also chairs the OCA Third Judicial District Gender Fairness Committee, and serves on the Center for Women in Government board of directors. She served as Vice President of the N.Y. Chapter of the National Association of Women Judges and President of the N.Y.S. Association of City Court Judges. She is also Past Presiding Member of the N.Y.S. Bar Association's Judicial Section, and co-authored the 2014 NYSBA Judicial Diversity Report. From 2003-2009 she served as Vice President of the N.Y.S. Bar Association, representing the Third Judicial District. Judge Kretser is Past President of the Women's Bar Association of the State of New York (1995-1996) and Past President of the Capital District Women's Bar Association (1991-1992). She is a founding member of the CDWBA Legal Project and the Women's Bar Foundation, and is a Life Fellow of the NYS Bar Foundation. She also serves on the Honorary Board of the Judges and Lawyers Breast Cancer Association. Judge Kretser is a member of the Albany County Bar Association, the Lawyer-Pilots Bar Association and the Women Pilots Association. She is a lifetime member of Hadassah, serves on the steering committee of the Brandeis Baruch Society and is a member of the United Jewish Federation of NENY.

Judge Kretser was appointed to a number of state and federal judicial screening panels and Office of Court Administration committees. In 1993, she was appointed by then Deputy Administrative Judge Joseph J. Traficanti, Jr. to the OCA Committee on City Courts, and was reappointed to that Committee in 2008 and 2013. In 1994, she was appointed to the Federal Bankruptcy Judge Merit Selection Panel by Jon O. Newman, former Chief Judge of the Second Circuit Court of Appeals. Judge Kretser was



appointed by former NYS Court of Appeals Chief Judge Judith S. Kaye to the Third Department Judicial Screening Panel in 1996, and served on that committee for ten years. In 1997, she was appointed to the Third Judicial District Litigation Task Force by former Presiding Justice Anthony Cardona; and was appointed to the Northern District Magistrate Selection Committee in 2001 by Hon. Frederick Scullin, Jr., former Chief U.S. District Judge for the Northern District. In 2011 she was appointed by former Chief Judge Jonathan Lippman to the Judicial Institute on Professionalism in the Law.

Through her public service and volunteer activities, Judge Kretser has worked to provide increased access to legal services for victims of abuse and to expand education and services for breast cancer victims. In recognition of her dedication to the profession and to the community, she has received a number of prestigious awards including the Ruth Shapiro Memorial Award from the NYS Bar Association, the Marilyn Menge Award from the Women=s Bar Association of the State of New York, the Woman of Excellence Award from the Albany-Colonie Chamber of Commerce, the Kate Stoneman Award from Albany Law School, the Distinguished Member Award from the Capital District Women=s Bar Association, the Distinguished Service Award from the Attorney General=s office, and the Anthony Cardona Award from the Albany County Children=s Center.

Judge Kretser is a licensed private pilot.



**Mike Mooney**

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Mike Mooney is the Senior Vice President and Professional Liability Practice Leader for USI Affinity. Mike's responsibility is to drive growth and provide strategic leadership in the area of professional liability. Mike's key focus is the management and development of existing programs, new programs, business development and marketing planning. Mike also focuses on placement, negotiating carrier terms and conditions, and Risk Management in our Large Law Firm Group.

Mike oversees the underwriting, operations, and sales departments that support the professional liability programs. Mike is also responsible for coordinating the program management for USI Affinity's endorsed insurance programs, including The New York State Bar Association, The New Jersey State Bar Association, DC Bar, Boston Bar, and Exponent Philanthropy.

With more than 15 years of industry experience, Mike has worked extensively on many facets of insurance programs for professional service firms. Prior to joining USI Affinity, Mike spent over 8 years with Aon in a variety of management roles. Most notably, Mike was the Assistant Vice President and National Sales Manager for Aon Affinity's Healthcare Division, and also spent time as the National Sales Manager for the AICPA Accountant's Professional Liability Program. Mike was also the product lead on EPLI and Cyber for Large Regional Accounting Firms.

Mike currently sits on the Law Practice Management Services Committee of the DC Bar. Mike is a regular speaker and panelist for the Law Practice Sections of the NYSBA, NJSBA, and NJICLE regarding Insurance and Risk Management topics relative to the legal industry.

Mike holds a Property and Casualty Insurance License in New Jersey and many non-resident Producer Licenses in a variety of other states. He graduated from Rowan University in New Jersey with a Bachelors Degree in Business Management.







**Andrea E. Tomaino, Esq.**  
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Andrea E. Tomaino is Principal Counsel for the Seventh Judicial District Attorney Grievance Committee, an agency of the New York State Supreme Court, Appellate Division, Fourth Department. Previously, she practiced law with the firms of Chamberlain, D'Amanda, Oppenheimer & Greenfield, and Woods Oviatt Gilman LLP, in Rochester, New York, where she concentrated in family law and general civil litigation.

Ms. Tomaino also served as a Confidential Law Clerk to the Appellate Division, Fourth Department, before entering private practice.

Ms. Tomaino lectures regularly at Continuing Legal Education seminars on legal ethics for various County Bar Associations, the Greater Rochester Association for Women Attorneys, and the New York State Bar Association. She earned her bachelor's degree in psychology from the College of the Holy Cross in Worcester, Massachusetts, and her law degree from Washington & Lee University School of Law in Lexington, Virginia.





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