Legal Malpractice

Professional Liability Claims, Litigation Strategies, and Attorney Disciplinary Procedures

Friday, March 10, 2017
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Friday, March 17, 2017
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Friday, March 24, 2017
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Sponsored by the Law Practice Management Committee, the Torts, Insurance & Compensation Law Section and the Trial Lawyers Section of the New York State Bar Association.

This program is offered for educational purposes. 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.

Program Description

Lawsuits against lawyers arising from errors and/or omissions in the performance of legal services are on the rise. It is now an integral part of a law firm's business practice to evaluate its legal risk and malpractice insurance needs. This program is designed to educate attorneys on how to prosecute and/or defend a legal malpractice action. In addition, this program will educate attorneys about their legal malpractice exposures, what they should do in the event that a lawsuit is filed against them, and what they should do when situations arise that indicate that a legal malpractice claim is likely. Both solo practitioners and members of larger firms would benefit from knowing how to assess professional liability risk and manage legal malpractice litigation.

This program will bring you up-to-date with important issues, such as how to:

- Identify potential legal malpractice claims and avoid professional liability risk
- Respond appropriately when you are aware of a situation that could reasonably lead to a legal malpractice claim, or when such a claim is made or threatened against you
- Identify the main elements of a legal malpractice suit
- Prosecute and defend a legal malpractice action through trial
- Understand the Attorney Disciplinary Process
- Interact with professional liability insurance companies

Legal Malpractice 2017 Agenda

8:30 a.m. - 9:00 a.m. **Registration**

9:00 a.m. - 9:10 a.m. **Welcome and Introduction**

9:10 a.m. – 10:00 a.m. **Legal Malpractice Causes of Action, Litigation Strategy and Ethics**

> Theories of Liability
* Negligence
* Breach of Fiduciary Duty
* Statutory Liability
* Violations of Disciplinary Rules and Ethical Considerations
* Conflicts of Interest

> Statute of Limitations
* Claim Accrual
* Continuous Representation Doctrine
* Concealment and Discovery

> Capacity to Sue and Standing
* Privity
* Ripeness and Mootness
* Collateral Estoppel and *Res Judicata*
* Release and Waiver

> The Standard of Care
* Negligence, Breach of Fiduciary Duty
* Statutory Liability/Violations of Disciplinary Rules
* Conflicts of Interest

> The Burden of Proof
* Causation
* Expert Opinions
* Damages

> Trial Tactics and Motion Practice
* Jury Selection
* Evidentiary Issues
* Expert Testimony
* Jury Instructions

(1.0 MCLE Credit in Ethics)

10:00 a.m. - 10:50 a.m. **Sources of Legal Malpractice Claims & Ethical Considerations**

Panel Discussion with Professional Liability Industry Leaders

>Typical Claim Scenarios
* Conflicts of Interest
* Failure to Investigate/Evaluate Claims or Defenses
* Failure to Comply with Statute of Limitations
* Neglect of Prosecution/Trial Errors
* Failure to Protect Secured Interests/Assets/Property

> Claimants and Vicarious Liability– Who Can Sue and Be Sued

* Liability to Clients/Third-Parties
* Liability of Law Firm/Partners for Acts of Another

> Legal Malpractice Claim Defense Strategy

* Pre-Suit Discussions/Settlement
* Discovery/Legal Malpractice Litigation Management
* Use of Experts
* Motion Practice
* Trial Strategies/Tactics

(1.0 MCLE Credit in Ethics)

10:50 a.m. - 11:00 a.m. **Break**

11:00 a.m. – 11:50 a.m. **Identifying and Responding to Professional Liability Claims**

> Claim Notification and Reporting Issues

* What Constitutes a "Claim"
* Responding to and Reporting of Potential Claims
* Representations in the LPL Application
* Notification of Claims

> What is Covered Under the Typical LPL Policy

* The Scope of Professional Services
* Non-Covered Acts, Errors or Omissions
* Damages Excluded from Coverage
* Intentional Acts/Fraud Exclusions
* Typical Exclusions

(1.0 MCLE Credit in Law Practice Management)

11:50 a.m. - 12:45 p.m. **Attorney Discipline and Risk Management for Lawyers**
Discussion of the NYS Attorney Disciplinary Process and Law Firm Risk Management

* Overview of the NYS Disciplinary Process
* New Client/Matter Intake
* Conflict Management and Avoidance
* Engagement Letters/Part 1215 Requirements
* Docket and Calendar Management
* Billing Systems and Controls
* File Closing and Disengagement Letters
* Training and Associate Supervision
* Fee Actions
* Client Management

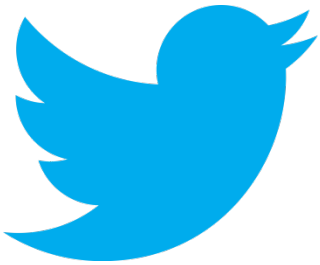
(1.0 MCLE Credit in Ethics)

12:45 p.m. – 1:00 p.m. **Questions and Answers**
1:00 p.m. **Adjournment**

Course Materials for this program are available at the following URL:

www.nysba.org/ LegalMalpractice2017materials

Supplemental Outlines will be posted post-program.



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Sources of Legal Malpractice Claims: Theories of Liability and Defenses

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BASIC THEORIES OF ATTORNEY LIABILITY

A. Negligence-Based Claim

Professional negligence is the most commonly pled cause of action against an attorney in a legal malpractice lawsuit. In order to establish a claim for legal malpractice, a plaintiff must first demonstrate privity, or that the attorney owed plaintiff a duty of care. See Leggiadro, Ltd. v. Winston & Strawn, LLP, 119 A.D.3d 442, 988 N.Y.S.2d 493 (1st Dept. 2014); see also Betz v. Blatt, 116 A.D.3d 813, 984 N.Y.S.2d 378, (2d Dept. 2014) (sustaining the dismissal of a legal malpractice claim on grounds that plaintiff failed to establish the existence of an attorney-client relationship).

While this may appear to be a rather straight-forward point, the issue of the existence and/or nature of privity in the legal malpractice context is often the source of dispute. As set forth in Millennium Import, LLC v Reed Smith LLP, 104 A.D.3d 190, 958 N.Y.S.2d 375, (1st Dept. 2013), "[i]t is well settled that attorneys may be liable for their negligence both to those with whom they have actual privity of contract and to those with whom the relationship is so close as to approach that of privity." See also Bloostein v. Morrison Cohen LLP, 2016 N.Y. Misc. LEXIS 2611, 2016 NY Slip Op 31309 (U). For example, a court may look to "objective factors" when determining whether a client had a reasonable, good faith basis to believe that an attorney-client relationship existed between the parties. See e.g. Sang Lan v. Time Warner, Inc., 2013 U.S. Dist. LEXIS 56816, 2013 WL 1703584 (S.D.N.Y. 2013); See also Case v. Clivilles, 2016 U.S. Dist. LEXIS 147114 (indicating that a fee arrangement, a written contract, and an informal pattern of gratuitous legal services are factors that may demonstrate the existence of an attorney-client relationship).

Moreover, the issue of whether an attorney owes a duty of care does not depend on the execution of a formal retainer agreement or whether the attorney is being paid, or has been paid, for the legal services provided. See Abramowitz v Lefkowicz & Gottfried, LLP, 2012 N.Y. Misc. LEXIS 1786, 2012 NY Slip Op 31011(U) (N.Y. Sup. Ct., 2012) citing Nelson v. Kalathara, 48 A.D.3d 528, 853 N.Y.S.2d 89 (2d Dept. 2008) ("Since an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee, a court must look to the words and actions of the parties to ascertain the existence of such a relationship")

Typically, in the absence of a duty owed by the attorney to the client, there can be no breach of duty and, therefore, no negligence. For example, a party generally may not pursue a legal malpractice claim against an adversary's attorney and, in most jurisdictions, a non-client cannot sue a lawyer for legal malpractice. As discussed in greater detail *infra*, the well-established rule in New York is that absent fraud, collusion, malicious acts or other special circumstances, an attorney will not be liable to third parties who are not in privity, for harm caused by the attorney's professional negligence. See Zinnanti v 513 Woodward Ave. Realty, LLC, 105 A.D.3d 736, 963 N.Y.S.2d 269 (2d Dept. 2013); see also Leff v. Fulbright & Jaworski, LLP, 78 A.D.3d 531, 911 N.Y.S.2d 320 (1st Dept. 2010); Bluntt v. O'Connor, 291 A.D.2d 106,

737 N.Y.S.2d 471 (4d Dept. 2002); Cherry v. Mallery, 280 A.D.2d 860, 721 N.Y.S. 2d 144 (3d. Dept. 2002).

However, in Estate of Schneider v. Finmann, 15 N.Y.3d 306, 907 N.Y.S.2d 119 (2010), the New York Court of Appeals carved out an exception, holding that a personal representative of an estate (i.e., an executor) may maintain a legal malpractice claim against a decedent's attorney for damages resulting from negligent representation in estate tax planning that causes enhanced estate tax liability. Agreeing with the Texas Supreme Court that "the estate essentially stands in the shoes of a decedent, the Court of Appeals held that "privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney." The Court explicitly narrowed its ruling to hold that New York's strict privity rule still applies to bar beneficiaries and other third-parties from commencing estate planning malpractice claims absent a claim of fraud or other intentional conduct, acknowledging that relaxing privity to permit such claims "would produce undesirable results -- uncertainty and limitless liability." See also Ianiro v. Bachman, 131 A.D.3d 925, 16 N.Y.S.3d 85 (2d. Dept. 2015); Russo v. Rozenholc, 130 A.D. 3d 482, 13 N.Y.S. 3d 391 (1st Dept. 2015); Sutch v. Sutch-Lenz, 129 A.D.3d 1137, 11 N.Y.S. 3d 281 (2d. Dept. 2015).

When privity or a relationship sufficiently approaching privity can be established, a legal malpractice plaintiff must then prove the remaining three prongs of a *prima facie* claim for legal malpractice: (1) breach of the standard of care, i.e. that the attorney was negligent in his representation of the plaintiff; (2) proximate causation, i.e. that the attorney's negligence was the "but for" proximate cause of the loss sustained; and (3) damages, i.e. that the plaintiff has suffered actual and ascertainable damages as a result of the malpractice. See Dombrowski v. Bulson, 19 N.Y.3d 347, 948 N.Y.S.2d 208 (2012); see also Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 19 N.Y.S.3d 488 (2015); Kaufman v. Medical Liab. Mut. Ins. Co., 121 A.D.3d 1459, 995 N.Y.S.2d 807 (3d Dept. 2014); Bullock v. Miller, 2016 N.Y. App. Div. LEXIS 8136, 2016 NY Slip Op 08268 (3d Dept. 2016); Schottland v. Brown Harris Stevens Brooklyn, LLC, 147 A.D.3d 995, 27 N.Y.S. 3d 259 (2d. Dept. 2016).

As discussed in greater detail herein, the most common method of defending a negligence-based legal malpractice claim (aside from statutory defenses, such as the statute of limitations), is to attack one or more of the elements of a legal malpractice plaintiff's claim. Similar to any simple negligence claim, a legal malpractice plaintiff's inability to establish one of the critical elements of her/his claim, renders the legal malpractice claim unsustainable.

B. Breach of Fiduciary Duty

Apart from the obligations set forth in the New York Rules of Professional Conduct, the New York Courts have held that an attorney owes separate fiduciary obligations to his client, including confidentiality and undivided loyalty. A breach of either of those duties may give rise to a separate cause of action for breach of fiduciary duty.

"It is well settled that the relationship of client and counsel is one of 'unique fiduciary reliance' and that the relationship imposes on the attorney '[t]he duty to deal fairly, honestly and with undivided loyalty ... including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's.' Thus, any act of disloyalty by counsel will also comprise a breach of the fiduciary duty owed to the client." See Ulico Casualty Company v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1, 21, 865 N.Y.S.2d 14 (1st Dept. 2008) *citing* Matter of Cooperman, 83 N.Y.2d 465, 611 N.Y.S.2d 465 (1994). While "[a] cause of action for legal malpractice must be based on the existence of an attorney-client relationship at the time of the alleged malpractice", "[t]he fiduciary duty of an attorney…extends both to current clients and former clients and thus is broader in scope than a cause of action for legal malpractice." Neuman v. Frank, 82 A.D.3d 1642, 919 N.Y.S.2d 644 (4th Dept. 2011); see Pomerance v. McGrath, 2015 N.Y. App. Div. LEXIS 449, 2015 NY Slip Op 00466 (1st Dept 2015).

Typically, a claim for breach of fiduciary duty is pled concurrently with a plaintiff's claim for legal malpractice. However, a plaintiff should not assert a claim for breach of fiduciary duty with the expectation of a diminished, or less stringent, pleading standard than that of a claim for legal malpractice. On the contrary, the New York courts have held that in the context of attorney liability, claims of malpractice and breach of fiduciary duty are governed by the same standard of recovery. See Estate of Feder v. Winne, Banta, Hetherington, Basralian & Kahn, P.C., 117 A.D.3d 541, 985 N.Y.S.2d 558 (1st Dept. 2014); see also Weil, Gotshal & Manges v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267, 780 N.Y.S.2d 593 (1st Dept. 2004).

The courts have routinely dismissed breach of fiduciary duty claims which were found to be duplicative of a plaintiff's legal malpractice claim when the injury alleged is the same as those arising from the legal malpractice, or when the breach of fiduciary claim arises from the same set of operative facts as the plaintiff's legal malpractice claim. See Tenesaca Delgado v. Bretz & Coven, LLP, 109 A.D.3d 38, 967 N.Y.S.2d 371 (1st Dept. 2013); (affirming that the lower court properly dismissed cause of action for breach of fiduciary duty as duplicative of the legal malpractice cause of action,); see also Facie Libre Assocs., 2015 N.Y. App. Div. LEXIS 1385 (1st Dept. 2015); Biberaj v. Acocella, 120 A.D.3d 1285, 993 N.Y.S.2d 64 (2d Dept. 2014); Cohen v. Kachroo, 115 A.D.3d 512, 981 N.Y.S. 711 (1st Dept. 2014); Antonelli v. Guastamacchia, 131 A.D.3d 1078, 17 N.Y.S.3d 436 (2d. Dept. 2015).

A plaintiff pursuing a breach of fiduciary duty claim against an attorney must prove the same "but for" proximate causation standard, and that the breach of fiduciary duty produced a separate and distinct injury from those resulting from her legal malpractice claim. See Weil Gotshal, *supra* (holding that a "but for" proximate causation standard applies to claims for breach of fiduciary duty); see also Lauder v Goldhamer, 122 A.D.3d 908, 2014 NY Slip Op 08321 (2d Dept. 2014)(additional allegations present to support separate cause of action for breach of fiduciary duty).

C. Judiciary Law § 487

New York Judiciary Law §487 is a punitive statute that allows an injured party to recover treble damages from an attorney who has engaged in willful misconduct. Judiciary Law §487 provides that an attorney who:

> 1) is guilty of any deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party; or
>
> 2) willfully delays his client's suit with a view to his own gain; or willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for, is guilty of a misdemeanor and is liable for treble damages to the aggrieved party.

In cases where an opposing party or attorney is making a claim under Judiciary Law §487, the First Department has held that a party's remedy for a violation of Section 487 stemming from an attorney's actions in a litigation "lies exclusively in that lawsuit itself, ... not a second plenary action." Alliance Network, LLC v. Sidley Austin LLP, 43 Misc. 3d 848, 858, 987 N.Y.S.2d 794, 802 (N.Y. Sup. Ct. 2014) citing Yalkowsky v. Century Apartments Assocs., 215 AD2d 214, 626 N.Y.S.2d 181 (1st Dept. 1995). Nevertheless, under an exception to that rule, a separate lawsuit may be brought where the alleged perjury or fraud in the underlying action was "merely a means to the accomplishment of a larger fraudulent scheme." Specialized Indus. Servs. Corp. v Carter, 68 A.D.3d 750, 890 N.Y.S.2d 90 (2d Dept. 2009). See also Pieroni v. Phillips Lytle LLP, 140 A.D.3d 1707, 34 N.Y.S.3d 55 (4d. Dept. 2016); Little Rest Twelve, Inc. v. Zajic, 137 A.D.3d 540, 27 N.Y.S.3d 142 (1st Dept. 2016).

Judiciary Law § 487 (1) requires that any alleged deceit must occur in the course of a pending judicial proceeding, if the deceitful act was not directed at a court. See Mahler v. Campagna, 60 A.D.3d 1009, 876 N.Y.S.2d 143 (2d Dept. 2009); Barouh v. Law Offs. of Jason L. Abelove, 131 A.D.3d 988, 17 N.Y.S.3d 144 (2d. Dept. 2015) (holding statute only applies to wrongful conduct by an attorney in a pending proceeding in which the plaintiff was a party). Judiciary Law § 487(1) "only applies to wrongful conduct by an attorney in a suit actually pending." Tawil v. Wasser, 21 A.D.3d 948, 801 N.Y.S.2d 619 (2d. Dept. 2005) *quoting* Henry v. Brenner, 271 A.D.2d 647, 706 N.Y.S.2d 465 (2d Dept. 2000). Additionally, Judiciary Law § 487 does not apply to conduct before courts outside of New York, as New York's legislature was primarily concerned with "the integrity of the truth-seeking processes of the New York courts." See Schertenleib v. Traum, 589 F.2d 1156 (2d. Cir. 1978). See also New Amsterdam Capital Partners, LLC v. Krasovsky, 2016 U.S. Dist. LEXIS 24117 (S.D.N.Y. 2016).

The New York Court of Appeals has held that the "deceit or collusion" referenced in the statute need not be successful to fall under Judiciary Law § 487(1), and the recovery of treble damages does not depend upon the court's belief in a material misrepresentation of fact in a complaint – indeed, the mere existence of such misrepresentation is sufficient, as the lawsuit could not have gone forward without said material misrepresentation. See Amalfitano v.

Rosenberg, 12 N.Y.3d 8, 874 N.Y.S.2d 868 (2009). See also Melcher v. Greenberg Traurig LLP, 135 A.D.3d 547, 24 N.Y.S.3d 249 (1st Dept. 2016).

The First Department has held that in order to prevail on a Judiciary Law §487, a plaintiff must plead and prove that the defendant attorney engaged in a "chronic, extreme pattern of legal delinquency." See Dinhofer v. Medical Liability Mut. Ins. Co., 92 A.D.3d 480, 938 N.Y.S.2d 525 (1st Dept. 2012); Wailes v. Tel Networks USA, LLC, 116 A.D.3d 625, 983 N.Y.S.2d 801 (1st Dept. 2014). The Second Department, however, has eliminated the "chronic, extreme pattern of delinquency" predicate for liability, holding, "to the limited extent that decisions of this Court have recognized an alternative predicate for liability under Judiciary Law § 487 based upon an attorney's "chronic, extreme pattern of legal delinquency" … they should not be followed, as the only liability standard recognized in Judiciary Law § 487 is that of an intent to deceive."
Dupree v. Voorhees, 102 A.D.3d 912, 913, 959 N.Y.S.2d 235 (2d. Dept. 2013). See also Schiller v. Bender, Burrows & Rosenthal, LLP, 116 A.D.3d 756, 759, 983 N.Y.S.2d 594 (2d. Dept. 2014) (holding that "the second cause of action, based on allegations that the defendants engaged in an extreme and chronic pattern of legal delinquency, is not legally recognized").

II. COMMON SOURCES OF LEGAL MALPRACTICE CLAIMS

There are many different types of legal malpractice claims and many different sources from which potential claims can arise. Some of the more common sources of legal malpractice claims are listed below:

A. Time Limitations

One of the most common sources of legal malpractice is caused by the failure to comply with certain time limitations or deadlines. This is true regardless of an attorney's practice area.

A large number of legal malpractice claims arise out of the failure of a personal injury plaintiff's counsel to timely file a lawsuit on behalf of his or her client within the applicable statute of limitations. Often the failure to timely file suit is attributable to: a misunderstanding of the applicable statute of limitations; failure to comply with Notice of Claim provisions against public entities; or a simple case of letting the matter "slip through the cracks." The latter often occurs due to communication issues between the attorney and the client, or after a loss of interest in the matter after it is revealed that the injuries claimed (and the attendant recovery) are not as substantial as initially believed.

It can be difficult to overcome liability, or a finding of a breach of the applicable standard of care, when a legal malpractice claim results from the failure to comply with a time limitation. Despite this, even if it is clear that the lawyer's failure to meet the time limitation was an obvious departure of the standard of care, the legal malpractice plaintiff must still prove causation, namely that she would have prevailed in the underlying matter if the error had not occurred- i.e., the proverbial "case within a case." See Section IV, *infra*.

B. Conflicts of Interest

Another primary source of legal malpractice claims stems from conflicts of interest. This is a universal problem, faced by lawyers in every practice area, whether practicing in a large firm capacity or as a solo practitioner. Often the conflict arises when the lawyer acts for both parties in a transaction – i.e. representing both a seller and a purchaser in a real estate matter. In other situations, the conflict arises when the lawyer represents an adverse party in an unrelated matter. Where an attorney takes on a representation where a conflict of interest exists without disclosure and consent (if the representation is permissible in the first instance), there is a breach of the duty of loyalty which may form the basis for disciplinary proceedings, a motion to disqualify the attorney from continued representation, and/or a legal malpractice lawsuit.

Conflicts of interest claims are fact specific, rarely clear cut and require the weighing of competing interests. See Crawford v. Antonacci, 297 A.D.2d 419, 746 N.Y.S.2d 94 (3d Dept. 2002). While a conflicts of interest (even ones that violate the Code of Professional Responsibility) generally will not alone support a cognizable claim for legal malpractice, liability can follow where the client can show that he or she sustained damages as a result of the conflict. See Davis v Davis, 2014 N.Y. Misc. LEXIS 2259 (N.Y. Sup. Ct. 2014); see also Kimm v. Chang, 38 A.D.3d 481, 833 N.Y.S.2d 429 (1st Dept. 2007) *citing* Schafrann v. N.V. Famka, Inc., 14 A.D.3d 363, 787 N.Y.S.2d 315 (1st Dept. 2005). In other words, to establish liability based upon an alleged conflict of interest, a plaintiff must prove a causal relationship between the conflict of interest and the damages sustained. See Boone v. Bender, 74 A.D.3d 1111, 904 N.Y.S.2d 467 (2d Dept. 2010); Esposito v. Noto, 132 A.D.3d 944, 19 N.Y.S.3d 300 (2d. Dept. 2015); see also Amodeo v. Gellert & Quartararo, P.C., 26 A.D. 3d 705, 810 N.Y.S. 2d 246 (3d Dept. 2006); Kaminsky v. Herrick, Feinstein LLP, 59 A.D.3d 1, 13, 870 N.Y.S.2d 1, 9 (1st Dept. 2008).

For example, the First Department reversed the dismissal of a legal malpractice claim, based in part upon an alleged conflict of interest that "compromised the level of advocacy" and contributed to an outcome that was less favorable than would otherwise have been achieved, such that the former client's allegations were sufficient to state a claim that "but for" the conflict of interest, the client could have obtained a more favorable result. See Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267, 780 N.Y.S.2d 593 (1st Dept. 2004).

Conversely, a plaintiff will be unable to maintain an actionable cause of action for legal malpractice based upon an alleged conflict of interest, where a plaintiff's interests are sufficiently aligned with and do not differ from those simultaneously represented by a defendant attorney, as to ensure that their interests were protected. See In re Adoption of Gustavo G., 9 A.D.3d 102, 776 N.Y.S.2d 15 (1st Dept. 2004); see also Allegretti-Freeman v. Baltis, 205 A.D.2d 859, 613 N.Y.S.2d 449 (3d Dept. 1994) (Court held that the risk of a conflicting interest was non-existent and found that a law firm could represent multiple homeowners in a related breach of contract action against a real estate developer given the multiple homeowners' unity of interests). Moreover, conclusory allegations based on speculation are insufficient to sustain a

cause of action for malpractice based upon an alleged conflict of interest. See Stonewell Corp. v. Conestoga Title Ins. Co., 678 F. Supp. 2d 203 (S.D.N.Y. 2010).

It is important to remember that as a fiduciary, attorneys are charged with the "duty to deal fairly, honestly, and with undivided loyalty… honoring the clients' interests over the lawyers." See Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1, 865 N.Y.S.2d 14 (1st Dept. 2008); see also Pillard v. Goodman, 82 A.D.3d 541, 918 N.Y.S.2d 461 (1st Dept. 2011) ("liability can follow where the divided loyalty results in malpractice") . Conflict of interest claims are difficult to defend, as the equities (and sympathies of jurors) balance in favor of the client in situations of non-disclosure. Since an undisclosed conflict of interest is a "ticking time-bomb" waiting to explode, a comprehensive, electronic and searchable database for conflicts clearance should be in place to try to avoid conflicts from arising in the first place. Full disclosure should occur immediately upon even the slightest inclination that a conflict exists.

C. Negligent Advice

It is well established that attorneys are not held to a rule of infallibility and are not liable for honest mistakes of judgment, where the proper course of action is open to reasonable doubt. The Court of Appeals has held the selection of one among several reasonable courses of action does not constitute legal malpractice. See Darby & Darby, P.C. v. VSI Intl., 95 N.Y.2d 308, 716 N.Y.S.2d 378 (2000), citing Rosner v. Paley, 65 N.Y.2d 736, 739 N.E.3d 744, 492 N.Y.S.2d 13 (1985). Under New York law, the "attorney judgment rule" recognizes that an attorney must make a myriad of judgmental decisions and that these judgmental decisions cannot be subjected to 20/20 hindsight and form the basis of a malpractice claim unless the decisions were palpably unreasonable. See Rodriguez v. Fredericks, 213 A.D.2d 176, 623 N.Y.S.2d 241 (1st Dept. 2005) ("retrospective complaints about the outcome of defendant's strategic choices and tactics without demonstrating that [they] were so unreasonable to have manifested professional incompetence is not actionable").

Where the plaintiff is unable to establish that the attorney's alleged unreasonable conduct proximately caused his or her injury, the legal malpractice cause of action must fail. See Chibcha Rest., Inc. v David A. Kaminsky & Assoc., P.C., 102 A.D.3d 544, 958 N.Y.S.2d 135 (1st Dept. 2013); FDIC v. Glattman, 2012 U.S. Dist. LEXIS 110754, 2012 WL 3241294 (E.D.N.Y. 2012); Boone v. Bender, 74 A.D.3d 1111, 904 N.Y.S.2d 467 (2d Dept. 2010); Brown-Jodoin v. Pirrotti, 138 A.D.3d 661, 29 N.Y.S.3d 426 (2d. Dept. 2016). Additionally, where a client has other options available in how to proceed with their defense and that client chooses one path, he cannot thereafter show that his attorney alleged negligence was the proximate cause of any alleged damages as the client, not the attorney, ultimately selected his course in the litigation. Bellinson Law, LLC v. Iannucci, 102 A.D.3d 563, 958 N.Y.S.2d 383 (1st Dept. 2013); see also Fletcher v. Boies, Schiller & Flexner LLP, 44 Misc. 3d 1216(A), 997 N.Y.S.2d 98 (N.Y. Sup. Ct. 2014).

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The best way to minimize liability in situations where a choice is made among several different possible strategies is to engage the client in the decision-making process. This can be done by keeping him or her apprised of the risks and benefits of each situation to permit the client's informed participation in the process. While it may be time consuming, furnishing clients with written correspondence outlining the mutually agreed upon litigation strategy is a good course of practice in reducing the lawyer's exposure.

D. Failure to Investigate/Evaluate

While a legal malpractice action is unlikely to succeed where an attorney erred because an issue of law was unsettled or debatable, an attorney may be liable for a failure to conduct adequate legal research. See Kempf v. Magida, 37 A.D.3d 763, 832 N.Y.S.2d 47 (2d Dept. 2007). An attorney is obligated to know the law relating to the matter for which he is representing a client and it is the attorney's duty, if lacks knowledge of the statutes, to inform himself; like any artisan, by undertaking the work, the attorney represents that he is capable of performing in a skillful manner. See Wo Yee Hing Realty, Corp. v. Stern, 99 A.D.3d 58, 949 N.Y.S.2d 50 (1st Dept. 2012).

While omissions in investigation or evaluation are inevitable, the issue of whether there is liability hinges upon an analysis of whether the omissions were reasonable or whether they were a deviation from the applicable standard of care. If an attorney's conduct deviates from the reasonable standard of care, his failure to investigate or evaluate the sufficiency of the claims or defenses available can serve as the basis for a malpractice action. Whether and to what extent the attorney should have investigated facts can raise an issue to be governed by the standard of care and to be determined by the trier of fact. See Thompson v. Seligman, 53 A.D.3d 1019, 863 N.Y.S.2d 285 (3d Dept. 2008).

E. Failure to Prosecute/Appear

An attorney may be liable for his ignorance of the rules of practice, his failure to comply with conditions precedent to suit, his neglect to prosecute an action, or his failure to conduct adequate legal research. See Dempster v. Liotti, 86 A.D.3d 169, 924 N.Y.S.2d 484 (2d Dept. 2011); Mortenson v. Shea, 62 A.D.3d 414, 880 N.Y.S.2d 229 (1st Dept. 2009). An attorney's failure to prosecute or appear in a matter is a common basis for a legal malpractice action. Lawsuits may be dismissed because of failure to comply with discovery procedures or failure to answer court calendar calls. Where a dismissal is solely attributable to the attorney's neglect, the client whose case was dismissed will have a viable cause of action for legal malpractice. See Conklin v. Owen, 72 A.D.3d 1006, 900 N.Y.S.2d 118 (2d Dept. 2010). To prevail on a cause of action for legal malpractice, however, the client must still demonstrate "but for" proximate causation. See Section IV, *infra*.

F. Waiver of Defenses

The mere failure to plead a specific defense is not necessarily actionable. Under the attorney judgment rule, an attorney's selection of one among several reasonable courses of action

does not constitute malpractice. See Ackerman v. Kesselman, 100 A.D.3d 577, 954 N.Y.S.2d 103 (2d Dept. 2012); Leon Petroleum, LLC v. Carl S. Levine & Assoc., P.C., 122 A.D.3d 686, 996 N.Y.S.2d 139 (2d. Dept. 2014); Hefter v. Citi Habitats, Inc., 81 A.D.3d 459, 916 N.Y.S.2d 87 (1st Dept. 2011); Brookwood Cos., Inc. v. Alston & Bird LLP, 2017 N.Y. App. Div. LEXIS 534 (1st Dept. 2017); M & R Ginsburg, LLC v. Segel, Goldman, Mazzotta & Siegel, P.C., 121 A.D.3d 1354, 995 N.Y.S.2d 325 (3d. Dept. 2014). Furthermore, a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances, and the client gives informed consent. See New York Rules of Professional Conduct, Scope of Representation, §1.2(c); Oneida Indian Nation of N.Y. State v. County of Oneida, 802 F.Supp.2d 395, 2011 U.S. Dist. LEXIS 74698 (N.D.N.Y. 2011), aff'd 503 F.App'x 37, 2012 WL 5860515 (2d Cir. 2012).

However, an attorney's failure to raise or pursue a defense, usually in connection with the preparation of pleadings, is a common basis for a legal malpractice claim. If the client can prove that the omitted defense was meritorious and that the failure to raise the defense proximately caused the client damages, liability will then be imposed. See Breslin Realty Dev. Corp. v. Shaw, 17 Misc.3d 1110(A), 851 N.Y.S.2d 62 (N.Y. Sup. Ct. 2007) (holding "[w]here the malpractice plaintiff was the defendant in the prior proceeding, the test is whether a proper defense would have altered the result of the prior action").

III. LEGAL MALPRACTICE DEFENSES

A. Statute of Limitations

1. Accrual of a Legal Malpractice Claim

Legal malpractice claims must be commenced within three (3) years of the accrual of damages by the plaintiff. See CPLR §214(6). An action to recover damages for legal malpractice accrues on the date that the alleged malpractice is committed. See Farage v. Ehrenberg, 124 A.D.3d 159, 996 N.Y.S.2d 646 (2d Dept. 2014); Krichmar v. Scher, 82 A.D.3d 1164, 919 N.Y.S.2d 378 (2d Dept. 2011). An action alleging legal malpractice is deemed to accrue on the date the malpractice was committed, not when it was discovered. See Landow v. Snow Becker Krauss, P.C., 111 A.D.3d 795, 975 N.Y.S.2d 119 (2d Dept. 2013); Yardeny v. Tanenbaum, 132 A.D.3d 984, 18 N.Y.S.3d 349 (2d. Dept. 2015); Hahn v. Dewey & LeBoeuf Liquidation Trust, 143 A.D.3d 547, 39 N.Y.S.3d 30 (1st Dept. 2016). There is no exception to the majority rule that the accrual date of a legal malpractice claim is calculated from the date of the attorney's alleged malpractice. See Byron Chemical Co v. Groman., 61 A.D.3d 909, 877 N.Y.S.2d 457 (2d Dept. 2009). Legal malpractice actions commenced outside the limitations period provided by the CPLR are subject to dismissal on the pleadings. See Papa v. Fairfield on the Green, 123 A.D.3d 990, 997 N.Y.S.2d 327 (2d Dept. 2014); Singh v. Edelstein, 103 A.D.3d 873, 962 N.Y.S.2d 225 (2d Dept. 2013).

For example, in Shivers v. Siegel, 11 A.D.3d 447, 782 N.Y.S.2d 752 (2d Dept. 2004), the plaintiff argued that her cause of action for legal malpractice did not accrue, and the statute of

limitations did not begin to run, until her right of relief was established by reason of having sustained actual damages. Specifically, the plaintiff maintained that she could not have asserted a legal malpractice claim, as actual damages could not be ascertained until there was a resolution in favor of the last remaining defendant sued in the underlying action. The Second Department found that the plaintiff's position was in contravention to New York law, holding that the legal malpractice claim accrued at the latest on the date when the plaintiff discharged the defendant as her counsel, which was over four (4) years prior to the commencement of the malpractice action. Id. citing Daniels v. Lebit, 299 A.D.2d 310, 749 N.Y.S.2d 149 (2d Dept. 2002).

The Second Department's reasoning in *Shivers* has been repeatedly reiterated by other courts in subsequent decisions. See e.g., Perkins v. Am. Transit Ins. Co., 2013 U.S. Dist. LEXIS 6703, 2013 WL 174426 (S.D.N.Y. 2013) ("The Court notes that 'accrual is not delayed until the damages develop or become quantifiable or certain.'"); see generally McCormick v. Favreau, 82 A.D.3d 1537, 919 N.Y.S.2d 572 (3d Dept. 2011).

2. The "Continuous Representation" Doctrine

Although a cause of action for legal malpractice accrues on the date of the act of the alleged malpractice, the statute of limitations in a legal malpractice action may be "tolled" in circumstances when there is continuous representation of the client for the same matter by the attorney. See Deep v. Boies, 121 A.D.3d 1316, 995 N.Y.S.2d 298 (3d Dept. 2014); Louzoun v. Kroll Moss & Kroll, LLP, 113 A.D.3d 600, 979 N.Y.S.2d 94 (2d Dept. 2014); Tantleff v. Kestenbaum & Mark, 131 A.D.3d 955, 15 N.Y.S.3d 840 (2d. Dept. 2015). Pursuant to the continuous representation doctrine, a legal malpractice action is tolled until the attorney's on-going representation of the plaintiff in connection with the particular matter in question is completed. The parties must have a 'mutual understanding' that further representation is needed with respect to the matter underlying the malpractice claim. See Debevoise & Plimpton LLP v. Candlewood Timber Group LLC, 102 A.D.3d 571, 959 N.Y.S.2d 43 (1st Dept. 2013); Krichmar v. Scher, 82 A.D.3d 1164, 919 N.Y.S.2d 378 (2d Dept. 2011).

The continuous representation doctrine is not applicable when the client no longer manifests a desire to have the attorney complete the services for which the attorney was retained, formal termination is not required. See Debevoise & Plimpton LLP, 102 A.D.3d at 572. To invoke the tolling of the statute of limitations pursuant to the "continuous representation" doctrine, the plaintiff is required to establish, by sufficient evidentiary facts, a clear indicia of an ongoing, continuous, developing and dependent relationship between her and the attorney. Id; see also Farage v. Ehrenberg, *supra*; Aseel v. Jonathan E. Kroll & Assoc., PLLC, 106 A.D.3d 1037, 966 N.Y.S.2d 202 (2d Dept. 2013); Quinn v. McCabe, Collins, McGeough & Fowler, LLP, 138 A.D.3d 1085, 30 N.Y.S.3d 288 (2d. Dept. 2016).

The continuous representation doctrine hinges on a relationship of trust and confidence between the attorney and the client, and ceases to apply when the attorney-client relationship ends for any reason. See Waggoner v. Caruso, 68 A.D.3d 1, 886 N.Y.S.2d 368 (1st Dept. 2009). Where a client explicitly terminates his or her attorney's legal services and subsequently files a

legal malpractice action, the statute of limitations will only be extended until the date the attorney-client relationship was terminated. See Perkins v. American Transit Ins. Co., *supra*.

It is well-established that the attorney-client relationship ends when a plaintiff retains new counsel. See Perkins, *supra*; Rupolo v. Fish, 87 A.D.3d 684, 928 N.Y.S.2d 596 (2d Dept. 2011). A client's retention of other counsel breaks the ongoing, continuous, developing and dependent relationship between the client and his or her attorney thus breaking the chain of continuous representation. See Amusement Industry, Inc. v. Buchanan Ingersoll & Rooney, P.C., 2013 U.S. Dist. LEXIS 8569, 2013 WL 264684 (S.D.N.Y. 2013).

Consultations between a client and a new attorney regarding pending litigation cannot be equated with ongoing representation. See Rupolo v. Fish, *supra*, citing Tal-Spons Corp. v, Nurnberg, 213 A.D.2d 395, 623 N.Y.S.2d 604 (2d Dept. 1995). New York courts have routinely held that the continuation of a general professional relationship with former counsel, not concerning the specific matter from which the client's purported legal malpractice claim arose, is insufficient to extend the limitations period. See Nuzum v. Field, 106 A.D.3d 541, 965 N.Y.S.2d 113 (1st Dept. 2013); Hadda v. Lissner & Lissner LLP, 99 A.D.3d 476, 952 N.Y.S.2d 126 (1st Dept. 2012); Berger & Assoc. Attorneys, P.C. v. Reich, Reich & Reich, P.C., 42 N.Y.S.3d 16 (2d. Dept. 2016); see also Tantleff v. Kestenbaum & Mark, 131 A.D.3d 955, 15 N.Y.S.3d 840 (2d. Dept. 2015); Dischiavi v. Calli, 125 A.D.3d 1435, 3 N.Y.S.3d 491 (4d. Dept. 2015); Deep, *supra*, 121 A.D.3d at 1318. The continuous representation doctrine tolls the running of the statute of limitations only if the defendant attorney continues to advise the client in connection with the particular transaction which is the subject of the action and not merely during the continuation of a general professional relationship. See Pace v. Raisman & Associates, 95 A.D.3d 1185, 945 N.Y.S.2d 118 (2d Dept. 2012).

In Offshore Express v. Milbank, Tweed, Hadley & McCloy, LLP, 291 Fed.Appx. 358, 2008 WL 3992323 (2d Cir. 2008), the Second Circuit upheld the lower court's dismissal of a legal malpractice action as untimely based on upon a statute of limitations defense. The plaintiff in Offshore alleged that the defendant law firm committed malpractice in its negotiation of a restructuring of a corporation into two successor corporations. Seven (7) months later, the defendant represented the plaintiff in an arbitration over the tax obligations of the two successor corporations as a result of that division.

In affirming the lower court's decision to dismiss the legal malpractice claim, the Second Circuit reasoned that the "continuous representation" doctrine is intended to protect litigants from jeopardizing his or her pending case or relationship with the attorney handling that case during the period that the attorney continues to represent that person. Id. at 359; see also Waggoner, 68 A.D.3d at 7, supra. Based upon this reasoning, the Court found that by the time the transaction was consummated and the restructuring of the corporation had been completed there was no "pending case" to "jeopardize." Thus, at the time the defendant law firm was subsequently retained to represent plaintiff with regard to the tax dispute, there was nothing to indicate a "mutual understanding" of the need for further litigation representation.

In Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoebel & Conway, LLP, 52 A.D.3d 566, 860 N.Y.S.2d 182 (2d Dept. 2008), the defendant law firm represented the plaintiff in connection with a real estate transaction in 1996. Following the 1996 transaction, the defendant law firm represented the plaintiff in several other matters involving the subject real estate as late as 2003. In 2005, the plaintiff commenced a legal malpractice action, arguing that the defendant was negligent in its handling of the 1996 real estate transaction. The Second Department held that the 2005 action was untimely, and that the continuous representation did not toll the applicable statute of limitations. See Hasty Hills, 52 A.D.3d at 567-68. Specifically, the Court held that the defendant's representations of the plaintiff subsequent to the 1996 closing were "unrelated to the specific subject matter that gave rise to the alleged malpractice" and was "insufficient to toll the statute of limitations." See id. In other words, the Court held that the defendant's representation of the plaintiff in the 1996 transaction amounted to a complete representation that was separate and apart from the subsequent representations, even though those subsequent representations involved the same property that was the subject of the 1996 transaction. See id.

Similarly, in Nuzum v. Field, 106 A.D.3d 541, 965 N.Y.S.2d 113 (1st Dept. 2013), the plaintiff claimed that the defendant attorney committed malpractice in connection with alleged defective promissory notes prepared in 1999. Although the defendant represented the plaintiff in connection with a matter related to the proceeds of those promissory notes in 2004, the First Department held that plaintiff's 2007 lawsuit was untimely, and that the subsequent representation "was insufficiently related to the matter sued upon to bring it within the continuous representation." See Nuzum, 106 A.D.3d at 541.

B. Redundant Pleadings

Where a plaintiff brings separate causes of action, but the allegations supporting those causes of action are identical to those supporting the legal malpractice cause of action, the other causes of action will be found to be redundant of the malpractice claim and subject to dismissal. Oftentimes, in addition to alleging a cause of action for legal malpractice, a plaintiff will also allege claims sounding in breach of contract, breach of fiduciary duty, fraud, intentional misrepresentation, and/or tortious interference. Where the defendant is able to establish that the claims are based on the same set of operative facts as the legal malpractice claim, they will be dismissed. See Ullmann-Schneider v. Lacher & Lovell-Taylor, P.C., 121 A.D.3d 415, 944 N.Y.S.2d 72 (1st Dept. 2014) (dismissing claims for breach of implied covenant of good faith and fair dealing, breach of fiduciary duty and unjust enrichment on the basis that they are duplicative of the legal malpractice claim); Antonelli v Guastamacchia, 131 A.D.3d 1078, 17 N.Y.S.3d 436 (2d. Dept. 2015) (dismissing allegations of breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, and aiding and abetting fraud were dismissed as duplicative of claim alleging legal malpractice); Bibeaj v. Acocella, 120 A.D.3d 1285, 993 N.Y.S.2d 64 (2d Dept. 2014) (dismissing causes of action for fraud and breach of contract as duplicative of the legal malpractice claim because they did not allege distinct damages); Weksler

v. Kane Kessler, P.C., 63 A.D.3d 529, 881 N.Y.S.2d 79 (1st Dept. 2009) (dismissing negligent misrepresentation and tortious interference claims as duplicative).

In considering whether claims are redundant of the legal malpractice claim, the Courts analyze whether the plaintiff has alleged distinct damages flowing from the other causes of action. For example, in Postiglione v. Castro, 119 A.D.3d 920, 990 N.Y.S.2d 257 (2d Dept. 2014), the Appellate Division reversed the trial court's decision dismissing plaintiff's causes of action for fraud and breach of contract. The Appellate Division found that the plaintiff sufficiently alleged distinct damages arising from the defendant's alleged fraud and breach of contract. See also Vermont Mut. Ins. Co. v. McCabe & Mack, LLP, 105A.D.3d 837, 964 N.Y.S.2d 160 (2d Dept. 2013) (holding that where tortious conduct independent of the alleged legal malpractice is alleged, a motion to dismiss a cause of action as duplicative is properly denied).

A plaintiff may avoid asserting a legal malpractice claim in an effort to take advantage of the longer statute of limitations associated with breach of contract and/or breach of fiduciary duty claims; however, the Courts generally treat the "disguised" cause of action as a claim for legal malpractice and apply the applicable legal malpractice law. See Walter v. Castrataro, 94 A.D.3d 872, 942 N.Y.S.2d 151 (2d Dept. 2012) (the complaint is "nothing more than a rephrasing of the claim of malpractice in the language of breach of contract"); see also Kinberg v. Garr, 60 A.D.3d 597, 874 N.Y.S.2d 907 (1st Dept. 2009) (affirming dismissal of plaintiff's breach of contract and fraud claims which were essentially legal malpractice claims barred by the three year statute of limitations); Harris v. Kahn, Hoffman, Nonenmacher, & Hochman, LLP, 59 A.D.3d 390, 871 N.Y.S.2d 919 (2d Dept. 2009); Tsafatinos v Lee David Auerbach, P.C., 80 A.D.3d 749, 915 N.Y.S.2d 500 (2d. Dept. 2011); Matter of HSBC Bank U.S.A. (Littleton), 70 A.D.3d 1324, 895 N.Y.S.2d 615 (4d. Dept. 2010) ("the breach of fiduciary claim against respondent law firm was, in essence, a claim for legal malpractice and thus was barred by the three-year statute of limitations").

C. Res Judicata and Collateral Estoppel

Legal malpractice claims are barred by the doctrines of collateral estoppel and res judicata where a Court Order has determined the value of legal services in the underlying action, necessarily deciding that there was no legal malpractice.

As the Court noted in Cie Sharp v. Krishman Chittur, 2014 N.Y. Misc. LEXIS 2289, 1 (N.Y. Sup. Ct. 2014), "it has long been the law in New York that a judicial determination fixing the value of a professional's services necessarily decides there was no malpractice." In Cie Sharp, the Court held that a plaintiff's claim for legal malpractice is barred by the attorney's successful prosecution of a lien proceeding to recover fees for the same legal services that plaintiff alleged were negligently performed.

Likewise in WIN Radio Broadcasting Corp. v Fletcher, Heald & Hildreth, PLC, 94 A.D.3d 985, 942 N.Y.S.2d 211 (2d Dept. 2012), the defendant law firm previously commenced an action against the plaintiff to recover unpaid legal fees incurred in connection with its

representation. That action concluded with a judgment in favor of the defendant directing the plaintiff to pay the defendant for outstanding legal fees. Thereafter, when plaintiff sought to bring a separate action against the law firm, the Court dismissed those claims pursuant to the doctrines of collateral estoppel and res judicata. Id.; see also Breslin Realty Development Corp. v. Shaw, 72 A.D.3d 258, 893 N.Y.S.2d 95 (2d Dept. 2010) ("Under New York State law, a determination fixing a defendants' fees in a prior action brought by the defendant against the plaintiff for fees for the same legal services which the plaintiff alleges were negligently performed, necessarily determines that there was no legal malpractice"); Liberty Associates v. Etkin, 69 A.D.3d 681, 893 N.Y.S.2d 564 (2d Dept. 2010) (the legal malpractice action was barred by the defendant attorney's successful prosecution of a prior action to recover fees for the same legal services that the plaintiff alleges were negligently performed);

The rationale behind this line of cases is that an attorney may not collect a legal fee in the face of legal malpractice; thus, if a court awards a legal fee, it is deemed to have determined that there was no legal malpractice. This principle applies to arbitration awards as well. See Wallenstein v. Cohen, 45 A.D.3d 674, 845 N.Y.S.2d 428 (2d Dept. 2007) (the Court found the determination fixing the value of the defendants' services by an arbitrator necessarily determined there was no malpractice.).

Moreover, Courts have also applied doctrines of res judicata and collateral estoppel to bar legal malpractice actions arising from alleged negligence in an underlying arbitration. More specifically, where a client has challenged a settlement based on allegations of malpractice against his attorney. For example, in Speken v. Moore, 6 A.D.3d 198, 773 N.Y.S.2d 880 (1st Dept. 2004), the plaintiff had twice unsuccessfully sought to have an arbitration award vacated on the basis that his attorney had committed malpractice during the arbitration proceeding. After the failed attempts to vacate the arbitration award, plaintiff then brought a legal malpractice claim against his attorney. The lower court dismissed the legal malpractice complaint on the grounds that the plaintiff's two failed attempts to vacate a settlement had a res judicata effect in the subsequent legal malpractice action, as the plaintiff raised the same arguments in attempting to vacate the settlement agreement that were subsequently raised against the legal malpractice defendants in the legal malpractice action. This decision was unanimously affirmed by the Appellate Division, First Department. Id.

D. Privity/Third Party Exposure

The foundation of any legal malpractice claim in New York is the attorney-client relationship, as New York adheres to a strict privity rule whereby legal malpractice plaintiffs must establish they were in contractual privity with defendant attorneys. To that end, absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties not in privity or near-privity for harm caused by professional negligence. See Betz v. Blatt, 116 A.D.3d 813, 984 N.Y.S.2d 378 (2d Dept. 2014); Cascardo v. Stacchini, 100 A.D.3d 675, 954 N.Y.S.2d 177 (2d Dept. 2012); Sutch v. Sutch-Lenz, 129 A.D.3d 1137, 11 N.Y.S.3d 281 (3d. Dept. 2015). The absence of an attorney-client relationship is fatal to a claim for legal

malpractice. See Keness v Feldman, Kramer & Monaco, P.C., 105 A.D.3d 812, 963 N.Y.S.2d 313 (2d Dept. 2013).

However, the Court of Appeals has carved out an exception to the strict privity rule in estate planning malpractice lawsuits commenced by the estate's personal representative (though not beneficiaries). See Estate of Schneider v. Finmann, 15 N.Y.3d 306, 907 N.Y.S.2d 119 (2010). The Court reasoned that the estate essentially stands in the shoes of a decedent and to find otherwise would leave the estate with no recourse against negligent estate planning by the attorney. See also Ianiro v Bachman, 131 A.D.3d 925, 16 N.Y.S.3d 85 (2d. Dept. 2015); Russo v Rozenholc, 130 A.D.3d 492, 13 N.Y.S.3d 391 (1st Dept. 2015); Sutch, 129 A.D.3d at 1139.

1. The Attorney-Client Relationship

Usually, an attorney-client relationship is formed where there is a mutual understanding that the attorney will undertake to render legal services on the client's behalf. In the absence of this mutual understanding between attorney and client, no attorney relationship is formed, as an attorney owes no duty of care to a non-client.

Although the attorney-client relationship is generally memorialized in a formal retainer agreement, there are situations where no such formal retainer exists. "A claim for attorney malpractice arises out of the contractual relationship between the parties, whether documented by a retainer agreement or not." Yuko Ito v. Suzuki**,** 57 A.D.3d 205, 869 N.Y.S.2d 28 (1st Dept. 2008), citing Moran v. Hurst, 32 A.D. 3d 909, 911, 822 N.Y.S.2d 564 (2d Dept. 2006). "While the payment of a fee or existence of a formal retainer agreement may be indicators of an attorney-client relationship, such factors are not dispositive. An attorney-client relationship may instead arise by words and actions of the parties; however, one party's unilateral belief, standing alone, does not confer upon him or her the status of a client." Droz v. Karl, 736 F.Supp.2d 520 (N.D.N.Y. 2010) citing Moran 822 N.Y.S.2d 564; see Nelson v. Roth, 69 A.D.3d 912, 893 N.Y.S.2d 605 (2d Dept. 2010); Lombardi v Lombardi, 127 A.D.3d 1038, 7 N.Y.S.3d 447 (2d. Dept. 2015); Cormier v. Gebo, 2014 U.S. Dist. LEXIS 134147, 2014 WL 4771897 (N.D.N.Y. 2014).

Additionally, it is important to note that when an attorney agrees to represent a corporate entity, the scope of the representation is limited to the representation of the company and does not extend to individuals within that company absent a special agreement for same. In Bayit Care Corp. v Einbinder, 41 Misc. 3d 1202(A), 977 N.Y.S.2d 665 (N.Y. Sup. Ct. 2013), the Court held:

> It is well settled that a corporation's attorney represents the corporate entity, not its shareholders or employees. As the First Department has observed, [a] lawyer's representation of a business entity does not render the law firm counsel to an individual partner, officer, director or shareholder unless the law firm assumed an affirmative duty to represent that individual. That is, [u]nless the parties have expressly agreed otherwise in the circumstances of a

> particular matter, a lawyer for a corporation represents the corporation, not its employees. Id. (internal citations omitted).

2. Pleading Fraud to Avoid the Privity Rule

Non-clients who seek to bring suit against an attorney can avoid the strict privity rule by pleading a fraud-based cause of action. However, like all fraud claims, each element must be pled with sufficient particularity pursuant to CPLR 3016(b). Notably, a plaintiff cannot reasonably rely on the legal opinions or conclusion of another party's attorney. See Cascardo v. Stacchini, 100 A.D.3d 675, 954 N.Y.S.2d 177 (2d Dept. 2012) (in action against the attorneys who represented her adversaries in unrelated litigation, litigant could not properly plead reasonable reliance on the representations of another party's counsel); see also Pecile v. Titan Capital Group, LLC, 96 A.D.3d 543, 947 N.Y.S.2d 66 (1st Dept. 2012) (former employee failed to sufficiently allege fraud, collusion, malice or bad faith on part of employer's attorney, sufficient to overcome attorney's immunity for advice given employer); Fortress Credit Corp. v. Dechert LLP, 89 A.D.3d 615, 934 N.Y.S.2d 119 (1st Dept. 2011) (lender's allegation that law firm which ostensibly represented purported borrower acted recklessly in failing to confirm that purported borrower was, in fact, involved in loan transaction did not sufficiently allege the scienter required to state fraud claim against law firm).

E. The "Sophisticated Client" Doctrine

The sophisticated client doctrine is a versatile doctrine, which, depending on the factual context in which it is applied, can be a complete defense to a legal malpractice claim or further support for affirmative defenses, *i.e.*, comparative fault and mitigation of damages. A "sophisticated client" possesses a higher level of expertise than an average client, especially when a client is a skilled attorney, fully advised of all legal issues, and decides for his or herself what course of action to take. The premise of the "sophisticated client" doctrine is that a defendant-attorney ought not to be held liable where a "sophisticated client" independently determines his or her own strategy for the handling of a legal matter by weighing legal considerations against his or her own objectives and constraints.

1. The "Sophisticated Client" Doctrine As a Complete Defense to a Legal Malpractice Claim

Pursuant to the "sophisticated client" defense, the imposition of a strategic decision on an attorney by the client may sever the "but for" chain of causation in a legal malpractice claim. See Town of North Hempstead v. Winston & Strawn LLP, 28 A.D.3d 746, 814 N.Y.S. 2d 237 (2d Dept. 2006) (a legal malpractice plaintiff cannot prove proximate causation when a

sophisticated client imposes a strategic decision on the defendant attorney); see also Stolmeier v. Fields, 280 A.D.2d 342, 343, 721 N.Y.S.2d 313 (1st Dept. 2001) (no proximate causation where sophisticated client was deemed to have been aware of the licensing requirement of which it allegedly was not advised); Merz v. Seaman, 265 A.D.2d 385, 389, 697 N.Y.S.2d 290 (2d Dept. 1999) (plaintiff could not establish proximate causation because as a sophisticated client, plaintiff understood the risks of which the lawyer had allegedly not advised him); DiPlacidi v. Walsh, 243 A.D.2d 335, 335, 664 N.Y.S.2d 537 (1st Dept. 1997) (documentary evidence demonstrated that the failure to close on a proposed sale was due solely to plaintiffs' own actions, and that there was otherwise no causal relationship between plaintiffs' loss and the defendants' malpractice); : Jeremias v Allen, 2017 N.Y. App. Div. LEXIS 376 (1st Dept. 2017) (the sole cause of the damages was shown to result from the sophisticated plaintiffs-investors' informed choice to take a calculated risk).

For example, in Town of North Hempstead, *supra*, the Second Department held that "where a sophisticated client imposes a strategic decision on counsel, the client's actions absolve the attorney from liability for malpractice." Id. at 748. There, the defendant law firm represented the Town of North Hempstead (the "Town") in connection with a breach of contract claim brought against it. The defendant attorney elected not to challenge the validity of the subject contract based in part on his concern that doing so would backfire against the Town in the form of an equitable claim. However, this was a strategic decision that the Town, as the client, imposed on its counsel, the defendant law firm. When the Town subsequently commenced an action against the defendant law firm alleging legal malpractice for failing to challenge the validity of the contract, the court ruled that in light of the Town's imposition of the strategic decision not to challenge the validity of the contract, the Town could not establish that it would have prevailed "but for" the law firm's representations. Id. at 748-49.

The "sophisticated client" doctrine not only applies to clients who are attorneys but extends to other professions as well. In Stolmeier, *supra*, the clients, home improvement contractors, alleged that the defendant attorneys failed to advise of the need for a home improvement contracting license prior to entering into a home improvement contract. Stolmeier, 280 A.D.2d at 342. In granting summary judgment, the court determined that "Stolmeier was plainly a sophisticated home improvement professional at all relevant times, with many years of experience in the building trades in New York City and elsewhere, who had served as general contractor on other substantial home improvement jobs." Id. Additionally, the plaintiff had obtained licenses in other jurisdictions where he previously worked as a home improvement contractor. Accordingly, based on Stolmeier's knowledge prior to entering into the contract that his company was required to hold a home improvement contractor's license, any alleged failure by the defendants to advise him of the need for the license could not be, as a matter of law, the proximate cause of the alleged losses. Id. at 343.

In addition to overcoming the proximate causation element of a legal malpractice claim, courts have also found that an attorney's standard of care is lower when dealing with a sophisticated client. In 4777 Food Serv. Corp. v. DeMartin & Rizzo, P.C., 2013 N.Y. Misc.

LEXIS 5520 (Sup. Ct., Suffolk County, 2013), plaintiff alleged, in part, that the defendant law firm failed to properly advise the plaintiff of the amount of rent payable in a lease agreement. In granting a defense verdict after a bench trial, the court found that not only was plaintiff, who was the president of an IHOP restaurant franchise, "a sophisticated and experienced salesman, skillful and accomplished" but the court surmised that the plaintiff likely took the lead in lease negotiations while the less-experienced attorney simply memorialized the agreement. Id. at *22-23. Because of this client's experience and involvement in the negotiations, the defendant law firm was not required to provide advice concerning the amount of rent payable under the lease.

2. The "Sophisticated Client" Doctrine in Support of Affirmative Defenses

The "sophisticated client" doctrine may serve as a mitigating factor in the calculation of damages or to demonstrate plaintiff's comparative negligence in a legal malpractice action rather than a complete disposition of claims against a defendant attorney. In SF Holdings Group, Inc. v. Kramer Levin Naftalis & Frankel LLP, 56 A.D.3d 281, 866 N.Y.S.2d 674 (1st Dept. 2008), the plaintiff alleged that the defendants failed to classify certain assets of the plaintiff as "working capital" in a merger agreement. The defendant attorneys raised the "sophisticated client" defense and argued that the "working capital" was clearly defined in the merger agreement, which plaintiff, a sophisticated businessman, reviewed and executed with full knowledge of its terms. The Appellate Division acknowledged the sophistication of the client, but refused to adopt the "sophisticated client" doctrine as a complete defense finding that "any negligence on the part of the client in reviewing the agreement is merely a factor to be assessed in mitigation of damages." Id. at 282, *quoting* Mandel, Resnik & Kaiser, P.C. v. E.I. Electronics, Inc., 41 AD3d 386, 839 NYS2d 68 (1st Dept. 2007)

Similarly, in Mandel, Resnik & Kaiser, the court reinstated legal malpractice counterclaims dismissed by the lower court even though the court agreed that E.I. Electronics was a sophisticated client. The First Department found that "[a]ny negligence on the part of defendant in reviewing the agreement is merely a factor to be assessed in mitigation of damages." Id. at 388. See also Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300, 727 N.Y.S.2d 688 (2001) ("[t]he culpable conduct of a plaintiff client in a legal malpractice action may be pleaded by the defendant attorney, by way of affirmative defense, as a mitigating factor in the attorney's negligence"); 180 E. 88th St. Apt. Corp. v Law Off. of Robert Jay Gumenick, P.C., 84 A.D.3d 582, 923 N.Y.S.2d 474 (1st Dept. 2011);

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3. Application of the "Sophisticated Client" Doctrine in Dispositive Motions

New York courts continue to apply the "sophisticated client" doctrine in granting dispositive motions. See, e.g., Stolmeier; Town of North Hempstead, *supra*. For example, in SS Marks LLC v Morrison Cohen LLP, 2014 N.Y. Misc. LEXIS 1835 (N.Y. Sup. Ct. 2014), plaintiffs brought a legal malpractice action alleging, in part, that the defendant law firm failed to advise them of the effect of a subordination clause in a lease agreement. In granting summary judgment, the court found that "[i]t beggars belief that Marks, a sophisticated long-time real estate mortgage broker, would not know the effect of a subordination clause…." Id. at *13.

Similarly, in Goldman v. Akin, Gump, Strauss, Hauer & Feld, LLP, 11 Misc.3d 1077(A), 816 N.Y.S.2d 695 (Sup. Ct., New York County 2006) the plaintiffs were general partners of seven limited partnerships who retained the defendant attorneys to assist them negotiating the sale of facilities without a release from the other limited partners. Subsequently, the dissenting partners commenced arbitration against plaintiffs, which resulted in a series of awards against plaintiffs. The plaintiffs then commenced an action against their attorneys for legal malpractice, contending that the attorneys negligently advised them concerning the sale. While the case was dismissed based on statute of limitations grounds, the court also noted that the action would have otherwise been dismissed on the basis of the "sophisticated client" defense because plaintiffs were "obviously sophisticated businessmen who knew the risks they were taking." Id.

Practitioners should also be aware that the defense may not be applicable where the defendant attorney has provided erroneous advice which has been relied upon by the clients. See Board of Mgrs. of Bridge Tower Place Condominium v. Starr Assoc., LLP, 38 Misc. 3d 1203(A) (Ssup. Ct., New York County 2012), aff'd 111 A.D.3d 526, 527 (1st Dept. 2013) (granting summary judgment on a sophisticated client affirmative defense even though the client was an attorney; finding that the client relied on the defendant law firm's advice rather than imposing his own decisions). The doctrine is especially unavailable in cases where the client who was provided erroneous advice is not an attorney. In Kram Knarf, LLC v. Djonovic, 74 A.D.3d 628, 903 N.Y.S.2d 386 (1st Dept. 2010), plaintiffs alleged that the defendant attorneys failed to disclose certain liabilities contained in a contract to purchase real property. In response, the defendant attorneys moved to dismiss claiming that all of the necessary information was contained in the transaction documents, which the plaintiffs, as sophisticated clients, were presumed to have read and understood. The court, however, refused to apply the "sophisticated client" doctrine holding that the defendants were required to advise plaintiffs correctly regarding the contract, regardless of plaintiffs' sophistication in the real estate industry. Id. at 628-629. See also Comer v. Krolick, 2015 N.Y. Misc. LEXIS 4395 (N.Y. Sup. Ct. 2015) (the principles that a party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a document on the ground that he or she did not read it or know its contents, will not defeat a claim for malpractice based on an attorney's failure to accurately explain the terms of a contract to his client).

IV. PLEADING & ESTABLISHING A LEGAL MALPRACTICE ACTION

A. Breach of the Standard of Care

Once the plaintiff has established that he or she was owed a duty of care by the attorney, the plaintiff must plead that the attorney *breached* the standard of care. The test is whether the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession. See Valley Ventures, LLC v. Joseph J. Haspel, PLLC, 102 A.D.3d 955, 958 N.Y.S.2d 604 (2d Dept. 2013).

While an attorney has an affirmative duty to act with ordinary and reasonable skill and knowledge commonly possessed by members of his profession, he or she is not held to a rule of infallibility, and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt. See DaSilva v. Suozzi, English, Cianciulli & Peirez, P.C., 233 A.D.2d 172, 649 N.Y.S.2d 680 (1st Dept. 1996). Nor are attorneys liable in negligence for errors of judgment or the exercise of appropriate judgment that leads to an unsuccessful result. See Rubinberg v. Walker, 252 A.D.2d 466, 676 N.Y.S.2d 149 (1st Dept. 1998). Thus, the Court of Appeals has held that "selection of one among several reasonable courses of action does not constitute [legal] malpractice." See Rosner v. Paley, 65 N.Y.2d 736, 738, 492 N.Y.S.2d 13 (1985) (holding that a selection of one among several reasonable courses of action does not constitute malpractice); see also Orchard Motorcycle Distribs., Inc. v. Morrison Cohen Singer & Weinstein, LLP, 49 A.D.3d 292, 853 N.Y.S.2d 320 (1st Dept. 2008); Rosner : Brookwood Cos., Inc. v. Alston & Bird LLP, 2017 N.Y. App. Div. LEXIS 534 (1st Dept. 2017); Leon Petroleum, LLC v. Carl S. Levine & Assoc., P.C., 122 A.D.3d 686, 996 N.Y.S.2d 139 (2d. Dept. 2014); Bixby v. Somerville, 62 A.D.3d 1137, 880 N.Y.S.2d 205 (3d. Dept. 2009). Indeed, findings of fact are unnecessary where the court concludes that an attorney's actions were reasonable as a matter of law. See Bernstein v. Oppenheim & Co., P.C., 160 A.D.2d 428, 554 N.Y.S.2d 487 (1st Dept. 1990); see also Siracusa v. Sager, 105 A.D.3d 937, 963 N.Y.S.2d 364 (2d. Dept. 2015).

For example, decisions made at trial do not necessarily give rise to a cause of action for legal malpractice. See Bassim v. Halliday, 234 A.D.2d 628, 650 N.Y.S.2d 467 (3d Dept. 1996); see also Hatfield v. Herz, 109 F.Supp.2d 174, 2000 U.S. Dist. LEXIS 11529 (S.D.N.Y. 2000) (holding that an attorney's failure to call a particular witness at trial is insufficient as a matter of law to state a claim for legal malpractice); Perkins v. Am. Transit Ins. Co., 2013 U.S. Dist. LEXIS 6703 (S.D.N.Y. 2013) (courts have routinely held that the decision to call or not to call certain trial witnesses is a question of strategy that generally does rise to the level of malpractice); see also Antokol & Coffin v. Myers, 86 A.D.3d 876, 927 N.Y.S.2d 723 (3d Dept. 2011) (dismissing legal malpractice counterclaim on grounds that attorney's conduct was part of trial strategy). Furthermore, "when a plaintiff's allegations amount to nothing more than dissatisfaction with his attorney's strategic choices, said allegations do not support a malpractice claim as a matter of law." See Siracusa v. Sager, 105 A.D.3d 937, 963 N.Y.S.2d 364 (2d Dept. 2013). See also Bixby v. Somerville, 62 A.D.3d 1137, 880 N.Y.S.2d 205 (3d Dept. 2009) (holding that "where allegations involve errors in the exercise of an attorney's professional

judgment in areas such as strategy, the selection of appropriate evidence or argument, they are not actionable as malpractice").

New York courts have held that allegations involving "speculative" alleged errors at trial are insufficient to state a claim for legal malpractice unless the plaintiff can prove that there would have been a different result in the underlying action. See Sevey v. Friedlander, 83 A.D.3d 1226, 920 N.Y.S.2d 831 (3d Dept. 2011) (finding that plaintiff's speculation as to how a court may have ruled if it had been presented with certain information was insufficient to establish a triable issue of fact); see also Allen v. Potruch, 282 A.D.2d 484, 723 N.Y.S.2d 101 (2d Dept. 2001) (holding with regard to an alleged claim for legal malpractice that the plaintiff's allegation that the defendant law firm failed to move for re-argument in connection with the award of expert fees in the underlying matrimonial matter, at most, constituted an error of judgment which did not rise to the level of legal malpractice); Financial Servs. Veh. Trust v. Saad, 137 A.D.3d 849, 27 N.Y.S.3d 584 (2d. Dept. 2016) ("conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action); Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP v Wilson, 136 A.D.3d 1326, 25 N.Y.S.3d 468 (4d. Dept. 2016).

In Hand v. Silberman, the attorney entered into a stipulation at the outset of an administrative hearing which stated that the Transit Authority had "reasonable suspicion" that the plaintiff was under the influence of alcohol or drugs. See Hand v. Silberman, 15 A.D.3d 167, 789 N.Y.S.2d 26 (1st Dept. 2005). The attorney's strategy was to avoid emphasis on plaintiff's pre-testing conduct which would have been detrimental to other defenses, including the defense that the testing standards were insufficient. Id. In upholding the lower court's decision, the First Department held that choosing a reasonable course of action does not support a claim for legal malpractice. Id.

Although New York does not require specialists in a particular field to be certified, in some jurisdictions there is a trend to apply a heightened standard of care to attorneys who hold themselves out as specialists. See Pytka v. Gadsby Hannah, LLP, 15 Mass. L. Rep. 451 (Mass. Super. Ct. 2002); *citing* Fishman v. Brooks, 396 Mass. 643, 487 N.E.2d 1377 (1986). In Pytka v. Gadsby Hannah, LLP, *supra,* the Court applied a heightened standard of care to a law firm that held itself out as having "broad competence in a wide variety of specialties relating to corporate law." The Pytka Court specifically held that the defendant law firm "should be held to the higher standard applied to specialists in those areas [specialties relating to corporate law]." Id. at 19. See also Dr. R.C. Samanta Roy Inst. of Sci. & Tech., Inc. v. Lee Enters., 2006 U.S. Dist. LEXIS 53922 (E.D. Wis. 2006) (noting that a legal specialist may be held to an even higher standard of care than a generalist).

B. Proximate or "But For" Causation

In addition to pleading a breach of the standard of care, a legal malpractice plaintiff must plead and ultimately prove that "but for" the attorney's negligence, the plaintiff would have been successful in the underlying action. In Sabalza v. Salgado, 85 A.D.3d 436, 437, 924 N.Y.S.2d 373 (1st Dept 2011), the First Department stated that:

> A plaintiff's burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation. (Internal citations omitted).

Significantly, proximate causation can only be demonstrated where the plaintiff can plead and prove that but for the defendant's negligence, the plaintiff would have prevailed or received a better result in the underlying action. See Hyman v. Schwartz, 114 A.D.3d 1110, 1112, 981 N.Y.S.2d 468 (3d Dept 2014); Levine v. Horton, 127 A.D.3d 1395, 7 N.Y.S.3d 631 (3d. Dept. 2015); Keness v. Feldman, Kramer & Monaco, P.C., 105 A.D.3d 812, 813, 963 N.Y.S.2d 313 (2d Dept 2013); Louzoun v Kroll Moss & Kroll, LLP, 139 A.D.3d 680, 32 N.Y.S.3d 172 (2d. Dept. 2016). The "but for" causation element in legal malpractice actions requires that the plaintiff prove "a case within a case," as it requires a hypothetical re-examination of the events at issue absent the alleged legal malpractice. See Aquino v. Kuczinski, Vila & Assoc., P.C., 39 A.D.3d 216, 219, 835 N.Y.S.2d 16 (1st Dept 2007); see also Ruotolo v. Mussman & Northey, 105 A.D.3d 591, 592 963 N.Y.S.2d 222 (1st Dept 2013). The burden of proving a case within a case is a heavy one. See Aquino, *supra*.

The failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the attorney's negligence. See Global Bus. Inst. v. Rivkin Radler LLP, 101 A.D.3d 651, 958 N.Y.S.2d 41 (1st Dept. 2012); Louzoun v Kroll Moss & Kroll, LLP, 139 A.D.3d 680, 32 N.Y.S.3d 172 (2d. Dept. 2016).

For example, in Wo Yee Hing Realty Corp., the plaintiff alleged that it was caused to sustain damages as a result of the defendant attorney's negligence in connection with a failed 1031 exchange transaction. See Wo Yee Hing Realty Corp. v. Stern, 99 A.D.3d 58, 949 N.Y.S.2d 50 (1st Dept. 2012). The defendant attorney argued that even if the plaintiff could establish that he was negligent in handling the 1031 transaction, plaintiff could not establish damages proximately caused by such negligence as plaintiff failed to establish that it could have consummated the 1031 transaction in the absence of the attorney's negligence. Id. The Appellate Division adopted defendant's argument and affirmed the dismissal of the legal malpractice action on the grounds that plaintiff failed to demonstrate any causal connection between the alleged negligence and his damages.

Furthermore, it is well-settled that contentions underlying a claim for legal malpractice which are couched in terms of gross speculations on future events and point to the speculative nature of a claim are insufficient, as a matter of law, to establish that proximate causation. See Bernard v. Proskauer Rose, LLP, 87 A.D.3d 412, 927 N.Y.S.2d 655 (1st Dept. 2011).

For example, in Schutz v. Kagan Lubic Lepper Finkelstein & Gold, LLP, the Court granted the defendants-law firm's motion to dismiss for failure to state a cause of action for legal malpractice based on plaintiff's failure to sufficiently plead the elements of proximate causation and ascertainable damages. Schutz v. Kagan Lubic Lepper Finkelstein & Gold, LLP, 2013 U.S. Dist. LEXIS 93762 (S.D.N.Y. 2013). The plaintiff in Schutz asserted various allegations he

would have fared better if defendants conducted settlement negotiations differently. Id. at 26. The Court held that such blanket allegations were too conjectural to adequately plead actual damages for malpractice. Id. The Schutz Court reasoned that such allegations were in fact "too conjectural in any context to "raise a right to relief above the speculative level." Id.

There are rare instances where the Courts have relieved the plaintiff of the burden of establishing that plaintiff would have been successful in an underlying matter. For example, in Gotay v. Breitbart, 14 A.D.3d 452, 790 N.Y.S.2d 1 (1st Dept. 2005), the First Department relaxed the "but for" requirement in a legal malpractice claim due to a twenty-five year delay in the prosecution of plaintiff's underlying medical malpractice claim. Specifically, the Gotay Court held that if plaintiff is unable to establish any element of the underlying medical malpractice action as a direct consequence of defendants' delay, such element will be deemed "admitted." Id.

More recently, in a string of cases from the Appellate Division, Second Department, the "but for" requirement has seemingly been relaxed through a series of holdings which require that the plaintiff need to prove only that the defendant's negligence was "a proximate cause" of damages rather than "*the* proximate cause" or the "but for" cause. See Held v. Seidenberg, 87 A.D.3d 616, 617, 928 N.Y.S.2d 477 (2d Dept. 2011); Stein v Chiera, 130 A.D.3d 912, 14 N.Y.S.3d 133 (2d. Dept. 2015) (To state a cause of action to recover damages for legal malpractice, a plaintiff must allege … that the attorney's failure was a proximate cause of actual and ascertainable damages); DeNatale v Santangelo, 65 A.D.3d 1006, 884 N.Y.S.2d 868 (2d Dept. 2009); see also Feldman v. Finkelstein & Partners, LLP, 76 A.D.3d 703, 907 N.Y.S.2d 313 (2d Dept. 2010) (reversing the dismissal of plaintiff's complaint for failure to state a cause of action and determining that the complaint adequately pleaded that defendants' negligence was a proximate cause of damages); Rock City Sound, Inc. v. Bashian & Farber, LLP, 74 A.D.3d 1168, 903 N.Y.S.2d 517 (2d Dept. 2010) (reversing the dismissal of plaintiff's complaint and determining that plaintiff sufficiently pleaded that the defendants' actions were a proximate cause of plaintiff's damages).

Further, it appears that the trend is to relax the "but for" requirement in connection with a cause of action for breach of fiduciary duty, which often accompanies a plaintiff's complaint for legal malpractice. Ordinarily, an action for breach of fiduciary duty requires a plaintiff to merely identify a conflict of interest amounting to a substantial factor in the plaintiff's loss. See Boone v. Bender, 74 A.D.3d 1111; 904 N.Y.S.2d 467 (2d Dept. 2010). If the remedy sought by the plaintiff is a restitutionary one to prevent the fiduciary's unjust enrichment, the less stringent substantial factor standard would apply to the causation element of the claim for breach of fiduciary duty. See RSL Communs. PLC v. Bildirici, 649 F. Supp. 2d 184, 209 (S.D.N.Y. 2009). However, where damages are sought in connection with a plaintiff's claims of breach of fiduciary duty that are essentially claims of legal malpractice, plaintiff's claims are governed by the same "proximate causation" standard. See Boone, *supra*.

C. "Actual and Ascertainable" Damages

The final element that a plaintiff must prove in a legal malpractice action is that he/she sustained economic damages as a direct result of the attorney's alleged negligence. See Ehlinger v. Ruberti Girvin & Ferlazzo, 304 A.D.2d 925, 926, 758 N.Y.S. 2d 195 (3d Dept. 2003) (affirming that a legal malpractice plaintiff in New York must demonstrate "actual and ascertainable" damages); Miazga v. Assaf, 136 A.D.3d 1131, 25 N.Y.S.3d 408 (3d. Dept. 2015); Simpson v. Alter, 78 A.D.3d 813, 911 N.Y.S.2d 405 (2d Dept. 2010) (motion to dismiss the Complaint properly denied where Complaint sufficiently pleads allegations from which damages attributable to the alleged legal malpractice might be reasonably inferred); See also Bua v. Purcell & Ingrao, P.C., 99 A.D.3d 843, 952 N.Y.S.2d 592 (2d Dept. 2012) (Complaint failed to plead actual and ascertainable damages, as "conclusory allegations of damages or injuries predicated on speculation cannot suffice for a [legal] malpractice action").

The general rule is that an attorney is liable for all damages proximately caused by his/her wrongful act or omission. Consequently, a plaintiff is entitled to recover the difference between his/her current economic position and what it would have been "but for" the attorney's malpractice. See Kaminsky v. Herrick, Feinstein LLP, 59 A.D.3d 1, 870 N.Y.S.2d 1 (1st Dept. 2008). For liquidated claims, proving damages is fairly straightforward. However, where claims are not liquidated, it is up to the jury to determine the value of the damages. See Robinson v. Way, 57 A.D.3d 872, 871 N.Y.S.2d 233 (2d Dept. 2008). Essentially, the ultimate damages should amount to the lost benefit or the detriment directly caused by the negligence.

Additionally, a plaintiff can recover the fees and expenses incurred to mitigate the loss caused by the attorney's malpractice. See Rudolf v. Shayne, 8 N.Y.3d 438, 835 N.Y.2d 534 (2007); Bua v. Purcell & Ingrao, P.C., 99 A.D.3d 843, 952 N.Y.S.2d 592 (2d Dept. 2012); Barouh v. Law Offs. of Jason L. Abelove, 131 A.D.3d 988, 17 N.Y.S.3d 144 (2d. Dept. 2015). However, mere speculation about incurring additional attorney's fees is not sufficient to sustain a cause of action for legal malpractice. See Dempster v. Liotti, 86 A.D.3d 169, 924 N.Y.S.2d 484 (2d Dept. 2011).

In some instances, unpaid interest (including prejudgment interest on a lost claim) is recoverable as damages in a legal malpractice action. See Baker v. Dorfman, 239 F.3d 415 (2d Cir. 2000); Barnett v. Schwartz, 47 A.D.3d 197, 203 (2d Dept. 2007); see also DiTondo v. Meagher, 85 A.D.3d 1385, 924 N.Y.S.2d 666 (3d Dept. 2011). However, when an award of prejudgment interest is speculative, the Courts have declined to grant such an award. See Rudolf v. Shayne, 8 N.Y.3d 438, 443, 835 N.Y.2d 534 (2007).

The applicable interest rate to be applied in such instances is 9%, as codified by CPLR §5004. The Court in Barnett, *supra*, stated that "[CPLR §5001] operates to permit an award of prejudgment interest from the date of accrual of the malpractice action in actions seeking damages for attorney malpractice." *See* Barnett 47 A.D.3d at 208, *citing* Horstmann v. Nicholas J. Grasso, P.C., 210 A.D.2d 671, 619 N.Y.S.2d 848 (3d Dept. 1994). CPLR §5001 (a) provides "interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item

from the date it was incurred or upon all of the damages from a single reasonable immediate date." Therefore, interest is to be computed from the date(s) that the damages were incurred or, if impractical, from a single reasonable intermediate date. See Barnett, 47 A.D.3d at 208.

1. Proof of Actual and Ascertainable Damages

A plaintiff cannot advance a legal malpractice action for speculative damages. See Plymouth Org., Inc. v. Silverman, Collura & Chernis, P.C., 21 A.D. 3d 464, 465, 799 N.Y.S. 2d 813 (2d Dept. 2005); Dempster v. Liotti, 86 A.D.3d 169, 924 N.Y.S.2d 484 (2d Dept. 2011). The mere possibility, or even probability, that a plaintiff will suffer damages at some future point is not enough to sustain a legal malpractice action because the damages are not "actual and ascertainable." See MacDonald v. Guttman, 72 A.D.3d 1452, 900 N.Y.S.2d 177 (3d. Dept. 2010) *citing* Antokol & Coffin v. Myers, 30 A.D.3d 843, 845, 819 N.Y.S. 2d 303 (3d. Dept. 2006).

In Giambrone v. Bank of New York, 253 A.D.2d 786, 677 N.Y.S.2d 608 (2d. Dept. 1998), the Second Department held that alleged damages arising from an unexecuted single-life trust, under which plaintiff's right to income as the beneficiary was at the sole discretion of the trustees, were speculative and incapable of being proven. The court further emphasized that the judiciary's ability to circumscribe the trustees' absolute discretion, did not lessen speculative nature of the plaintiff's damages claim. Id. Therefore, the Giambrone plaintiff was precluded from recovery as he could not sustain his contention that the attorney's alleged negligence caused him injury. Id.

In Fusco v Fauci, 299 A.D.2d 263, 749 N.Y.S.2d 715 (1st Dept. 2002), the First Department held that, "settlement of an action will not preclude an award of damages for legal malpractice where the plaintiff is able to demonstrate that the settlement was caused by the malpractice, namely, that the value of the underlying claim was in excess of the settlement." However, in that case, the First Department found that "it is clear, as a matter of law, that plaintiff's settlement of his underlying claims was not eventuated by the alleged malpractice," and in any event, "the amount of the settlement, $1,250,000, exceeds the $700,000 plaintiff previously stipulated to accept in full satisfaction of those underlying claims, plus interest." Id.

In Miszko v. Leeds & Morelli, 3 A.D. 3d 726, 769 N.Y.S. 2d 923 (3d. Dept. 2004), the plaintiff, a former state trooper who was awarded accidental disability retirement benefits at 50% of his salary after he sustained on-the-job injuries, retained the defendant in an underlying federal action alternatively seeking benefits at 75% of his salary. In the plaintiff's subsequent legal malpractice action, the Third Department in Miszko found that the plaintiff had not suffered actual damages as a result of his attorney's alleged malpractice because during the pendency of his appeal to the Second Circuit, the New York legislature retroactively amended the applicable law to provide state troopers retirement benefits at 75%. As such, the plaintiff was granted the relief that he sought and his claim was rendered moot. Id. Ultimately, the Miszko Court held that because the plaintiff failed to articulate any other identifiable damages, the legal malpractice claim was properly dismissed; without proof of actual damages, the claim was

unsupportable. Id., *citing* Ressis v. Wojick, 105 A.D. 2d 565, 567, 481 N.Y.S. 2d 507 (3d. Dept. 1984).

In Plymouth Organization, Inc. v. Silverman, Collura & Chernis, P.C., 21 A.D.3d 464, 799 N.Y.S.2d 813 (2d. Dept. 2005), the plaintiff alleged that the law firm defendant was negligent in advising it with regard to an investment offering. Id. Specifically, the plaintiff alleged that it was forced to terminate an investment offering because of the defendant's failure to advise the plaintiff as to the proper licenses its employees/agents were required to hold. In denying the defendant's motion for summary judgment, the Second Department held that, although the plaintiff's claims for damages regarding lost investment opportunities, profits and commissions were speculative, the plaintiff did succeed in making a prima facie showing of other actual and ascertainable damages.

In Kaufman v. Medical Liab. Mut. Ins. Co., 121 A.D.3d 1459 (3d. Dept. 2014), plaintiff physician brought suit against her insurer and the law firm appointed to represent her, another physician and their employer hospital in an underlying medical malpractice action. After a jury found her 35% liable towards the underlying plaintiff, plaintiff instituted an action alleging the law firm's representation of all defendants and their use of a "united front" defense resulted in a conflict of interest constituting legal malpractice. In affirming the grant of summary judgment in favor of the law firm, the Third Department found there was no triable issue of fact as to the absence of actual and ascertainable damages alleged by plaintiff. Plaintiff was fully covered by the hospital and insurer and did not have to pay any part of the $3.2 million verdict. The Court found plaintiff's claims that she suffered actual damages due to her inability to find employment with comparable compensation too speculative and unsupported, particularly where plaintiff had left the hospital voluntarily after being offered a new contract, subsequent to the verdict. The Court also found plaintiff's claimed taint on her reputation resulting from the verdict and associated media coverage unavailing, as it represented a non-pecuniary form of damages unrecoverable in a legal malpractice action.

2. Proving Damages that are Not Liquidated – Collectability

A necessary element of a cause of action for legal malpractice is the collectability of the damages in the underlying action. See Williams v. Kublick, 41 A.D.3d 1193, 837 N.Y.S.2d 803 (4d. Dept. 2007). The majority rule, followed by the Second, Third, and Fourth Departments of New York, and the majority of other jurisdictions, holds that a plaintiff is required to prove "the value of the claim lost" or collectability of the judgment in the underlying action in order to establish a prima facie claim for legal malpractice. See McKenna v. Forsyth & Forsyth, 280 A.D.2d 79, 720 N.Y.S.2d 654 (4th Dept. 2001) (holding that it is the plaintiff's burden to prove the amount that would have been collected in the underlying action). The damages recoverable are limited to the amount that "could or would have been collected" in the underlying action, to limit a potential windfall by a plaintiff. Id. In Jedlicka v. Field, 14 A.D.3d 596, 787 N.Y.S.2d 888 (2d. Dept. 2005), the Second Department held that the plaintiff bore the burden of establishing the "hypothetical judgment" that would have been collectible in the underlying action.

In the First Department, however, the burden of proving collectability is borne by the defendant attorney. See Lindenman, et al. v. Kreitzer, et al, 7 A.D. 3d 30, 775 N.Y.S. 2d 4 (1st Dept. 2004). Proof of collectability, or non-collectability, must be introduced by the defendant attorney as "as a matter constituting an avoidance or mitigation of the consequences of the attorney's malpractice." Id. The defendant's burden of proving non-collectability is generally limited to between the date of the alleged malpractice and a reasonable period of time after the legal malpractice trial, short of the full 20–year viability period of a judgment (after which the judgment would be deemed "uncollectible"). Id. However, the time period is case-sensitive and will be determined by a trial court, consistent with the life span of any judgment and any other relevant information necessary to balance the equities.

3. Emotional Damages

It is well-established in New York that a plaintiff may not recover emotional damages in a legal malpractice action based upon an attorney's conduct in an underlying civil action. See Kaiser v. Van Houten, 12 A.D. 3d 1012, 785 N.Y.S.2d 569 (3d Dept. 2004); Wolkstein v. Morgenstern, 275 A.D.2d 635, 713 N.Y.S.2d 171 (1st Dept. 2000); Dirito v. Stanley, 203 A.D.2d 903, 611 N.Y.S.2d 65 (4th Dept. 1994); Walker v. Stroh, 192 A.D.2d 775, 596 N.Y.S.2d 213 (3d Dept. 1993); Guiles v. Simser, 35 A.D.3d 1054, 826 N.Y.S.2d 484 (3d. Dept. 2006).

Similarly, a plaintiff may not recover emotional damages in a legal malpractice action stemming from a criminal action. In Wilson v. City of New York, 294 A.D.2d 290, 743 N.Y.S.2d 30 (1st Dept. 2002), emotional damages stemming from the representation an attorney provided during an underlying criminal action were denied. The First Department held that a cause of action for legal malpractice arising from an underlying criminal action does not allow recovery for physical and emotional injury. Id.

The Fourth Department recently reversed its prior position that a plaintiff may recover non-pecuniary damages for legal malpractice arising out of an attorney's conduct in an underlying criminal action. See Dombrowski v. Bulson, 19 N.Y.3d 347 (2012). Plaintiff, who was convicted in a criminal action and subsequently able to successfully petition the federal court for a writ of habeas corpus, attempted to recover nonpecuniary damages resulting from the loss of liberty during his period of incarceration in a legal malpractice action against defendant who made a number of errors during the underlying criminal trial. In its recent reversal of the prior decision, the Court held that it saw no compelling reason to depart from the established rule limiting recovery in legal malpractice action to pecuniary damages.

LEGAL MALPRACTICE 2017:

Legal Malpractice Causes of Action,

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LEGAL MALPRACTICE 2017:

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Never in the history of our judicial system has the concept of seeking redress from one's attorney for real or perceived grievances been as common place. Prior to 1970, there were few reported decisions discussing an attorney's liability for "legal malpractice." From 1970 forward, reported decisions on cases involving the theory of "legal malpractice" or "attorney malpractice" ballooned geometrically with 407 reported decisions in the 70s, 2,663 in the 80s, 6,668 in the 90s, well over 10,000 reported decisions in the first decade of this century, and 9,171 reported decisions since 2010. That's reported decisions – not just filed claims against attorneys.

The theories under which lawyers are sued and the defenses to these claims are constantly evolving. Not all of the news is good. In fact, much of it is bad. Some is just plain ugly. However, the bottom line is that a good percentage of all legal malpractice cases are dismissed on motion.

This article is intended to review the elements of a legal malpractice action as well as some of the available defenses. It is hoped that the issues discussed assist in not just exploring the topic at hand but also in providing some thought as to how the exposure may be avoided in the first place.

I. ELEMENTS

Legal malpractice is defined as the failure by an attorney to "exercise that degree of skill commonly exercised by an ordinary member of the legal community."[1] In order to prevail on a cause of action for legal malpractice, a plaintiff must show that (1) defendant owes plaintiff a duty, (2) defendant breached that duty, and (3) actual damages were proximately caused by the breach.[2]

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1 *Conklin v. Owen*, 72 A.D.3d 1006, 900 N.Y.S.2d 118 (2nd Dep't 2010); *Estate of Nevelson v. Carro, Spanbock, Kaster, & Cuiffo*, 259 A.D.2d 282, 284, 686 N.Y.S.2d 404 (1st Dep't 1999).

2 *Global Business Institute v. Rivkin Radler LLP*, 101 A.D.3d 651, 958 N.Y.S.2d (1st Dep't 2012); *Kotzian v. McCarthy*, 36 A.D.3d 863, 827 N.Y.S.2d 875 (2nd Dep't 2007); *Simmons v. Edelstein*, 32 A.D.3d 464, 820 N.Y.S.2d 614 (2nd Dep't 2006); *Hatfield v. Herz*, 109 F.Supp2d 174, 179 (S.D.NY 2000).

The elements of negligence and proximate cause are established with proof that the attorney failed to exercise "the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession"[3] and that, 'but for' the attorney's failure to exercise due care, the plaintiff would have prevailed in the underlying action or would not have incurred damages as a result of the attorney's conduct.[4] An attorney may not undertake a representation tat he or she is unqualified to handle without associating with experienced counsel.[5] To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence."[6] The failure to allege that "but for" the attorney's conduct, the client would not have sustained damages warrants a dismissal of the complaint.[7]

Since legal malpractice is the failure of an attorney to use due care in the representation of a client, it is well settled in New York that a cause of action for fraud, breach of contract, negligent misrepresentation or breach of fiduciary duty complaining of the same conduct and alleging the same damages as a legal malpractice claim will be dismissed as duplicative.[8]

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3 *Dombrowski v. Bulson,* 19 N.Y.3d 347 (2012);.*Darby & Darby, P.C. v. V.S.I. International, Inc*., 95 N.Y.2d 308, 716 N.Y.S.2d 378 (2000).

4 *Waggoner v. Caruso,* 14 N.Y.3d 874, 903 N.Y.S.2d 333 (2010); *AmBase Corp. v. Davis Polk & Wardwell,* 8 N.Y.3d 428, 834 N.Y.S.2d 705 (2007); *Blank v. Harry Katz, P.C.,* 3 A.D.3d 512, 770 N.Y.S.2d 742 (2nd Dep't 2004); *Caires v. Siben & Siben,* 2 A.D.3d 383, 384, 767 N.Y.S.2d 785 (2nd Dep't 2003); *see, Natale v. Jeffrey Samel & Assocs.,* 308 A.D.2d 568, 764 N.Y.S.2d 883 (2nd Dep't 2003), *lv denied* 2 NY3d 701, 778 N.Y.S.2d 460 (2004); *Magnacoustics, Inc. v Ostrolenk, Faber, Gerb & Soffern,* 303 A.D.2d 561, 755 N.Y.S.2d 726 (2nd Dep't 2003), *lv denied* 100 N.Y.2d 511, 766 N.Y.S.2d 165 (2004); *Iannarone v. Gramer,* 256 A.D.2d 443, 682 N.Y.S.2d 84 (2nd Dep't 1998).

5 NY Rules of Professional Conduct ("RPC") 1.1:

> (a)A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

See also Wo Yee Hing Realty Corp. v. Stern, 99 A.D.3d 58, 949 N.Y.S.2d 50 (1st Dep't 2012) (Attorney is obligated to know the law relating to the matter for which he is representing a client and it is the attorney's duty, if he lacks knowledge of the statutes, to inform himself; like any artisan, by undertaking the work, the attorney represents that he is capable of performing it in a skillful manner. However, where negligent representation fails to be the proximate cause of damage, plaintiff cannot recover); *Fielding v. Kupferman,* 65 A.D.3d 437, 440, 885 N.Y.S.2d 24 (1st Dep't 2009)c.

6 *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438, 442 (2007).

7 *Waggoner v. Caruso,* 14 N.Y.3d 874, 903 N.Y.S.2d 333 (2010).

8 *Sun Graphics Corp. v. Levy, Davis & Maher, LLP*, 94 A.D.3d 669, 943 N.Y.S.2d 464 (1st Dep't 2012) (causes of action for breach of contract, breach of fiduciary duty, and negligent misrepresentation are redundant of the legal malpractice claim, since they arise from the same allegations and seek identical relief"); *Gaskin v. Harris,* 98 A.D.3d

A. Standard of Care

In order to prove a legal malpractice claim, a plaintiff must demonstrate that the attorney "failed to exercise that degree of skill commonly exercised by an ordinary member of the

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941, 950 N.Y.S.2d 751 (2nd Dep't 2012) (breach of contract claim duplicative of legal malpractice cause of action) *Waggoner v. Caruso,* 14 N.Y.3d 874, 903 N.Y.S.2d 333 (2010) (Duplicative breach of fiduciary duty claim dismissed notwithstanding failure to plead legal malpractice action); *Tsafatinos v. Lee David Auerbach, P.C.,*80 A.D.3d 749, 915 N.Y.S.2d 500 (2nd Dep't 2011) (Breach of fiduciary duty and breach of contract claims alleging same damages as time-barred legal malpractice claim dismissed); *Leon Petroleum, Inc. v. Carl S. Levine & Associates, P.C.*, 80 A.D.3d 573, 914 N.Y.S.2d 661 (2nd Dep't 2011) (duplicative breach of contract and breach of fiduciary duty claims dismissed), *Turner v. Irving Finkelstein & Meirowitz, LLP*, 61 A.D.3d 849, 879 N.Y.S.2d 145 (2nd Dep't 2009) (To the extent complaint can be construed to assert claims of breach of contract, negligence, or fraud, those causes of action were duplicative of legal malpractice cause of action); *Maoiliniv. McAdams & Fallon, P.C.,* 61 A.D.3d 644, 877 N.Y.S.2d 368 (2nd Dep't 2009) (Breach of contract claim duplicative of deficient legal malpractice claim): *Carl v. Cohen*, 55 A.D.3d 478, 868 N.Y.S.2d 7 (1st Dep't 2008) (fraud claim duplicative of legal malpractice claim); *Ideal Steel Supply Corp. v. Beil,*55 A.D.3d 544, 865 N.Y.S.2d 299 (2nd Dep't 2008) (breach of contract claim duplicative of legal malpractice allegations); *Rivas v. Raymond Schwartzberg & Assoc., PLLC,* 52 A.D.3d 401, 861 N.Y.S.2d 313, 2008 (1st Dep't 2008) (breach of contract action duplicative of legal malpractice claim); *Amodeo v. Kolodny, P.C.,* 35 A.D.3d 773, 828 N.Y.S.2d 446 (2nd Dep't 2006) (breach of contract claim duplicative of legal malpractice claim); *AmBase Corp. v. Davis Polk & Wardwell,* 30 A.D.3d 171, 816 N.Y.S.2d 438 (1st Dep't 2006) *aff'd* 8 N.Y.3d 428, 834 N.Y.S.2d 705 (2007) (breach of fiduciary duty claim duplicative of legal malpractice claim); *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.,* 10 A.D.3d 267, 780 N.Y.S.2d 593(1st Dep't. 2004) (breach of fiduciary duty claim duplicative of legal malpractice claim)*; Ferdinand v. Crecca & Blair*, 5 A.D.3d 538, 774 N.Y.S.2d 714 (2nd Dep't 2004) (breach of contract claim duplicative of legal malpractice); *Miszko v. Leeds & Morelli*, 3 A.D.3d 726, 769 N.Y.S.2d 923 (3rd Dep't 2004) (breach of contract claim as plead is dismissed as redundant); *Proskauer Rose, LLP v. Asia Electronics Holding Co.,* 2 A.D.3d 196, 767 N.Y.S.2d 771 (1st Dep't 2003) (breach of fiduciary duty claim duplicative of legal malpractice claim); *Murray Hill Investments, Inc. v. Parker Chapin Flattau & Klimpl, LLP,* 305 A.D.2d 228, 759 N.Y.S.2d 463 (1st Dep't 2003) (breach of fiduciary duty and fraud claims dismissed as duplicative of legal malpractice claims); *Lory v. Parsoff*, 296 A.D.2d 535, 745 N.Y.S.2d 218 (2nd Dep't 2002) (dismissing claims which were duplicative of malpractice claims); *Sage Realty Corporation v. Proskauer Rose LLP*, 251 A.D.2d 35, 675 N.Y.S.2d 14 (1st Dep't 1998) (breach of contract claim is a redundant pleading of the malpractice claim); *Best v. Law Firm of Queller & Fisher*, 278 A.D.2d 441, 718 N.Y.S.2d 397 (2nd Dep't 2000), *cert. den. sub nom. Best v. Sears, Roebuck & Co.,* 534 U.S. 1080, 122 S.Ct. 812, 151 L.Ed.2d 696 (2002) (fraud, breach of contract and indemnity claims duplicative of legal malpractice claim); *Waggoner v. Caruso,* 2008 WL 4274491 (N.Y.Sup.) affirmed by Appellate Division and Court of Appeals (fraud and breach of fiduciary duty claims dismissed as duplicative of legal malpractice claims – court rejected contention that claim for punitive damages due to fraud alleged separate and distinct damages: "Plaintiffs' argument would render the law on duplicativeness meaningless, because malpractice plaintiffs could always simply circumvent the requirement that the claims be independent by asking for punitive damages as part of their fraud claim."); *Tal v. Leber,* 2008 WL 4274490 (N.Y.Sup.) (breach of contract and fraud claims predicated upon same facts as legal malpractice dismissed). *But see, Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP,* 56 A.D.3d 1, 865 N.Y.S.2d 14 (1st Dep't 2008) (Breach of fiduciary duty claim predicated upon firm's alleged actions in helping competing company set not duplicative of legal malpractice claims related to firm's handling of claims as company's counsel); *Morgan, Lewis & Bockius LLP v. IBuyDigital.com, Inc.,*14 Misc.3d 1224(A), 2007 WL 258305 (N.Y. Sup 2007)(Although legal malpractice, breach of fiduciary duty, breach of standard to use due care and partial breach of contract claim dismissed as duplicative, engagement letter specifying named attorney would lead IPO states sufficient breach of contract claim on motion to dismiss); *Becker v. Julien, Blitz & Schlesinger, P.C.*, 66 A.D.2d 674, 411 N.Y.S.2d 17 (1st Dep't 1978). *Contrast, Bixby v. Summerville,*62 A.D.3d 1137, 880 N.Y.S.2d 205 (3rd Dep't 2009), ("Additionally, given that defendant regularly paid the firm for more than a year after the retainer agreement (permitting the law firm to staff the representation appropriately) was executed, while Stiglmeier continued to represent him, we agree with Supreme Court that, by his conduct, defendant waived any objection to the firm's assignment of Stiglmeier to his case.")

legal community."[9] The issue is not whether the attorney could have come up with a better plan or performed differently, but whether the attorney departed from the requisite standard of care.[10]

The New York Pattern Jury Instruction, a source all attorneys should consult on a regular basis no matter what the nature of the claim, presents this summary of standard of care:

> An attorney who undertakes to represent a client impliedly represents that (he, she) possesses a reasonable degree of skill, that (he, she) is familiar with the rules regulating practice in actions of the type which (he, she) undertakes to bring or defend and with such principles of law in relation to such actions as are well settled in the practice of law, and that (he, she) will exercise reasonable care. Reasonable care means that degree of skill commonly used by an ordinary member of the legal profession. However, an attorney is not a guarantor of the result of the case. Moreover, if an attorney points out to the client the nature of the risks involved in a certain course of procedure and the client elects to follow that course, the attorney is not responsible for the consequences.[11]

In most legal malpractice actions, the plaintiff must introduce expert testimony in order to establish the standard of care in the legal profession and to testify as to whether the defendant's acts or omissions negligently deviated from that standard and whether such negligence was the proximate cause of any damages to plaintiff.[12] Plaintiff's failure to meet the burden of presenting expert testimony on professional standard of care warrants a dismissal of plaintiff's claim.[13] Conclusory opinions by experts are insufficient.[14] The failure to produce competent expert testimony as to the elements of the underlying case will also result in dismissal of the malpractice claim.[15]

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9 *Zeitlin v. Greenberg, Margolis, Ziegler, Schwartz, Dratch, Fishman, Franzblau & Falkin,* 209 A.D.2d 510, 619 N.Y.S.2d 289 (2nd Dep't 1994); *Caires v. Siben & Siben,* 2 A.D.3d 383, 384, 767 N.Y.S.2d 785 (2nd Dep't 2003).

10 *Estate of Nevelson v. Carro, Spanbock, Kaster, & Cuiffo, supra; Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP,* 301 A.D.2d 63, 750 N.Y.S.2d 277 (1st Dep't 2002).

11 NY PJI 2:152.

12 *See, Green v. Payne, Wood and Littlejohn,* 197 A.D.2d 664, 602 N.Y.S.2d 883 (2nd Dep't 1993); *Canavan v. Steenburg*, 170 A.D.2d 858, 566 N.Y.S.2d 960 (3rd Dep't 1991); *Fidler v. Sullivan,* 93 A.D.2d 964, 463 N.Y.S.2d 279, 280 (3rd Dep't 1983).

13 *Orchard Motorcycle Distributors, Inc. v. Morrison Cohen Singer & Weinstein, LLP*,49 A.D.3d 294, 853 N.Y.S.2d 320 (1st Dep't 2008); *Merlin BioMed Asset Management, LLC v. Wolf Block Schorr & Solis-Cohen, LLP ,* 23 A.D.3d 243, 803 N.Y.S.2d 552 (1st Dep't 2005); *Active Operations Corp. v. Lampert,* 115 A.D.2d 452, 495 N.Y.S.2d 689, 690 (2nd Dep't 1985).

14 *Brady v. Bisogno & Meyerson,* 32 A.D.3d 410, 819 N.Y.S.2d 558 (2nd Dep't 2006).

15 *Joseph DelGreco & Co., Inc. v. DLA Piper L.L.P,* 899 F. Supp. 2d 268 (S.D.N.Y. 2012); *Yousian v. Eisenberg, Margolis, Friedman & Moses*, 34 A.D.3d 228, 822 N.Y.S.2d 710 (1st Dep't 2006).

The rare exceptions to this rule are when "the ordinary experience of the fact-finder provides sufficient basis for judging the adequacy of the professional service, or the attorney's conduct falls below any standard of due care."[16]

The expert may not opine on what constitutes legal malpractice, as that is the province of the court. In rejecting the affidavit of plaintiff's counsel as support for the claimed malpractice, the Appellate Division held in *Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*:

> We do not rely on an attorney's affidavits to tell us what constitutes malpractice. Moreover, the affidavit offered here raises an additional concern. It is tinged with the sense that since the affiant would have done things differently, therefore the attorney being challenged was incompetent. Such a contest of strategies is easily reduced to a malpractice standard that impermissibly compares the defendant-attorney's choice of strategies with the afterthoughts later offered by plaintiff's now-favored attorney, for whom bias is a necessary concern, rather than measuring counsel's performance against the much more objective standard of the profession's commonly prevailing practices.[17]

In addition, the testimony of a disbarred attorney may not be used to establish either the standard of care or defendant attorney's departure from the acceptable standard.[18]

Proof of the violation of a Rule of Professional Conduct alone will not sustain a cause of action for legal malpractice.[19] The newly enacted New York Rules of Professional Conduct include express language that states that the rules of conduct were not intended to create a civil

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16 *Greene,* 602 N.Y.S.2d at 885; *O'Shea v. Brennan*, 2004 WL 1118109 at *3-4 (S.D.N.Y 2004); *Momah v. Massena Memorial Hosp.,* 2000 WL 306774 (N.D.N.Y. 2000); *Logalbo v. Plishkin, Rubano & Baum,* 558 N.Y.S.2d 185 (2nd Dep't 1990); *S & D Petroleum Co., Inc. v. Tamsett,* 144 A.D.2d 849, 534 N.Y.S.2d 800, 802 (3rd Dep't 1988); but see *Suppiah v. Kalish*, 76 A.D.3d 829, 907 N.Y.S.2d 199 (1st Dep't 2010) *mot. for lv to app. granted* 1/11/2011 NYLJ 26, (col. 5) ("As this is a motion for summary judgment, the burden rests on the moving party-here, defendant-to establish through expert opinion that he did *not* perform below the ordinary reasonable skill and care possessed by an average member of the legal community . . . Also, defendant was required, on this motion, to establish through an expert's affidavit that even if he did commit malpractice, his actions were not the proximate cause of plaintiff's loss . . . By failing to submit the affidavit of an expert, defendant never shifted the burden to plaintiff." *Note*, although leave to appeal to the Court of Appeals was granted, the case was resolved beforethe further appeal was heard)

17 750 N.Y.S.2d at 282.

18 *Kranis v. Scott*, 178 F.Supp.2d 330, 334 (E.D.N.Y. 2002).

19 *Guiles v. Simser*, 35 A.D.3d 1054, 826 N.Y.S.2d 484 (3rd Dep't 2006) (claim that attorney had sexual relationship with client during the course of matrimonial representation insufficient to sustain legal malpractice action).

action in favor of a litigant.[20] The long-standing decisional law in New York is in accord with the intent of the drafters.[21] In *Tilton v. Trezza*,[22] the court held that introduction of the Code provisions into evidence and reference to the Code sections by plaintiff's expert would not be permitted and the jury would not be charged that Code violations may be used as evidence of malpractice.

A conflict of interest, even if a violation of the Rules of Professional Conduct or its predecessor Code of Professional Responsibility, does not by itself support a legal malpractice cause of action.[23] In *Mills v. Pappas,*[24] the Appellate Division rejected plaintiff-executrix' claim that her former attorneys' representation in a proceeding against her in the same forum, arising out of the same estate, constituted malpractice, holding:

> To the extent that the alleged malpractice is based upon a claimed conflict of interest resulting from the [law] firm proceeding in Surrogate Court against plaintiff, any such conflict is at most a violation of defendants' ethical responsibilities, an insufficient basis for imposing liability in favor of a former client.[25]

Similarly, in *Brainard v. Brown*,[26] the Appellate Division held:

> Finally, the assertion that defendant, by dint of his representation simultaneously of both plaintiff and the excavating concern, breached the duty of loyalty imposed by Canon 5 of the Code of Professional Responsibility and that this gives rise to a cause of action for breach

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20 A complete copy of New York Rules of Professional Conduct, effective April 1, 2009, ["RPC"], issued by the Appellate Divisions, together with the Preamble, Scope and Comments authored by NYSBA are available at nysba.org in a .pdf format which may be downloaded and kept for easy reference. The Scope of the RPC carries over the concept from the prior Code of Professional Liability Code provides: "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."

21 *Shapiro v. McNeill*, 92 N.Y.2d 91, 677 N.Y.S.2d 48 (1998); *Sumo Container Sta. v. Evans, Orr, Pacelli, Norton & Laffan,* 278 A.D.2d 169, 170, 719 N.Y.S.2d 223 (1st Dep't 2000).

22 12 Misc.3d 1152(A), 819 N.Y.S.2d 213 (N.Y. Sup. 2006)

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23 *Schafrann v. N.V. Famka, Inc.,* 14 A.D.3d 363, 787 N.Y.S.2d 315(1st Dep't 2005); *Joyce v. JJF Associates, LLC*, 8 A.D.3d 190, 781 N.Y.S.2d 62 (1st Dep't 2004).

24 *Mills v. Pappas,* 174 A.D.2d 780, 782, 570 N.Y.S.2d 726 (3rd Dep't 1991), *appeal dismissed* 78 N.Y.2d 1121, 578 N.Y.S.2d 874 (1991), *cert. denied* 504 U.S. 971, 112 S.Ct. 2957, 119 L.Ed.2d 579 (1992).

25 570 N.Y.S.2d at 728.

26 91 A.D.2d 287, 458 N.Y.S.2d 735 (3rd Dep't 1983); *See, also, Brown v. Samalin & Bock, P.C.*, 155 A.D.2d 407, 547 N.Y.S.2d 80 (2nd Dep't 1989) ("However, even if the procurement of the release constituted a violation of the Code of Professional Responsibility, as plaintiff claims, it did not, in itself, generate a cause of action which might support an award of punitive damages"); *Weintraub v. Phillips, Nizer, Benjamin, Krim & Ballon*, 172 A.D.2d 254, 568 N.Y.S.2d 84, 85 (1st Dep't 1991).

> of contract, is not well founded. A purported violation of a disciplinary rule does not, in itself, generate a cause of action . . .

While not supporting a cause of action, some of the conduct constituting a violation of a disciplinary rule may also constitute evidence of malpractice.[27] With the added obligations imposed upon attorneys in the new Rules of Professional Conduct, there is a real concern that the standard of the attorney's expected duty to the client with respect to such issues as obtaining the informed consent of the client and communication with the client has risen.

Notwithstanding the express language of the Rules of Professional Conduct and the former Code of Professional Responsibility Preamble and Scope and significant case precedent, in *Tabner v. Drake*,[28] the court held that, at a minimum, a question of fact existed as to whether the attorneys "breached the standards regarding conflicts of interest caused by simultaneous representation as set forth in Code of Professional Responsibility DR 5-105(c)" since the borrower client alleged that the law firm never expressly disclosed its representation of the lender. In addition, where plaintiff wife alleged that defendant attorney engaged in an impermissible dual representation of plaintiff wife passenger and husband driver without informing plaintiff of the risks and resulting in the claim that plaintiff wife lost the ability to recover against owner of vehicle, the court found that a question of fact precluded summary judgment by defendant attorney.[29]

Courts and jurors do not "like" cases where it is alleged an attorney put his or her personal interests over that of a client or where it is claimed that an attorney favored the interests of one client over another. For that reason, it is critical that attorneys rigorously employ the proper procedures for identifying, analyzing and resolving conflicts of interest.[30]

B. Privity

Across the country the "citadel of privity"[31] continues to erode and an increase in claims asserted against attorneys by non-clients is evident. New York remains one of the few states which honors the traditional concept that there must be privity, *i.e.,* a direct attorney-client relationship, in order to state a claim for legal malpractice against an attorney. "The well-established rule in New York with respect to attorney malpractice is that absent fraud, collusion,

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27 *The William Kaufman Organization, Ltd. v. Graham & James*, 269 A.D.2d 171, 703 N.Y.S.2d 439 (1st Dep't 2000); *Swift v. Choe*, 242 A.D.2d 188, 674 N.Y.S.2d 17 (1st Dep't 1998); (a release obtained in violation of a disciplinary rule should not serve to shield a lawyer from liability before the facts and circumstances surrounding the execution of the document are fully examined).

28 9 A.D.3d 606, 780 N.Y.S.2d 85 (3rd Dep't 2004).

29 *LaRusso v. Katz*, 30 A.D.3d 240, 818 N.Y.S.2d 17 (1st Dep't 2006); *see also, Tavarez v. Hill*, 23 Misc.3d 377, 870 N.Y.S.2d 774 (N.Y. Sup. 2009) (court sua sponte stayed defendant's motion for summary judgment on the basis of plaintiffs' attorney's inherent conflict in representing interests of passengers and driver).

30 *See* p. 51, *infra.*

31 *Ultramares v. Touche*, 255 N.Y. 170, 174 N.E. 441(1931).

malicious acts or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence."[32]

An attorney-client relationship exists when there is an explicit undertaking by the attorney to perform a specific legal task. Although required by court rule, the absence of a written engagement letter is not always determinative[33] – the court looks to the actions of the parties.[34] However, the unilateral belief of an individual is insufficient to establish the existence of an attorney-client relationship.[35]

In the 1992 decision in *Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*,[36] the New York Court of Appeals carved out a narrow exception to the privity requirement, finding a basis for liability on the theory of negligent misrepresentation where a third party has a relationship with defendant attorney that is "so close as to approach that of privity." In order to fall within this narrow exception, a litigant must prove "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance."[37]

Notwithstanding the *Prudential* exception, until very recently there were relatively few cases against attorneys in which the claim had been successfully made that the relationship between plaintiff and defendant attorney was "so close as to approach that of privity."[38] Even where

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32 *Council Commerce Corp. v. Schwartz, Sachs & Kamhi,* 144 A.D.2d 422, 534 N.Y.S.2d 1 (2nd Dep't 1988).

33 *Gardner v. Jacon*, 148 A.D.2d 794, 538 N.Y.S.2d 377 (3rd Dep't 1989). However, when plaintiff alleged the existence of a written agreement in opposition to defendants' summary judgment motion but failed to produce a copy on the motion or in response to prior discovery orders, defendants' summary judgment motion will be granted. *Smith v. Cohen*, 24 A.D.3d 183, 806 N.Y.S.2d 29 (1st Dep't 2005).

34 *Wei Cheng Chang v. Pi*, 288 A.D.2d 378, 733 N.Y.S.2d 471 (2nd Dep't 2001).

35 *Carlos v. Lovett & Gould*, 29 A.D.3d 847, 815 N.Y.S.2d 695 (2nd Dep't 2006); *Volpe v. Canfield*, 237 A.D.2d 282, 654 N.Y.S.2d 150 (2nd Dep't 1997) *lv. den*. 90 N.Y.2d 802, 660 N.Y.S.2d 712 (1997); *Jane St. Co. v. Rosenberg & Estis*, 192 A.D.2d 451, 597 N.Y.S.2d 17 (1st Dep't 1993); *but see Bloom v. Hensel*,59 A.D.3d 1026, 872 N.Y.S.2d 776 (4th Dep't 2009) (Plaintiff raised question of fact as to whether attorney-client relationship existed at time of alleged malpractice despite lack of fee-sharing relationship between moving attorney and attorney of record in underlying personal injury action); *Shanley v. Welch*, 31 A.D.3d 1127, 818 N.Y.S.2d 878 (4th Dep't 2006)(court found question of fact existed with respect to existence of attorney client relationship despite concession that defendant attorney did not negotiate separation agreement and despite fact that agreement specified plaintiff had been advised to retain counsel and decided to proceed without representation).

36 80 N.Y.2d 377, 382, 590 N.Y.S.2d 831, 833 (1992).

37 *Id.*, 80 N.Y.2d at 384.

38 *See, State of California Public Employees' Retirement System v. Shearman & Sterling*, 95 N.Y.2d 427, 718 N.Y.S.2d 256, 741 N.E.2d 101 (2000) (relationship demonstrated between assignee and law firm was not "so close as to approach that of privity"); *Bluntt v. O'Connor*, 291 A.D.2d 106, 737 N.Y.S.2d 471 (4th Dep't. 2002) (relationship between law guardian and mother of ward insufficient); *Busino v. Meachem,* 270 A.D.2d 606, 704 N.Y.S.2d 690 (3rd Dep't. 2000) (minority shareholder's relationship to law firm representing corporation insufficient); *Tajan v. Pavia &*

the plaintiff alleges negligent misrepresentation based upon statements contained in an opinion letter, the courts have dismissed claims where the opinion letter contained precisely the information called for in the parties' sale agreement and did not contain a misrepresentation.[39]

The extent to which direct privity remains a necessary element of any legal malpractice claim was recently addressed by the First Department in *Federal Ins. Co. v. North American Specialty Co.*[40] In *Federal Ins. Co.*, plaintiff excess carrier asserted a legal malpractice claim against defendant law firm retained by the primary carrier to represent its insured in a suit alleging that a worker sustained serious personal injuries as a result of a violation of Labor Law §§ 240(1) and 241(6). The excess carrier maintained that it paid $1,000,000 more than it should have towards the settlement of the underlying claim as a result of defendant law firm's failure to raise the prohibition against anti-subrogation as a basis for dismissal of the cross-claim seeking contractual indemnification against the insured. In reversing the trial court and dismissing the legal malpractice claim, the Appellate Division held (i) the allegation that defendant law firm owed a duty to defend in the absence of the allegation of an attorney-client relationship is insufficient to sustain a legal malpractice action; (ii) defendant law firms duty ran only to its client, the insured; (iii) the cause of action seeking damages for the excess carrier individually and not as the subrogee of its insured's rights, Federal could not recover on the theory of equitable subrogation; (iv) the excess insurer did not plead facts sufficient to establish a relationship "so close as to touch the bounds of privity" under *Prudential* which applies only to negligent misrepresentation cases; and (v) the excess carrier could not recover on the theory of equitable subrogation because the insured did not sustain any damage as a result of the alleged malpractice in failing to raise the prohibition against anti-subrogation in response to the cross-claim for contractual indemnification. In reaching this decision, the First Department held:

> Strict adherence to the rule prohibiting legal malpractice claims by non-clients serves an important policy consideration. An attorney's paramount duty is to protect zealously the interests of his or her client, and if that duty is breached and the breach proximately causes injury, the attorney may be subject to a malpractice claim, but only by his or her client. While, concededly, third parties may be interested in the actions by another's attorney and even benefit therefrom, that circumstance does not give rise to a duty on the part of the attorney to the third party. Were it otherwise, the attorney would be faced with the constant burden of weighing all the competing interests attendant upon such diverse obligations to the

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Harcourt, 257 A.D.2d 299, 693 N.Y.S.2d 544 (1st Dep't 1999) (plaintiff failed to establish relationship so close as to approach privity with estate's law firm that wrote opinion letter on validity of artwork).

39 *Mega Group, Inc. v. Pechenik & Curro, P.C.,* 32 A.D.3d 584, 819 N.Y.S.2d 796 (3rd Dep't 2006).

40 47 A.D.3d 52, 847 N.Y.S.2d 7 (1st Dep't 2007).

potential detriment of his or her client, to whom he owes undivided fidelity.[41]

In contrast, in 2004 the same court held that an excess liability insurer that was potentially liable for indemnification in a wrongful death action against an insured site owner brought by the estate of a contractor's employee could, as the insured's equitable subrogee, assert a breach of fiduciary duty claim against the insured's law firm based upon the law firm's failure to commence a third-party contractual indemnification action against the contractor/employer.[42] In addition to relying upon the doctrine of equitable subrogation, the *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.* court specifically held that the excess insurer stated a professional liability cause of action under the "so close as to approach privity" test since it alleged that (i) the attorney was aware that his services were to be used for a specific purpose; (ii) the excess insurer relied upon those services; and (iii) the attorney engaged in some conduct evincing an understanding of the excess insurer's reliance. As a result, the First Department reinstated the excess carrier's complaint against defendant law firm even though the complaint did not assert the existence of a negligent misrepresentation. Notwithstanding this decision, the *Federal Ins. Co*. decision appears to indicate that the courts do not intend to utilize the *Allianz* decision to expand the application of the *Prudential* test.

However, in *Benedict v. Whitman Breed Abbott & Morgan*,[43] the Appellate Division affirmed the trial court's denial of the defendant attorneys' motion to dismiss, holding that a partner in a partnership represented by the defendant law firm had standing to maintain claims for legal malpractice where it was alleged that another equal partner participated in some wrongdoing with the law firm.

At the present time in New York, the attorney for the decedent is not liable to either the beneficiary or the estate itself.[44] The "will drafting" cases decided in New York since the *Prudential* "so close as to approach privity" test was established confirm that the *Prudential* holding will not be applied to extend the scope of an attorney's liability to will beneficiaries. In *Conti v. Polizzotto*,[45] the Appellate Division rejected plaintiff will beneficiary's claim that the payment of the

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41 *Id*., at *5. *But see, Kumar v. American Transit Ins. Co.,* 49 A.D.3d 1353, 854 N.Y.S.2d 274 (4th Dep't 2008) (third party action against insured's attorneys by primary carrier permitted under the theory of equitable subrogation notwithstanding insurer's failure to pay sum on behalf of insured).

42 13 A.D.3d 172, 787 N.Y.S.2d 15 (1st Dep't 2004).

43 282 A.D.2d 416, 722 N.Y.S.2d 586 (2d Dep't. 2001).

44 *See*, *Spivey v. Pulley*, 138 A.D.2d 563, 526 N.Y.S.2d 145 (2nd Dept. 1988) (legal malpractice action brought against decedent's attorney on behalf of the estate of the decedent dismissed on the grounds that there existed no privity between the estate and the attorney and "that the decedent's estate possesses no cause of action against the defendant in its own right"); *see also, Deeb v. Johnson*, 170 A.D.2d 865, 566 N.Y.S.2d 688 (3rd Dept. 1991) ("the courts of this State have not departed from the privity requirement in will-drafting cases, whether brought by intended beneficiaries or the estate itself").

45 243 A.D.2d 672, 663 N.Y.S.2d 293 (2nd Dep't 1997).

fees for services rendered by defendant attorney to the decedent was sufficient to establish the existence of privity and held:

> Plaintiffs' status as beneficiaries of that will, and their mere claim that they instructed the defendants to draft the instrument in accordance with the decedent's expressed intentions, fail to suggest the existence between the parties of the type of relationship necessary to sustain this action.

In *Goldfarb v. Schwartz*[46] and *Rovello v. Klein*,[47] the Second Department confirmed that the plaintiff will beneficiaries may not maintain a claim against the attorney retained to represent the estate. In *Matter of Pascale*,[48] the court recognized the test set forth in *Prudential* but nevertheless held that "[t]he privity requirement would be rendered meaningless if it could be circumvented by the simple device of having a fiduciary appointed for the estate of the deceased client who would then commence the proceeding against the attorney on behalf of all, or some, of the beneficiaries of the estate." Similarly, an attorney retained by the trustor to create a trust is not in privity with the trust beneficiaries.[49]

In 2010, the Court of Appeals did carve out an exception to the strict privity rule involve estate planning activities. However the decision in *Estate of Schneider v. Finmann*[50] makes it abundantly clear that while the personal representative of an estate may maintain a legal malpractice action against an attorney for negligent estate planning services rendered to the decedent that increased estate tax liability, New York continues to prohibit suits by beneficiaries – even intended beneficiaries - against the decedent's counsel. Although the Estate of Schneider decision was trumpeted as presenting significantly more exposure to trust and estate attorneys, in reality it only leveled the playing field and allowed the estate of a former client to sue an attorney for errors that caused increased tax liability to the estate. Furthermore, the Estate of Schneider decision plainly held that the exception would be construed narrowly and subsequent attempts to expand liability to beneficiaries has been rejected.[51]

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46 26 A.D.3d 462, 811 N.Y.S.2d 414 (2nd Dep't 2006).

47 304 A.D.2d 638, 757 N.Y.S.2d 496 (2nd Dep't 2003) *lv. to app. den.* 100 N.Y.2d 509, 798 N.E.2d 347, 766 N.Y.S.2d 163 (2003).

48 168 Misc.2d. 891, 644 N.Y.S.2d 887 (Surr. Ct., Bx. Cty. 1996).

49 *Fredriksen v. Fredriksen*, 30 A.D.3d 370, 817 N.Y.S.2d 320 (2nd Dep't 2006).

50 15 N.Y.3d 306, 907 N.Y.S.2d 109 (2010).

51 *Leff v. Fulbright & Jaworski, LLP,* 78 A.D.3d 531, 911 N.Y.S.2d 320 (1st Dep't 2010) (Although lawfirm represented wife in her own estate planning, wife could not recover for advice rendered to late husband in his estate planning since there was no prvity and plaintiff could not establish that there was a relationship so close as to approach the functional equivalent of privity since there was no evidence that law firms' advice to husband was aimed at affecting plaintiff's conduct or inducing her to act).

Notwithstanding the continued requirement of privity by the New York courts in suits filed by beneficiaries, it is noted that across the country there has been a substantial eroding of the strict privity requirement in these types of cases.[52]

May a plaintiff maintain a cause of action against trial counsel retained by the attorney of record notwithstanding the absence of privity between trial counsel and plaintiff? One treatise answers this question in the negative:

> When the nature of the relationship of the attorney to the plaintiff is that of an 'of counsel' or 'trial counsel' relationship to the attorney of record, neither the plaintiff nor the 'of counsel' attorney has any direct right of action against the other, as there is no privity.[53]

In *Hirsch v. Weisman*,[54] the court found that there was no privity of contract between the plaintiffs and an attorney who was of counsel to the attorney they retained holding:

> Here, there was no contractual relationship between plaintiffs and the Bondy defendants. Plaintiffs were in privity only with Weisman, their retained counsel. At best, the Bondy defendants had an "of counsel" relationship with plaintiffs. Historically, such a relationship has been held not to provide a basis for recovery by the retained trial counsel directly from the client (*Levy v. Jacobs,* 3 Misc.2d 994, 148 N.Y.S.2d 507), even where the client may ultimately have benefited from the services performed (*Kiser v. Bailey,* 92 Misc.2d 435, 400 N.Y.S.2d 312; *Grennan v. Well Built Sales,* 35 Misc.2d 905, 907, 231 N.Y.S.2d 625). The lack of privity runs both ways, and without showing knowledge of the contractual agreement between [the attorney of record] and [trial counsel], plaintiffs cannot be considered third-party beneficiaries of that arrangement.[55]

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52 *Harrigfeld v. Hancock*, 90 P.3d 884 (Id. 2004); *Borissoff v. Taylor & Faust,* 33 Cal.4th 523, 93 P.3d 337 (Sup. Ct. CA 2004); *Caba v. Barker*, 93 P.3d 74, 193 Or.App. 798 (Ct. App. 2004); *Stanley L. and Carolyn M. Watkins Trust v. Lacosta,* 92 P.3d 620 (Mont. 2004); *Sorkowitz v. Lakritz, Wissburn & Associates*, 261 Mich.App. 642, 683 N.W.2d 210 (2004); *Lucas v. Hamm,* 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685 (1961) (multi-factor balancing approach); *Pelham v. Griesheimer,* 92 Ill.2d 13, 64 Ill.Dec. 544, 440 N.E.2d 96, 99-100 (1982) (third party beneficiary analysis). *Trask v. Butler,* 123 Wash.2d 835, 872 P.2d 1080 (1994) (combination of multi-factor balancing test and the third party liability test).

53 15 N.Y. Practice, N.Y. Law of Torts, §13.32 (2001).

54 189 A.D.2d 643, 592 N.Y.S.2d 337 (1st Dept. 1993), *appeal dismissed,* 81 N.Y.2d 1067, 601 N.Y.S.2d 584 (1993).

55 592 N.Y.S.2d at 338.

Similarly, in *Vogel v. Lyman*, [56] the court dismissed legal malpractice claims asserted by plaintiff against an associate working for the attorney holding that since the associate did not commence employment with the attorney of record until after the attorney was retained, there was no privity between plaintiff and the associate.[57]

In New York, an attorney may limit the scope of the engagement by careful drafting of an engagement letter.[58]

C. Proximate Cause – the 'But For' Burden of Proof

In New York, a plaintiff must prove that 'but for' the negligence of the attorney, plaintiff would have recovered or would not have sustained damage in the underlying case.[59] A complaint failing to allege a prima facie case of legal malpractice must be dismissed.[60] The courts note that the burden is a "heavy one"[61] and requirement presents a "high bar to attorney malpractice liability."[62]

To establish the elements of proximate cause and actual damages, where the injury is the value of the claim lost, the client must meet the "case within a case" requirement, demonstrating that 'but for' the attorney's conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages. [63] If a litigant is unable to prove the elements

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56 246 A.D.2d 422, 668 N.Y.S.2d 162 (1st Dep't 1998).

57 668 N.Y.S.2d at 163.

58 *Weissman v. Kessler*, 78 A.D.3d 465, 912 N.Y.S.2d 25 (1st Dep't 2010).(retainer agreement's express waiver relieved attorney from any liability for events occurring in client's underlying divorce matter prior to attorney's engagement); *Turner v. Irving Finkelstein & Meirowitz, LLP*, 61 A.D.3d 849, 879 N.Y.S.2d 145 (2nd Dep't 2009) (Retainer agreement clearly stated that law firm's representation of client in workers' compensation action was limited to proceedings before Workers' Compensation Board, and thus firm could not be liable for legal malpractice relating to its alleged failure to advise client of "other legal remedies" relating to workplace incident after client was denied full Board review); *See, also,* RPC § 1.2(c) (A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and /or opposing counsel).

59 *Leder v. Spiegel*, 9 N.Y.3d 836, 840 N.Y.S.2d 888 (2007); *Am-Base Corp. v. Davis Polk & Wardwell,* 8 N.Y.3d 428, 434, 834 N.Y.S.2d 705 (2007).

60 *Leder, supra*, 9 N.Y.3d at 837.

61 *Nazario v. Fortunato & Fortunato, PLLC,* 32 A.D.3d 692, 822 N.Y.S.2d 236 (1st Dep't 2006).

62 *See Littman Krooks Roth & Ball, P.C. v. New Jersey Sports Productions, Inc.*, No. 00 Civ. 9419, 2001 WL 963949, at *3 (S.D.N.Y., Aug. 22, 2001).

63 *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.,* 10 A.D.3d 267, 780 N.Y.S.2d 593 (1st Dep't 2004); *Davis v. Klein,* 88 N.Y.2d 1008, 1009 (1996); *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo, supra* at 284, 686 N.Y.S.2d 404; *Reibman v. Senie*, 302 A.D.2d 190, 756 N.Y.S.2d 164 (1st Dep't. 2003); *Zarin v. Reid & Priest*, 184 A.D.2d 285, 386, 585 N.Y.S.2d 379 (1st Dep't. 1992); *Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180, 710 N.Y.S.2d 578 (1st Dep't. 2000).

of the underlying claim, they cannot prevail on a summary judgment motion against the attorney[64] or successfully defend a summary judgment motion by the attorney.[65] As a result, even where the court has previously found that defendant attorney failed to preserve an objection to a jury charge in an underlying medical malpractice case, a subsequent legal malpractice case will be dismissed where plaintiff did not set forth the requisite factual allegations demonstrating that "but for" the failure alleged, there would have been a more favorable outcome in the underlying proceeding.[66] Even where an attorney was admittedly negligent, plaintiff may not recover unless plaintiff proves that 'but for' the negligent advice, plaintiff would not have been suffered damage.[67] As a result, even where the court found an attorney was negligent in a Section 1031 like-kind exchange by allowing the funds from the sale of the relinquished property to be paid directly to the client instead of an intermediary, the client's failure to designate replacement property and the ability to fund acquisition warrants dismissal of the complaint.[68]

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64 *Rodriguez v. Killerlane,* 44 A.D.3d 420, 843 N.Y.S.2d 69 (1st Dep't 2007). In reversing the trial court's award of summary judgment against attorney who failed to move for a default judgment against defendant within one year, the Appellate Division held:

> "[T]he effect of [defendant's] oversight [to move for entry of a default judgment within one year of the default] was, as best, ethereal--that which impressed Judge Cardozo as merely 'negligence in the air'--and cannot overcome the lack of merit in the underlying action.... [T]he 'but for' rule ... continues to control [in this CPLR 3215(c) context].... Any evaluation of the potential stability of a default judgment, had one been entered herein, would require impermissible speculation." *Tanel v. Kreitzer & Vogelman*, 293 A.D.2d 420 (1st Dep't 2002) (internal citations omitted). The only proof of the owners' liability presented by plaintiff was defendant's initial assessment of the merits and value of plaintiff's case against the owners, expressions of optimism that are insufficient to establish the merits of the underlying action.

See also, Jampolskaya v. Victor Gomelsky, P.C., 36 A.D.3d 761, 828 N.Y.S.2d 527 (2nd Dep't 2007).

65 *Oberkich v. Charles G. Eichinge*r, P.C., 35 A.D.3d 558, 827 N.Y.S.2d 192 (2nd Dep't 2006)(notwithstanding the fact that failure to obtain default within four years was malpractice, law firm entitled to summary judgment where plaintiff doe not allege delay in obtaining default made judgment unenforceable); *Gumbs v. Friedman & Simon,* 35 A.D.3d 362, 828 N.Y.S.2d 103 (2nd Dep't 2006) (plaintiff's inability to demonstrate City created condition by improper snow removal efforts warrant dismissal of malpractice claim despite failure to timely commence claim against City); *Nazario v. Fortunato & Fortunato, PLLC*, 32 A.D.3d 692, 822 N.Y.S.2d 236 (1st Dep't 2006) (failure to counter defendant attorney's demonstration that plaintiff did not sustain "serious injury" in underlying motor vehicle accident warrants dismissal of malpractice claim); *Billis v. Dinkes & Schwitzer*, 30 A.D.3d 260, 817 N.Y.S.2d 257 (1st Dep't 2006).

66 *Ellsworth v. Foley*, 24 A.D.3d 1239, 805 N.Y.S.2d 899 (4th Dep't 2005); *see also, Tortura v. Sullivan, Papain, Block, McGrath & Cannavo, P.C.*, 21 A.D.3d 1082, 803 N.Y.S.2d 571 (2nd Dep't 2005).

67 "[T]he failure to demonstrate proximate cause requires dismissal of a legal malpractice action regardless of whether the attorney was negligent" *Markowitz v. Kurzman Eisenberg Corbin Lever & Goodman, LLP,* 82 AD3d 719, 719 (2nd Dep't 2011); *G & M Realty, L.P. v. Masyr*, 96 A.D.3d 689, 948 N.Y.S.2d 256

68 *Wo Yee Hing Realty Corp. v. Stern*, 99 A.D.3d 58, 949 N.Y.S.2d 50 (1st Dep't 2012).

Referring again to the Pattern Jury Instructions, the need to be able to demonstrate a right to prevail in the underlying action is summarized as follows:

> Even though you find that defendant was negligent in failing to bring an action against T.P. on plaintiff's behalf, plaintiff may not recover in this action unless you further find that plaintiff would have been successful in an action against T.P. had one been brought. In order to decide the latter question, you must, in effect, decide a lawsuit within a lawsuit. Therefore, in order for the plaintiff to succeed, you would have to decide that on the evidence presented in this case plaintiff would have been successful in (his, her) action against T.P. had one been brought. If you find that on the evidence plaintiff would not have been successful, then you will find for defendant on this issue.
>
> In such an action *[insert rules that would govern burden of proof and substantive law in the action against T.P.]*.[69]

In *Weil, Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc*.,[70] the First Department rejected defendant's effort to assert a breach of fiduciary duty counterclaim in an effort to avoid the strict 'but for' causation:

> We take this occasion to note that the court erred in holding that the 'but for' standard of causation, applicable to a legal malpractice claim, does not apply to the claim for breach of fiduciary duty. Instead, it applied the less rigorous "substantial factor" causative standard. We have never differentiated between the standard of causation requested for a claim of legal malpractice and one for breach of fiduciary duty in the context of attorney liability. The claims are co-extensive.

As the *Weil, Gotshal* decision makes evident, the 'but for' requirement has been strictly adhered to by the appellate courts.[71]

However, in *Barnett v. Schwartz*,[72] the Second Department affirmed the trial courts refusal to charge the jury that plaintiff was required to prove that 'but for' defendant attorney's

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69 NY PJI 2:252.

70 10 A.D.3d 267, 780 N.Y.S.2d 593 (1st Dep't. 2004).

71 *See,e.g., Pistilli v. Gandin*, 10 A.D.3d 353, 780 N.Y.S.2d 293 (2d Dep't. 2004); *Lyons v. Gandin, Schotsky, Rappaport, Glass & Greene, LLP*, 8 A.D.3d 347, 777 N.Y.S.2d 912 (2d Dep't. 2004); *Iocovello v. Weingrad & Weingrad*, LLP, 4 A.D.3d 208, 772 N.Y.S.2d 53 (1st Dep't. 2004); *Ferdinand v. Crecca & Blair*, 5 A.D.3d 538, 774 N.Y.S.2d 714 (2d Dep't. 2004), *lv. to app. den.*, 3 N.Y.2d 609 (2004).

72 47 A.D.3d 197, 848 N.Y.S.2d 663 (2nd Dep't 2007).

alleged malpractice, plaintiff would not have sustained the damages alleged. The cases following *Barnett* do not support any lessening in the burden of proof required to prevail on a legal malpractice claim.[73]

In cases where a successor counsel had sufficient time to protect a party's rights, the outgoing counsel could not be liable for malpractice.[74] Any alleged negligence by an outgoing attorney cannot be the proximate cause of any of plaintiffs' alleged damages. As a result, a litigant cannot sustain the 'but for' burden against an attorney based upon the negligent failure to timely sue where successor counsel had the opportunity to bring suit in a timely fashion[75] or a statutory opportunity afforded successor counsel to revive a dismissed claim despite expiration of the Statute of Limitations [76]

A partner is ordinarily individually liable for the tortious conduct of another member or employee of the firm only if such conduct occurred while that partner was a member of the firm.[77] As a result, where the negligence occurs after the withdrawal of a partner from a law firm, the individual partner will be dismissed.[78]

D. Damages

In order to state a claim for legal malpractice, a plaintiff must have sustained "actual and ascertainable damages."[79] In the absence of actual damages sustained by plaintiff, a legal

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73 *See Joseph DelGreco & Co., Inc. v. DLA Piper L.L.P,* 899 F. Supp. 2d 268 (S.D.N.Y. 2012) (declining to follow the language of *Barnett)*; *But see, Smartix Intern. Corp. v. Garrubbo, Romankow & Capese, P.C.*, 2009 WL 857467 (S.D.N.Y.). Citing *Barnett*, the Southern District held: "With respect to causation, the possibility that the sanctions hearing also resulted from the failure of attorneys who are not defendants in this case to attend the court-ordered mediation does not preclude the possibility of establishing proximate cause, because it is not necessary to demonstrate sole causation in order to demonstrate proximate or but-for causation."

74 *Somma v. Dansker & Aspromonte Associates*, 44 A.D.3d 376, 843 N.Y.S.2d 577 (1st Dep't 2007); *Ramcharan v. Pariser,* 20 A.D.3d 556 (2nd Dep't 2005); *Perks v. Lauto & Garabedian,* 306 A.D.2d 261 (2nd Dep't 2003); *Albin v. Pearson,* 289 A.D.2d 272 (2nd Dep't 2001); *Richardson v. Lindenbaum & Young*, 2007 WL 316354 (N.Y. Sup. 2007); *DiBenedetto v. Hadziyianis*, 13 Misc.3d 1231(A), 2006 WL 3069284 (N.Y. Sup. 2006); 13 Misc.3d 1232(A), 2006 WL 3113181 (N.Y. Sup. 2006). The converse of this principle is similarly true. Where the malpractice occurred before successor counsel was retained, a legal malpractice claim against successor counsel will be dismissed. *Rivas v. Raymond Schwartzberg & Assoc., PLLC*, 52 A.D.3d 401, 861 N.Y.S.2d 313, 2008 (1st Dep't 2008).

75 *Artese v. Pollack*, 2 Misc.3d 1008; 784 N.Y.S.2d 918 (Sup. Ct. Nass. Co. 2004); *Golden v. Cascione, Chechanover & Purcigliotti,* 286 A.D.2d 281, 729 N.Y.S.2d 140 (1st Dep't 2001); *Greenwich v. Markoff,* 234 A.D.2d 112, 650 N.Y.S.2d 704 (1st Dep't 1996); *Shertov v. Capoccia,* 161 A.D.2d 871, 555 N.Y.S.2d 918 (3rd Dep't 1990).

76 *Kozmol v. Rothenberg,* 241 A.D.2d 484, 660 N.Y.S.2d 63 (2d Dept, 1997).

77 *See* Partnership Law § § 24, 26[a][1]; *Green v. Conciatori,* 26 AD3d 410, 411, 809 N.Y.S.2d 559 (2nd Dep't 2006); *Watkins v. Fromm,* 108 A.D.2d 233, 241-242, 488 N.Y.S.2d 768 (2nd Dep't 1985); *Gorton v. Fellner,* 88 A.D.2d 742, 451 N.Y.S.2d 873 (3rd Dep't 1982).

78 *Wright v. Shapiro*, 37 A.D.3d 1181, 830 N.Y.S.2d 627 (4th Dep't 2007).

79 *Ehlinger v. Ruberti, Girvin & Ferlazzo,* 304 A.D.2d 925, 926, 758 N.Y.S.2d 195 (3rd Dep't 2003), quoting

malpractice claim must be dismissed.[80] "Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a *prima facie* case of legal malpractice."[81] Where defendant attorney is able to demonstrate that his efforts on plaintiff's behalf resulted in an increase in the value of plaintiff's asset, as well as a savings in excess of the damages allegedly caused by the attorney's representation, the legal malpractice complaint will be dismissed.[82]

1. Punitive Damages

As with any other tort, in order to recover punitive damages in the context of a legal malpractice case, plaintiff must allege facts demonstrating that defendants' conduct "was so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply criminal indifference to civil obligations."[83] The failure to plead and, ultimately, prove this level of conduct warrants a dismissal of any claim for punitive damages.[84]

On a related front, New York courts hold that in a legal malpractice suit, "it would be 'illogical' to hold the law firm liable for causing the loss of a claim for punitive damages which are meant to punish the wrongdoer and deter future similar conduct."[85] Since punitive damages against an attorney will not punish or deter the underlying wrongdoer, it is not a recoverable item of damages in a legal malpractice suit.

Businо v. Meachem, 270 A.D.2d 606, 609, 704 N.Y.S.2d 690 (3rd Dep't 2000); *Brooklyn Law School v. Great Northern Insurance Co.,* 283 A.D.2d 383, 723 N.Y.S.2d 861 (2nd Dep't 2001).

80 *Miszko v. Leeds & Morelli*, 3 A.D.3d 726, 769 N.Y.S.2d 923 (3rd Dep't 2004).

81 *Giambrone v. Bank of New York,* 253 A.D.2d 786, 677 N.Y.S.2d 608 (2nd Dep't 1998); *Plymouth Organization, Inc. v. Silverman, Collura & Chernis, P.C.,* 21 A.D.3d 464, 799 N.Y.S.2d 813 (2nd Dep't 2005); *Albanese v. Hametz,* 4 A.D.3d 379, 771 N.Y.S.2d 393 (2nd Dep't 2004).

82 *Vlahakis v. Mendelson & Associates*, 54 A.D.3d 670, 863 N.Y.S.2d 479 (2nd Dep't 2008).

83 *Long v. Cellino & Barnes, P.C.*, 59 A.D.3d 1062, 873 N.Y.S.2d 805 (4th Dep't 2009); *Williams v. Coppola*, 23 A.D.2d 1012, 804 N.Y.S.2d 172 (4th Dep't 2005); *Zarin v. Reid & Priest,* 184 A.D.2d 385, 388, 585 N.Y.S.2d 379 (1st Dep't 1992); *Rucker v. Sayegh*, 35 A.D.3d 706, 824 N.Y.S.2d 913 (2nd Dep't 2006)(motion to amend pleading to assert punitive damage claim against attorney denied).

84 *Robinson v. Way*, 57 A.D.3d 872, 871 N.Y.S.2d 233 (2nd Dep't 2008) (jury award of $100,000 punitive damages against attorney defendant reversed in light of absence of evidence demonstrating that the defendants' "conduct was so outrageous as to evince a high degree of moral turpitude ... showing such wanton dishonesty as to imply a criminal indifference to civil obligations"; *Rosenkrantz v. Steinberg,* 13 A.D.3d 88, 786 N.Y.S.2d 35 (1st Dep't 2004); *Kaiser v. VanHouten*, 12 A.D.3d 1012, 785 N.Y.S.2d 569 (3rd Dep't 2004).

85 *Summerville v. Lipsig,* 270 A.D.2d 213, 704 N.Y.S.2d 598 (1st Dep't. 2000) citing *Cappetta v. Lippman*, 913 F.Supp.302, 306 (S.D.N.Y. 1996); *Braun v. Rosenblum*, 25 A.D.3d 696, 811 N.Y.S.2d 683 (2nd Dep't 2006).

2. Collectibility

In New York, the plaintiff must have been able to collect the underlying judgment against the original tort-feasor before there can be recovery against an attorney in a subsequent legal malpractice action as a result of the loss of the underlying claim.[86]

One might argue that there is an open issue as to whose burden it is to plead and prove that the underlying judgment would or would not have been collectible against the original tort-feasor. At present, the law in three of the four Appellate Departments is that the plaintiff must plead and, ultimately, prove that the underlying judgment would have been collectible against the original tort-feasor.[87] As a result, the overwhelming body of law in New York presently holds that the collectibility of any damage award is an element of a legal malpractice case which must be proven by the plaintiff.

However, in 2004, the First Department in *Lindenman v. Kreitzer*,[88] departed from a long line of established cases and held that, in the context of a legal malpractice suit, it is the defendant attorney's burden to prove that the plaintiff would not be able to collect an award in the underlying case. The decision went so far as to suggest that the time period over which collectibility should be determined is something short of the ten year initial period in which a New York judgment is viable and "should be one that effects a fair balance between the rights of, and burdens on, both the client and the attorney who negligently conducts litigation on the client's behalf." In the 2005 decision in *Jedlicka v. Field*,[89] the Second Department refused to follow the First Department's lead.

Given the split in the Departments, it is possible that the issue will come before the Court of Appeals. In the interim, in the First Department at least, the affirmative defense should be raised in the answer and discovery should be geared towards the possibility that uncollectibility may be part of the defendant attorney's burden of proof.

3. Non-Pecuniary Damages

In New York, non-pecuniary damages are not recoverable in a legal malpractice case.[90] As a result, damages for "loss of liberty,"[91] personal injury or emotional distress flowing

86 *Williams v. Kublick*, 41 A.D.3d 1193, 837 N.Y.S.2d 803 (4th Dep't 2007) ("A necessary element of a cause of action for legal malpractice is the collectibility of the damages in the underlying action.").

87 *See, Jedlicka v. Field*, 14 A.D.3d 596, 787 N.Y.S.2d 888 (2nd Dep't 2005); *McKenna v. Forsyth & Forsyth*, 280 A.D.2d 79, 720 N.Y.S.2d 654 (4th Dep't. 2001), *lv. to app. den.* 96 N.Y.2d 720, 733 N.Y.S.2d 372 (2001); *Chiaffi v. Wexler, Bergerman & Crucet*, 116 A.D.2d 614, 615, 497 N.Y.S.2d 703 (2d Dep't. 1986); *Schweizer v. Mulvehill*, 93 F.Supp.2d 376, 396 (S.D.N.Y. 2000); *Reynolds v. Picciano*, 29 A.D.2d 1012, 289 N.Y.S.2d 436 (3d Dep't. 1968).

88 7 A.D.3d 30, 775 N.Y.S.2d 4 (1st Dep't. 2004).

89 14 A.D.3d 596, 787 N.Y.S.2d 888 (2nd Dep't 2005).

90 *Dombrowski v. Bulson,* 19 N.Y.3d 347 (2012).

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from the claimed malpractice of an attorney are not permitted.[92] Efforts to couch such a cause of action by alleging intentional infliction of emotional harm are equally unsuccessful.[93]

4. Attorney Fees

Absent the existence of a statute authorizing an award of attorney's fees in the event of a successful recovery, attorney fees may not be recovered as an item of damages.[94]

While the attorney fees incurred in the prosecution of a legal malpractice claim are not recoverable as damages, a claim may be asserted for the recovery of attorneys' fees as damages in a legal malpractice claim if the fees were reasonably incurred in retaining alternate counsel to perform services for which a defendant attorney was originally retained and paid or to make a reasonable attempt to cure the error caused by the attorney's negligent conduct.[95]

5. Damages Based Upon Allegedly Erroneous Tax Advice

In the context of a malpractice case, where plaintiff alleges tax advice was negligently rendered, the failure of the IRS to disallow is a defense since, in the absence of a disallowance, no damage has been sustained.[96] Clearly, the taxes owed by plaintiff are not a recoverable item of damages.[97] Furthermore, interest imposed by the taxing authority as a result of taxes not timely paid is not an item of damages in a suit against counsel since the interest represents the benefit plaintiff had of using the tax money during the period of time the taxes were not paid.[98]

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92 *Kaiser v. VanHouten*, 12 A.D.3d 1012, 785 N.Y.S.2d 569 (3rd Dep't 2004); *Guiles v. Simser*, 35 A.D.3d 1054, 826 N.Y.S.2d 484 (3rd Dep't 2006); *Salichis v. Tortorelli*, 2004 WL 602784 *4 (S.D.N.Y. 2004); *Epifano v. Schwartz*, 279 A.D.2d 501, 719 N.Y.S.2d 268 (2d Dep't 2001); *Kaiser v. Van Houten*, 2003 WL 22137465 (N.Y. Sup. 2003); *Risman v. Leader,* 256 A.D.2d 1245, 683 N.Y.S.2d 462 (4th Dep't 1998); *Dirito v. Stanley*, 203 A.D.2d 903, 611 N.Y.S.2d 65 (4th Dep't 1994); *Green v. Leibowitz*, 118 A.D.2d 756, 500 N.Y.S.2d 146 (2d Dep't 1986).

93 *Id.*

94 *Hunt v. Sharp*, 85 N.Y.2d 883, 626 N.Y.S.2d 57 (1995) "Under the 'American rule,' to which this State adheres (*see, e.g., Chapel v. Mitchell,* 84 N.Y.2d 345, 618 N.Y.S.2d 626, 642 N.E.2d 1082), the prevailing litigant ordinarily cannot collect its reasonable attorneys' fees from its unsuccessful opponents."

95 *Lory v. Parsoff*, 296 A.D.2d 535, 745 N.Y.S.2d 218 (2nd Dep't 2002); *Affiliated Credit Adjustors v. Carlucci & Legum*, 139 A.D.2d 611, 527 N.Y.S.2d 426 (2nd Dep't 1988). This premise is based upon the exception to the general rule that attorney fees are not recoverable as set forth in *Shindler v. Lamb*, 25 Misc.2d 810, 812, 211 N.Y.S.2d 762, aff'd 10 A.D.2d 826, 200 N.Y.S.2d 346 (1st Dep't 1960), aff'd 9 N.Y.2d 621, 210 N.Y.S.2d 226 (1961). The *Shindler* exception states as follows: "If, through the wrongful act of his present adversary, a person is involved in earlier litigation with a third person in bringing or defending an action to protect his interests, he is entitled to recover the reasonable value of attorneys' fees and other expenses thereby suffered or incurred. . ."

96 *Zwecker v. Kuhlberg*, 209 A.D.2d 514, 618 N.Y.S.2d 840 (2nd Dep't 1994).

97 *Shalam v. KPMG, LLP*, 43 A.D.3d 752, 843 N.Y.S.2d 17 (1st Dep't 2007).

98 *Nevelson v. Carro, Spanbock, Kaster & Cuiffo,* 259 A.D.2d 282, 686 N.Y.S.2d 404 (1st Dep't 1999); *Alpert v. Shea, Gould, Climenko & Casey*, 160 A.D.2d 67, 559 N.Y.S.2d 312, 315 (1st Dep't 1990). *But see, Jamie Towers*

II. DEFENSES

In addition to the strict elements of a legal malpractice case which must be proven before recovery is allowed, the defenses to a legal malpractice action also provide several bases for dismissal.

A. Statute of Limitations

In New York, the statute of limitations for a claim asserted against an attorney is three years "regardless of whether the underlying theory is based in contract or tort."[99] Earlier efforts by the judiciary to enlarge the period to six years based upon a contract theory[100] were soundly rebuffed by the Legislature in the *Justification* which accompanied passage of the 1996 amendment to the CPLR which characterized the judicial expansion of the limitations period as "abrogating and circumventing the original legislative intent."

Notwithstanding the clear legislative intent that the claim against a non-medical professional be subject to a three year period of limitations, following the 1996 amendment there was some speculation that the courts would revert to the six year contract limitations period where the plaintiff alleged an attorney had contracted for and did not provide a "specific result." In fact, in its decision in *Chase Scientific Research, Inc. v. NIA Group, Inc.,*[101] the court acknowledged that

> [The 1996 amendment] was intended not only to remediate the *Sears* line of cases but also to reduce potential liability of insurers and corresponding malpractice premiums, and to restore a reasonable symmetry to the period in which all professionals would remain exposed to a malpractice suit.

Despite this acknowledgment that the court had over-stepped its bounds in expanding the period of limitations, the *Chase Scientific* court continued to recognize that a malpractice claim could "theoretically also rest on breach of contract to obtain a particular bargained-for result."[102]

Housing Co., Inc. v. William B. Lucas, Inc., 296 A.D.2d 359, 745 N.Y.S.2d 532 (1st Dep't 2002).

99 N.Y. Civ. Proc & R. § 214(6).

100 In *Santulli v. Englert, Reilly & McHugh, P.C.*, 78 N.Y.2d 700, 579 N.Y.S.2d 324 (1992), the court held:

> A cause of action for breach of contract may be based upon a promise to exercise due care in performing the services required by the contract.
>
> . . .
>
> Turning then to the legal malpractice cause of action, we reject, as did the Appellate Division, defendant's argument that the three-year Statute of Limitations provided in CPLR 214(6) applies . . .

101 96 N.Y.2d 20, 27 (2001).

102 96 N.Y.2d at 25.

In *R. M. Kliment v. McKinsey & Co*.,[103] however, the court held that even where an express breach of a contractual provision, bargained-for by the parties, is alleged, the claim will be subject to a three year period of limitations.

In *Kliment*, petitioner architect sought a permanent stay of McKinsey's demand for arbitration which alleged, four years after the completion of construction, that Kliment breached the parties' agreement by failing to provide a fire protection system. The agreement provided that Kliment was to comply with "all laws, codes, ordinances and other requirements applicable to the Project (including, without limitation, the relevant building code, the requirements of the local board of fire underwriters or similar body, and any permits for the work) . . ."

The trial court denied Kliment's motion to stay arbitration holding that the underlying breach of contract claim was subject to a six year period of limitations. The Appellate Division reversed on the basis of the fact that CPLR 214(6) provided for a three year period of limitations whether the claim was for contract or tort. The Court of Appeals affirmed stating

> Allowing this claim to proceed would accomplish the precise result the Legislature sought to prevent--allowing what is essentially a malpractice claim to be couched in breach of contract terms in order to benefit from the six-year statute of limitations. McKinsey's claim is fundamentally a claim that K & H failed to perform services in a professional, non-negligent manner by neglecting to comply with the relevant building codes as promised in the agreement. As a result, the claim is barred by CPLR 214(6).[104]

In light of the language of this decision, it seems clear that "where the underlying complaint is one which essentially claims that there was a failure to utilize reasonable care or where acts of omission or negligence are alleged or claimed, the statute of limitations shall be three years if the case comes within the purview of CPLR Section 214(6), regardless of whether the theory is based in tort or in a breach of contract,"[105] notwithstanding the fact that the specific result may have been bargained for by the parties.[106]

As noted above, an effort to predicate a fraud claim against an attorney in an attempt to avoid application of the three year statute of limitations will also fail.[107]

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103 3 N.Y.3d 538, 788 N.Y.S.2d 648 (2004).

104 *Id.*

105 Revised Assembly Mem. in Support, Bill Jacket, L 1996, ch 623.

106 *But see, O'Shea v. Brennan*, 2004 WL 1118109 *3 (S.D.N.Y 2004), "Moreover, under New York law, when no express promise was made in a retainer agreement to obtain a specific result, a breach of contract claim is a redundant pleading of a legal malpractice claim."

107 *See*, fn. 5, *supra; but see, Mitschele v. Schulz*, 36 A.D.3d 249, 826 N.Y.S.2d 14 (1st Dep't 2006).

1. Accrual

The statute of limitations in a legal malpractice action accrues on the date of negligence, not the date the client discovers the attorney's negligence.[108] The client's ignorance of either the attorney's negligence or the damage caused is irrelevant.[109] It is noted that in *McCoy v. Feinman*, the Court of Appeals expressly noted ". . . if there is injustice in the operation of CPLR 214(6), the Legislature has not seen fit to ameliorate the statute's effects by enacting a date of discovery rule."[110] Thus far, the legislature has not taken up the court's challenge. As a result, to this date "A malpractice cause of action sounds in tort and, therefore, absent fraud, accrues when an injury occurs, even if the aggrieved party is then ignorant of the wrong or injury."[111] However, it is noted that the legal malpractice period of limitations in many jurisdictions outside of New York is extended by the application of a discovery rule which delays the accrual of the claim.

Taking a somewhat contrary position, however, in *Britt v. Legal Aid Society*,[112] the Court of Appeals held that since a client convicted of a crime must prove that he or she is innocent before a legal malpractice case may be commenced against the attorney, the claim against the attorney does not accrue until the conviction is vacated and the decision is made not to re-prosecute.

On a motion to dismiss, the attorney has the initial burden of making a *prima facie* case that the three year limitations period has expired. The burden then shifts to the former client to show that an exception to the statute of limitations applies.[113]

2. Continuous Representation

Because a malpractice action accrues at the time of negligence, the doctrine of "continuous representation" operates to toll the period of limitations while the attorney continues to

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108 *Shumsky v. Eisenstein,* 96 N.Y.2d 164, 726 N.Y.S.2d 365 (2001); *St. Stephens Baptist Church, Inc. v. Salzman*, 37 A.D.3d 589, 830 N.Y.S.2d 248 (2nd Dep't 2007); *Amodeo v. Kolodny, P.C.,* 35 A.D.3d 773, 828 N.Y.S.2d 446 (2nd Dep't 2006); *Barbieri v. Shayne, Dachs, Stanisi, Corker & Sauer,* 304 A.D.2d 512, 757 N.Y.S.2d 583 (2nd Dep't 2003).

109 *McCoy v. Feinman,* 99 N.Y.2d 295, 301, 305, 755 N.Y.S.2d 693 (2002).

110 *Id.*, 755 N.Y.S.2d at 697, fn.2.

111 *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 620 N.Y.S.2d 318 (1994).

112 95 N.Y.2d 443, 718 N.Y.S.2d 264 (2000).

113 *Alicanti v. Bianco,* 2 A.D.3d 373, 374, 767 N.Y.S.2d 815 (2d Dep't. 2003), *lv. denied* 3 N.Y.3d 602, 782 N.Y.S.2d 405 (2004).

represent the client for the same matter. The doctrine does not delay the period on which the legal malpractice accrues and, as was stated by the Court of Appeals in *Glamm v. Allen*:[114]

> . . . its application is limited to situations in which the attorney who allegedly was responsible for the malpractice continues to represent the client in that case. When that relationship ends, for whatever reason, the purpose for applying the continuous representation rule no longer exists.[115]

Although codified by statute in the medical malpractice field, the doctrine of continuous representation was first applied based upon decisional law to toll the period of limitations in a legal malpractice action in the case *Siegel v. Kranis*.[116] The Court of Appeals, however, first expressed the rationale of the application of the doctrine to attorneys in *Greene v. Greene*:[117]

> In a broader sense the rule recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered.

Where, however, there has been a disruption in the confidence ordinarily placed in an attorney by a client, the continuous representation doctrine does not toll the period of limitations,[118] notwithstanding the fact that a formal substitution of counsel has not been effected.[119]

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114 57 N.Y.2d 87, 453 N.Y.S.2d 674, 678 (1982).

115 *See, also*, *Frischhut v. Laverne, Sortino, Hanks & Lustig*, 230 A.D.2d 890, 646 N.Y.S.2d 869 (2nd Dep't 1996). An exception to this rule may be found where a law firm continued to represent a plaintiff in the same manner following the departure of an employed attorney. In that case, the continuous representation of the law firm is imputed to the employed attorney notwithstanding the termination of the attorney-client relationship between the employed attorney and the client. *Pollicino v. Roemer & Featherstonhaugh*, 260 A.D.2d 52, 699 N.Y.S.2d 238 (3d Dept. 1999). Although the Court of Appeals seemed to have implicitly held to the contrary in *Gotay v. Breidbart*, 12 N.Y.3d 894, 884 N.Y.S.2d 677 (2009) , there are several cases which appear to hold that the negligence of a departed attorney will be imputed to his former firm in order to toll the period of limitations against the former law firm. *The New Kayak Pool Corporation v. Kavinoky Cook, LLP*, 74 A.D.3d 1852, 902 N.Y.S.2d 497(4th Dep't 2010); *Waggoner v. Caruso*, 68 A.D.3d 1, 886 N.Y.S.2d 368 (1st Dep't 2009) *affirmed on other grounds* 14 N.Y.3d 874, 903 N.Y.S.2d 333 (2010); *HNH Intl., Ltd. v. Pryor Cashman Sherman & Flynn LLP,* 63 A.D.3d 534, 535, 881 N.Y.S.2d 86 (1st Dep't 2009).

116 29 A.D.2d 47, 288 N.Y.S.2d 831 (2d Dep't 1968).

117 56 N.Y.2d 80, 94, 451 N.Y.S.2d 46, 50 (1982).

118 *Goicoechea v. Law Office of Stephen Kihl*, 234 A.D.2d 507, 651 N.Y.S.2d 198 (2d Dept. 1996); *Shivers v. Siegel,* 11 A.D.3d 447, 782 N.Y.S.2d 752 (2nd Dep't 2004).

119 *Daniels v. Lebit,* 299 A.D.2d 310, 749 N.Y.S.2d 149 (2nd Dep't 2002); *Piliero v. Adler & Stavros*, 282 A.D.2d 511, 723 N.Y.S.2d 91 (2d Dept. 2000); *Aaron v. Roemer, Wallens and Mineaux, LLP*, 272 A.D.2d 252, 707 N.Y.S.2d 711 (3rd Dep't 2000), app. den. 96 N.Y.2d 730, 722 N.Y.S.2d 796 (2001).

There was concern that the legislature's re-affirmance of the three year limitations period in 1996 would lead to a spate of continuous representation decisions which stretched the bounds of the original doctrine. This, however, has not proved to be the case. The courts have addressed the issue with restraint in several decisions that comport with the original requirements that the continuing relationship must be for the same matter[120] and terminates at the time the attorney-client relationship ends. [121]

The continuous representation doctrine does not apply to toll the period of limitations indefinitely where the client was unaware of the need for any further legal services in connection with the retained matter.[122] However, where the attorney and client "both explicitly anticipate continued representation" and the clients are "left with the reasonable impression that defendant (attorney) was, in fact, actively addressing their legal needs," the period of limitations will be tolled.[123]

In *McCoy v. Feinman,*[124] the wife's attorney failed to assert a claim for pre-retirement death benefits and no such provision was included in the stipulation settling the action for divorce. When the former husband died prior to retirement, the former wife was denied any share in the death benefit. The Court of Appeals found that the cause of action accrued on the day of the stipulation or, at the latest, the date on which the judgment incorporating the stipulation was filed saying, "we find no reason that plaintiff's damages were not then sufficiently calculable to permit plaintiff to obtain prompt judicial redress."[125]

In *CLP Leasing Co., LP v. Nessen*,[126] plaintiff relied upon an entry in the invoices

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120 *Hasty Hills Stables, Inc. v. Dorfman, Lynch, Knoeble & Conway, LLP*, 52 A.D.3d 566, 860 N.Y.S.2d 182 (2nd Dep't 2008) (representation of plaintiff in matters unrelated to owners' sale of property to Town insufficient to establish continuous representation); *Maurice W. Pomfrey & Assocaites, Ltd. v. Hancock & Estabrook, LLP*, 50 A.D.3d 1531, 862 N.Y.S.2d 217 (4th Dep't 2008) (representation of employer in matters other than subject employment agreement does not toll period of limitations for legal malpractice claim arising out of drafting of employment agreement); *Chicago Title Ins. Co. v. Mazula*, 47 A.D.3d 999, 849 N.Y.S.2d 333 (3rd Dep't 2008) (attorney's alleged continuous representation of estate did not toll limitations period on surviving spouse's malpractice claim for preparing faulty deeds conveying tenancy in the entirety property where attorney represented surviving spouse in her individual capacity in conveying her interests in faulty original deed and in faulty corrective deed and performed no more work for her in regard to conveyances); *Lai v. Gartlan*, 28 A.D.3d 263, 811 N.Y.S.2d 917 (1st Dep't 2006) ("The documentation plaintiffs submitted showed only the continuation of a general professional relationship, and not an ongoing representation concerning the specific matters from which their claim rose . . .")

121 *Marlett v. Hennessy*, 32 A.D.3d 1293, 823 N.Y.S.2d 325 (4th Dep't 2006).

122 *Ashmead v. Groper*, 251 A.D.2d 716, 673 N.Y.S.2d 779 (3rd Dep't 1998); *Melendez v. Bernstein*, 29 A.D.3d 872, 815 N.Y.S.2d 792 (2nd Dep't 2006).

123 *Shumsky, supra*, 726 N.Y.S.2d at 370.

124 99 N.Y.2d 295, 755 N.Y.S.2d 693, 785 N.E.2d 714 (2002).

125 *Id,* 755 N.Y.S.2d 693.

126 12 A.D.3d 226, 784 N.Y.S.2d 535 (1st Dep't 2004).

rendered by defendant attorneys to support its claim that the doctrine of continuous representation applied to toll the period of limitations. The First Department rejected plaintiff's claim holding that the documentation "submitted showed only the continuation of a general professional relationship, and not an ongoing representation concerning the specific matters from which their claims arose" since the "insurance matter reflected in defendants' billing statements was unrelated to the litigation conduct that they criticized."

To take advantage of the continuous representation toll, the acts of representation forming the basis of the claim must be specifically plead in the complaint.[127] Plaintiff's allegations of legal representation amounting to the attorney acting as corporate counsel from 1993 through 2003 on a myriad of matters is insufficient to toll the period of limitations with respect to the 1993 drafting of an employment agreement.[128]

B. Plaintiff's Conduct

1. Culpable conduct

The conduct of a plaintiff-client may result in a reduction or even a complete bar of a legal malpractice claim.[129] If the client's conduct was such that the plaintiff-client cannot demonstrate that 'but for' the attorneys conduct, the damage would not have occurred, then the legal malpractice case will be dismissed.[130] While an attorney has the responsibility to investigate and prepare every phase of a client's case, an attorney is not liable for not knowing facts that the client failed to tell him or her.[131] The client's conduct can also operate to reduce the attorney's liability. As a result, a plaintiff's motion for summary judgment against an attorney has been denied when there is a question of fact as to whether the plaintiff's own negligence contributed to the defect in the notice of claim.[132]

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127 *Zaref v. Berk & Michaels*, 192 A.D.2d 346, 596 N.Y.S.2d 773, 774 (1st Dep't 1993).

128 *Byron Chemical Corp. v. Groman, Tisman & Ross, P.C.*, 61 A.D.3d 909, 877 N.Y.S.2d 457 (2nd Dep't 2009) ("Accepting the facts alleged in the plaintiff's complaint as true, there was a nine-year lapse between the defendants' representation as to the employment agreements. The continuous representation doctrine does not contemplate such intermittent representation").

129 *Cicorelli v. Capobianco*, 89 A.D.2d 842, 453 N.Y.S.2d 21 (2nd Dep't 1982) *affd* 59 N.Y.2d 626, 463 N.Y.S.2d 195. *But see, Northrup v. Thorsen,* 46 A.D.3d 780, 848 N.Y.S.2d 304 (2nd Dep't 2007) (Client's attempt to persuade attorney to correct his error in settling personal injury action through binding arbitration without first obtaining the consent of client's workers' compensation carrier constituted a reasonable effort on client's part to mitigate her damages, and therefore attorney's inaction in rectifying his error could not be attributed to any culpable conduct on the client's part, in client's legal malpractice action).

130 *DiPlacidi v. Walsh*, 243 A.D.2d 335, 664 N.Y.S.2d 537 (1st Dep't 1997).

131 *Green v. Conciatori*, 26 A.D.3d 410, 809 N.Y.S.2d 559 (2nd Dep't 2006).

132 *Cappadonna v. Simon, Sarver, Friedman & Rosenberg,* 233 A.D.2d 118, 649 N.Y.S.2d 777 (1st Dep't 1996).

Where the allegations asserted by the plaintiff-client are flatly contradicted by a document signed by the plaintiff, the courts regularly dismiss claims on the basis that the client is bound to read and know what he or she signed.[133] The sole exception to this well-settled doctrine is where the client alleges that he had previously read and executed the document and was advised by counsel that the new document now being signed was identical to the document previously read and executed.[134] As a result, a legal malpractice action that is predicated upon a claim that the plaintiff client was unaware of the existence of a conflict[135] or the terms of a settlement agreement[136] will be

In addition, the conduct of plaintiff's agents, including counsel, may be imputed to the plaintiff client under common agency principles and thereby reduce plaintiff's recovery.[137] In a recent case, the third party defendant law firms argued that the affirmative defense of the culpable conduct of plaintiff and its agents precluded a third party action seeking contribution against several law firms that had represented plaintiff.[138] Although the trial court accepted the third party defendant law firms' arguments, the Appellate Division ruled that there were circumstances under which the culpable conduct affirmative defense would not afford third party plaintiff attorney all of the relief sought. This issue, however, remains far from settled and further test of the defense is warranted.

2. Sophisticated Client

Even where it is alleged that a law firm rendered negligent advice to a client, where the client was 'sophisticated' and already aware of the advice in question, the claim will be dismissed since the law firm's actions are not the proximate cause of the plaintiff's injuries.[139] As a result, where a sophisticated client imposes a strategic decision on counsel, the client's action absolves the attorney from liability for malpractice.[140]

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133 *Beattie v. Brown & Wood*, 243 A.D.2d 395, 663 N.Y.S.2d 199 (1st Dep't 1997).

134 *Arnav Indus., Inc. v. Brown, Raysman, Millstein, Felder & Steiner, LLP,* 96 N.Y.2d 300, 727 N.Y.S.2d 688 (2001).

135 *Bishop v. Mauer*, 33 A.D.3d 497, 823 N.Y.S.2d 366 (1st Dep't 2006).

136 *Laruccia v. Forchelli, Curto, Schwartz, Mineo, Carlino & Cohen, LLP*, 295 A.D.2d 321, 744 N.Y.S.2d 335 (2nd Dep't 2002).

137 *New York Islanders Hockey Club, LLP v. Comerica Bank – Texas*, 115 F.Supp.2d 348 (E.D.N.Y. 2000)(dismissing third party action against plaintiff's attorneys since any culpable conduct by team's law firm was attributable to team, so that bank could not maintain contribution claim against law firm).

138 *Millennium Import, LLC v. Reed Smith LLP*, 2013 WL 257389 (1st Dep't 2013).

139 *Stolmeier v. Fields*, 280 A.D.2d 342, 721 N.Y.S.2d 313 (1st Dep't 2001); *Merz v. Seaman*, 265 A.D.2d 385, 697 N.Y.S.2d 290 (2nd Dep't 1999); *Smookler v. Kronish Lieb*, 1/6/2006 NYLJ 1, (col. 3), index no. 604165/02 (N.Y. Sup. 2006). However, where plaintiff raises questions of fact as to the level of sophistication claimed by defendant law firm, a pre-answer motion to dismiss on this basis may result in a denial of the motion. *SF Holdings Group, Inc. v. Kramer, Levin, Naftalis &Frankel, LLP,* 56 A.D.3d 281, 866 N.Y.S.2d 674 (1st Dep't 2008).

140 *Town of North Hempstead v, Winston & Strawn, LLP,* 28 A.D.3d 746, 814 N.Y.S.2d 237 (2nd Dep't 2006).

C. Standing/Capacity to Sue

1. Shareholder May Not Assert A Legal Malpractice Claim Against the Corporation's Attorney

As a corollary of the well-settled rule that privity must exist between plaintiff and defendant in a legal malpractice case, a law firm does not owe a duty to a former member of its limited liability company client to amend the offering plan after the former member's buyout so as to remove the former member from the list of managers of the company.[141] Similarly, a shareholder lacks standing to assert a claim for legal malpractice against the attorney for a corporation[142] and a corporation's principal may not maintain a legal malpractice action against the attorney even where the principal paid the attorney fees.[143]

2. The Wagoner/Hirsch Rule and *In Pari Delicto*

Breach of fiduciary duty and "aiding and abetting" claims against attorneys and other professionals asserted by bankruptcy trustees are problematic in terms of exposure, as well as venue. Very often motions to withdraw the reference are denied or deferred until trial. The attorney, alleged to have wronged the debtor, possibly to the detriment of the creditors, rarely fares well in the bankruptcy court. However, a very strong but underutilized defense does exist to claims where the facts suggest that the debtor joined with third party professionals in wronging its creditors. If facts can be demonstrated that "management" was the architect or complicit in the alleged wrongdoing, the bankruptcy trustee lacks standing to recover against the third party, on a professional malpractice or other theory, for damage to creditors.[144] This powerful defense, known as the *Wagoner/Hirsch* Rule, has its genesis in the common law theory of *in pari delicto*. Criticized in some jurisdictions, the defense is still very much viable.

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141 *Berkowitz v. Fischbein, Badillo, Wagner & Harding, LLP*, 7 A.D.3d 385, 777 N.Y.S.2d 99 (1st Dep't 2004).

142 *Griffin v. Medical Quadrangle, Inc.,* 5 A.D.3d 151, 772 N.Y.S.2d 513 (1st Dep't 2004).

143 *Moran v. Hurst*, 32 A.D.3d 909, 822 N.Y.S.2d 564 (2nd Dep't 2006).

144 *See, Hirsch v. Arthur Andersen & Company*, 72 F.3d 1085 (2nd Cir. 1995); *Shearson Lehman Hutton v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991). In *In re The Bennett Funding Group, Inc.*,[144] the trustee of the corporate debtor's bankruptcy estate brought an adversary proceeding against the debtor's accountants and attorneys for their alleged malpractice, breach of fiduciary duty and negligence in failing to report, to debtor's innocent directors and officers, their suspicions that management was using the debtor to perpetrate a Ponzi scheme. The district court granted the defendant professional's motion for summary judgment and the Second Circuit affirmed holding that where the corporation's management and the professionals have allegedly collaborated in a scheme to defraud corporate creditors, the trustee of the debtor corporation's bankruptcy estate can sue only if he can establish that there has been damage to the corporation apart from damage to creditors and, even in those circumstances, the trustee cannot recover if alleged malfeasor was the corporation's sole shareholder and decision-maker. The court also rejected the trustee's attempts to portray public relations figureheads, such as sports figures or others who held titles in the company but performed no decision-making ability, as innocent members of management to whom defendant professional could have reported the wrongdoing.

In *Kirschner v. KPMG,*[145] the Court of Appeals was asked by the Second Circuit to define New York's position on the application and role of *in pari delicto*:

> The justice of the *in pari delicto* rule is most obvious where a willful wrongdoer is suing someone who is alleged to be merely negligent. A criminal who is injured committing a crime cannot sue the police officer or security guard who failed to stop him; the arsonist who is singed cannot sue the fire department. But, as the cases we have cited show, the principle also applies where both parties acted willfully. Indeed, the principle that a wrongdoer should not profit from his own misconduct is so strong in New York that we have said the defense applies even in difficult cases and should not be "weakened by exceptions" (*McConnell v. Commonwealth Pictures Corp.,* 7 N.Y.2d 465, 470, 199 N.Y.S.2d 483, 166 N.E.2d 494 [1960] ["We are not working here with narrow questions of technical law. We are applying fundamental concepts of morality and fair dealing *not to be weakened by exceptions* " (emphasis added)]; *see also Saratoga County Bank v. King,* 44 N.Y. 87, 94 [1870] [characterizing the doctrine as "inflexible"])..

As a result, although the adverse interest exception exists, it will be narrowly applied.[146] As the Court of Appeals decision in *Kirschener* made clear "[s]o long as the corporate wrongdoer's fraudulent conduct enables the business to survive-to attract investors and customers and raise funds for corporate purposes-this test is not met."[147]

3. Capacity to sue

If the plaintiff lacks capacity to maintain suit against the attorney, the legal malpractice claim will be dismissed. One example of this defense is the fact that a dissolved corporation lacks the capacity to maintain a legal malpractice action where it does not relate to the plaintiff's winding up of its corporate affairs.[148]

In addition, a plaintiff who has filed for bankruptcy and failed to list the potential malpractice claim as an asset of the bankrupt estate lack capacity to sue the attorney and is judicially estopped from maintaining the legal malpractice claim.[149] The fact that the bankruptcy proceeding

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145 15 N.Y.3d 446, 457, 938 N.E.2d 941, 912 N.Y.S.2d 508 (2010).

146 *In re CBI Holding Co., Inc.*, 529 F.3d (2nd Cir. 2008)

147 *Kirschner v. KPMG,* 15 N.Y.3d 446, 468, 938 N.E.2d 941, 912 N.Y.S.2d 508 (2010).

148 *2 North Broadway Food, Inc. v. Anduze*, 33 A.D.3d 992, 822 N.Y.S.2d 733 (2nd Dep't 2006).

149 *Whelan v. Longo*, 7 N.Y.3d 821, 822 N.Y.S.2d 751 (2006); *DiBenedetto v. Hadziyianis*, 13 Misc.3d 1231(A), 2006 WL 3069284 (N.Y. Sup. 2006). *Cf., Kremin v. Benedict Morelli & Associatates, P.C.*, 54 A.D.3d 596, 864

was dismissed rather than discharged does not change the result.[150] This defense, however, must be raised affirmatively by the defendant or it may be considered waived.[151]

D. Collateral Estoppel

The equitable remedy of collateral estoppel is based upon the notion that a party or one in privity with a party, should not be permitted to re-litigate an issue decided against it.[152] A party will be collaterally estopped if: (i) the issue to be precluded is identical to the issue decided in the prior proceeding; (ii) the issue was necessarily decided in the prior proceeding; and (iii) the party sought to be precluded had a full and fair opportunity to litigate the issue. The use of collateral estoppel has four separate applications in the context of legal malpractice actions.

1. Fee Actions

In the area of fee dispute claims, the law has long been settled that a legal malpractice claim is barred by the attorney's successful prosecution of a prior action to recover fees for the legal services which the client now alleges were negligently performed.[153] Although the concept has its genesis in some rather ancient cases, the principle remains good law today. "A judicial determination fixing the value of a professional's services necessarily decides that there is no malpractice."[154] The doctrine of collateral estoppel, or issue preclusion, forecloses "issues which were necessarily decided in the first action and applies even if the plaintiff does not actually raise the legal malpractice as a defense to the fee claim.[155] The test is whether plaintiff had an opportunity to raise it. Thus, "[u]nder New York law, a determination of entitlement to attorney's fees necessarily decides the issue of malpractice and any subsequent action for malpractice is barred under the doctrine of collateral estoppel."[156] Where the court approves a class settlement, including an award

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N.Y.S.2d 2 (1st Dep't 2008).

150 *Nationwide Associates, Inc. v. Epstein*, 24 A.D.3d 738, 809 N.Y.S.2d 118 (2nd Dep't 2005).

151 *Edwards v. Siegel, Kelleher & Kahn*, 26 A.D.3d 789, 811 N.Y.S.2d 828 (4th Dep't 2006).

152 *D'Arata v. N.Y. Central Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 563 N.Y.S.2d 24 (1990).

153 *Gates v. Preston*, 41 N.Y. 113 (1869); *Blair v. Bartlett*, 75 N.Y. 150 (1878).

154 *Altamore v. Friedman*, 193 A.D.2d 240, 246, 602 N.Y.S.2d 894, 898 (2d Dep't. 1993), *quoting Kagan Meat & Poultry v. Kalter*, 70 A.D.2d 632, 416 N.Y.S.2d 646 (2d Dep't. 1979).

155 *Kinberg v. Garr,* 28 A.D.3d 245, 811 N.Y.S.2d 568 (1st Dep't 2006); *Chisholm-Ryder Company, Inc. v. Sommer & Sommer*, 78 A.D.2d 143, 434 N.Y.S.2d 70 (4th Dep't. 1980).

156 *Best v. Law Firm of Queller & Fisher*, 278 A.D.2d 441, 718 N.Y.S.2d 397 (2d Dep't. 2000), *cert. denied sub nom. Best v. Sears Roebuck and Co.*, 534 U.S. 1080, 122 S.Ct. 812, 151 L.Ed.2d 696 (2002); *Hutton v. County of Rockland*, 1997 WL 291954, at 3 (S.D.N.Y. June 2, 1997). *But see, York v. Landa,* 57 A.D.3d 980, 870 N.Y.S.2d 459 (2nd Dep't 2008) (where underlying action was to enforce settlement agreement that addressed fee claim rather than to fix the attorney's fee, plaintiff is not collaterally estopped from asserting subsequent legal malpractice action)

of "fair and reasonable" attorneys' fees to class counsel, a subsequent malpractice action against class counsel is precluded under the "relitigation" exception to the Anti–Injunction Act.[157]

A collateral estoppel defense may be based upon an order finding that the attorney is entitled to a charging or retaining lien (even where the amount of the lien is not yet set),[158] an arbitration award in the attorney's favor,[159] or bankruptcy court approval of the attorney's fee.[160] It is immaterial whether the professional had obtained a default judgment in connection with the fee suit or that there was a significant disparity in the amount of money sought on the fee claim from the malpractice claim also will not avoid preclusive effect.[161]

2. Underlying Criminal Proceedings

To maintain a cause of action for legal malpractice arising out of an attorney's representation in a criminal matter, the client has the heavy burden of establishing that "the conviction was due to the attorney's actions alone and not due to some consequence of his guilt."[162] So long as the conviction stands, the convicted client cannot assert a malpractice claim against the attorney who represented him in the criminal matter.[163] Even if the conviction has been vacated, plaintiff may not assert a legal malpractice claim where plaintiff cannot assert his innocence, such as where, following the vacatur of the conviction, plaintiff pleas to a lesser charge.[164]

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157 *Wyly v. Weiss, et al*, 697 F.3d 131 (2nd Cir, 2012).

158 *Zito v. Fischbein Badillo,* 80 A.D.3d 520, 2011 WL 166721 (1st Dep't 2011) (Causes of action for legal malpractice and violation of Judiciary Law § 487 barred by doctrines of collateral estoppel and res judicata by prior court's imprimatur of retaining lien); *Coburn v. Robson & Miller, LLP*, 2004 WL 2984870 (1st Dep't. 12/28/04); *John Grace & Co., Inc. v. Tunstead, Schechter & Torre*, 186 A.D.2d 15, 588 N.Y.S.2d 262 (1st Dep't. 1992); *Nat Kagan Meat & Poultry, Inc. v. Kalter*, 70 A.D.2d 632, 416 N.Y.S.2d 646 (2d Dep't. 1979).

159 *Altamore v. Friedman*, *supra*, 602 N.Y.S.2d at 898; *but see, Soni v. Pryor*, 102 A.D.3d 856, 958 N.Y.S.2d 721 (2nd Dep't 2013) (Arbitration award under Part 137 Fee Dispute Program is not collateral estoppel of subsequent legal malpractice case even where award is affirmed by trial court since legal malpractice claims are excluded from program).

160 *Orchard Motorcycle Distributors, Inc. v. Morrison Cohen Singer & Weinstein, LLP*,49 A.D.3d 294, 853 N.Y.S.2d 320 (1st Dep't 2008); *Izko Sportswear Co., Inc. v. Flaum*, 25 A.D.3d 534, 809 N.Y.S.2d 119 (2nd Dep't 2006). *But see, Breslin Realty Dev. Corp. v. Shaw,* 19 Misc.3d 1127(A), 866 N.Y.S.2d 90 (N.Y. Sup 2008).

161 *Harris v. Stein*, 207 A.D.2d 382, 615 N.Y.S.2d 703 (2d Dep't 1994).

162 *Britt v. Legal Aid Society*, 95 N.Y.2d 443, 718 N.Y.S.2d 264 (2000); *Carmel v. Lunney*, 70 N.Y.2d 169, 518 N.Y.S.2d 605 (1987); *Cummings v. Donovan*,36 A.D.3d 648, 828 N.Y.S.2d 475 (2nd Dep't 2007); *Boomer v. Gross,* 34 A.D.3d 1096, 825 N.Y.S.2d 171 (2nd Dep't 2006); *Casement v. O'Neill,* 28 A.D.3d 508, 812 N.Y.S.2d 649 (2nd Dep't 2006); *Biegin v. Paul K. Rooney, P.C.*, 269 A.D.2d 264, 703 N.Y.S.2d 121 (1st Dep't 2000); *Malpeso v. Burstein & Fass*, 257 A.D.2d 476, 684 N.Y.S.2d 201 (1st Dep't 1999); *Doyle v. Ruskin,* 230 A.D.2d 888, 646 N.Y.S.2d 889 (2nd Dep't 1996); *Kaplan v. Sachs,* 224 A.D.2d 666, 639 N.Y.S.2d 69 (2nd Dep't 1996);

163 *Daly v. Peace,* 54 A.D.3d 801, 863 N.Y.S.2d 770 (2nd Dep't 2008); *Young Wong Park v. Wolff & Sampson, P.C.*, 56 A.D.3d 351, 867 N.Y.S.2d 424 (1st Dep't 2008); *Carmo v. Lazzaro*, 5 A.D.3d 128, 771 N.Y.S.2d 892 (1st Dep't 2004); *D'Amato v. Bray*, 83 Fed.App. 380, 2003 WL 22976108 (2d Cir. 2003).

164 *Rosado v. Legal Aid Society*, 12 A.D.3d 356, 784 N.Y.S.2d 154 (2nd Dep't 2004).

Where, however, the state or federal court has vacated a conviction on the basis of ineffective assistance of counsel, the court will not collaterally estop the defendant attorney in a subsequent legal malpractice action from maintaining that the services rendered did not deviate from accepted standards inasmuch as the attorney did not have a full and fair opportunity to litigate the allegation.165

3. Underlying Civil Proceedings

In general, a plaintiff will not be collaterally estopped from pleading a fact adjudicated in the underlying proceeding when the issue resolved in the underlying case is not identical to the issue in the legal malpractice claim.[166] Where a litigant rests the claim for collateral estoppel on an alternate holding nor reviewed by the appellate court, a claim of collateral estoppel will not lie.[167]

However, there have been a number of cases in which the court has collaterally estopped plaintiff from proceeding based upon a finding in the underlying matter.[168] In *Rosenkrantz v. Steinberg*,[169] the court applied the doctrine of collateral estoppel to bar a legal malpractice action in a situation commonly confronted by attorneys in the defense of legal malpractice claims. In *Rosenkrantz*, the plaintiff sued her attorney for malpractice based upon the dismissal of the underlying action due to the attorney's failure to appear at a court conference. Upon the dismissal of the underlying action, the attorney moved to vacate, which was denied. The attorney then filed an appeal from the denial of the motion to vacate, which was denied because the plaintiff failed to establish a reasonable excuse for the default and a meritorious cause of action. In the subsequent legal malpractice action, the First Department held that its prior determination in the underlying action, that the plaintiff's claims lacked merit, served as a bar to plaintiff's malpractice claims because she could not establish that she would have prevailed 'but for' the attorney's negligence.

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165 *Gersten v. Lemke,* 2008 WL 549152 (Trial Order) (N.Y. Sup.).

166 *Weiss v. Manfredi,* 83 N.Y.2d 974, 616 N.Y.S.2d 325 (1994).

167 *Tydings v. Greenfield, Stein & Senior, LLP*, 11 N.Y.3d 195, 866 N.Y.S.2d 563 (2008).

168 *Rosenkrantz v. Steinberg*, 13 A.D.3d 88, 786 N.Y.S.2d 35 (1st Dep't 2004); *DeGregorio v. Bender,* 4 A.D.3d 384, 772 N.Y.S.2d 89 (2d Dep't. 2004); *Colleran v. Rockman*, 712 N.Y.S.2d 108 (1st Dep't. 1999), dismissing legal malpractice action where plaintiff could not establish any damages due to attorney's recommendation to accept settlement; *Choi v. Dworkin*, 230 A.D.2d 780, 646 N.Y.S.2d 531 (2d Dep't. 1996), dismissing complaint where plaintiff failed to show that attorney's negotiation of the settlement or his advice that the plaintiff accept the terms of it was wrongful or negligent; *Neff v. Schwartzapfel*, 254 A.D.2d 137, 679 N.Y.S.2d 37 (1st Dep't. 1998). *But see, Richter v. Davidson & Cohen, P.C.,* 25 A.D.3d 595, 807 N.Y.S.2d 637 (2nd Dep't 2006) (client not collaterally estopped from claiming attorney settled case without her authority since plaintiff did not have a full and fair opportunity to litigate the issue of actual authority in the underlying hearing).

169 13 A.D.3d 88, 786 N.Y.S.2d 35 (1st Dep't 2004).

DeGregorio v. Bender[170] presents another situation commonly confronted, namely a legal malpractice claim predicated upon an allegedly inadequate settlement,[171] this time in the context of an underlying matrimonial action. Although not dismissed upon the strict grounds of collateral estoppel, the Appellate Division reversed the trial court and granted summary judgment to the defendant attorneys because in the underlying action the plaintiff entered into a detailed stipulation of settlement and allocuted to the terms of it in open court. During the allocution, the plaintiff acknowledged that she participated in the settlement negotiations and understood the terms of settlement, that she had not been forced into the settlement and that she wanted the court to approve it. Issues of a wife's distributive award and mental state litigated in a prior matrimonial action collaterally estops re-litigation of the same issues in a subsequent legal malpractice action.172

4. Affirmative Use of Collateral Estoppel Against Attorney

(a) Civil Proceedings

In a legal malpractice action, an attorney is not bound by an adverse decision rendered in the underlying action or affidavits submitted by the attorney adv ocating the former client's position since the attorneys were not parties to the underlying action and, consequently, were not afforded a full and fair opportunity to litigate the issue determined.[173]

(b) Disciplinary Proceedings

However, an attorney who is found to have committed an act warranting disbarment

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170 4 A.D.3d 384, 772 N.Y.S.2d 89 (2nd Dep't 2004).

171 Many jurisdictions provide that settlement of the underlying claim precludes a subsequent legal malpractice action absent fraud in the inducement or erroneous advice about the effect of the settlement. *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 256 Pa. 541, 587 A.2d 1346 (Penn. 1991); *Glinne v. Sullivan*, 245 N.W.2d 869 (Minn. 1976). In this jurisdiction, however, a claim for legal malpractice is viable despite the settlement of the underlying action if it is alleged that the settlement of the action was effectively compelled by the mistake of counsel. *N.A. Kerson Co. v. Shayne, Dachs, Weiss, Kohlbrenner, Levy & Moe Levine*, 45 N.Y.2d 730, 408 N.Y.S.2d 475 (1978) *aff'g* 59 A.D.2d 551, 397 N.Y.S.2d 142 (2nd Dep't 1977) on the concurring opinion of Suozzi, J. The mere allegation that the settlement is inadequate in the absence of negligence on the part of the attorney that necessitates the settlement is insufficient. *Somma v. Dansker & Aspromonte Associates*, 13 Misc.3d 1232(A), 2006 WL 3113181 (N.Y. Sup. 2006). Furthermore, the courts will not recognize plaintiff's claim that the settlement was coerced: "When informed further as to the prospects of losing the case altogether, plaintiff thereafter accepted the offer . . . that does not spell out coercion . . . Recognition of the inevitable is not tantamount to duress." *Becker v. Julien, Blitz & Schlesinger*, 95 Misc.2d 64, 406 N.Y.S.2d 412 *aff'd* 66 A.D.2d 674, 411 N.Y.S.2d 17 (1st Dep't 1978).

172 *Weissman v. Kessler*, 78 A.D.3d 465, 912 N.Y.S.2d 25 (1st Dep't 2010).

173 *Reisner v. Litman & Litman,* 29 Misc.3d 1208(A), 2010 WL 3959620 (N.Y.Sup.) (Attorney is not bound by affidavit submitted in support of client's motion to file a late notice of claim since attorney ". . . was not a 'witness' in the plaintiff's action against the County, but was the plaintiff's advocate. Needless to say, an attorney's position in his client's underlying case is going to be diametrically opposed to the position he advances in his defense in a legal malpractice action."); *See also Lyons v. Medical Malpractice Ins. Ass'n*, 275 A.D.2d 396, 713 N.Y.S.2d 61 (2d Dep't 2000).

may be collaterally estopped from contesting the act at a subsequent disciplinary proceeding.[174] Furthermore, an attorney who has been disbarred based upon the same facts and circumstances resulting in a subsequent legal malpractice suit may also be estopped from contesting the facts determined during the course of the disbarment proceedings.[175]

E. Professional Judgment

A lawyer, with the informed consent of the client, may select one of several reasonable alternatives and will not be liable for legal malpractice as an attorney is not liable for an honest mistake of judgment where the appropriate steps to be taken are open to reasonable doubt.[176]

The client's subsequent dissatisfaction with a settlement obtained by the defendant attorney does not rise to the level of legal malpractice.[177] The fact that there may be an alternative strategy which might have been pursued by the defendant is protected by the professional judgment rule.[178] Allegations which amount to a client's criticism of counsel's strategy may be dismissed as insufficient inasmuch as the attorney cannot be held liable for choosing a reasonable, although unsuccessful course of action.[179] Furthermore, an attorney who achieves success for the client will not be liable to a client complaining that another strategy would have been more efficient[180] or the result was not achieved in the precise manner the client would have preferred.[181]

Reasonable strategic decisions made as to the selection of appropriate trial exhibits,[182]

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174 *In re Abady,* 22 A.D.3d 71, 800 N.Y.S.2d 651 (1st Dep't 2005); *In re Truong,* 768 N.Y.S.2d 450 (1st Dep't 2003); *In re Dorfman*, 304 A.D.2d 273, 760 N.Y.S.2d 413 (1st Dep't 2003); *In re Harley*, 746 N.Y.S.2d 137 (1st Dep't 2001).

175 *Burton v. Kaplan*, 184 A.D.2d 408, 585 N.Y.S.2d 359 (1st Dep't 1992).

176 *Lok Prakashan, Ltd. v. Berman*, 349 Fed.Appx. 640, 2009 WL 3377908 (2nd Cir. 2009); *Rosner v. Paley,* 65 N.Y.2d 736, 492 N.Y.S.2d 13 (1985); *Rubinberg v. Walker,* 252 A.D.2d 466, 676 N.Y.S.2d 149 (1st Dep't 1998); *Geller v. Harris,* 258 A.D.2d 421, 685 N.Y.S.2d 734 (1st Dep't 1999); *see also, Bernstein v. Oppenheim & Co.,* 160 A.D.2d 428, 430, 554 N.Y.S.2d 487 (1st Dep't 1990).

177 *Noone v. Stieglitz*, 59 A.D.3d 505, 873 N.Y.S.2d 661 (2nd Dep't 2009) (Plaintiff was adequately informed of consequences of high-low settlement); *Holschauer v. Fisher*, 5 A.D.3d 553, 772 N.Y.S.2d 836 (2nd Dep't 2004).

178 *Dweck Law Firm v. Mann,* 283 A.D.2d 292, 293, 727 N.Y.S.2d 58 (1st Dep't 2001).

179 *Palazzolo v. Herrick, Feinstein, LLP***.** 298 A.D.2d 372, 751 N.Y.S.2d 401 (2nd Dep't 2002).

180 *AmBase Corp. v. Davis Polk & Wardwell,* 30 A.D.3d 171, 816 N.Y.S.2d 438 (1st Dep't 2006) *aff'd* 8 N.Y.3d 428, 834 N.Y.S.2d 705 (2007).

181 *Novak v. Fischbein, Olivierie, Rozenholc & Badillo*, 151 A.D.2d 296, 542 N.Y.S.2d 568 (1st Dep't 1989).

182 *Noone v. Stieglitz*, 59 A.D.3d 505, 873 N.Y.S.2d 661 (2nd Dep't 2009) (Alleged failure to introduce road maps and accident reports reasonable strategy in light of reliance on non-party witness testimony); *Ideal Steel Supply Corp. v. Beil,*55 A.D.3d 544, 865 N.Y.S.2d 299 (2nd Dep't 2008) (decision to prosecute a RICO claim on behalf of client to exclusion of other causes of action was reasonable exercise of attorney's professional judgment); *Orchard Motorcycle Distributors, Inc. v. Morrisson Cohen Singer & Weinstein, LLP,*49 A.D.3d 294, 853 N.Y.S.2d 320 (1st Dep't 2008)

expert witnesses,[183] witnesses[184] and the timing of arguments[185] have been held protected by the courts as the proper exercise of an attorney's professional judgment.

An attorney similarly will not be held liable for reasoned judgments made in connection with unsettled areas of law.[186]

F. Prematurity

The doctrine of prematurity in a legal malpractice action is simply the reverse corollary of the well known principle that a plaintiff cannot recover unless he shows he would not have sustained damage 'but for' his attorney's negligence. If plaintiff has a viable avenue of recovery still available despite the attorney's conduct, the cause of action is premature. Logical as this principle may seem, cases in New York have been slow to adopt the theory, at least under the banner of prematurity.

1. Dismissal Based Upon Prematurity

In New York, the doctrine of prematurity has its genesis in a lower court decision of *Wright v. Diebold*.[187] In *Wright*, plaintiff commenced a legal malpractice action arising out of services performed by defendant attorney in a still pending contract action. The court dismissed plaintiff's complaint holding

> In this Court's opinion, the cause of action here sought to be asserted by plaintiff has not yet accrued and will not accrue, if at all, unless and until plaintiff sustains damage as the result of the main action.
>
> . . .

(plaintiff's claim that defendants failed to advise plaintiff that Chapter 11 reorganization could be accomplished as opposed to liquidation was protested as selection of one of several reasonable alternatives); *Dimond v. Kazmierczuk & McGrath,* 15 A.D.3d 526, 527, 790 N.Y.S.2d 219 (2nd Dep't 2005) (choice of expert found later unqualified by trial court was reasonable exercise of attorney's judgment as to how to proceed in the underlying action); *Iocovello v. Weingrad & Weingrad, LLP***,** 4 A.D.3d 208, 772 N.Y.S.2d 53,(1st Dep't 2004) (reasonable rationale for n*ot introducing attendance records into evidence protected by professional judgment rule*); *Ianazzo v. Day Pitney, LLP,* 2007 WL 2020052 (S.D.N.Y.) (reliance on document evidence at trial protected by professional judgment rule).

183 *Pacesetter Communications Corp. v. Solin & Breindel, P.C.,* 150 A.D.2d 232, 541 N.Y.S.2d 404 (1st Dep't 1989).

184 *LIC Commercial Corp. v. Rosenthal,* 202 A.D.2d 644, 609 N.Y.S.2d 301 (2nd Dept 1994); *but see Gonzalez v. Ellenberg,* 5 Misc.3d 1023(A), 2004 WL 2812884 (N.Y.Sup.).

185 *Holmberg, Galbraith, Holmberg, Orkin and Bennett v. Khoury***,** 176 A.D.2d 1045, 575 N.Y.S.2d 192 (3rd Dep't 1991).

186 *Darby & Darby v. VSI Intl.,* 95 N.Y.2d 308, 315, 716 N.Y.S.2d 378 (2000); *Duane Morris, LLP v. Astor Holdings, Inc*., 61 A.D.3d 418, 877 N.Y.S.2d 250 (1st Dep't 2009).

187 217 N.Y.S.2d 238 (N.Y. Co. 1961).

> Since damage is an essential ingredient of the cause and plaintiff has not yet made allegations of ultimate fact establishing any present damage, it would seem the cause of action sought to be alleged has not yet accrued and is premature.

Following *Wright*, the courts have dismissed numerous legal malpractice actions for want of ascertainable damages.[188] Rarely, however, has the dismissal been on the basis of the doctrine of prematurity.[189] Rather, the dismissals hinge upon plaintiff's inability to demonstrate damages, an "essential" element of a legal malpractice claim.

However, the decision in *Lopes v. Mangiatordi, Maher & Lemmo*, LLC,[190] indicates that the doctrine of prematurity is alive and well. In *Lopes*, plaintiff was injured in the fall from a ladder at a worksite. The claims asserted under Labor Law Sections 200, 241(6) and 240 were dismissed, although a common law negligence claim remained standing. In a legal malpractice action filed before the common law negligence claim was adjudicated, defendant attorneys moved to dismiss the complaint as "premature" since the plaintiff's cause of action against the subcontractor based on common-law negligence remains viable and may result in a complete recovery.

Citing the well known principal that "plaintiff must show that but for the attorney's negligence, what would have been a favorable outcome was an unfavorable outcome," the trial court dismissed the legal malpractice complaint, holding that plaintiff

> . . . cannot show that he has sustained demonstrable damages for legal malpractice proximately caused by the defendants' alleged negligence until after the resolution of the underlying personal injury action, if then. (*See, Pudalov v. Brogan,* 103 Misc.2d 887; *Taylor v. Robustelli,* New York State Supreme Court, County of Westchester, Index No. 1401/98; *Schwartzberg v. Tucciarone,* New York State Supreme Court, County of Westchester, Index No. 1197/00.) There is still the possibility of recovery from the subcontractor. The appeal in the underlying action did not directly concern the cause of action for common-law negligence. While the Appellate Division dismissed the cause of action based on Labor Law § 200 against the subcontractor on the ground that it did not have the authority to control the worker's activity producing the injury (*see, Lopes v. Interstate Concrete, Inc., supra*), there remains an open issue concerning whether the dismissal

188 *Novack v. Fischbein, Olivieri, Rozenholc & Badillo*, 151 A.D.2d 296, 542 N.Y.S.2d 568 (1st Dep't 1989); *Murphy v. Stein*, 156 A.D.2d 546, 549 N.Y.S.2d 53 (2d Dep't 1989); *St. John v. Tepper*, 54 A.D.2d 712, 387 N.Y.S.2d 457, 458 (2d Dep't 1976); *Becker v. Julien, Blitz & Schlesinger*, 66 A.D.2d 674, 411 N.Y.S.2d 17 (1st Dep't 1978).

189 In *Johnston v. Raskin*, 193 A.D.2d 272, 598 N.Y.S.2d 272 (2d Dep't 1993), the court appeared to reject "prematurity" as a basis for dismissal.

190 6 Misc.3d 1004(A), 800 N.Y.S.2d 349 (Table) (N.Y.Sup. 2004).

> of that cause of action necessitates the dismissal of the cause of action for common-law negligence. That issue should be determined by the court having jurisdiction over the underlying action and over the proper parties. At this time, the cause of action for common law negligence remains pending in the underlying action, not having been discontinued or otherwise disposed of.

2. Severance and Stay of the Legal Malpractice Action

Where an outright dismissal is not granted, the courts have also acknowledged a willingness to stay a legal malpractice action commenced prior to the resolution of the underlying claim and before plaintiff has actually suffered damage. In *Stettner v. Bendet*,[191] the Appellate Division held that where a plaintiff's right to proceed against a doctor's personal assets as a result of a claimed malpractice was still in question, the malpractice action against the attorneys would be stayed:

> Since the client's remedies in the bankruptcy proceedings are uncertain, and since the client can have no cause of action for legal malpractice unless he would have a remedy in the bankruptcy proceeding but for the attorney's negligence (*see, Geraci v. Bauman, Greene & Kunkis*, 17 A.D.2d 454,455, *app dismissed* 78 N.Y.2d 907), we modify to stay the instant action until such time as the client's rights in the bankruptcy proceeding, and his contingent right to prosecute the underlying action are settled.

In *Corrado v. Rubine*,[192] the Appellate Division held that the trial court's failure to stay a legal malpractice action pending resolution of a matrimonial matter in which some or all of the components of damage claimed in the legal malpractice case would be addressed, was an improvident exercise of discretion.

In addition, citing prejudice to defendants and confusion to the jury, the courts have also resisted the efforts of former clients to try jointly a still pending underlying action with a legal malpractice action based upon the underlying claim.[193] At least one commentator has stated that the severance and stay is

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191 227 A.D.2d 202, 642 N.Y.S.2d 253 (1st Dep't 1996); *See, also, Washington Mut. Bank v. Law Office of Robert Jay Gumenick, P.C.,* 561 F. Supp.2d 410 (S.D.N.Y. 2008) (bank's claim against attorney will be stayed in favor of claim asserted by bank in bankruptcy court since the bankruptcy court can grant the bank a substantial amount of the relief it seeks); *But see*, *Creditanstalt Inv. Bank AG v. Chadbourne & Parke LLP*, 14 A.D.3d 414, 788 N.Y.S.2d 104 (1st Dep't 2005), holding that the court appropriately declined to dismiss or indefinitely stay the malpractice claim pending completion of the Russian legal proceedings since plaintiffs allege damages that have already been incurred; *Jones v. Pricewaterhousecoopers, LLP*, 6 Misc.3d 1014(A), 800 N.Y.S.2d 348 (N.Y.Sup. 2004).

192 25 A.D.3d 748, 807 N.Y.S.2d 878 (2nd Dep't 2006).

193 *See*, *Brown v. Brooklyn Union Gas Company*, 137 A.D.2d 479, 524 N.Y.S.2d 228 (2d Dep't 1988). "Although the personal injury and legal malpractice actions involve a 'common question of law and fact' as required by CPLR

> . . . particularly appropriate where the attorney's alleged error is the basis for the client's adversary's defense, but that issue is yet to be resolved. The issue to be resolved may be whether the client will sustain an injury. Abatement or a stay enables resolution of an issue central to the legal malpractice claim, avoiding unnecessary expense and litigation for all.[194]

While the New York courts' treatment of this issue is not uniform, counsel representing plaintiffs are well advised to consider the impact of joining the underlying claim with a legal malpractice action against the original attorney. In ***Buxton v. Ruden***,[195] plaintiff joined for trial her dental malpractice claim against one defendant dentist with a legal malpractice claim against her original attorney alleging that the failure to join another potentially liable dentist prejudiced the still pending claim. The Appellate Division rejected plaintiff's attempt to prevent production of the legal file maintained by defendant attorney to counsel representing defendant dentist holding:

> "The prevailing view is that once a client waives the privilege to one party, the privilege is waived *en toto*" *Matter of Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 [6th Cir.2002], particularly since the actions were joined for trial, at the plaintiff's request, and it would be highly prejudicial to deny Ruden access to relevant discovery material. Thus, the Supreme Court properly granted Ruden's application and directed the plaintiff to turn over the case file to him.

As a result, the potentially adverse consequences of joining a legal malpractice action with a pending underlying action should be carefully considered.

G. Release

Although circumstances do exist where an attorney may utilize the existence of a general release executed by the client to defeat a subsequent legal malpractice action, the circumstances surrounding the execution of the release will be closely scrutinized. Similar to its

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602(a), under the facts of this case consolidation was an improvident exercise of discretion, since a consolidation of this action would be unduly prejudicial to the appellant's right to a fair trial. Accordingly we reverse . . . Furthermore, the actions involve many dissimilar issues which may confuse the jury. "[S]eparate trial will enable the juries to focus on the factual issues presented as to each [case]." *Shackleford v. Mills*, 110 A.D.2d 630, 487 N.Y.S.2d 371 (2nd Dep't 1985). *See, also*, *Gouldsbury v. Dan's Supreme Market, Inc.*, 138 A.D.2d 675, 526 N.Y.S.2d 779 (2nd Dep't 1988); *But see*, *Coakley v. Africano*, 181 A.D.2d 1071, 581 N.Y.S.2d 515 (4th Dep't 1992); *Rist v. Comi*, 260 A.D.2d 890, 688 N.Y.S.2d 806 (3rd Dep't 1999).

194 5 Mallen & Smith, *Legal Malpractice*, 5th ed., § 33.7, p. 66 (West 2000).

195 12 A.D.3d 475, 784 N.Y.S.2d 619 (2nd Dep't 2004).

predecessor,[196] the Rules of Professional Conduct provide

> A lawyer shall not:
> (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or
> (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.[197]

Provided the client has been demonstrably apprised of the advisability of retaining counsel, an attorney may negotiate a settlement with a former client including obtaining a General Release. As a practical matter, the release is more likely to be sustained if the former client is represented by counsel at the time of execution and better practice would dictate that once an area of malpractice is uncovered, not only should the client be advised to retain counsel, but the potential defendant law firm should likewise have a third party firm undertake any settlement communications with the former client and his attorney.

It is all too frequent that a defendant attorney will assert a third party claim against plaintiff's current counsel or an interim successor counsel for tactical purposes seeking contribution for the damages asserted by plaintiff. Assuming no basis for the claim exists and the release was not procured by fraud, a nominal settlement and release may be entered into that will result in a dismissal of the third party claim for contribution under General Obligations Law § 15-108.[198] Of course the plaintiff-client should be advised by independent counsel as to the benefits and risks of entering into the nominal settlement.

However, where a general release exchanged releases the law firm's client and its "agents" barred any claim against the law firm which accrued prior to the date of the release.[199]

III. ALTERNATIVE BASES OF LIABILITY TO CLIENTS AND NON-CLIENTS

A. Judiciary Law Section 487

The assertion of claims under Section 487 of the Judiciary Law in malpractice actions

196 22 NYCRR §1200.31.

197 22 N.Y.C.R.R § 1200 et seq. Rule 1.8(h).

198 *Balkheimer v. Spanton*, 2013 WL 440595 (2nd Dep't 2013).

199 *Blum v. Perlstein,* 47 A.D.3d 741, 851 N.Y.S.2d 596 (2nd Dep't 2008); *Hugar and LKC, LLC v. Damon & Morrey*, LLP, 51 A.D.3d 1387, 856 N.Y.S.2d 434 (4th Dep't 2008); *Berkowitz v. Fischbein, Badillo, Wagner & Harding, LLP*, 7 A.D.3d 385, 777 N.Y.S.2d 99 (1st Dep't 2004*); see also, Littman v. Magee*, 2007 WL 419373 (N.Y.Sup.).

has accelerated in recent years most likely due to the seemingly attractive trebling of damages should a violation of the statute be proven. In addition, because the penalty may not be insured, plaintiffs realize that defendant attorneys are particularly sensitive to the allegation that the statute was breached.

> The statute provides that
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> An attorney or counselor who:
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> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
>
> 2. Willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Inclusion of a claim under Section 487 as an add-on to the garden variety malpractice claim is a misuse of the statute. Section 487 was enacted as a vehicle to punish attorneys who engage in a "pattern of delinquent, wrongful or deceitful behavior" directed at the court or a party in a pending litigation.[200] Claims of deceit or delay where there is no pending litigation or other judicial proceeding will fail.[201] The factual allegations supporting this pattern of conduct must be plead with specificity or the complaint will be dismissed. Where the only misrepresentation alleged is contained in a letter upon which plaintiff could not have reasonably relied, the Section 487 standard is not met.[202] In addition, where plaintiff alleges that the fraud was committed in the context of a prior proceeding before the court, "plaintiff's remedy lies exclusively in that lawsuit itself, i.e. by moving pursuant to CPLR 5015 to vacate the civil judgment due to its fraudulent

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200 *Robinson v. Way*, 57 A.D.3d 872, 871 N.Y.S.2d 233 (2nd Dep't 2008); *Jaroslawicz v. Cohen*, 12 A.D.3d 160, 783 N.Y.S.2d 467 (1st Dep't 2004); *Kaiser v. VanHouten*, 12 A.D.3d 1012, 785 N.Y.S.2d 569 (1st Dep't 2004); *Markard v. Bloom*, 4 A.D.3d 128, 770 N.Y.S.2d 869 (1st Dep't 2004); *Havell v. Islam,* 292 A.D.2d 210, 739 N.Y.S.2d 371 (1st Dep't 2002); *Pellegrino v. File,* 291 A.D.2d 60, 64, 738 N.Y.S.2d 320 (1st Dep't 2002), *lv. denied* 98 N.Y.2d 606, 746 N.Y.S.2d 456 (2002); *Hansen v. Caffry,* 280 A.D.2d 704, 705-706, 720 N.Y.S.2d 258 (3rd Dep't 2001), *lv. denied* 97 N.Y.2d 603, 735 N.Y.S.2d 492 (2001); *Schindler v. Issler & Schrage,* 262 A.D.2d 226, 228, 692 N.Y.S.2d 361 (1st Dep't 1999), *lv. dismissed* 94 N.Y.2d 791, 700 N.Y.S.2d 422 (1999); *Estate of Steinberg v. Harmon,* 259 A.D.2d 318, 686 N.Y.S.2d 423 (1st Dep't 1999); *Henry v. Brenner,* 271 A.D.2d 647, 706 N.Y.S.2d 465 (2nd Dep't 2000).

201 *Costalas v. Amalfitano*, 305 A.D.2d 202, 760 N.Y.S.2d 422 (1st Dep't 2003) (Since alleged misconduct related to the creation of the corporation and the execution of the transfer documents is not within the course of a judicial proceeding, statute is inapplicable); *Empire Purveyors, Inc. v. Brief Justice Carman & Kleinman*, LLP, 21 Misc. 3d 1137(A), 2008 WL 5056406 (N.Y.Sup 2008).

202 *Briarpatch Ltd., L.P. v. Frankfurt Garbus Klein & Selz, P.C.,* 13 A.D.3d 296, 787 N.Y.S.2d 267 (1st Dep't 2004); *Beshara v. Little*, 215 A.D.2d 823, 626 N.Y.S.2d 310, 311 (3rd Dep't 1995).

procurement, not a second plenary action collaterally attacking the judgment in the original action."[203] Section 487 does not apply to fee disputes among attorneys.[204]

Similarly, where liability is predicated upon the Judiciary Law § 487(2) claim that an attorney intentionally prolonged proceeding for the sole purpose of personal gain, it is insufficient to allege that the defendant attorneys permitted a medical malpractice claim languish for 25 years.[205] Allegations of neglect alone will not support a claim under Section 487(2).

Even assuming the egregious pattern of behavior or intentional prolonging of a claim for the attorney's personal profit is proven, plaintiff cannot recover under Judiciary Law § 487 unless the plaintiff can prove that compensable damages were proximately caused by the claimed deceit or intentional delay.[206] In the event there is an award of treble damages under Judiciary Law § 487, plaintiff is not entitled to pre-judgment interest.[207]

In 2012, the Court of Appeal, in response to a certified question interposed by the Second Circuit, held that a claim under § 487 did not necessarily track the requirements for a fraud claim and held that where the court was not deceived by counsel's attempt to perpetrate a fraud upon the court, damages flowing from the attempted deceit are recoverable.[208] This holding – essentially stating that litigants need not meet the elements of fraud in order to recover under Section 487 has lead to a flurry of claims against attorneys by victorious litigants looking to recover the attorney fees that they paid to their own counsel to counter claims the attorneys allegedly knew were not meritorious.[209] The Court of Appeals, however has declined to hear Facebook's appeal from the Section 487 suit filed against the attorneys who represent the now-fugitive Ceglia who was – without basis – attempting to claim ownership rights in Facebook, signaling that the statute will not be applied to attorneys who in good faith represent their clients without knowledge of the client's

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203 *Cramer v. Sabo*, 31 A.D.3d 998, 818 N.Y.S.2d 680 (3rd Dep't 2006); *see, also, Melnitzky v. Owen*, 19 A.D.3d 201, 796 N.Y.S.2d 612 (1st Dep't 2005).

204 *Leskinen v. Fusco*, 18 A.D.3d 387, 796 N.Y.S.2d 54 (1st Dep't 2005).

205 *Gotay v. Breitbart*, 14 A.D.3d 452, 790 N.Y.S.2d 1 (1st Dep't 2004).

206 *Stanski v. Ezersky*, 228 A.D.2d 311, 644 N.Y.S.2d 220 (1st Dep't 1996), *lv. denied* 89 N.Y.2d 805, 653 N.Y.S.2d 918, 676 N.E.2d 500 (1996); *Feldman v. Jasne*, 294 A.D.2d 307, 742 N.Y.S.2d 540 (1st Dep't 2002); *Havell v. Islam*, 292 A.D.2d 210, 739 N.Y.S.2d 371 (1st Dep't 2002); *Burton v. Kaplan*, 184 A.D.2d 408, 585 N.Y.S.2d 359 (1st Dep't 1992); *DiPrima v. DiPrima*, 111 A.D.2d 901, 490 N.Y.S.2d 607 (2nd Dep't 1985).

207 *Resnick v. Socolov*, 5 A.D.3d 125, 771 N.Y.S.2d 889 (1st Dep't 2004).

208 *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 874 N.Y.S.2d 868 (2009).

209 In *Dupree v. Voorhees*, 876 N.Y.S.2d 840 (N.Y. Sup. 2009), the court granted plaintiff's motion to renew the dismissal of the complaint asserted against her husband's attorney on the basis of the Amalfitano holding "it should not be fatal to a plaintiff that the misrepresentation(s) upon which the Judiciary Law claim is based became known during the course of the underlying litigation, and that attorneys' fees alone may be considered damages proximately caused by the wrongful conduct."

fraudulent conduct.210

Finally, a cause of action under Section 487 of the Judiciary Law is subject to a six year period of limitations[211] although a few cases have held where the suit is filed by a client, the limitations period will remain three years.212

B. Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act applies to all attorneys who collect consumer debt on behalf of their clients on a regular basis, even if the activity involves litigation. "Debt collector" is defined to include "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[213] In *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti,*[214] the Second Circuit set forth a non-inclusive test for determining, on a case-by-case basis, whether an attorney is a 'debt collector' under the statute.

> We hold that the question of whether a lawyer or law firm "regularly" engages in debt collection activity within the meaning of section 1692a(6) of the FDCPA must be assessed on a case-by-case basis in light of factors bearing on the issue of regularity. None of the following factors is alone dispositive of the issue; they are illustrative rather than exclusive.
>
> Most important in the analysis is the assessment of facts closely relating to ordinary concepts of regularity, including (1) the absolute number of debt collection communications issued, and/or collection-related litigation matters pursued, over the relevant period(s), (2) the frequency of such communications and/or litigation activity, including whether any patterns of such activity are discernable, (3) whether the entity has personnel specifically assigned to work on debt collection activity, (4) whether the entity has systems or contractors in place to facilitate such activity, and (5) whether the activity is undertaken in connection with ongoing client relationships with entities that have retained the lawyer or firm to assist in the collection of outstanding consumer debt obligations. Facts relating to the role debt collection work plays in the practice as a whole should

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210 *Facebook v. DLA Piper, et al,* 134 AD3d 610 (1st Dep't 2015) lv to app. den. 28 NY3d 903 (2015)..

211 *Melcher v. Greenberg Traurig, LLP,* 23 NY3d 10 (2014).

212 *See, e.g., Farage v. Ehrenberg,* 124AD3d (2nd Dep't 2014).

213 15 U.S.C. § 1692a(6).

214 *Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti*, 374 F.3d 56 (2nd Cir. 2004).

> also be considered to the extent they bear on the question of regularity of debt collection activity (debt collection constituting 1% of the overall work or revenues of a very large entity may, for instance, suggest regularity, whereas such work constituting 1% of an individual lawyer's practice might not). Whether the law practice seeks debt collection business by marketing itself as having debt collection expertise may also be an indicator of the regularity of collection as a part of the practice. If an attorney falls within this category and is not intimately familiar with every provision of the act, an immediate review is warranted since a comprehensive review of the pitfalls under the statute is outside the scope of this article.

A prevalent source of claims under the Fair Debt Collection Practices Act rests upon the allegation that the attorney-debt collector failed to include the language mandated by the statute either in the initial communication with the debtor or within five day thereafter. Section 1692g(a) requires a debt collector to clearly communicate to the debtor certain information, including without limitation:

> (1) the amount of the debt;
> (2) the name of the creditor to whom the debt is owed;
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

While the language of the statute need not appear verbatim, including language that overshadows the statutory notifications is a violation.[215] As a result, deviations from the exact language of the statute should be made only after careful consideration. The issue as to whether the communication does overshadow the Section 1692g(a) requirements is evaluated from the standpoint of the "least sophisticated consumer."[216]

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215 *Shapiro v. Dun & Bradstreet Receivable Management Services, Inc.*, 59 Fed.Appx. 406, 2003 WL 1025581 (2nd Cir. 2003) (validation notice not overshadowed by invitation to call the creditor if debtor wants to settle).

216 *Russell v. Equifax A.R.S.,* 74 F.3d 30, 34 (2nd Cir.1996); *Savino v. Computer Credit, Inc.,* 164 F.3d 81, 85 (2nd Cir.1998).

While there was a split in the federal circuit court of appeals as to whether a pleading served by an attorney-debt collector seeking to collect consumer debt constitutes an "initial communication" so as to trigger the notification outlined above,[217] the statute has been amended to exclude a pleading from the definition of "initial communication."[218]

Of particular concern to attorneys regularly engaged in the practice of consumer debt collection is the decision in *Miller v. Wolpoff & Abramson.*[219] In *Miller*, the Second Circuit apparently accepted the premise that a law firm's failure to have meaningful attorney involvement in the mailing of the letters to debtors constitutes a "false, deceptive, or misleading representation or means in connection with the collection of any debt"[220] and reversed a district court's award of summary judgment in favor of defendant law firms on the basis of the fact that summary judgment was premature since discovery had not yet been conducted. Although this was the result directed by the court, the language of the decision speculates that

> if discovery in this case were to reveal that [defendant attorneys] handled this high volume of accounts, received only the limited information described in the attorney affidavits, reviewed the collection files with such speed that no independent judgment could be found to have been exercised, and then issued form collection letters with a push of a button, a reasonable jury could conclude that [defendant law firms] lacked sufficient professional involvement with plaintiff's file that the letters could be said to be from an attorney.

Since *Miller*, however, the Second Circuit did affirm the decision dismissing plaintiff's complaint on a pre-discovery motion to dismiss filed by defendant attorney in the matter *Shapiro v. Riddle*, [221] In addition, in two cases decided in 2004, the courts suggested that a statement by the law firm to the effect that there was no current intent to sue and the attorney did not form an opinion as to the validity of the debt is sufficient to avoid any claim of deceptive collection practices simply because the letter was written on attorney letterhead.[222]

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217 *Goldman v. Cohen*, 445 F.3d 152 (2nd Cir. 2006) (pleading is an initial communication); *Vega v. McKay*, 351 F.3d 1334 (11th Cir.2003) (pleading is not an initial communication); *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir. Dec 20, 2004) (pleading is an initial communication).

218 15 U.S.C. § 1692g(d) "Legal pleadings - A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a) of this section."

219 321 F.3d 292 (2nd Cir. 2003).

220 15 U.S.C. § 1692e.

221 351 F.3d 63 (2003).

222 *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360 (2nd Cir. 2005)(Letter from attorney stating "[a]t this time, no attorney with this firm has personally reviewed the particular circumstances of your account. . ." belies any claim for deceptive practices); *Pujol v. Universal Fidelity Corp.*, 2004 WL 1278163 (E.D.N.Y. 2004) (Letter from in-house counsel containing the language "[d]o not consider this letter a notification of intent to sue, since I do not have the

While there was clearly a need to impose some checks and balances in the debt collection field prior to 1986, the act imposed by Congress is a morass of technical regulations that provide countless traps for the unwary and enables the consumer to collect damages for even *de minimus* technical violations of the statute. On an individual claim, failure to comply with the statute will subject an attorney to "actual damages" suffered by the debtor, including recovery for "personal humiliation, embarrassment, mental anguish or emotional distress," statutory penalties up to $1,000, at the discretion of the court, together with court costs and attorney fees. Class action damages are capped at up to $1,000 statutory damages to the lead plaintiff, 1% of the debt collector's net worth and, of course, court costs and attorney fees.

As a defense to a claim asserted under the Fair Debt Collection Practices Act, the debt collector may show that by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the fact that safeguards were in place to stop the error.[223] While it is not difficult to establish that the violation occurred as a result of a bona fide error, the defense will not apply unless the debt collector also demonstrates that practices and procedures were in place to prevent the error.[224] Furthermore, the bona fide error may not be a mistake of law arising from the debt collectors misinterpretation of the requirements of the statute.[225] The defense that the action resulting in the claimed violation was the result in reliance on advisory opinion of the Federal Trade Commission also exists[226] but it is rare that an opinion falls squarely on the facts presented in the complaint. Lastly, the period of limitations is one year.[227]

Notwithstanding the continued prevalence of FDCPA claims against attorneys, there is some evidence in recent cases that the courts are fed up with the relentless pursuit of violations which exist only in the eyes of counsel pursuing the claims.[228]

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legal authority to sue. I have not, nor will I, review each detail of your account status, unless you so request . . ." cannot form the basis for a deceptive practice claim).

223 15 U.S.C.A. § 1692k(c).

224 *Johnson v. Equifax Risk Management Services*, 2004 WL 540459 (S.D.N.Y. 2004).

225 *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,* 130 S.Ct. 1605 (2010).

226 15 U.S.C.A. § 1692k(e).

227 15 U.S.C.A. § 1692k(d).

228 *See, Jacobson v. Healthcare Financial Services, Inc*., 434 F.Supp.2d 133 (E.D.N.Y. 2006) (reciting the manner in which the statute has enable a class of "professional plaintiffs;" holding that "courts should not construe lawsuits based on frivolous misinterpretations or nonsensical assertions of being led astray;" and awarding attorney fees under 15 U.S.C. § 1692k(a)(3) to the defense); *Riddle & Associates, P.C. v. Kelly*, 414 F.3d 832 (7th Cir. 2005) (Law firm retained to collect debt successfully brought action under the Declaratory Judgment Act against debtor and her lawyer, seeking declaration that its collection letter to debtor did not violate the FDCPA by "overshadowing or contradicting" her right to dispute debt and was entitled to sanctions against debtor's attorney under statute permitting sanctions to deter frivolous litigation and abusive practices by attorneys, for his multiplication of proceedings).

C. Fraud

While a fraud claim against one's attorney alleging the same conduct and seeking the same damages as a malpractice claim will be dismissed as duplicative,[229] the problem arises when a third party is in a position to state the elements of a fraud claim against his adversary's counsel. A fraud claim against an attorney is no different from a fraud claim against anyone else; if an attorney commits actual fraud in dealing with a third party, the fact he or she did so in the capacity of attorney for a client does not relieve the attorney of liability. In order to state a cause of action for fraud against an attorney or other party, a litigant must allege (i) a material misrepresentation of fact; (ii) knowledge of falsity or reckless disregard for the truth; (iii) scienter; (iv) justifiable reliance; and (v) damages proximately caused by the claimed fraud.[230] These elements must be proven with "clear and convincing evidence."[231]

As noted above, a fraud claim asserted against an attorney predicated upon the same facts and alleging the same damages as plead in a legal malpractice claim will be dismissed as redundant.

CPLR § 3016(b) provides that in a complaint claiming damages for fraud or breach of trust the "circumstances constituting the wrong shall be stated in detail." Where the strict pleading standard is not met, the complaint will be dismissed.[232]

If the fraud is alleged to have been committed by the omission of a material fact on the part of an adversary's attorney, the third party must show a duty of disclosure in addition to reasonable reliance.

> Reliance is inappropriate in an adversarial context. The theory of negligent misrepresentation is not likely to be available in actual or prospective litigation. Rarely can there be justifiable reliance on, or a duty for, an attorney to act with care regarding a person whose interests are adverse to the client. The ethical dictates of the adversarial system impose on an attorney obligations to pursue his client's interests with undivided loyalty, independent judgment and to resolve doubts concerning the law and facts in the client's favor.[233]

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229 *See*, fn. 5, *supra.*

230 *Simcuski v. Saeli*, 44 N.Y.2d 442, 406 N.Y.S.2d 259 (1978); *Kaufman v. Cohen*, 307 A.D.2d 113, 760 N.Y.S.2d 157 (1st Dep't 2003).

231 *Paton v. Kutner & Lynch*, 215 A.D.2d 301, 626 N.Y.S.2d 792 (1st Dep't 1995).

232 *Joyce v. JJF Associates, LLC*, 8 A.D.3d 190, 781 N.Y.S.2d 62 (1st Dep't 2004); *Lanzi v. Brooks*, 54 A.D.2d 1057, 388 N.Y.S.2d 946 (3rd Dep't 1976); *Winkler v. Messinger, Alpain & Hufjay*, 147 A.D.2d 693, 538 N.Y.S.2d 299 (2nd Dep't 1989).

233 1 Mallen & Smith, Legal Malpractice, 5th ed. (West 2000), § 7.10, p. 515.

As a result, a plaintiff cannot reasonably rely upon the actions of one's adversary as a matter of law,[234] particularly where the information sought to be disclosed was equally available to both sides.[235]

An alleged representation by an attorney that an investment would be profitable is not actionable as fraud but is merely "speculation[s] and expression[s] of hope for the future . . ."[236]

The claim that an attorney concealed the existence of acts alleged to constitute malpractice does not create the basis for an independent fraud claim.[237]

D. Retaliatory Claims

A distinct increase in the number of retaliatory lawsuits, *i.e.,* lawsuits against attorneys by their former adversaries or adversaries' counsel, over the last couple of years is apparent. Typically, the suits are premised upon the theories of defamation, abuse of process, malicious prosecution, generalized *prima facie* tort, interference with prospective business advantage, interference with contractual relations, litigation fraud and spoliation of evidence. Often these claims are dismissed on motion but the cost of litigation continues to be a problem.

1. Malicious Prosecution

In order to maintain an action for malicious prosecution it is essential to prove: (1) that the prosecution was malicious; (2) that it was without reasonable or probable cause; and (3) that it terminated favorably to plaintiff.

In New York, a litigant is also required to allege the existence of a special injury in order to recover on a malicious prosecution claim.[238] As a result, in *Gershon v. Goldberg*,[239]

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234 *I.L.G.W.U. Nat'l. Retirement Fund v. Cuddlecoat, Inc*., 2004 WL 444071 (S.D.N.Y.); *Karsanow v. Kuehlewein,* 232 A.D.2d 458, 458-459 (2nd Dep't 1996) ("plaintiffs' allegation that they consented to the inclusion of a non-recourse clause in the extension agreements because [defendant's attorney] assured them that such a provision was 'customary' is insufficient to establish a claim for fraud. The plaintiffs could not reasonably rely on the legal opinions or conclusions of their adversary's counsel."); *Aglira v. Julien & Schlesinger, P.C.,* 214 A.D.2d 178, 185, 631 N.Y.S.2d 816, 820 (1st Dep't 1995); *Lazich v. Vittorio & Parker*, 592 N.Y.S.2d 418, 189 A.D.2d 753 (2nd Dep't 1993) *app. dism'd*, 81 N.Y.2d 1006, 599 N.Y.S.2d 805.

235 *Jachetta v. Vivona Estates, Inc.,* 249 A.D.2d 512, 672 N.Y.S.2d 111 (2nd Dep't 1998).

236 *Zaref v. Berk & Michaels*, 192 A.D.2d 346, 596 N.Y.S.2d 773, 774 (1st Dep't 1993).

237 *Weiss v. Manfredi*, 83 N.Y.2d 974, 977, 616 N.Y.S.2d 325, 327 (1994) *rearg. den.* 84 N.Y.2d 848, 617 N.Y.S.2d 134. *See, also*, *Boyd v. Gering, Gross & Gross,* 226 A.D.2d 489, 641 N.Y.S.2d 108 (2nd Dep't 1996).

238 *Engels v. CBS, Inc.*, 93 N.Y.2d 195, 689 N.Y.S.2d 411 (1999).

239 30 A.D.3d 372, 817 N.Y.S.2d 322 (2nd Dep't 2006).

plaintiff sued the litigants and their attorney that had previously maintained a civil rights claim against plaintiff that had been resolved in plaintiff's favor. The Appellate Division held that the failure to allege a special injury causally connected to the claimed malicious prosecution warranted a dismissal of the complaint.

2. Abuse of Process

Attorneys have always been the target of abuse of process claims asserted by their clients' adversaries. To be successful on an abuse of process claim, plaintiff must show (1) regularly issued process, either civil or criminal; (2) an intent to do harm without excuse or justification; (3) use of process in a perverted manner to obtain a collateral objective.[240] In New York, the courts have taken the position that issuance of a civil summons and complaint cannot form the basis for an abuse of process claim.[241]

3. Defamation

New York recognizes the existence of a strong "litigation" or "judicial proceedings" privilege which provides an absolute privilege for allegedly defamatory statements made in the context of a judicial proceeding so long as the statements bear some relation to the proceeding.

Statements in a malpractice complaint to the effect that plaintiff "defrauded" client and "used the retainer provisions as a club" to extort fees; statements to an arbitration panel that plaintiff attorney was a "thief," "liar" and pathological character; and statement in law journal article that clients had been "poorly served" by plaintiff were privileged.[242]

4. Prima Facie Tort

While many jurisdictions have relaxed the pleading elements for a *prima facie* tort, New York has long maintained that plaintiff must allege that the complained-of conduct by the defendants was motivated solely by malice, *i.e.,* "disinterested malevolence."[243] Where plaintiff fails to set forth allegations of special damages or to demonstrate that malice was the defendants' only motive in commencing the prior lawsuit, the cause of action must be dismissed.[244]

5. Interference with Contractual Relations

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240 *Curiano v. Suozzi,* 63 N.Y.2d 113, 480 N.Y.S.2d 466 (1984).

241 *Siegel v. Smith, Panish & Shapiro, P.C.,* 136 A.D.2d 620, 523 N.Y.S.2d 866 (2nd Dep't 1988).

242 *Lacher v. Engel*, 33 A.D.3d 10, 817 N.Y.S.2d 37 (1st Dep't 2006).

243 *Curiano v. Suozzi*, 63 N.Y.2d 113, 480 N.Y.S.2d 466 (1984).

244 *Burns Jackson Miller Summit & Spitzer v. Lindner,* 59 N.Y.2d 314, 333, 464 N.Y.S.2d 712 (1983); *Siegel v. Smith, Panish & Shapiro, P.C.*, 136 A.D.2d 620, 523 N.Y.S.2d 866 (2nd Dep't 1988); *Vevaina v. Paccione,* 125 A.D.2d 392, 509 N.Y.S.2d 113 (2nd Dep't 1986).

The tort of intentional interference with contractual relations requires a plaintiff to prove (1) existence of a valid contractual relationship; (2) defendant's knowledge of the terms of the contract; (3) defendant's intentional and improper procurement of a third party's breach of that contract without justification; and (4) damages proximately caused by the defendant to the to the party whose relationship has been disrupted.[245]

Under ordinary circumstances, where the attorney is acting on behalf of the client and within the scope of authority, under standard agency-principal theories the courts will not impose liability against the attorney based upon advice which purportedly induces the principal client to breach a contract with a third party.[246]

6. Spoliation of Evidence – E-Discovery

The Court of Appeals has held that New York does not recognize an independent tort based upon spoliation of evidence.[247] However, case law and the e-discovery rules have defined the broad extent to which an attorney may be held responsible to its client's adversary for discovery lapses. In *Zubulake v. UBS Warburg*,[248] the court articulated the scope of the increased burden on counsel to ensure that the client maintains and produces requested discovery and held that "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. However, this is only the starting point of counsel's obligation:

> Once a "litigation hold" is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold," . . . To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information.
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> . . .
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> To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the

245 *Foster v. Churchill*, 87 N.Y.2d 744, 642 N.Y.S.2d 583 (1996).

246 *See, e.g., Hussie v. Bressler*, 122 A.D.2d 113, 114, 504 N.Y.S.2d 510 (2nd Dep't 1986) [quoting *Kartiganer Associates v. Town of New Windsor*, 108 A.D.2d 898, 899, 485 N.Y.S.2d 782 (2nd Dep't 1985)].

247 *Ortega v. City of New York*, 9 N.Y.3d 69, 845 N.Y.S.2d 773 (2007).

248 229 F.R.D. 422 (S.D.N.Y. 2004).

> lawsuit, counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each "hit." Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents. When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as "hits" on the second, more restrictive search. The initial broad cut merely guarantees that relevant documents are not lost.
>
> In short, it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take *some reasonable steps* to see that sources of relevant information are located.

Against this background, the court set forth three steps counsel must take to ensure compliance with the preservation obligation:

> *First,* counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipated. The litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.
>
> *Second,* counsel should communicate directly with the "key players" in the litigation, *i.e.,* the people identified in a party's initial disclosure and any subsequent supplementation thereto Because these "key players" are the "employees likely to have relevant information," it is particularly important that the preservation duty be communicated clearly to them. As with the litigation hold, the key players should be periodically reminded that the preservation duty is still in place.
>
> *Finally,* counsel should instruct all employees to produce electronic copies of their relevant active files. Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place. In cases involving a small number of relevant backup tapes, counsel might be advised to take physical possession of backup tapes. In other cases, it might make sense for

> relevant backup tapes to be segregated and placed in storage. Regardless of what particular arrangement counsel chooses to employ, the point is to separate relevant backup tapes from others. One of the primary reasons that electronic data is lost is ineffective communication with information technology personnel. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, counsel eliminates the possibility that such tapes will be inadvertently recycled.[249]

Based upon the discovery lapses of "counsel and client alike," the court order that the jury empanelled would receive the adverse inference instruction and directed defendant to pay for the re-deposition of key witnesses, the restoration of certain back-up tapes and the cost of the motion.

The *Zubulake* standards were addressed in *Phoenix Four, Inc. v. Strategic Resources Corporation*,[250] with the result that counsel and the client were equally sanctioned for the costs of the motion and $30,000 for the re-deposition of witnesses as a result of the "gross negligence" in failing to locate 200-300 boxes of documents discovered on a server abandoned by the defendant during eviction proceedings but then used by a principal of the defendant in a new business venture. In its decision, the court emphasized that "counsel's obligation is not confined to a request for documents; the duty is to search for sources of information." As a result, the court rejected counsel's acceptance of its client's representation that because it "was not longer in operation, there were no computers or electronic collections to search" and noted that counsel's "obligation under *Zubulake V* extends to an inquiry as to whether information was stored on that server and had the defendants been unable to answer that question, directing that a technician examine the server."

Perhaps the decision in *Qualcomm, Inc. v. Broadcom Corp*.[251] best evidences the extent to which the failure to observe e-discovery rules can fracture the attorney-client relationship and further expose the attorney and law firm to potential claims by the client. In *Qualcom*, the court reported six attorneys to the state disciplinary committee and sanctioned Qualcomm and its attorneys $8 million towards Broadcom's defense costs for jointly withholding discovery documents – a lapse the trial court found could only have been done with assistance of counsel. The court thereafter vacated its decision in part and, under the self-defense exception to the attorney-client privilege, allowed the attorneys to defend themselves using confidential information gleaned during the course of the representation. The potential for adversity between a law firm and its client in such situations is evident.

In short, while not creating an independent tort, the scope of counsel's obligations to ensure its client's response to discovery may create exposure to a sanction in favor of a non-client or

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249 *Zubulak*e, at *434-435.

250 2006 WL 1409413 (S.D.N.Y. 2006). *See also, Treppel v. Biovale Corp*., 249 F.R.D. 111 (S.D.N.Y. 2008).

251 *Qualcomm, Inc. v. Broadcom, Corp.*, 2008 WL 66932 (S.D.N.Y. Cal .Jan. 7, 2008) vacated in part, 2008 WL 638108 (S.D. Cal. March 5, 2008) (Six retained attorneys representing Qualcomm that objected to the magistrate's imposition of discovery sanctions are not prevented from defending themselves by the attorney-client privilege).

form the basis for a subsequent legal malpractice case by a client who sustains actual and ascertainable damages as a result of the counsel's failure to advise the client of its discovery obligations.

IV. IDENTIFYING, ANALYZING AND RESOLVING CONFLICTS OF INTEREST

It doesn't matter how long you have been practicing – whenever a new client or a new matter comes into the office – you feel that sense of satisfaction. Having to then reject that representation because of the existence of a non-waivable conflict is one of the most frustrating experiences an attorney faces. A far more frustrating experience, however, is to be the subject of a civil claim or grievance as a result of the existence of a conflict of interest that was missed or ignored. According to statistics compiled on a nationwide basis, 6.3% of all malpractice claims are asserted because of administrative errors that occur in the identification of conflicts.[252] Based solely upon anecdotal evidence, law suits against attorneys involving errors in identifying, analyzing and resolving conflicts in New York well exceed the nationwide statistics.

Conflicts of interest must be addressed every day of a legal career; they are the bane of every attorney's existence. No single topic in the Code of Professional Responsibility is more problematic than the determination as to whether a conflict exists between an attorney and client or former client. Attorneys who believe that the client's consent to a conflict immunizes the attorney or law firm from the consequences of conflict issues are sadly mistaken and grossly misinformed. It is the job of every attorney, not just the senior attorneys in a firm, to identify conflicts and be certain that identified conflicts are resolved. In recent years, the frequency of breach of fiduciary duty claims predicated upon alleged conflicts of interest has increased and has resulted in substantial verdicts.[253] It is important to remember when analyzing a conflicts issue that the appearance of a conflict is nearly as devastating as the existence of a true conflict. The perception of whether a conflict exists is from the point of view of the client or potential client, and it is often made from the vantage point of hindsight. As a result, the process of conflicts identification and resolution should always err on the side of caution.

A. Maintenance of Conflict Procedures

Before any conflicts analysis can take place, the law firm must have in place procedures designed to permit a review of the entities and individuals the firm and its attorneys have represented. The RPC requires all law firms to maintain a conflicts check system and to have a policy in place pursuant to which the law firm regularly implements the system to screen for conflicts whenever (i) the firm agrees to represent a new client; (ii) the firm agrees to represent an existing client in a new matter; (iii) the firm hires or associates with another lawyer; or (iv) an

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252 ABA Standing Committee on Professional Liability, *Profile of Legal Malpractice Claims 2000 – 2003* Table 5, p.12 (ABA 2005).

253 *See, e.g., Milbank, Tweed, Hadley & McCloy v. Chan Cher Boon*, 13 F.3d 537 (2nd Cir. 1994); *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 780 N.Y.S.2d 593 (1st Dep't 2004).

additional party is named or appears in a pending matter.[254] The Rule creates what amounts to a *per se* violation of the disciplinary rules and provides a basis upon which attorneys and law firms[255] may be found to have engaged in misconduct without the necessity of demonstrating intent. It is sufficient to show that the firm failed to keep contemporaneous records of engagements by clients and did not maintain a policy for checking past relationships with clients before new retentions are undertaken.

The responsibility for identifying and resolving conflicts is the responsibility of every attorney – not just the senior attorneys in a firm. From the moment an attorney begins to practice, a database and back-up rolodex of all clients and those related to each representation, including non-clients, must be maintained. On each retention or proposed retention, all clients, former clients, opposing parties and their attorneys, and all entities relating to these categories must be entered in the firm's conflicts system, together with the subject matter of retention.[256]

As lateral hires are brought into the firm, care must be taken to incorporate the new attorney's prior representations into the firm's system.[257] Records of the identity of non-clients and the specific matters where engagements are declined must also be recorded in the firm's conflicts program. Attorneys must reflect upon the nature of their practice and adapt conflict procedures to take into account relationships that may be of importance to the attorney's clients. A reasoned conflicts analysis can only be performed if this practice is rigorously and scrupulously maintained.

In 2003, the New York City Bar released a comprehensive ethics opinion addressing the issue of what constitutes an effective procedure for identifying conflicts of interest.[258] The opinion, which should be required reading for all attorneys, may be accessed at abcny.org and is attached to these materials at Appendix 2.

In order to ensure that all attorneys in the firm adhere to the practice, all potential retentions with new or existing firm clients must be entered on standardized intake sheets and entered by third parties in the firm's system. A sample intake sheet is annexed at Appendix 3. The intake sheet should contain, at a minimum, the following information:

- the name, address and contact number of the client and any entities related to the client;
- the date of the intake;

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254 RPC 1.10(e).

255 RPC 1.10(f).

256 *G.D. Searle, Inc. v. Pennie & Edmonds, LLP*, 7 Misc.3d 1010(A), 2004 WL 3270190 (N.Y.Sup.) (New York trial court asked the Departmental Disciplinary Committee to review the conduct of a law firm that represented clients with competing technology, even in the absence of actual adversity between the two clients).

257 RPC 1.10(e)(3).

258 ABCNY, Formal Op. 2003-03, *Checking for Conflicts of Interest*.

- the nature of the representation;
- if the client is a new client without established terms of compensation, the terms and conditions of the engagement;
- if the client is a new client, the identity of the person authorizing the engagement;
- the name, address and contact numbers of all parties involved in the representation;
- the terms/names which should be included in a conflict search.

Remember that accuracy counts. A name misspelled will not be properly recorded in the law firm's conflict system and may form the basis for a missed conflict. Consistency counts as well. Those individuals charged with entering information into the conflict system must be taught to enter names and other information in the same manner every time it is done. Where new representations are declined, be certain the information on these non-engagements is entered in the conflicts system as well.

If a potential conflict is identified, analysis of that conflict must be performed by an individual or committee within the firm, distinct from the attorney originating the retention, who is well versed in the ethical implications of a conflict. Too often a conflicts analysis is left to the attorney seeking to bring the proposed retention into a firm or to a junior attorney. In the former instance, the desire to bring work to the firm may result in "cutting corners" while the latter situation may result in a junior attorney deferring to the wishes of a firm rainmaker. Neither scenario is in a firm's best interests.

Conflict analysis should be the job of every person in a law office. The analysis as to whether a conflict exists does not end upon retention.[259] The Rules provide that attorneys may not continue employment if a conflict arises during a representation. Conflict checking must continue and be constantly updated throughout a representation as additional parties and their counsel are added to the matter. Every attorney and non-attorney staff members have the obligation to comply with the ethical rules. If a conflict comes to your attention, do not take the ostrich approach. Problems ignored only get worse.

(B) Lateral Hires

Lateral hires present special conflicts problems which require careful and frank evaluation.[260] Except with the written consent of the client after "full disclosure," a lawyer may not

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259 RPC 1.10(e)(4).

260 RPC 1.10(e)(3). A good discussion of the information a law firm must seek from a lateral hire is contained in New York State Bar Association Committee on Professional Ethics, Opinion 720, 8/27/99, 2000 N.Y. App. Div. LEXIS 7754. While the opinion concludes that, unless protected as protected confidential information of a

represent a new client in the same or substantially related matter where the new client's interests are materially adverse to the interests of a former client of a law firm with whom the attorney was formerly associated **if** the lawyer had acquired confidential information that is material to the matter.[261]

To even begin such an analysis, law firms are dependent upon the candor of their employees. If the lateral hire never acquired the confidential information of the client in the same or substantially related matter, the inquiry is closed.

Attorneys seeking to change law firms must be very cognizant of the impact that a proper conflicts analysis may have upon a prospective employer or even the attorney's current employer.[262] Before accepting a position, an attorney must effectively analyze the question of whether or not a conflict might preclude a law firm from hiring the attorney or face losing a significant client.[263] The failure to perform such an analysis can be devastating. The decision of *Ogden Allied Abatement & Decontamination Services, Inc. v. ConEd*,[264] presents a factual scenario that constitutes the ultimate nightmare for any associate. A law firm representing a party in the *Ogden* matter was impressed with the representation afforded by an adversary attorney. After several interviews, conducted while the *Ogden* litigation was in the middle of discovery, the law firm made the associate an offer. The law firm, however, rescinded the offer after the associate's current law firm raised the conflict issue by means of a motion to disqualify and after the associate had already given notice but before the associate had commenced his new employment. While the *Ogden* court did not disqualify the law firm that had made the offer to the associate, the firm's conduct in continuing the interview process while discovery was underway was soundly criticized.

(C) 'Of Counsels'

The RPC recognizes the existence of 'of counsel' relationships which it defines as a

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client, the firm must seek the names of clients represented by a new lawyer (or if the former firm was small, all clients of the former firm), the opinion sidesteps the all important issue as to how this information is obtained if the original firm refuses to voluntarily disclose the information or if the lateral hire does not want any contact with the former firm prior to acceptance of the new employment opportunity.

261 RPC 1.10(c).

262 It is recommended that any attorney contemplating a change in employers read Altman,. James, *Ethical Issues Can Cloud Job Search*, NYLJ 10/20/00 and Altman, James, *A Young Lawyer's Nightmare*, NYLJ 2/16/01.

263 Absent the former client's consent, a lawyer changing firms may not undertake representation adverse to the former client if (1) moving lawyer personally "represented" the client or otherwise acquired relevant confidences or secrets of the client, and (2) moving lawyer would be undertaking representation in the same matter or in a matter that is substantially related to one in which the moving lawyer or the old firm previously represented the former client. Absent the client's consent, if the moving lawyer is disqualified from engaging in representation under this rule, the moving lawyer's new law firm is also disqualified. N.Y.S. Bar Association Ethics Opinion No. 723.

264 NYLJ, September 25, 2000, p.25, col. 2.

"continuing relationship with a lawyer or law firm, other than as a partner or associate."[265] The ability to utilize the services of attorneys not technically employed by a law firm is of significant benefit to the newly formed law firm. If there is an 'of counsel' relationship, a law firm or an individual attorney may so indicate on the letterhead. However, as a usual practice, for purposes of analyzing conflicts of interest, the 'of counsel' relationship should be treated as if the 'of counsel' and the law firm are conducting business as a single firm.[266] As was summarized by the New York State Bar Association: "if a lawyer acting alone would be disqualified from a particular representation based on any of the rules enumerated in DR 5-105(D), then that disqualification is imputed to a law firm with which that lawyer has an "of counsel" relationship."[267] In other words, where an "of counsel" relationship exists, their conflicts are your conflicts.

In a recent case, on a disqualification motion where the criteria is whether the conflict has tainted the court proceedings, the Second Circuit rejected the blanket imputation of an 'of counsel's' conflicts to a law firm and instead took a more pragmatic approach in holding that the conflict would depend on the nature of the relationship between the "of counsel" and the law firm.[268] Finding that the relationship between the "of counsel" attorney and the law firm was attenuated and the attorney clearly continued to operate his sole practice in addition to serving as transactional counsel for certain enumerated firm clients and that adequate screening procedures negated any taint, the court denied the motion to disqualify. Notwithstanding the content of this decision, however, from the point of view of compliance with the RPC and effective risk management, law firms having "of counsel" relationships should follow the one entity rule.

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265 RPC 7.5(a)(4).

266 *See, e.g.,* ABA 90-357; ABCNY Formal Op. 1995-8 ("attorneys will need to keep in mind that for purposes of analyzing conflicts of interest, 'of counsel' relationships are treated as if the 'counsel' and the firm are one unit"). ABCNY Formal Op. 2000-4. The same position has been adopted by the *Restatement of theLaw Governing Lawyers*, Restatement (Third), The Law Governing Lawyers, § 123 cmt. c(ii) (1998), which states:

> A lawyer who is of counsel to a firm often has more limited access to confidential client information than firm partners and associates and usually a smaller financial stake in the firm. Nonetheless, the incentive to misuse confidential information, the difficulty of determining when it has been misused, the ostensible professional relationship, as well as the administrative ease of a definite rule, justify extending imputation to lawyers having an of-counsel status.

267 NYSBA Committee on Professional Ethics Op. 773, 1/23/04.

268 *Hempstead Video, Inc. v. Village of Valley Stream*, 409 F.3d 127 (2nd Cir. 2005) ("We believe the better approach for deciding whether to impute an "of counsel" attorney's conflict to his firm for purposes of ordering disqualification in a suit in federal court is to examine the substance of the relationship under review and the procedures in place. The closer and broader the affiliation of an "of counsel" attorney with the firm, and the greater the likelihood that operating procedures adopted may permit one to become privy, whether intentionally or unintentionally, to the pertinent client confidences of the other, the more appropriate will be a rebuttable imputation of the conflict of one to the other. Conversely, the more narrowly limited the relationship between the "of counsel" attorney and the firm, and the more secure and effective the isolation of nonshared matters, the less appropriate imputation will be. Imputation is not always necessary to preserve high standards of professional conduct. Furthermore, imputation might well interfere with a party's entitlement to choose counsel and create opportunities for abusive disqualification motions."

(D) Suitemates

Sharing office space is a common solution to containing the expenses inherent in running a law practice. Before entering into such a relationship, however, you should carefully consider the problems associated with such an arrangement. In the first instance the RPC prohibits attorneys from holding themselves out as having a partnership with one or more attorneys unless they are, in fact, partners.[269] Using a common letterhead, office sign, receptionist, telephone system, computer system and other resources, combined with the physical impression of continuity within the office space, all place the perception of an implied partnership in the public's mind. Such a perception may be difficult to dispel in the event one attorney in a shared suite is the target of a malpractice claim is sued by a client. In addition, office-sharing raises issues involving conflicts of interest and potential breaches of client confidentiality.

If an attorney or law firm is designated as an "affiliate" or "of counsel" on a law firm's letterhead, the majority of ethics opinions reach the conclusion that conflicts must be analyzed as if the "affiliate or the "of counsel" and the law firm were "one unit."[270]

To maintain the independence of the law firm within a suite, an attorney must be certain to use separate letterhead; take affirmative steps to explain the office-sharing arrangement to every client (in writing, perhaps in the content of the engagement letter), maintain distinct directory listings, online, telephone and in the building; keep client files in an area not common to all suite residents; separate computer network systems containing client related documents and obtain independent policies of professional liability insurance (requiring all suite members to do the same with minimum levels of coverage set by agreement). Resist the temptation to refer to a suitemate as an associate or 'of counsel' which serve to blur the lines of distinction in the client's eyes. Above all, make certain that all resident firms within the suite are taking the same precautions in order to avoid the possibility that another suite member is leaving the impression in his or her client's eyes that you are part of their firm.

E. Who is the Client?

In virtually every situation, an attorney represents a client. While the issue of the identity of a client is usually easily ascertained in the litigation context,[271] in the business world, the issue is less defined. In every representation, an attorney must define the identity of the client. Doing so in the context of the retainer agreement is not sufficient where the person or entity who believes the attorney is representing their interests is not privy to the terms of retention. Letters must

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269 RPC 7.5(c) provides: "Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners."

270 The Association of the Bar of the City of New York ["ABCNY"], Formal Op. 2000-4, *Listing "Affiliated" Firms on Letterhead and Elsewhere; Affiliated Law Firms Clearing Conflicts as a Single Unit.*

271 A discussion of the problems faced by attorneys when entering into a tri-partite relationship between the attorney, client and a third party paying the attorney and theoretically retaining control over the litigation must await another time.

be sent to individuals or entities that may reasonably believe their interests are being represented by the attorney in any given transaction when in fact this is not the case

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Where an attorney is retained by an organization and deals directly with the organization's constituents (*i.e.*, directors, officers, shareholders, members, employees, etc.), the RPC places the onus on the attorney to advise the constituents that their interests may differ from the organizations and that the lawyer represents only the organization.[272] To be effective, this advice must, of course, be in writing. If an attorney knows (not suspects) that the conduct of a constituent constitutes (i) a violation of a legal obligation to the organization; or (ii) a violation of law that may reasonably be imputed to the organization and (iii) is likely to result in substantial injury to the organization, the attorney must take all necessary steps to protect the organization.[273] If the highest authority in the organization insists on maintaining the course of conduct, the attorney may reveal confidential information if permitted under RPC 1.6 and should resign.[274]

(F) Conflicts with Current Clients[275]

1. Conflict between Current Client and Attorney

The first step in analyzing the possibility of a conflict between an attorney and the client or potential client requires the attorney to identify his or her financial, personal, business or property interest in the matter. If no such interest exists, the analysis terminates. If an interest is acknowledged, the second step is to determine whether a "reasonable attorney"[276] would conclude

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272 RPC 1.13.

273 RPC 1.13(b) provides "Such measures may include, among others:
(1) Asking reconsideration of the matter;
(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law."

274 RPC 1.13(c).

275 RPC 1.7 provides: (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:(1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a),a lawyer may represent a client if:(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;(2) the representation is not prohibited by law;(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

276 RPC 1.0(q) provides: "When used in the context of conflict of interest determinations, 'reasonable lawyer' denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation."

that there is a significant risk that the lawyer's exercise of independent judgment will be adversely affected by lawyer's interest. If a reasonable attorney would not conclude that there is a significant risk that the lawyer's judgment would be impaired, there is no conflict. However, if a reasonable attorney does conclude that there is a significant risk that the attorney's independent judgment would be adversely affected by the lawyer's interest, there is a conflict and the determination must be made as to whether the conflict is waivable.

RPC 1.7(b) sets forth the criteria which determine whether or not a conflict can be waived:

(1) the lawyer must "reasonably believes"[277] that he or she will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives "informed consent,"[278] "confirmed in writing."[279]

If any one of these elements cannot be met, the conflict is not waivable.

Under the Rules, a conflict may only be waived if the client's "informed consent" is confirmed in writing. Although the Rules do not specify what must be included in the writing, evidence of the extent of the client's understanding of the ramifications of the potential adverse impact should be included in the written disclosure.[280] A general statement that there are

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277 RPC 1.0(r) - "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

278 RPC 1.0(j) - "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

279 RPC 1.0(e) - "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

280 "Informed consent requires that each affected client be aware of the relevant circumstances, including the material and reasonably foreseeable ways that the conflict could adversely affect the interests of that client. Informed consent also requires that the client be given the opportunity to obtain other counsel if the client so desires. See Rule 1.0(j). The information that a lawyer is required to communicate to a client depends on the nature of the conflict and the nature of the risks involved, and a lawyer should take into account the sophistication of the client in explaining the potential adverse consequences of the conflict. There are circumstances in which it is appropriate for a lawyer to advise a client to seek the advice of a disinterested lawyer in reaching a decision as to whether to consent to the conflict. When representation of multiple clients

unspecified conflicts of interest and a waiver based upon that statement will not be sufficient to rebut a client's claim that a particular adverse consequence was not explained. If the issues are complicated, for the waiver to be effective, the client should have the advice of independent counsel.[281] Once subjected to this array of nay-saying, no rational client would choose to waive the conflict. On the flip side, one must question the desirability of a client who is willing to pay an attorney who may benefit from the advancement of a position adverse to the client's interests.

And the process does not end upon the intake of a new client, the same analysis must take place, with the client's "informed consent" continually updated, as new facts come to light during the course of discovery, new witnesses testify and positions of the parties to a representation change. Even where a conflict is not evident at the outset of a relationship, the attorney must be sensitive to conflict issues that emerge as a representation proceeds.

2. Conflicts between Current Clients

An attorney may not take on a new matter[282] or continue with the representation of a client[283] where a "reasonable attorney" would conclude that the representation will involve the lawyer in representing "differing interests."[284] If the reasonable attorney would not conclude that the

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in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege, and the advantages and risks involved. See Comments [30] and [31] concerning the effect of common representation on confidentiality." RPC 1.7, Comment 18.

281 In *Rhodes v. Buechel*, 258 A.D.2d 274, 685 N.Y.S.2d 65 (1st Dep't 1999), the Appellate Division affirmed the trial court's determination that the attorney had no interest in inventions or patents held by defendants individually despite a written retainer agreement and years of course of conduct:

> No matter the form the parties' relationship assumed, it remained at all times that of attorney -client, a relationship based upon plaintiff's performance of legal services in exchange for an interest initially in defendants' inventions, and then in the corporation, and later the trusts, set up to exploit those inventions. The record supports the trial court's findings that neither the initial arrangement not its subsequent incarnations were entered into upon adequate disclosure to defendants of other possible fee arrangements, and potential conflicts of interest, or with the aid of independent counsel retained for the purpose of safeguarding defendants' interests. Rescission of the parties' arrangements *ab initio*, with payment to plaintiff in quantum meruit for his services, is an equitable result.

282 RPC 1.7, Comment 3 provides "A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b)."

283 RPC 1.7, Comment 4 provides "If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16(b)(1). Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9; see also Comments [5], [29A]"

284 "Differing interests include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." RPC 1.0(f).

representation involved "differing interests," there is no conflict and the analysis stops. However, if the "differing interests" are found, there is a conflict and the same analysis noted in the preceding section must be performed pursuant to RPC 1.7(b) to ascertain if the conflict may be waived.

Once again, the same pitfalls discussed in analyzing the existence of a conflict between an attorney and client must be addressed where clients have competing interests - except the risks are now multiplied. Instead of being concerned with the understanding of one client and the comprehensiveness of "full disclosure" so that "informed consent" may be obtained "confirmed in writing," the process must be repeated with respect to each client potentially involved. In a recent decision, the court deferred decision on a summary judgment motion made by defendants while it sua sponte examined the inherent conflict of plaintiffs' counsel in representing four plaintiffs – one of whom was the driver of the vehicle in which the other three were passengers and noted that the existence of such a conflict may result in forfeiture of any fee.[285]

Furthermore, where one client refuses to consent to a dual representation, an attorney may not jettison the uncooperative client in an attempt to convert a continuing representation into a past relationship.[286]

G. Duties to Former Clients

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.[287] In the lateral hire situation, if a lawyer acquired confidential information as a result of the lawyer's former firm's representation of a client that is material, the lawyer may not thereafter represent another client in the same or substantially related matter where the two clients' interest are materially adverse unless the former client provides informed consent, again confirmed in writing.[288] Further, the attorney may not use any confidential information gained in the course of the former client' representation unless in compliance with RPC 1.6 or if it has become generally known and may not reveal such confidential information except in compliance with Rule 1.6.

The question arises as to when a client is characterized as a "former" as opposed to a "current" client. There is no clear answer. A law firm may represent a client for twenty years and yet have no open matters for a one year period. If the relationship was such that the client expected the law firm to be continuing its services, the client may be considered "current" notwithstanding the absence of any open matters. For this reason, among others, it is a good idea to get into the habit of

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285 *Tavarez v. Hill,* 870 N.Y.S.2d 774 (N.Y. Sup. 2009); *See also, LaRusso v. Katz,* 30 A.D.3d 240, 818 N.Y.S.2d 17 (1st Dep't 2006); *Shaikh v. Waiters*, 185 Misc.2d 52, 710 N.Y.S.2d 873 (N.Y. Co. 2001).

286 *Burda Media, Inc. v. Blumenberg*, 1999 WL 1021104.

287 RPC 1.9(a).

288 RPC 1.9(b)

sending closing letters confirming the termination of the representation in any given matter. In addition to providing some contemporaneous documentation that the client could not reasonably be expecting the law firm to be rendering further services, a termination letter also fixes the accrual date for the period of limitations.

H. Transactions Between Lawyer and Client

While years ago equity in lieu of fees was standard in the Silicon Valley, New York attorneys were not quick to follow suit. However, there was a time when, in order to compete with their California counterparts, and in part to cash in on the potential windfalls once possible in representing a dot-com client, some larger New York City firms began to enter the waters, albeit reluctantly.[289] But investment in or with a client is not for the average attorney or law firm. In addition to the substantial ethical concerns which we will discuss, there can be serious financial concerns as well. Most attorneys or law firms cannot sustain the financial loss of fees should the start-up client fail, as so many do.

[289] *See,* Davis, W., *New York Firms Now Investing in Clients, Taking Equity in High-Techs Stirs Ambivalence*, NYLJ, 3/20/00, p.1; Coffee, J., *The New Compensation*, NYLJ, 3/16/00, p.5, col. 1.

A New York lawyer may not enter into a business transaction with a client if their interests differ and if the client is expecting the attorney to protect the client's interests in the transaction unless:

> (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
>
> (3) the client gives 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.[290]

If, after full disclosure, a client still refuses independent counsel, agrees that the attorney has an inherent conflict, but wants to rely upon his or her advice anyway, why would one want to do business with this client who clearly lacks any business judgment? The answer is, you don't. Put mildly, entering into a business transaction with a client is a minefield. Find another source to borrow from or lend to. Invest elsewhere or seek another source of investors. Do what you can to avoid entering into a business transaction with a client and – although the Rules set forth a way in which it can be accomplished ethically – sound principles of risk management dictate that you should never do so unless the client is separately represented by counsel that is truly independent and competent. Remember the reasonableness of each element of the test will be assessed from the vantage point of hindsight. The attorney will never emerge unscathed.

I. Waivers of Conflicts

Once the determination is made that a conflict does exist, steps must be taken to properly document the client's waiver of the conflict. If the requirements of the Rules are met so as to permit waiver, how should the client's agreement to the waiver be documented? First of all, for any waiver to be effective, the client's "informed consent" must be obtained. As one commentator has said:

> In sum, a prudent lawyer will tell the client everything the lawyer knows about present or potential conflicts of interest, and make these disclosures both orally and in writing. The more disclosure, the better. Disclosure is essentially cost-free to the lawyer and is valuable to the client in understanding what lies ahead. Holiday Inn grew into the nation's largest motel chain by offering lodging with "no surprises." I advise lawyers to use the Holiday Inn method of law practice and strive to offer representation with "no surprises."

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290 RPC 1.8(a).

> Conflicts with a lawyer's personal interests are hard to predict, but lawyers should do their best to convey the full situation to their clients so that a client's consent is truly informed. The more the client knows in the beginning, the less is likely to go wrong in the end.[291]

As one might imagine, there is no "form" that can adequately disclose to the client the particulars of a conflict in any particular fact-driven scenario. At a minimum, the written disclosure should set forth:

- The identity of the clients involved;
- An identification of the work involved and any limitations to that work;
- The factual basis for the conflict (without disclosure of client secrets or confidences);
- A discussion as to whether the conflict might cause the attorney to be less zealous on either client's behalf;
- A discussion of how client secrets and confidences will be addressed;
- Whether it is anticipated that the conflict could become more significant than it is presently viewed and the consequences if this takes place;
- A request that each client consider the issues raised carefully before reaching a decision and advising the client, if appropriate, that the advice of independent counsel should be sought;
- Advice that the client ask any additional questions that may assist their decision-making process.

While the exact extent of what must be disclosed to obtain the client's "informed consent" will depend to a large extent on the sophistication of the client,[292] if an attorney is concerned that disclosing a particular risk will cause the client not to consent, that is the very risk that should be included in the document covering the "full disclosure."

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[291] Simon, R., *Simon's New York Code of Professional Responsibility Annotated*, 2005 ed. (West 2005), p. 579.

[292] RPC 1.7, Comment 18. American Bar Association ["ABA"] Formal Op. 372 (1993).

An article appearing in the New York Law Journal suggested that the engagement letter is a "convenient" time to document the waiver of an identified document and proposed the following language:

> We are currently representing Company Y, on matters unrelated to you and the transaction for which this engagement covers. To the extent that we provide advice to you relative to your rights or obligations in respect of Company Y, or advise or assist in your dealings with Company Y, we would be adverse to Company Y and can only proceed with a waiver from you and from Company Y. We have obtained a conflict waiver from Company Y which will cover our work for you on this engagement. We believe that such waivers permit us to represent you in all respects in connection with this engagement, except that we have agreed not to participate in litigation where Company Y is an adverse party. Similarly, you have agreed to waive any conflict that might otherwise arise in connection with our simultaneous representation of you and of Company Y on matters unrelated to this engagement.[293]

Whether or not a prospective waiver of conflicts that an attorney may have in the future would depend upon whether or not the waiver would have been valid if contemporaneously given.[294] The mere fact that a waiver has been obtained with respect to both a current and future conflict is not dispositive as to whether or not the waiver is effective.

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293 Keyko, David G., *Practicing Ethics: Effectively Waiving Conflicts of Interest*, NYLJ Sept. 23, 2005.

294 RPC 1.7, Comment 20. "Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the conditions set forth in paragraph (b). The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the understanding necessary to make the consent "informed" and the waiver effective. See Rule 1.0(j). The lawyer should also disclose the measures that will be taken to protect the client should a conflict arise, including procedures such as screening that would be put in place. See Rule 1.0(t) for the definition of "screening." The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client. For example, if the client is unsophisticated about legal matters generally or about the particular type of matter at hand, the lawyer should provide more detailed information about both the nature of the anticipated conflict and the adverse consequences to the client that may ensue should the potential conflict become an actual one. In other instances, such as where the client is a child or an incapacitated or impaired person, it may be impossible to inform the client sufficiently, and the lawyer should not seek an advance waiver. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or advised by in-house or other counsel in giving consent. Thus, in some circumstances, even general and open-ended waivers by experienced users of legal services may be effective." *See*, New York County Lawyer's Association Ethics Op. No. 724; ABA Formal Op. 372 (1993).

The analysis of conflicts is not easy. It is, however, absolutely critical to the proper management of a law firm. The failure to appropriately respond to a conflict can have a devastating effect upon a law firm. Incorporating a systematic approach to reviewing and analyzing conflicts into our daily practice will not only avoid claims and grievances, but also will enhance our reputations as attorneys and assist in achieving the goal of becoming better lawyers.

V. CONCLUSION

While both procedural and substantive defenses do exist to legal malpractice actions, there is no defense like prevention. It is hoped that a review of elements and available defenses will provide ideas on the implementation of safeguards to prevent the problems in the first instance rather than simply providing an outline of how to minimize exposure once the claim has been made.

Legal Malpractice 2017

Presented for the New York State Bar Association

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Claims Against Attorneys

- Legal malpractice
- Breach of fiduciary duty
- Fraud
- Judiciary Law Section 487
- Fair Debt Collection Practices Act
- Retaliatory claims

Legal Malpractice

Elements of a Legal Malpractice Action

- Privity required to establish duty
  - Direct attorney-client relationship or one "so close as to approach that of privity."
- Standard of Care
  - Failure to exercise that degree of skill commonly exercised by an ordinary member of the legal community.
- Proximate Cause
  - The 'But For' Test.
- Damages
  - Must be "actual and ascertainable."

Privity

- Only the client may sue an attorney for legal malpractice.
- Absent fraud, collusion or malicious or tortious act, a third party may not sue an attorney.
- An individual's unilateral belief that the attorney represents the individual does not confer the status of client. There must be an explicit undertaking to perform a specific task.

Privity- Factors

- Factors in determining whether an attorney-client relationship has been entered into include:
  - Whether a fee arrangement was entered into or a fee paid;
  - Whether a written engagement letter demonstrates acceptance of the retention;
  - Whether there was an informal relationship in which the attorney rendered services gratuitously;
  - Whether the attorney actually represented the plaintiff in one aspect of the matter;
  - Whether the attorney excluded the plaintiff from some aspect of the representation in order to protect another;
  - Whether plaintiff had a reasonable belief that the attorney was representing him or her.

Privity – Scope of Engagement

- An attorney seeking to limit the scope of an engagement must explicitly define the activities being undertaken.
- Engagement letters.
- Must take care to advise the client as to the areas where the attorney is not representing the client and that the client may need to seek counsel in those area.

Privity - Exception

- "So close as to approach privity"
  - The attorney must be aware the services were being used for a particular purpose.
  - The third party relied upon those services.
  - The attorney demonstrates some understanding of the third party's reliance.
- Exception narrowly applied:
  - Third party opinion letters.
  - Suit by excess insurer against insured's attorney.
  - Will beneficiary cases – NY stands alone.
    - Estate may sue the decedent's attorney where the attorney's error resulted in increased estate taxes

Standard of Care - PJI

- Under PJI 2:152, an attorney who undertakes to represent a client:
  - Impliedly represents that he or she possesses a reasonable degree of skill;
  - That he or she is familiar with the rules regulating practice in actions of the type at issue and with the well-settled principles of law involved; and
  - That he or she will exercise reasonable care with the degree of skill commonly used by an ordinary member of the legal profession
- "An attorney is not a guarantor of the result of the case."

Standard of Care – Necessity of an Expert

- Plaintiff must prove, through expert testimony, that the attorney departed from acceptable legal standards in the community. The failure to timely designate an expert may result in the dismissal of plaintiff's legal malpractice case.
  - Exceptions – (1) when the ordinary experience of the fact-finder is sufficient to judge the adequacy of the services or (2) the conduct fell below any standard of care.
- The expert cannot opine that certain conduct is legal malpractice.

Standard of Care – Ethical Violations

- A claimed ethical violation without more will not support a legal malpractice action.
- However, a violation of provision of the Rules of Professional Conduct, which sets forth minimum standards of conduct expected of attorneys, may be some evidence of negligence.
  - Tilton v. Trezza
- A conflict of interest alone will not support a legal malpractice action.

'But For'

- It is not enough that an attorney breached the standard of care in representing a client.
- Plaintiff must prove that 'but for' the attorney's conduct, plaintiff would not have sustained damages.
- 'But for' causation requires a tighter causal nexus between the conduct alleged and the injury claimed than proximate cause.
  - Barnett v. Schwartz

'But For' – Case within a Case

- Plaintiff must prove each and every element in the underlying case as well as the elements of the legal malpractice claim.
- The 'but for' standard applies to breach of fiduciary duty claims brought against attorneys where relief sought is money damages.

Damages

- The damages alleged must be actual pecuniary loss. The damages may not be speculative.
  - However, several recent cases have sustained complaint where damages may be "reasonably inferred" from the allegations of the complaint
- Punitive damages are not recoverable in the absence of conduct that is "so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply criminal indifference to civil obligations."
- An attorney will not be held liable for the loss of a claim for punitive damages which were intended to punish the underlying wrongdoer.

Damages – Collectibility and Emotional Distress

- Collectibility – Must be collectible
  - But see *Lindenman v. Kreitzer*
- Non-pecuniary damages are not recoverable in the context of a legal malpractice action - *Dombrowsky*
  - Emotional distress
  - Loss of liberty

Damages – Attorney Fees and Interest

- Attorney fees incurred prosecuting a legal malpractice action are not recoverable, although reasonable fees incurred by the client to cure an error may be.
- Interest charged by a taxing authority as a result of the late payment of taxes allegedly caused by an attorney is not a recoverable item of damages.

Breach of Fiduciary Duty

Elements of a Breach of Fiduciary Duty Claim

- The existence of a fiduciary relationship;
- A breach of the duty owed by the fiduciary;
- Causing damages;
- That would not have been suffered 'but for' the breach.
- Where a breach of fiduciary duty claim against an attorney is predicated upon the same alleged conduct causing the same damages, it is duplicative of the legal malpractice claim and will be dismissed.

Nature of the Duty

- Attorneys are under a duty to represent the client with undivided loyalty.
- The fiduciary relationship is predicated upon the existence of an attorney-client relationship.
- A fiduciary relationship may be owed to a non-client if the attorney assumes the role as an escrow agent or trustee or if the attorney is aware that the non-client is relying upon the attorney to act on his behalf.

Fraud

Elements of a Fraud Claim

- The attorney made a material misrepresentation;
- That was knowingly false – scienter;
- Upon which the plaintiff reasonably relied; and
- Which caused damages to plaintiff
- Elements must be proven by "clear and convincing evidence"

Judiciary Law Section 487

Elements of a Judiciary Law § 487 Claim

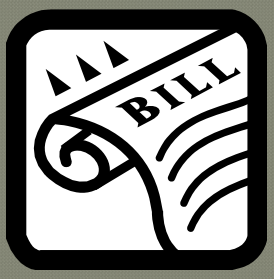
An attorney or counselor who:

- Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
- Willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured

Amalfitano v. Rosenberg – attempted deceit

Fair Debt Collection Practices Act



Fair Debt Collection Practices Act

- The Fair Debt Collection Practices Act applies to all attorneys who regularly collect consumer debt on behalf of their clients, even if the activity involves litigation.
- If the Act applies, there are technical rules set forth in the statute that must be followed.
- Any violation will result in statutory damages and attorney fees.

Fair Debt Collection Practices Act - Defenses

- Defenses to a FDCPA claim include:
  - The attorney is not a debt collector under the statute;
  - The debt sought to be collected is not "consumer debt;"
  - The one year statute of limitations has expired;
  - The violation occurred as a result of a bona fide error despite the existence of procedures designed to prevent such an error; and
  - The claimed violation was the result of reliance on an advisory opinion of the Federal Trade Commission.

Retaliatory Claims

Retaliatory Claims

- Malicious prosecution
  - that the prosecution was malicious;
  - that it was without reasonable or probable cause; and
  - that it terminated favorably to plaintiff.
- In New York, a litigant is also required to allege the existence of a special injury in order to recover on a malicious prosecution claim.

Retaliatory Claims

- Abuse of process
  - regularly issued process, either civil or criminal;
  - an intent to do harm without excuse or justification;
  - use of process in a perverted manner to obtain a collateral objective

Retaliatory Claims

- Defamation
  - False statement;
  - Published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard;
  - Causing either special harm or constituting defamation per se.
    - charges another with a serious crime; or
    - tends to injure another in his or her trade, business, or profession.
- Strong litigation privilege
  - *Front Inc. v. Khalil* – privilege extends to communications pertinent to a good-faith anticipated litigation

Retaliatory Claims

- Prima facie tort
  - Intentional infliction of harm;
  - Without excuse or justification;
  - Through acts that would otherwise be lawful;
  - Causing special damages.
- Plaintiff must show that defendant acted with disinterested malevolence
- Rarely permitted where claim is asserted by litigant against adversary's counsel

Retaliatory Claims

- Interference with contractual relations
  - existence of a valid contractual relationship;
  - defendant's knowledge of the terms of the contract;
  - defendant's intentional and improper procurement of a third party's breach of that contract without justification; and
  - damages proximately caused by the defendant to the to the party whose relationship has been disrupted.

Retaliatory Claims

- Spoliation of evidence – E-discovery
  - No independent tort in New York
  - Potential for disruption of attorney-client relationship
  - Counsel's obligations
    - Counsel must issue a "litigation hold" at the outset of litigation or whenever litigation is reasonably anticipate and must be re-issued regularly.
    - Counsel should communicate directly with the "key players" in the litigation, *i.e.,* the people identified in a party's initial disclosure and any subsequent supplementation thereto Counsel should instruct all employees to produce electronic copies of their relevant active files.
    - Counsel must also make sure that all backup media which the party is required to retain is identified and stored in a safe place.

Legal Malpractice 2017

Presented for the New York State Bar Association

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Common Defenses To The Malpractice Action And Related Causes of Action

Presented By

Janice J. DiGennaro

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Statute of Limitations

Period

- Whether plaintiff characterizes the claim as one for breach of the retainer or in tort for malpractice under CPLR 214 (b) a three-year period of limitations applies to a claim of malpractice.

Accrual

- The cause of action for malpractice accrues at the time of the act, error or omission, even if it is discovered later.

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Continuous Representation Toll

- The accrual of the three-year statute of limitations is tolled during the period of the lawyer's continuous representation in the same matter out of which the malpractice arose.
- There must be a continuing relationship of trust and confidence between lawyer and client.
- The plaintiff bears the burden of pleading its application.
- The continuous representation toll is matter specific such that the continuing representation must be in connection with the particular transaction or matter from which the malpractice allegedly arose.

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Absence Of Privity (No Standing)

Contractual Privity

- Since a claim of malpractice requires the existence of an attorney-client relationship based upon contractual privity, the absence of privity is a defense to a claim of malpractice.
- Privity with a husband does not mean privity with wife or children unless expressly undertaken.
- Privity with a corporate client does not mean privity with an officer or shareholder or investor of the corporation.

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Absence Of Privity (No Standing)

- Privity with the testator does not create attorney-client relationship between the attorney and beneficiaries (however, the New York Court of Appeals has just ruled privity exists with the personal representative of the estate).
- Privity with an insured does not create attorney-client relationship with his insurer or excess insurer for purposes of malpractice liability.

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Approaching Privity

Almost Privity?

In narrow circumstances, the courts have recognized that although actual privity is not present, the relationship is sufficiently close as to "approach" that of privity so as to support liability against the lawyer. This finding requires:

- awareness by lawyer that his or her statement is being used for a particular purpose (*e.g.*, opinion letter);
- reliance by a known party on the statement;
- some conduct by lawyer linking him or her to the relying party evincing understanding of reliance (usually some type of direct contact or communication).

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Collateral Estoppel/Res Judicata

Helpful Prior Adjudication

- A prior adjudication in the underlying matter may have a res judicata collateral estoppel effect for the resolution of the issue in the legal malpractice action.

- A prior adjudication, fixing the entitlement or value of a lawyer's fee, is res judicata or collateral estoppel for any subsequent claim of malpractice or breach of fiduciary duty because that adjudication necessarily establishes the absence of malpractice.

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Collateral Estoppel/Res Judicata

Attempted unsuccessful rescission of settlement agreement on grounds of fraud, duress or coercion, lack of voluntariness in the underlying matter can bar claim of malpractice predicated upon the same issues.

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Judicial Estoppel – Estoppel

Failure To List Malpractice Claim As An Asset In Bankruptcy

A client who fails to schedule the malpractice claim in a bankruptcy schedule will be barred under judicial estoppel principles from pursuing a claim.

Estoppel To Deny Voluntary Settlement

Estoppel has been applied to bar pursuit of a malpractice action where a client acknowledges the voluntariness of a settlement on the record in an underlying court proceeding and later brings a malpractice action on the theory of a coerced settlement.

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Absence Of Collectability

Collectability As An Element Of The Claim

- The plaintiff in a legal malpractice action had been generally required to establish the collectability of the hypothetical judgment against the underlying tortfeasor as part of their *prima facie* case.
- This issue was cast in doubt by a First Department decision in 2004, which held that the ultimate collectability of any judgment that could have been obtained in the underlying action is a matter of mitigation of damages to be plead and proved by the defendant as an affirmative defense.

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Absence Of Collectability

- The Second, Third and Fourth Departments still adhere to the original rule and hold that the plaintiff has the burden of proof.
- That split in the departments remains unresolved by the Court of Appeals.

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Prematurity/Ripeness

Unresolved Underlying Proceedings

- Since a claim of legal malpractice requires non-speculative pecuniary loss where an underlying action in which the lawyer's error occurred is still pending, the injury claimed (lost or diminished recovery) cannot be established and the claim is not ripe for adjudication.
- Sometimes the remedy is merely abatement not dismissal.

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Waiver/Assumption of the Risk

Client Knew The Risks

- A waiver defense to a malpractice claim can occur where a client knowingly and voluntarily waives a right, that client cannot later sue for legal malpractice complaining that the attorney did not protect the interest the client knowingly surrendered.
- Assumption of the risk can also be pleaded as an affirmative defense.

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Ratification

Client's Later Acceptance

Even unauthorized acts by counsel can be ratified by the client's failure to object and acceptance of benefits. Such ratification can be a bar to a subsequent malpractice action based upon the unauthorized act.

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Judicial Error In Underlying Action

Since *prima facie* case of legal malpractice requires proof showing "but for" lawyer's error result would have been better, what happens if the Judge in the decision or judgment in underlying matter got it wrong – not the lawyer?

- New York Court of Appeals Decision in *Grace v. Law*, 24 N.Y.3d 203 (2014) addressed this issue.
- If defendant attorney in malpractice action can establish that an appeal from an adverse decision "was likely to succeed" plaintiff/client must appeal.
- Failure to appeal in such a circumstance will be a bar to a subsequent claim of malpractice.

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Client's Or Third Party's Negligence

Client's Own Conduct Or The Conduct Of Other Lawyers

- Where damages claimed are attributable to the client's own inaction, negligence or wrongful act and not the lawyer's conduct, courts have not hesitated to dismiss the client's legal malpractice claim.
- An attorney is not liable for acts or omissions which did not occur during his or her representation, or due to acts of a predecessor or successor counsel.

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Attorney Judgment Rule

Lawyers Are Not Infallible

- Under the attorney judgment rule, a lawyer is not held to a standard of infallibility and is not a guarantor of the best result. Thus, a lawyer may take chances and if the lawyer errs on a question not elementary or conclusively settled by authority no liability will be imposed.
- Such an error is one of judgment for which there is no liability.
- Malpractice claims, based upon a client's after the fact criticism of a lawyer's strategic judgment, will not be sustained.

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Trial Tactics

Trial Involves Judgment

The attorney judgment rule recognizes that trial tactics, are a series of judgmental decisions which cannot be subjected to the scrutiny of 20/20 hindsight and form the basis of a malpractice claim unless the decisions made were palpably unreasonable.

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Settlement Recommendations

Settlement Decisions Are Judgmental

Similarly, lawyers make recommendations regarding settlement everyday. Such recommendations may be based upon a litany of tangible and intangible factors. Such judgment may also be based on unsettled issues of law. Such recommendations will not be the subject of a malpractice claim unless palpably unreasonable.

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Common Defenses To The Breach Of Fiduciary Duty Action

Statute Of Limitations

- Generally a three-year period of limitations applies where money damages are sought. Like malpractice, the claim accrues when injury is sustained, regardless of plaintiffs' discovery.
- The claim has been held subject to the continuous representation toll.
- Where the relief sought is equitable in nature, like rescission, accounting, disgorgement, etc., a six-year period of limitations has been applied.

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Redundant Of The Malpractice Claim

Where a breach of fiduciary duty claim is premised on the same facts and seeks the identical relief as a legal malpractice claim it will be dismissed as redundant.

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Defenses To The Judiciary Law § 487 Claim

Absence Of A Pending Judicial Proceeding

It is an essential element of the Judiciary Law claim that the alleged deception occurred during a pending judicial proceeding. Extra-judicial deception is not actionable under the statute.

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Absence Of Causation

As causation is essential to establishing liability under § 487, a deceptive act which causes no injury is not actionable.

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No Extra-Jurisdictional Reach

Must Occur In New York Proceedings

The claim under § 487 is limited to deceptions occurring in a proceeding pending in the state of New York. Thus, deception of courts in other states or countries is not actionable under the statute

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Statute Of Limitations

Six Years

Alleged violations of Judiciary Law § 487 are governed by a six-year period of limitations in CPLR 213(1) applicable to fraud. *See Melcher v. Greenberg Traurig*, LLP, 23 N.Y.3d 10 (2014).

The Court of Appeals in the *Melcher* Decision late last year resolved some inconsistency in the case law regarding whether a three-year period of limitations for claims founded on a statute or six-year period under CPLR 214(1) applied to such claims.

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Closing Thoughts

A malpractice claim may be easy to assert, but can be difficult to sustain. The best advice when faced with a threatened or actual malpractice suit is:

- Notify your carrier immediately;
- Don't dabble and try to represent yourself; and
- Secure counsel experienced in defending professional liability claims against lawyers.

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IDENTIFYING AND RESPONDING TO PROFESSIONAL LIABILITY CLAIMS

New York State Bar Association

Legal Malpractice 2017

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IDENTIFYING AND RESPONDING TO PROFESSIONAL LIABILITY CLAIMS

Any discussion of professional liability claims should start with a discussion of the lawyers' professional liability insurance policies which most private lawyers and law firms have. This article will discuss the provisions of the typical lawyers' professional liability policy, and the identification and reporting of claims so that the insurance coverage is there when it is needed most: when the attorney or firm becomes a defendant in a lawsuit.

1. The Lawyers' Professional Liability Insurance Policy – In General

Although New York does not mandate it, all lawyers and law firms should maintain professional liability insurance coverage. The terms of lawyers' professional liability ("LPL") policies differ depending on the company which issues the policy, but LPL policies typically provide coverage for "wrongful acts" or "acts, errors or omissions" which "arise out of the rendering of professional legal services."

"Professional legal services" is usually defined in LPL policies and typically includes services rendered by the attorney, for others, as a lawyer, arbitrator, mediator, title agent or as a notary public. Professional legal services may also include services performed as a court-appointed fiduciary, an administrator, receiver, executor, guardian or any similar fiduciary capacity. However, some policies may limit the coverage for administrators, executors or similar fiduciaries to situations where the act or omission in question is in the rendering of services ordinarily performed as a lawyer.

LPL policies are "Claims Made" or "Claims Made and Reported" policies, which means that coverage is triggered by the reporting of a claim, not the act or omission which gave rise to the claim. However, there are important exclusions to coverage - including the Known Claims and Circumstances Exclusion - which could eliminate coverage for a claim based on an act or omission which occurred prior to the inception of the policy. Also, LPL policies typically contain "Prior Acts Exclusions," which eliminate coverage for conduct occurring before a specific date, which is usually the first date that the particular insurer provided coverage to the attorney or firm.

2. What Constitutes a Claim?

Since the coverage is triggered by the claim, it is essential to know when a claim is first made. Courts have held that the word "claim," as used in liability insurance policies, is "unambiguous and generally means a demand by a third party against the insured for money damages or other relief owed." *See Schlather, Stumbar, Parks & Salk, LLP v. One Beacon Insurance Company*, 2011 WL 6756971 (N.D.N.Y. 2011).

The policy defines what a claim is. Some typical policy definitions are set forth below:

- "Claim means a demand received by you for money or services, including the service of suit or institution of arbitration proceedings against you, or a disciplinary proceeding."

- **"Claim** means a demand received by the **Insured** for money arising out of an act or omission, including **personal injury,** in the rendering of or failure to render **legal services.** A demand shall include the service of suit or the institution of an arbitration proceeding against the **Insured."**

It is important to note that a claim is not necessarily a formal lawsuit. In fact, the summons and complaint often is not the first notice an attorney receives of a claim. The action can come months or even years after a claim is first made. The first notice may be an oral complaint of alleged wrongdoing, or it can be a letter or email sent by a disgruntled client or former client.

The case of *Schlather, Stumbar, Parks & Salk, LLP v. One Beacon Insurance Company*, 2011 WL 6756971 (N.D.N.Y. 2011) addressed the issue of when a claim is deemed to have been made under an attorney's LPL policy. It provides a good illustration of how LPL policies work, and also serves as a cautionary tale for attorneys regarding the importance of identifying and reporting claims.

In *Schlather*, the law firm brought a declaratory judgment action against its insurance company, seeking a declaration that the company was required to defend and indemnify the firm in a malpractice action brought by a former client of the firm. The former client learned in May of 2007 that a wrongful death action that the firm had commenced on behalf of her deceased husband had been dismissed a year earlier. She immediately set up a meeting with the firm's managing partner and gave him a three page letter, alleging deficiencies in performance, including the failure to respond to inquiries and phone calls, and other professional misconduct. She also asked a number of questions about the firm's handling of the wrongful death action.

The firm responded by saying that the action was voluntarily dismissed because the handling attorney had concluded that it did not have merit. There was apparently some meeting between the former client and the handling attorney before the dismissal where the lack of merit to the action and the attorney's desire to discontinue it were discussed, but the client said she never agreed to the dismissal.

2007 drew to a close and the firm did not hear from the former client again. The firm's professional liability carrier at the time was Zurich, and the firm did not put Zurich on notice of a claim from the former client. In September of 2008, the firm's

LPL policy with Zurich expired, and through their broker they filed an application for insurance with One Beacon. The matter involving the former client and her wrongful death action was not mentioned in the application. One Beacon issued a policy to the firm, effective October 1, 2008.

Two months later, in December of 2008, the former client resurfaced. She retained an attorney who sent the firm a letter, alleging that the firm mishandled the wrongful death action. One month later, she filed a malpractice action against the firm.

The firm gave notice to One Beacon after it received the letter in December of 2008. One Beacon argued that the claim was made in 2007, when the former client went in with the three pages of notes and started complaining about the way her case was handled. The firm argued that it did not receive notice of the claim until December of 2008 when they received the letter from the former client's new attorney.

The court agreed with the firm, and denied One Beacon's motion for summary judgment on that issue, ruling that the 2007 letter from the former client did not constitute a "claim" under the policy. The court said that a "request for information is insufficient to constitute a claim." The former client alleged wrongdoing and demanded answers in 2007, but she did not demand money.

The court noted that an accusation of wrongdoing "is not by itself a claim…; nor is a naked threat of a future lawsuit . . . or a request for information or an explanation. A claim requires, in short, a specific demand for relief."

The *Schlather* firm no doubt breathed a sigh of relief after reading the first few pages of the judge's decision, but the relief was short lived. The judge went on to address the "Known Claims Exclusion" of the policy. That portion of the decision is discussed below.

The safest course for all attorneys is to err on the side of treating serious client complaints about errors or alleged errors as claims and reporting them to their professional liability carrier. The judge in the *Schlather* case was generous in concluding that the three page complaint letter from the firm's former client was not a claim. In *McCabe v. St. Paul Fire & Marine Ins. Co*., 79 A.D. 3d 1612, 914, N.Y.S. 2d 814 (4th Dept. 2010), *lv. to appeal granted*, 16 N.Y.3d 711, 923 N.Y.S.2d 415 (Table) (May 3, 2011), the court concluded that a letter from a client which demanded that the attorney "rectify their problem," and which clearly alleged that the attorney was negligent fell within the definition of a claim under the attorney's policy, which defined a claim as "alleging an error, omission or negligent act in the rendering of or failure to render professional legal services for others by you."

3. Giving Notice to Your Insurance Company of Claims and Potential Claims

Claims:

An attorney must give written notice of a claim to his/her insurance company. Under most policies, the written notice must be given "as soon as practicable." The giving of the written notice is, under many policies, a condition precedent to coverage. The "as soon as practicable" requirement has been interpreted by courts to mean within a reasonable time under all of the facts and circumstances. *See Heydt v. American Home Assurance*, 146 A.D.2d 497, 536 N.Y.S.2d 770 (1st Dept. 1989). Some courts have held that delays of only a few months in reporting claims or potential claims are unreasonable as a matter of law.

The landscape for late notice disclaimers changed significantly in January of 2009, when New York, by statute, eliminated the "no prejudice" rule. Under the no prejudice rule, an insurance carrier could disclaim coverage for late notice regardless of whether it suffered any prejudice or harm as a result of the late notice. In 2008, Insurance Law §3420(a) was amended to provide that, for insurance policies issued after January 17, 2009, an insurer is prohibited from denying coverage based on late notice unless the insurer can establish that it suffered prejudice as a result of the delay in reporting the claim.

There is some question as to whether the new legislation exempts claims-made policies. Insurance Law §3420(a)(5), as amended, states that "with respect to claims-made policies, however, the policy may provide that the claim shall be made during the policy period, any renewal thereof, or any extended reporting period." Some have argued that this language indicates that claims-made policies are exempt from the amendment. The only appellate court to have addressed the issue thus far concluded that claims-made policies are not excepted from the provisions of the new law, *see McCabe v. St. Paul Fire & Marine Ins. Co*., 79 A.D. 3d 1612, 914 N.Y.S. 2d 814 (4th Dept. 2010), *lv. to appeal granted*, 16 N.Y.3d 711, 923 N.Y.S.2d 415 (Table) (May 3, 2011), but the commentary following Pattern Jury Instruction 4:77 states unequivocally that "[t]he new law does not apply to claims-made policies."

It seems likely that other courts will reject the holding of the Fourth Department in *McCabe* and conclude that, under claims-made policies, if notice is not given within the policy period or any extended reporting period, the claim will not be covered, regardless of whether the carrier can demonstrate prejudice.

Potential Claims & the "Discovery Clause":

A potential claim is one where the attorney knows that he or she made an error, but the client or former client (a) has not complained, (b) has not made any demand for money or services and (c) has not given any indication of an intent to bring a claim against the attorney.

A typical Discovery Clause might provide that if the insured attorney first becomes aware during the policy period of an act or omission which may reasonably be expected to lead to a claim (even though no claim has been made), and if the attorney provides written notice of the act or omission along with "full particulars" regarding the act or omission, then, if the claim is subsequently made, the company will deem the claim to have been made when it received the written notification of the act or omission. This provision allows the attorney to protect him or herself from claims which might be made after the policy expires.

4. How is Notice Given?

The policy provides that you must give written notice to the insurer, and you will typically be given an address and fax number where the written notice can be sent. Usually, however, attorneys and firms send the written notice to their insurance broker rather than the insurer. On occasion, insurance brokers have failed to forward the notice to the insurance company, or failed to forward it timely. The best practice is to send the written notice to both the broker and the insurance company. If it is sent solely to the broker, the attorney or firm should follow up to ensure that the notice has been received by the company.

It should be noted that, even where the notice of a claim has already been provided - such as, for example, where the claim is first made by a pre-suit demand letter from the former client's new attorney, rather than the filing of an action - the attorney must immediately notify the company if he or she is served with a summons or complaint.

5. What is Excluded From the LPL Policy?

Every LPL policy has a list of claims which are expressly excluded from coverage. The following is a non-exhaustive list of exclusions typically found in an LPL policy:

a. Claims arising out of dishonest, fraudulent, criminal or malicious acts or omissions of the insured;
b. Claims for bodily injury;
c. Claims made by one insured under the policy against another insured under the policy (but this can be qualified by the language of the

policy to exclude claims by one insured against another insured "unless an attorney/client relationship exists");

d. Generally, claims arising from any act performed by the attorney in his or her capacity as a public official or an employee or representative of a public body or governmental agency;
e. Claims made for legal services rendered to any organization or corporation in which the insured and/or the insured's spouse has a controlling or equity interest (10% ownership interest or more);
f. In some policies, claims based on or arising out of financial or investment advice;
g. Claims arising from "Known Claims or Circumstances."

The last of these exclusions - the "Known Claims or Circumstances" exclusion - is perhaps the most important. A typical provision excludes claims for which you gave notice to a prior insurer, but it goes beyond that and includes claims which should have been reported to a prior insurer or disclosed in the application process. A typical "known claims or circumstances" clause will exclude coverage for "any claim arising out of a wrongful act occurring prior to the policy period if ... you had a reasonable basis to believe that you had breached a professional duty, committed a wrongful act, violated a Disciplinary Rule, engaged in professional misconduct, or to foresee that a claim would be made against you."

The "Known Claims or Circumstances" exclusion was the second issue litigated in the *Schlather* case discussed above, and it was based on this exclusion that the firm was found not to have coverage under its policy.

The firm's LPL policy provided that:

> This policy does not apply to ... any claim arising out of a wrongful act occurring prior to the policy period if, prior to the effective date of [the Policy]: ... you had a reasonable basis to believe that you had committed a wrongful act or engaged in professional misconduct; [or] ... you could foresee that a claim would be made against you[.]

The insurer, relying on this exclusion, argued that it did not have an obligation to defend and indemnify the firm in the former client's action because a reasonable basis existed, prior to the inception of the insurer's policy, to believe that a wrongful act was committed, professional misconduct had occurred, and a claim might be made against the firm.

The court noted that, under New York law, there is a two-pronged test to determine the applicability of a known claims exclusion.

> First, the court "must ... consider the subjective knowledge of the insured [.]" Second, the court must then consider "the objective understanding of a reasonable attorney with that knowledge." The "first prong requires the

> insurer to show the insured's knowledge of the relevant facts prior to the policy's effective date, and the second requires the insurer to show that a reasonable attorney might expect such facts to be the basis of a claim."

See 2011 WL 6756971, at *7 [citing *Liberty Ins. Underwriters, Inc. v. Corpina Piergrossi Overzat & Klar, LLP*, 78 A.D.3d, 604, 913 N.Y.S.2d 31, 33 (1st Dept. 2011)].

The court in *Schlather* found that both prongs were satisfied and that the exclusion applied. The court cited five provisions of the Code of Professional Conduct which were implicated by the former client's 2007 letter. Most importantly, the firm voluntarily dismissed the former client's action without her consent. The firm acknowledged that the former client voiced her displeasure with the firm's handling of the action in 2007, and therefore, the court found, subjectively the firm was aware in 2007 that professional misconduct may have occurred and that a claim might be coming. Similarly, employing the objective standard, the court concluded that a reasonable attorney with the knowledge possessed by the firm might expect a claim to arise because the conduct alleged fell below the minimum level of professional conduct expected of attorneys.

Thus, the court found that in 2007 (a) the firm knew, and (b) any reasonable attorney would have known, that a basis for a claim existed, even though one had not been made. The potential claim was not disclosed in the application process, and the court granted the insurer summary judgment based on the known claims exclusion.

6. <u>What Damages Are Covered by the LPL Policy?</u>

The damages which are covered under an LPL policy are judgments, awards or settlements. The following are typically <u>not</u> included in the definition of damages under LPL policies:

a. fines and statutory penalties;
b. sanctions;
c. punitive damages;
d. the return or restitution of legal fees;
e. the multiplied portion of multiplied damages awards.

A question recently litigated is whether an insurance company is required to indemnify an attorney for any part of an award of treble damages under Judiciary Law §487, a statute which is seen often in attorney liability cases.

Section 487 of the Judiciary Law, entitled "Misconduct by Attorneys," provides:

> "An attorney or counselor who,

> a. is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party;
>
> b. wilfully delays a client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
>
> is guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the Penal Law, he forfeits to the party injured *treble* damages, to be recovered in a civil action."

See Judiciary Law § 487 (emphasis added).

In *McCabe v. St. Paul Fire & Marine Ins. Co*., 79 A.D. 3d at 1612, 914, N.Y.S. 2d at 814, the Fourth Department addressed the issue of whether an attorney's professional liability insurance carrier was required to indemnify the attorney for damages assessed against him for violating Judiciary Law §487. The court noted that "New York public policy precludes insurance indemnification for punitive damages awards, . . . including awards of statutory treble damages." *See* 224 A.D.2d at 1614, 914 N.Y.S.2d at 817 (citations and internal quotation marks omitted). Citing the Second Department's decision in *Jorgensen v. Silverman*, 224 A.D.2d 665, 638 N.Y.S.2d 482 (2nd Dept. 1996), the Fourth Department held that damages awarded under section 487 are punitive, not compensatory, and that the carrier was not obligated to indemnify the attorney. *See id.*, 914 N.Y.S. 2d at 817 (quoting *Jorgensen*, 224 A.D.2d at 666, 638 N.Y.S.2d at 483). Although the Court of Appeals granted leave to appeal, the case settled before the Court of Appeals heard arguments.

The Fourth Department did not address the issue of whether the insurance carrier could be required to indemnify the attorney for the compensatory damages aspect of the award, *i.e.*, the amount of damages before trebling, but a recent decision from the Appellate Division, Second Department, suggests that the entire award is punitive and that even the compensatory portion of the award is not insurable. In *Specialized Industrial v. Carter*, 99 A.D.3d 692, 952 N.Y.S.2d 97 (2d Dept. 2012), the defendant-attorney was accused of violating Judiciary Law Section 487 by obtaining a default judgment against the plaintiff Specialized Industrial based on false invoices. The defendant-attorney brought a contribution claim against the plaintiff's former attorneys, claiming that their malpractice contributed to the plaintiff's damages. The third-party defendants moved to dismiss the contribution claim on the grounds that an award of treble damages under Judiciary Law 487 is punitive and a party cannot obtain contribution for punitive damages. The defendant responded that he could seek contribution for the compensatory aspect of the damages award, i.e., the damages before trebling. The lower court granted the third-party defendants' motions and dismissed the defendant's contribution claim.

In affirming the dismissal, the Second Department held:

> Treble damages awarded under Judiciary Law § 487 " 'are not designed to compensate a plaintiff for injury to property or pecuniary interests' " (*McCabe v. St. Paul Fire & Mar. Ins. Co.*, 79 A.D.3d 1612, 1614, 914 N.Y.S.2d 814, quoting *Jorgensen v. Silverman*, 224 A.D.2d 665, 666, 638 N.Y.S.2d 482). They are designed to punish attorneys who violate the statute and to deter them from betraying their "special obligation to protect the integrity of the courts and foster their truth-seeking function" (*Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 14, 874 N.Y.S.2d 868, 903 N.E.2d 265). Allowing an attorney who violates Judiciary Law § 487 to seek contribution for any part of the award would run counter to this intent (*but see Trepel v. Dippold*, 2006 WL 3054336, 2006 U.S. Dist. LEXIS 78050 [S.D.N.Y.2006]).

Id. at 693, 952 N.Y.S.2d at 98.

Given the conclusions of the Fourth Department in *McCabe* and Second Department in *Specialized Industrial*, it would seem that an insurance carrier would not be required to indemnify an attorney for any portion of an award of damages under Judiciary Law 487. This may all be an academic discussion, though, as the same conduct which gave rise to the Judiciary Law liability would likely give the insurer grounds to disclaim coverage under the dishonest, fraudulent and criminal acts exclusion.

7. Conclusion

The professional liability insurance policies that attorneys and firms pay for will have limited value if claims and potential claims are not properly identified and reported. In order to protect themselves and give themselves peace of mind, attorneys should keep the claim reporting and "Known Claims Exclusions" in mind during both the application process and the life of the policy.

4 TH DEPARTMENT ATTORNEY GRIEVANCE PROCEDURES & AVOIDING DISCIPLINARY COMPLAINTS

I. Role of the Attorney Grievance Committees (AGC)

A. Purposes of the Attorney Disciplinary System

1) Protection of the public

2) Preserve the integrity of the profession and the legal system

3) Education of the bar and the public

B. Authority & Rules

1) AGC is an auxiliary agency of the Appellate Division, Fourth Judicial Department. 22 NYCRR §1020.2.

2) Judiciary Law § 90 governs discipline.

3) Uniform Rules for Attorney Discipline Matters for all Departments, effective October 1, 2016. 22 NYCRR §1240.

4) Special Rules for the Fourth Department for Attorney Discipline Matters. 22 NYCRR §1020.

C. Structure

1) Grievance Committees - Each Judicial District in 4th Dept (5th, 7th, & 8th) has an Attorney Grievance Committee comprised of 18 lawyers and 3 lay members to "consider and cause to be investigated alleged misconduct by attorneys in their district" 22 NYCRR §1020.2(b).

2) Professional Staff - Investigate and report on allegations of professional misconduct and dispose of by dismissal, private letter, or formal disciplinary proceeding in Appellate Division.

3) Local Bar Association Grievance Committees - process allegations of minor delay, fee disputes, personality conflicts, and other minor matters

D. Investigative Procedures

1) Most files are based on written complaints submitted to AGC, which are forwarded to the attorney for a written response. AGC may also initiate *sua sponte* investigation.

2) AGC has authority to order a respondent attorney to appear @ AGC to be examined under oath and to seek subpoena from Court.

3) Attorneys are ethically obligated to cooperate in the investigations by AGC, and failure to do so constitutes professional misconduct. " Full and forthright cooperation with the Committee is the lawyer's obligation." Matter of Fraser, 515 NYS2d 361(4th); *NYSBA Op. # 348.*

4) Minor matters are often investigated by local Bar Committees, under the supervision of the AGC.

E. Disposition of Complaints

1) Confidential actions [Judiciary Law §90(10)]

a) Dismissal by letter

b) Mediation - minor matters may be referred to mediation.

c) Diversion - Certain complaints may be disposed of by reference to a Court approved monitoring program, where the attorney has an alcohol or substance abuse problem and is in treatment.

d) Letter of Advisement - Issued when the Committee finds that an attorney has engaged in conduct requiring comment that, under the facts of the case does not warrant imposition of discipline. It is confidential, but remains a permanent record and may be considered in evaluating subsequent complaints. 22 NYCRR § 1240(d)(2)(iv).

e) Letter of Admonition - A formal disciplinary sanction based upon a finding by Committee that an attorney has engaged in professional misconduct, but that public discipline is not required to protect the public, maintain the integrity and honor of the legal profession, or deter the commission of similar conduct. 22 NYCRR § 1240.7(d)(2)(v).

2) Public disciplinary actions - Only the Appellate Division can impose public discipline. All action at the Committee level (Letter of Admonition or Letter of Advisement) is private and confidential.

a) Censure - public declaration by court finding conduct of lawyer to be in serious violation of a Disciplinary Rule .

b) Suspension - reinstatement not automatic, attorney must make application to Appellate Division

c) Disbarment - lawyer's name stricken from the roll of attorneys and counselors. This is not permanent in New York, may apply for reinstatement after 7 years (but rarely granted).

d) Interim suspension - pending completion of disciplinary proceedings, court may suspend attorney where there is uncontroverted proof of serious misconduct which is an immediate threat to public/clients.

e) The burden of proof in disciplinary proceedings is a fair preponderance of the evidence. Matter of Capoccia 59 NY2d 549, 466 NYS2d 268; Matter of Friedman, 196 AD2d 280, 609 NYS2d 578, 586. 22 NYCRR § 1240.8b)(1).

3) Only the Committee, not professional staff, has authority to vote to issue a Letter of Admonition or to initiate formal charges in the Appellate Division.

4) Only the Appellate Division has authority to order public disciplinary sanction after sustaining a Petition charging serious misconduct, usually after a hearing before a referee.

F. Indefinite Suspension for Incapacitation or Incompetency - 22 NYCRR §1022.23.

G. Confidentiality - Judiciary Law § 90(10)

1) All complaints and proceedings of AGC investigations are deemed private and confidential. They become public records only if an order of censure, suspension, or disbarment is entered by the Appellate Division.

2) Only exception is that the Appellate Division may, for good cause, grant a petition for disclosure upon notice to the respondent attorney and the AGC pursuant to 22 NYCRR §1020.13 and 22 NYCRR § 1240.18(d) (rarely granted).

II. Procedures Concerning Appearances Before the Grievance Committees

A. When a complaint against an attorney is not dismissed or closed at the staff level, then the matter is placed on the agenda of the Grievance Committee for the respective district. If there is a recommendation that a Letter of Admonition issue, or formal charges to the Appellate Division, then the attorney-respondent is notified of their opportunity to appear before the Committee.

B. Procedural Rules concerning the appearances before the Committee are set forth 22 NYCRR § 1020 & 22 NYCRR § 1240.

C. Chief Attorney Report and Recommendation - Approximately 30 days before a scheduled appearance, the respondent-attorney is provided with a report which summarizes the Grievance Office's investigation, and which contains the Chief Attorney's recommendation.

1) Chief Attorney's recommendation is either for a Letter of Admonition (i.e. private discipline meted out by the Committee) or for Formal Disciplinary Charges to be filed with the Appellate Division.

2) Typical report will contain copies of the complaint, the respondent-attorney's response, and additional documentation concerning the matter (i.e. Court records, trust account records, audit reports, etc.).

D. Attorneys are afforded an opportunity to submit a written response to the Chief Attorney's Report and Recommendation, and most submit such a response.

E. Appearance procedures during Committee meeting.

1) Appearance is voluntary, and can be waived.

2) Most respondent-attorney's appear before the Committee with Counsel. An appearance before the Committee can be very stressful and is a very serious matter. There are 21 members of the Committee present in the room, plus the Committee's staff attorneys and investigators. Thus respondent-attorneys are encouraged to appear with counsel.

3) Respondent-attorneys are not put under oath during an appearance, but are reminded of their ethical duty under the Rules of Professional Conduct to be truthful at all times.

i) A lack of candor before the Committee or in written submissions to the Committee can be used as an independent basis for discipline.

4) Appearances are typically limited to 20 minutes. An appearance usually commences with the Committee Chairperson asking the respondent-attorney or their counsel to make a statement outlining their position. After the respondent-attorney has made their statement the Committee members and staff attorneys may ask questions of the attorney or their counsel, or both.

5) Following the appearance, the Committee will deliberate and will make a determination on the outcome (i.e. follow the Chief Attorney's recommendation for Letter of Admonition or Formal Charges, direct that a Letter of Advisement issue, dismiss, etc.).

6) Standard before the Committee for voting to file Formal Charges with the Appellate Division is whether there is sufficient probable cause to warrant such charges. 22 NYCRR § 1020.7 and 22 NYCRR § 1240.7(d)(vi).

F. Procedures following an appearance before the Committee.

1) Respondent-attorneys are notified shortly after the appearance of the Committee's determination.

2) If a Letter of Admonition is authorized, it will be prepared and signed by the Chairperson of the Committee, and then sent to the respondent-attorney shortly thereafter.

3) If Formal Charges are authorized, then the Committee's counsels will prepare a Petition outlining the charges, which will then be served on the respondent-attorney and filed with the Appellate Division (see A.D. procedures below).

III. Procedures Before the Appellate Division

A. Attorney Grievance proceedings are "Special Proceedings" governed by Article 4 of the C.P.L.R.

1) Parties are required to file a Statement of Disputed Facts and provide opposing party with names of witnesses and document. 22 NYCRR § 1240.8(2) and (3). Parties may also file a request to admit facts and documents.

2) Respondent-attorneys are provided an opportunity to appear in person before the Appellate Division to be heard in mitigation before the Court makes a final determination.

B. If Committee voted Formal Charges, then staff attorneys prepare a Petition, which must be served at least 20 days before the first day of the Term of Court that it is returnable.

C. If respondent-attorney's Answer makes material denials of fact, the matter is referred to a J.H.O. to conduct a hearing and report back to the A.D. without recommendation for the amount of discipline, if any, to be imposed.

1) Hearings before J.H.O.

i) Rules of evidence apply.

ii) Conducted in the Grievance Office. This helps to ensure confidentiality, and protects the privacy rights for the respondent-attorney and others involved (complainant, witnesses, etc.).

iii) At the conclusion of the hearing the parties typically are afforded 30 days after the receipt of the transcript to provide the J.H.O. with proposed findings. Thereafter, the J.H.O. will prepare his or her report, and submit it to the A.D.

2) After J.H.O.'s report is filed with the A.D., then the parties will typically file motions with respect to the report. For example, if the J.H.O. found facts that supported the Committee's position, then the Committee would file a motion to confirm the report. The respondent-attorneys are also free to file motions or cross-motions at this point in the proceeding.

3) The motions are then argued before the A.D. and ultimately the Court will render a decision (Censure, Suspension, Disbarment, or dismissal). If proceeding is dismissed, then it remains confidential and sealed.

D. If the respondent-attorney's Answer does not contain material denials, then the A.D. will afford the attorney an opportunity to be heard in mitigation, and then determine the outcomes, without reference to a J.H.O.

E. In addition to disciplinary proceedings that are presented to the Court by way of formal charges authorized by the Grievance Committee, the A.D. also considers other matters involving attorney misconduct.

1) Reciprocal proceedings - A.D. has authority to impose discipline on a New York licensed attorney, who is disciplined in another state or district. These proceedings by-pass the Committee, and are filed directly with the Court.

2) Serious Crimes & Felony Convictions - Certain misdemeanors and out-of-state felonies are considered to be "serious crimes" (see Judiciary Law §90). These are also filed directly with the Court. A New York State Felony conviction results in an automatic disbarment by operation of law.

3) Reinstatement Proceedings - The A.D. also considers applications from suspended or disbarred attorneys seeking a reinstatement of their license. All suspension orders contain the added phrase "until further order of the Court." Thus when the period of suspension has expired, the attorney does not automatically return to the Bar, and must establish in a reinstatement proceeding that they are fit to resume the practice of law.

IV. 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 §1240.1; Judiciary Law §90(2).

B. The New York Rules of Professional Conduct replaced the Lawyer's Code of Professional Responsibility effective April 1, 2009. These rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. The rules formally promulgated as joint rules of all four Appellate Divisions. 22 NYCRR §1200.

C. Other "announced standards" - a non-exhaustive list

1) Appellate Division, Fourth Department Rules relating to attorneys. 22 NYCRR Part 1020.

2) Statutes relating to "Attorneys and Counselors", Article 15 of the Judiciary Law (§§460-499).

3) The Matrimonial Rules, 22 NYCRR §§136, 202.16, and 1400. (Procedure for Attorneys in Domestic Relations Matters).

4) Etc. - important to know rules & statutes applicable to areas of your practice.

D. 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) County Bar Association's Ethics Committee, CLE and mentoring programs

3) Publications

a) New York Law Journal - frequent articles on ethics and professionalism, publishes disciplinary decisions and bar ethics opinions in full. (on-line version @ htpp://www.nylj.com)

b) Simon's New York Code of Professional Responsibility Annotated (West Group) by Professor Roy Simon of Hofstra School of Law , has the annotated Code and Judiciary Law, plus Court Rules in one volume with helpful commentary including leading cases and ethics opinions.

d) *The New York Professional Responsibility Report*, independent monthly newsletter, Prof. Simon is Chief Editorial Advisor, contact (888) 693-8442 toll free or e-mail: subscriptions@nyprr.com

4) Internet Resources

a) Appellate Division, Fourth Judicial Department -

www.courts.state.ny.us/ad4/

b) New York State Bar Association site (htpp://www.nysba.org) has the Code with recent revisions, Code of Judicial Conduct, full text of NYSBA Ethics Committee Opinions, and other good links to legal research sites.

c) Monroe County Bar Association - www.mcba.org.

d) Bar Association of Erie County home page - www.eriebar.org.

e) Legalethics.com (Internet Legal Services) - great source of links to all types of info on legal ethics, including articles, codes and rules, and legal research engines. Special emphasis on Internet ethical issues such as advertising, e-mail, and unauthorized practice. (htpp://www.legalethics.com)

f) New York Lawyers' Fund for Client Protection web site has the updated Code, full text of its publications including those on attorney trust accounts and record keeping, info and forms for filing a claim, and links to other client security funds nationwide (htpp://www.nylawfund.org)

g) New York County Lawyers' Association home page has digests of all of its Ethics Opinions from #580 (10/5/70) to the present, and full text of opinions from 7/9/96 to present. (htpp://www.nycla.org)

h) Find Law Ethics and Professional Responsibility (htpp://www.findlaw.com/01topics/14ethics/index.html)

i) ABA Center for Professional Responsibility (htpp://www.abanet.org/cpr/home.html)

j) BA/BNA Lawyers' Manual on Professional Conduct (htpp://www.bna.com/resources/MPC)

k) National Organization of Bar Counsel page includes summaries of court decisions regarding professional responsibility/discipline from most states over last three years. (htpp://www.nobc.org)

l) American Legal Ethics Library of the Legal Information Institute, Cornell University (htpp://www.law.cornell.edu/ethics)

III. **Common Problem Areas**:

A. Estates

1) Advance Fees & Fiduciary Commissions

a) Lawyer who is **both** the attorney and fiduciary for an estate must obtain court approval to receive advance legal fees or fiduciary commissions pursuant to SCPA §§ 2110,2111,2310, & 2311.

b) Moreover, Uniform Rules for Surrogate's Court mandate attorney/fiduciary shall not take advances until 30 days after filing affidavit of fees & commissions. 22 NYCRR§ 207.52.

c) Violation of the foregoing also constitutes serious professional misconduct. Mtr. of Embser, 639 NYS2d 240 (4th); Mtr. of Bridge, 624 NYS2d 1021 (4th); Mtr. of Ursitti, 651 NYS2d 86 (4th); Mtr. of Cerbone, 647 NYS2d 537 (2nd); Mtr. of Casey, 490 NYS2d 287 (3rd)

d) Courts generally reject claims that such advances were gifts or otherwise approved absent existence of documentary evidence. Mtr. of Prounis, 680 NYS2d 505, 654 NYS2d 131 (1st); Mtr. of Belge, 429 NYS2d 808 (4th); Embser & Ursitti, *supra.*

e) Unapproved advances cannot be "authorized" pursuant to an executor's discretionary powers under Will. Mtr. of Guy, 458 NYS2d 770 (4th).

2) Other Fiduciary Obligations

a) Attorney who is also a fiduciary for an estate must place estate funds in a separate account. This prohibition includes commingling with funds of other clients in an attorney's trust or IOLA account. "[T]he Estates Powers and Trusts Law, the SPCA, and the Lawyers' Code of Professional Responsibility, clearly required respondent to keep [estate] money segregated from the other money he held in a fiduciary capacity." Prounis, *supra* @ 506; RPC1.15(A) & (B)(1); EPTL §11-1.6. *See also* Cerbone, *supra;* Moreover, violation of EPTL §11-1.6 constitutes a Class A misdemeanor Mtr. of Piastra, 167 AD2d 95, 570 NYS2d 353.

b) An attorney who is also an executor for estate must maintain "contemporaneous records scrupulously delineating the legal services performed as an attorney from the executorial services performed as fiduciary so as to eliminate any duplication of charges." Estate of Coughlin, 633 NYS2d 610.

c) Failure to invest funds where they will generate income for the estate or its beneficiary may constitute violation of DR 9-102 (now RPC 1.15). Mtr. of Lawandus, 476 NYS2d 225 (4th).

d) Failure to render prompt accounting of estate funds and to maintain complete records of such funds constitutes violation of DR 9-102(B)(3) [now RPC 1.15]. Mtr. of Gray, 576 NYS2d 740 (4th).

B. Neglect & Failure to Communicate with Clients

1) Attorney may not neglect a legal matter entrusted to him [duty to represent client competently (RPC 1.3).

a) Lawyer who cannot complete matter for a client may withdraw as provided by RPC 1.

b) Lawyer cannot represent client competently without adequate communication with the client. This includes returning phone calls of the client. (*See* Matter of Stenstrom, 605 NYS2d 603 and *NYSBA Op. #396*).

c) Pattern of neglect of client matters or serious neglect resulting in detriment to the client will lead to close scrutiny by AGC. In addition, neglect often leads to further misconduct, such as misrepresentation and non-cooperation with AGC.

d) Fourth Department Rules specifically obligate attorney to expedite court cases. 22 NYCRR§ 1022.8.

2) Neglect - No Defense

a) Attorney could not justify neglect by citing inaction of clients, but "should have either pursued claimants' action or given timely notification that he was not representing them." Mtr. of Henry, 460 NYS2d 673 (4th).

b) " ... the fact that a legal matter may not appear to be particularly meritorious does not justify its neglect; once an attorney accepts a representation, then he or she is obliged to prosecute the case with due diligence." Mtr. of Chasin, 591 NYS2d 370,371. In such a case, lawyer had " basically three choices:

i) decline at the outset to undertake the representations;

ii) once the representations were accepted, seek permission to withdraw; or

iii) diligently pursue the representations." *Id.* @371

c) Attorney did not file estate tax returns for 6 years. When client filed grievance, attorney filed returns & paid penalties & late fees. "Although the client suffered no monetary loss, respondent's conduct cannot be condoned." (censured). Mtr. of Livadas, 350 NYS2d 35,36 (4th).

3) Plea and settlement offers - RPC 1.4(A)(1)(iii) imposes duty on lawyer to promptly communicate all settlement offers to the client. Mtr. of Yagman, 698 NYS2d 224,225. Settling lawsuit without client's knowledge or consent constitutes professional misconduct. Mtr. of Cholakis, 179 AD2d 862, 578 NYS2d 671.

4) Return of Client Papers/File

a) Subject to attorney's valid retaining lien, "documents, correspondence between persons other than the law firm, and papers which are not the lawyer's own work product are property of the client and must be promptly returned at the client's request pursuant to RPC 1.15(C)(4)." *NYSBA Op. # 398. See also* Mtr. of Stewart, 680 NYS2d 544; Mtr. of Ruden, 702 NYS2d 640.

b) Scope of this duty has been addressed by the Court of Appeals: "The draft Restatement provides that a former client is to be accorded access to 'inspect and copy *any document possessed* by the lawyer *relating to the representation*, unless substantial grounds exist to refuse' . . . Even without a request, an attorney is obligated to deliver to the client, not later than promptly after representation ends, ' such originals and copies of other documents possessed by the lawyer relating to the representation as the ***[former] client reasonably needs.' " Sage Realty v. Proskauer Rose Goetz, 91 NY2d 30, 666 NYS2d 985 [Ct. App. 1997].

c) However, *Sage Realty* also makes copying costs chargeable to the client - ". . . unless a law firm has already been paid for assemblage and delivery of documents to the client, performing that function is properly chargeable to the client under customary fee schedules of the firm, or pursuant to any governing retainer agreement."

d) Obligation encompasses evidentiary materials such as expert's reports (Mtr. of Vega, 463 NYS2d 49) and client's direction to forward to a 3rd party, such as successor counsel (Mtr. of Ripps, 652 NYS2d 266).

e) Attorney may not exercise retaining lien on an executed divorce decree and should file it promptly as ministerial act of officer of

the court. Mtr. of Kennedy v. Macaluso, 448 NYS2d 276 (4th), *affirmed* 450 NYS2d 479.

C. Dishonesty, Fraud, Deceit, and Misrepresentation - RPC 8.4 (C)

1) Falsified Documents & Improper Notarization

a) Often occurs in context of neglect or as a matter of expediency when a deadline is near.

b) Attorney must scrupulously avoid shortcuts such as backdating documents, signing name of another to a document (even with that party's permission), or notarizing signature when signer not actually present. Such acts constitute fraud and are prejudicial to the administration of justice. RPC(C) & (D).

c) Lawyer censured for signing client's name and notarizing same on an affidavit even though the information had been obtained from the client, had been factually correct, and no harm to the client resulted. Mtr. of Seidman, 606 NYS2d 477 (4th).

d) Lawyer was found to have engaged in dishonesty by notarizing signatures of persons who had not appeared before him. No defense that lawyer recognized one of the signatures from prior dealings and had no knowledge that the second was a forgery, where lawyer had made no effort to contact the purported signatories or otherwise verify them. Mtr. of Vignola, 639 NYS2d 315,319.

e) Improper notarization can also constitute criminal conduct pursuant to Executive Law § 135-a (unclassified misdemeanor).

2) Dishonesty and misrepresentation - no defense

a) Application of DR 1-102(A)(4) [now RPC 8.4(c)] is not limited to sworn documents or testimony. Sherman v. Eisenberg, 699 NYS2d 371.

b) Court rejected attorney's claim that his misrepresentations to client and submission of false documents did not violate DR 1-102(A)(4) [now RPC 8.4(C)] because he lacked any "venal intent" to profit from his actions or to harm his client, but was paralyzed with shame that forced him to resort to deception in order to preserve his self esteem. Fact that attorney deliberately and intentionally engaged in deception is enough, no requirement for a finding of

malice or intent to profit. Mtr. of Kantor, 670 NYS2d 448.

c) Lawyer who coached witness to impersonate his hospitalized client for testimony at a Workers' Comp hearing could not justify by his motivation of advancing dying client's wish to avoid burdening her survivors financially. Mtr. of Hobika, 707 NYS2d 741 (4th Dept. 2000).

3) Duty To Not Remain Silent

a) "An attorney has a duty not to remain silent when he knows that the other party to a transaction is being defrauded by his client . . . assisting a client in perpetrating a fraud upon the latter's creditors is misconduct warranting disbarment, even where the attorney gains no financial benefit." Mtr. of Westreich, 629 NYS2d 417,420.

b) Law firm which knowingly withheld crucial information from a court in which it had sought a declaratory judgement on behalf of its client violated Judiciary Law §487(1) which prohibits misconduct by an attorney involving "deceit. . .with intent to deceive the court or any party" and is subject to treble damages. "It is well settled that when there is a duty to speak, silence may very well constitute fraudulent concealment . . . this is especially true where an officer of the court owes such an obligation to the tribunal." Schindler v. Issler & Schrage, P.C., 692 NYS2d 361.

c) Attorney subject to discipline for violation of DR 1-102(A)(4) [now RPC 8.4(C)] and7-102(A)(3) & (5) [now RPC 3.4(A) (3) & (5)]because he concealed the death of his personal injury client from opposing counsel and continued to seek a settlement. Concealment included serving unsigned answers to interrogatories, advising arbitrator that client was "unavailable," and ignoring motion to compel client to appear for a medical exam. Mtr. of Forrest, 706 NYS2d 15.

4) Other aspects of dishonesty and misrepresentation

a) Lawyer's failure to disclose his or her status as a lawyer in a litigation context is deceptive conduct. *NYSBA Ethics Op. #662*

b) Secret recording of conversations, though not illegal under New York law, violates 1-102(A)(4) [now RPC 8.4(C)] because it is contrary to standards of candor and fairness. Valid exceptions to this prohibition include defense counsel and prosecutors in criminal matters, judicial or statutory authorization, or other

extraordinary circumstances. *NYSBA Ethics Op. #515 & 328 ; see also* Meachum v. Outdoor World Corp., 654 NYS2d 240, 249; *Bar of the City of New York Op. #1995-10.*

D. Conflicts of Interest - Conflicts of interests or perceived conflicts, result in several complaints to the Grievance Offices. Attorneys should fully familiarize themselves with the rules concerning conflicts. In the rules, conflicts are referred to as "Differing interests," which is defined in the RPC's as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

1) RPC 1.8(A) - A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless: (see rule for exceptions - which include giving full disclosure **in writing**, and obtaining an informed consent **in writing**).

2) RPC 1.8(B) - A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

3) RPC 1.8(C) - A lawyer shall not:

(1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

4) RPC 1.8(D) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:

(1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or

(2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.

5) RPC 1.8(E)- While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that [see rule for exceptions].

6) RPC1.8(F)- A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless [See rule for exceptions].

7) RPC 1.8(G) - A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.

8) RPC 1.8(H) - A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

9) RPC 1.8(I) - A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

10) **Sexual Relations with Clients:** RPC 1.8(J) - A lawyer shall not:

(i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;

(ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm; or

(iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

11) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.

12) RPC 1.8(K) - Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

13) Common conflict situations:

a) Representing buyer and seller in real estate transactions (justified only in limited circumstances). *NYSBA Op. #38 & 162*; Mtr. of Pohlman, 604 NYS2d 661 (4th); Mtr. of Stella, 602 NYS2d 636. Similarly, dual representation of buyer and seller in sale of a business. Mtr. of Sedor, 717 NYS2d 434 (4th Dept. 2000).

b) Acting as real estate broker and attorney in same transaction. See *NYSBA Op. #208 & 493*; Mtr. of Cerbone, 647 NYS2d 537,538; Mtr. of Tems, 666 NYS2d 732.

c) Acting as mortgage broker and attorney in the same transaction. Mtr. of Pine, 604 NYS2d 974.

d) Representing/advising both birth mother and adoptive parents. Mtr. of Michelman, 616 NYS2d 409.

e) Representing a party in a domestic relations action where attorney previously represented other spouse in a substantially related matter. Forbush v. Forbush, 485 NYS2d 898 (4th); Rose v. Becker, 586 NYS2d 70 (4th).

f) Attorney may not represent both parties in an uncontested matrimonial, even with the consent of both after full disclosure. *NYSBA Op. # 258.*

g) Attorney may not represent one spouse in matrimonial while representing other spouse in another pending action. *NYSBA Op. # 436 and 329.*

h) Representing criminal clients or co-defendants having differing interests.

E. Conflicts - Former Client - See RPC 1.9 for special rules concerning conflicts involving former clients.

1) " An attorney may not accept employment relating to matters that adversely affect a former client if he previously represented that client in a matter related to the subject of the new employment." Strianese v. Amalgamated Cordage Corp., 607 NYS2d 834,835 (4th); DR 5-108(A);

NYSBA Op.#628.

2) Lawyer who served as "family attorney" during marriage in matters which made him privy to financial issues relevant to subsequent matrimonial action was disqualified from representing husband in Forbush v. Forbush, 485 NYS2d 898 (4th); *See* DR 5-108(A) and *NYSBA Op.#628*.

3) However, simply representing both spouses in real estate closing or reciprocal wills may not be "substantially related" to the subsequent matrimonial to the level giving rise to an impermissible conflict. McDade v. McDade, 659 NYS2d 530; Messina v. Messina, 573 NYS2d 709.

F. Communicating with Represented and Unrepresented Parties - See RPC 4.2, 4.3, 4.4 & 4.5.

1) Common problem area is in insurance matters where a plaintiff's attorney mistakenly believes that the insurance carrier's attorney somehow cannot "really" be the attorney for the insured as well, especially where the amount may exceed the policy limit. *See* Mtr. of LaCava, 385 NYS2d 642 (4th).

2) Although child is not technically a party in a custody proceeding, attorneys for parents may not communicate with child for whom law guardian has been appointed unless law guardian has given prior consent. *NYSBA Op. #656.*

G. Preservation of Client Confidences and Secrets - See RPC 1.6

1) Many lawyers are unaware of the critical distinction between a client "confidence" and a client "secret" as defined in the Code.

2) A "confidence" refers simply to information that would be protected by the attorney-client evidentiary privilege.

3) A client "secret" is a much broader concept. It includes any information gained in the course of the representation which the client has requested be held inviolate or the disclosure of which would be embarrassing or likely to be detrimental to the client.

a) An attorney was disciplined in part for threatening to disclose client secrets in an effort to collect his legal fee. The attorney was found to have violated DR 4-101(B) **even though the threatened disclosures involved publicly available information** such as arrest records and documents filed in court. Mtr. of Chatarpaul, 706 NYS2d 714.

4) Attorney is ordinarily prohibited from knowingly revealing a client confidence or secret, and from using same to client's disadvantage or to lawyer's own advantage.

5) Attorney has duty to supervise employees with reasonable care to prevent disclosure.

H. Gifts From Clients

1) "Although respondent asserted that the funds he withdrew from the bank accounts were gifts, the Referee found that there was no written instrument or other documentation demonstrating the clients' intent to make such gifts." Mtr. of Casey, 653 NYS2d 746 (4th).

2) " We... reject respondent's affirmative defense that the executrix intended to permit respondent to make unlimited payments of the estate funds to himself because of their past friendship. " Embser , *supra*.

3) Mtr. of Mulrow, 670 NYS2d 441.

I. Fiduciary Obligations to Third Persons

1) RPC 1.15(C)(4) requires attorney to pay client **or third person**, as requested by the client **or third person** , funds or property which the 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.

3) Attorney holding settlement funds for which client had executed assignments to third persons was ethically obligated not only to **notify** third person but to **pay** the funds to him as the person then entitled to receive them, **despite** client's express instructions to the contrary. Leon v. Martinez 83 NY2d 83,614 NYS2d 972.

a) What does persons “entitled to receive” mean? NYSBA Ethics Committee interprets this to mean holders of valid liens and assignments. “We do not believe the attorney is ethically bound to prefer providers without liens or assignments over the client because those providers would be simply creditors of the client.” *NYSBA Op. # 717.*

b) **However,** “ if a provider asserts that it has a valid lien or assignment, but the client disputes that fact, the attorney should

hold the check or its proceeds, pending resolution of the dispute." *Id.*.

c) Lawyer who ignored repeated demands from client and insurer who had lien to satisfy lien from settlement funds violated RPC 1.15C)(4) and also guilty of neglect of legal matter. Mtr. of Gucciardo, 656 NYS2d 283,285.

d) Client gave his attorney check for $2500 printing costs for his appeal. Attorney placed funds in an interest bearing escrow account. After receiving two bills from the printer, attorney transferred the funds to his operating account and sent a bill to the client applying the $2500 to his legal fees, all w/o clients consent. Respondent violated RPC 1.15(C)(1) and (4) for failing to notify and pay over funds to printer, also found guilty of conversion. Mtr. of D'Onofrio, 672 NYS2d 889.

4) Nassau Bar Ethics Opinion 96-13 opines that attorney "cannot avoid serving as a kind of 'collection agent' for health care providers who assert liens against the anticipated future settlement proceeds in a personal injury action." It also says attorney must make reasonable efforts to ascertain whether a 3rd party has an interest or is otherwise entitled to funds.

5) Attorney improperly obtained "consent" of the client/estate administrator to borrow $5,000 from the estate bank account. Mtr. of Pottinger, 621 NYS2d 100. Similarly, court found attorney committed intentional conversion despite his claim that he obtained permission from client to invade down payment in escrow account because the funds were being held for benefit of another. Mtr. of Perrini, 662 NYS2d 445,447.

6) Attorney as Escrow Agent

a) Lawyer acting as escrowee is bound by the terms of the escrow agreement and is also a fiduciary over escrow funds. *NYSBA Op. # 710.*

b) Attorney/escrow agent violated fiduciary duty by releasing escrow funds to the client who was not entitled to them. Even if attorney had good faith belief in client's representations, once he learned otherwise attorney failed to take steps to return the money and even facilitated the client's deceit. Mtr. of Freimark 607 NYS2d 253. Likewise, attorney violated fiduciary duty by premature release of escrow funds to his client one week before scheduled closing. Mtr. of Wodinsky, 670 NYS2d 512.See also, Mtr. of Soviero, 676 NYS2d 667.

c) Attorney holding quit claim deed in escrow guilty of professional misconduct for his breach of escrow agreement by recording the deed without client having paid the agreed-upon consideration. Mtr. of Robert 608 NYS2d 491.

d) Law firm acting as escrow agent committed conversion by paying fees from escrow fund in the absence of provision in the escrow agreement which permitted it. "An escrow agent's authority is derived solely from the escrow agreement, and a delivery of the property that is inconsistent with the terms of the agreement may constitute conversion." Miller v. J.A. Keeffe, P.C., 715 NYS2d 423.

7) Duty to Inquire - W agrees to give P $50,000 to purchase an apartment in a co-op. At P 's direction, W makes the check out to "CN Vagionis Trust Acct." P gives the check to X, who gives it to attorney Vagionis and tells him to keep $5,000 for X's fees and forward the rest to a stockbroker. Only explanation X gives to Vagionis is "this is the way it's done in New Jersey". Vagionis deposited the check into a non-fiduciary account and forwarded the funds to the stockbroker. Vagionis breached his fiduciary obligation, should have put check into a trust account. He was "obligated to inquire concerning the way the checks were drawn...there was no justification " for relying on X's statements and not inquiring of W. Mtr. of Vagionis, 634 NYS2d 116,117; see also Mtr. of Papsidero, 502 NYS2d 563 (4th).

J. Legal Fees

1) Written Letter of Engagement or Written Retainer Agreement - Pursuant to 22 NYCRR Part 1215, effective March 4, 2002, New York attorneys were required to issue a letter of engagement or enter into a written retainer agreement in certain situations [See rule for specifics and exceptions].

a) applies when the fee is expected to be over $3,000.00.

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 any civil matter" commenced on or after January 1, 2002

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. R.P.C. 1.5(c). 22 NYCRR § 1015.15.

i) Note - Court rules relating to contingent fees in personal injury and wrongful death actions. 22 NYCRR §1015.15. Percentage in excess of the fee schedule is not enforceable. Connors v. Wildstein, 706 NYS2d 189 (2nd Dept. 2000)

ii) Contingent fee agreement providing that the attorney receive entire recovery up to $12,000 and 1/3 of anything more for a malicious prosecution claim violates DR 5-103(A) because it "caused the plaintiff's attorney to acquire too great a proprietary interest in the plaintiff's malicious prosecution action....The agreement at bar is not reasonable because it effectively assigns to the plaintiff's attorneys 100% of the plaintiff's recovery up to $12,000, thereby divesting the plaintiff of her interest in the action . . . Moreover, under such an agreement there is a genuine risk that a conflict of interest could arise which might affect the attorneys' ability to zealously represent the interests of their client." Landsman v. Moss, 180 AD2d 718, 579 NYS2d 450,452 [2nd Dept 1992].

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) Domestic Relations Matters

a) Special 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 The scope of the applicability of these rules, along with 22 NYCRR § 136 (relating to fee arbitration) is frequently misunderstood.

i) Main requirement is to 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; RPC 1.5(D)(5).

ii) Failure to comply with these rules may preclude attorney from collecting fee or enforcing charging lien. Julien v. Machson, 666 NYS2d 147; K.E.C. v. C.A.C., 661 NYS2d 715. "Strict compliance with those rules is required" Hunt v. Hunt, 709 NYS2d 744 (4th Dept. 2000).

b) Restrictions on fee arrangements and security for fees in Domestic Relations matters are addressed by RPC 1.5(D)(5). Non-refundable retainer fee clauses have also been specifically prohibited pursuant to RPC 1.5(D)(4).

c) Contingent fees are prohibited in domestic relations where the payment or the amount of the fee is contingent upon securing the divorce or **in any way** determined by reference to the amount of maintenance, support, equitable distribution or property settlement.

i) Attorney who negotiated a $2 million "performance fee" in light of "results achieved", the first installment of which was due upon transfer of the equitable distribution payment to the client, collected a prohibited contingent fee in violation of DR 2-106(C)(2)(a) and was ordered to disgorge fee. V.W. v. J.B., 629 NYS2d 971 [Sup Ct NY Co, 1995].

5) 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 (Second Dept., 1993).

c) The Cooperman Court did not address the distinction between general retainers (which are earned by the attorney ensuring availability for the client's matter and by foregoing other potential clients who may have sought the attorney's services) and special retainers.

6) Refund of Unearned Portion of Fee

a) Lawyer is obligated to promptly refund any part of fee paid in advance which is unearned upon termination of the representation. RPC 1.16(E).

b) Failure to comply with this obligation also constitutes a breach of fiduciary duty under RPC 1.15(C)(4). *See* Mtr. Of Corcoran, 672 NYS2d 324; Mtr. of Bakker, 636 NYS2d 99.

c) This can be responsible for action being taken by the AGC on an otherwise unsubstantiated or merit less complaint

7) Modification of Fee Agreement

a) Modifying the terms of the initial fee agreement to make them more favorable to the attorney may give rise to differing interests, constituting a transaction with a client that would be governed by RPC 1.8. It could likewise involve the attorney in placing his own financial or business interests above those of the client.

b) In addition to ethical implications, attorney will have burden to establish that the modification was the result of fair dealing in order to enforce modified fee agreement. *ABA/BNA Lawyers' Manual of Professional Conduct 41:112, 41:313, 41:909.*

c) Lawyer who charged client in excess of agreed-upon fee was found to have engaged in conduct involving dishonesty in violation of DR 1-102(A)(4) [now RPC 8.4(C)]. Mtr. of Betancourt, 661 NYS2d 209.

8) Referral fees/ 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.

b) Lawyer committed professional misconduct in violation of DR 2-

107(A) by forwarding a portion of his fee from a case to an attorney who had done no work on the case but who had referred the client to the lawyer for earlier matters. Mtr. of Kuslansky, 654 NYS2d 396.

c) Lawyers are prohibited from sharing legal fees with a non- lawyer under RPC 5.4(A). Such conduct also constitutes an unclassified misdemeanor under Judiciary Law § 491. Mtr. of Felman, 694 NYS2d 80 (2nd Dept. 1999).

9) Treatment of fees in attorney trust account

a) Upon deposit of funds into the trust account belonging in part to the client and in part to the attorney as fees, attorney must promptly notify the client of the receipt of funds and must not withdraw the portion for fees without the client's consent. Mtr. of Croak, 717 NYS2d 679; Mtr. of Byler, 712 NYS2d 500; RPC 1.15(B)(1)&(4) and RPC 1.15(C)(1)&(4).

b) Earned fees must be promptly withdrawn from the trust account. "By failing to contemporaneously remove his legal fees from the escrow account and permitting them to remain on deposit with client funds, the respondent engaged in improper commingling of personal and client funds," in violation of DR 9-102(A) [now RPC 1.15(A)]. Mtr. of Friedman, 717 NYS2d 240,242.

10) Other Fee Considerations

a) Attorney cannot charge interest as late penalty for unpaid legal fees without the consent of the client. Mtr. of Giorgi, 635 NYS2d 899 (4th); Mtr. of Jaffe, 623 NYS2d 615; *NYSBA Op. # 399*.

b) Attorney's misconduct may result in forfeiture of right to legal fees for services rendered in the representation. *See* Yannitelli v. D.Yannitelli & Sons, 668 NYS2d 613; Wehringer v. Brannigan, 647 NYS2d 770 (1st); Pessoni v. Rabkin, 633 NYS2d 338 (2nd). Although "... misconduct that occurs before an attorney's discharge but is not discovered until after the discharge may serve as a basis for a fee forfeiture..." however, post discharge misconduct may not. Orendick v. Chiodo, 707 NYS2d 574 (4th Dept. 2000).

c) Conflict of interest may be sufficient misconduct to result in forfeiture of fee. Mtr. of Winston, 625 NYS2d 927; Brill v. Friends World College, 520 NYS2d 160; Griffin v. F.J. Sciame Construction Co., Inc., 700 NYS2d 133 (1st Dept. 1999) Mtr. of Satin, 696 NYS2d 223(2nd Dept 1999) .

d) Lawyer committed professional misconduct by charging client for

time spent attempting to vacate a sanction that had been imposed upon the lawyer personally and for time spent seeking permission to withdraw from handling client's appeal. Mtr. of Lebron, 675 NYS2d 378.

e) Lawyer may accept mortgage from client to secure a specific fee that is reasonable and without interest if client agrees. However, such arrangement would be improper if fee is to be determined on a *quantum meruit* basis because the mortgage could be used as leverage against the client in reaching agreement on the amount of the fee. *NYSBA Op. # 253.*

f) Withdrawal for nonpayment of fee - "To be entitled to terminate the relationship with a client, the attorney must make a showing of good or sufficient cause and reasonable notice ... The fact that a client fails to pay an attorney for services rendered does not, without more, entitle the attorney to withdraw." George v. George, 629 NYS2d 602 (4th Dept. 1995).

g) An attorney may not impose a lien against child support payments in an effort to collect unpaid legal fees. Shipman v. City of New York Support Collection Unit [Supreme Court, Bronx - Index No. 21666/99].

h) Attorney censured in part for charging his criminal client a fixed advance fee which was secured by a confession of judgment. Such fee arrangement compromised client's unqualified right to discharge counsel at any time, in violation of DR 2-106. Mtr. of Harris, 719 NYS2d 172.

K Advertising and Solicitation **[Note - the old D.R.'s concerning advertising were adopted without any change in the Rules of Professional Conduct – They are found in RPC 7.1 - 7.5]**

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) TV ad in which lawyer touts self as the "meanest S.O.B.", while "extremely distasteful and degrading to the legal profession", is not inherently misleading but is constitutionally protected hyperbole. Mtr. of Shapiro, 656 NYS2d 80 (4th Dept. 1996).

3) However, telephone directory listing for "Accident Legal Clinic of Shapiro and Shapiro" is misleading because it falsely implies that attorney is operating a legal clinic separate from his firm and because it falsely states that his practice is limited to accident claims. [Censured] Shapiro, *supra.*

4) RPC 7.3 bans in-person solicitation: "A lawyer shall not solicit professional employment from a prospective client ... by in-person or telephone contact, except that a lawyer may solicit professional employment from a close friend, relative, former client, or current client."

a) Ban still includes in person solicitation by means of a third party, which also constitutes illegal conduct prejudicial to the administration of justice under DR 1-102(A)(5) [now RPC 7.3(A)]. Mtr. of Setareh, 703 NYS2d 91.

b) Employing another to solicit legal business is also an unclassified misdemeanor under Judiciary Law §482. People v. Hankin, 701 NYS2d 778.

5) Targeted direct mailings, written and recorded communications are permitted under amended RPC 7.3(A)(2) **unless:**

a) They are misleading pursuant to RPC 8.4(C).

b) Prospective client has made it known to the lawyer that they desire not to be solicited;

c) They are 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 make it unlikely that the recipient will be able to exercise reasonable judgment in retaining an attorney; or

e) The soliciting 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.

6) RPC 7.4(C) defines conditions under which "specialist" may be used in advertising with mandated disclaimers. Distinction is made between certification by a private organization approved by ABA and certification under authority of laws of another jurisdiction.

7) Use of terms such as “concentrating in” or “practice limited to” is permissible. *See* Mtr. of Peperone, 615 NYS2d 212 (4th).

L. Disputes With Client

1) It is professional misconduct for an attorney to seek to settle a malpractice liability claim with a client without advising client that independent legal advice would be appropriate. Mtr. of Sims, 614 NYS2d 846 (4th); RPC

1.8(H). Any release so obtained may be unenforceable. Swift v. Choe, 674 NYS2d 454.

2) Attorney may not condition settlement of fee dispute or civil claim on an agreement to withdraw disciplinary complaint. Mtr. of Pobiner, 670 NYS2d 497; Mtr. of Finn, 647 NYS2d 39; Mtr. of Smith, 541 NYS2d 454.

3) Improper for attorney to dissuade complainant from testifying in disciplinary proceeding or to induce them to withdraw their complaint. Mtr. of Moore, 612 NYS2d 138; Mtr. of Rosenberg, 598 NYS2d 25.

M. Rules Governing Domestic Relations Matters

1) Popular misnomer: "Matrimonial Rules" is misleading; these 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 The scope of the applicability of these rules, along with 22 NYCRR § 136 (relating to fee arbitration) is frequently misunderstood

2) Main requirement is to 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; RPC 1.5 (D)(5).

3) Violation of these rules constitutes misconduct pursuant to DR 1-102(A)(5) & (8). Mtr. of McMahon, 674 NYS2d 474; Mtr. of Eriksen, 659 NYS2d 71. This is a common area leading to Letters of Caution. Moreover, failure to comply with these rules may preclude attorney from collecting fee or enforcing charging lien. Julien v. Machson, 666 NYS2d 147; K.E.C. v. C.A.C., 661 NYS2d 715. "Strict compliance with those rules is required" Hunt v. Hunt, 709 NYS2d 744 (4th Dept. 2000)

   a) Failure to follow 60 day billing cycle requirement precludes recovery of fee, attorney claim of substantial compliance rejected. Kaplowitz v. Newman, 713 NYS2d 115 (2nd Dept. 2000).

4) Rules have withstood constitutional challenge in a Monroe County Court decision. Williams v. Foubister, 673 NYS2d 840.

5) Proper notice to client of right to fee arbitration pursuant to these rules is a condition precedent to filing suit for attorney's fees. L.H. v. V.W., 653 NYS2d 477. 2nd Dept has declined to follow 1st Dept case (Paiken v. Tsirelman 699 NYS2d 32) which had held that attorney is obligated to send notice of right to elect arbitration even in the absence of any fee

disagreement with the client. Scordio v. Scordio, 705 NYS2d 58 (2000)

6) A prospective client who has a preliminary consultation with attorney in domestic relations matter before any agreement is reached for attorney to undertake the representation need not be asked to sign retainer agreement, but must be provided with the " Statement of Client Rights and Responsibilities". *NYSBA Op. #685.*

7) Potential pitfalls of a technical nature abound, such as paragraphs that must be included in the above, or requirement that in giving client notice of right to elect arbitration, attorney must include standard instructions developed by the Chief Administrator regarding arbitration procedure [22 NYCRR § 136.5(a)].

8) Attorney/client relations - " An individual consulting an attorney with respect to matrimonial matters is often distraught. Such individual is likely to be concerned with personal matters such as maintenance and support, and be distracted by the acknowledged failed relationship. These factors clearly imperil any meaningful understanding of not only the terms of a retainer agreement, but also negatively impact upon the opportunity to comprehend an explanation of such individual's legal rights, engendering frequent repetitions thereof." Joel R. Brandes. P.C. v. Zingmond, 73 NYS2d 579,585 (Sup. 1991).

N. Miscellaneous Issues

1) Threatening Criminal Prosecution - RPC 3.4(D)

a) Lawyer censured for sending letter on behalf of client informing recipient that "you will return the money or go to jail", "you will be arrested", "I will have a warrant issued for your arrest", and that "If you return her money and just don't do any work then I will tell the City not to punish you." Mtr. of Glavin, 484 NYS2d 483.

b) Such conduct in litigation context may also be a basis for sanctions against attorney under 22 NYCRR §130. Jalor Color Graphics, Inc. v. Universal Advertising Systems, Inc., 703 NYS2d 370.

2) Compensation of witnesses - RPC (B)(3) allows lawyer to provide reasonable compensation to witness for loss of time in "preparing to testify or otherwise assisting counsel." Formerly had been limited to attending or testifying.

3) Supervisory and Subordinate lawyers - See RPC 5.1 & 5.2 for rules

concerning ethical responsibilities of attorneys under supervisory authority of another, and for lawyers who supervise other lawyers and non-legal personnel.

a) Lawyer censured for failing to exercise adequate supervision over a subordinate attorney who filed a false disclosure statement in a personal injury action and made false statements to the trial court and opposing counsel. Mtr. of Levy, 711 NYS2d 372 [4th Dept. 2000].

4) Suspension for child support arrears

a) Judiciary Law 90(2-a)(b) and Family Court Act 458-b

b) Attorney was properly denied the opportunity to present evidence concerning his ability to schedule payment of arrears. Once there is a finding of willful violation of order of child support, only issue is whether or not there has been full payment of the arrears. Mtr. of Rosoff 650 NYS2d 149 (1st Dept., 1996); *see also* Mtr. of Shapiro, 235 AD2d 135, 664 NYS2d 59; Berger-Carniol v. Carniol, 710 NYS2d 114.

5). Duty To Report Attorney Misconduct

1) RPC 8.3 - "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

2) Distinction must be made between when reporting is obligatory (attorney may be disciplined for failing to report) and when it is permissible.

a) Only unprivileged, actual knowledge must be reported, but unprivileged belief or suspicion may be reported. NYSBA Op. # 650,480

b) Only that which raises a "substantial question" must be reported, but minor violations may be reported.

3) Attorneys have been disciplined for failing to report knowledge of other lawyers' participation in illegal kickback schemes. Matter of Jochnowitz, 189 AD2d 342, 596 NYS2d 62; Matter of Dowd, 160 AD2d 78, 559 NYS2d 365. Even within own firm, lawyer was required to report request from a senior partner to pay "illegal

gratuities" to a court official. Matter of Lefkowitz, 105 AD2d 161, 483 NYS2d 28.

4) "A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct" RPC 8.3(C).

5) Note limited exceptions to reporting rules - Do not apply if information is protected under RPC 1.6 or if the information is gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

IV. Trust Account & Record keeping Considerations

A. The Lawyer As Fiduciary

1) Attorney in possession of funds or property belonging to another person incident to the practice of law is a fiduciary and has duty to preserve the identity of such funds and property; the lawyer must not misappropriate or commingle such funds and property with his own. RPC 1.15(A). Misappropriation of client funds or property has been specifically prohibited under RPC 1.15(A).

2) Funds in possession of an attorney incident to the practice of law belonging to another person must be kept separately in an account at an approved banking institution. RPC 1.15(B)(1).

3) Misappropriation and conversion

a) " 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 ... the conduct of the attorney is not excused because the improper handling of the funds is due to mismanagement rather than misconduct." Matter of Iversen, 381 NYS2d 711,713 (4th).

b) Claims of intent to make repayment or of ability to make repayment (Mtr. of LaBue ,469 NYS2d 498), alleged transformation of shortfall into a loan, (Mtr. of LaCava, 385 NYS2d 642), or claims that the funds were applied to fees that were previously owed by client (Mtr. Of Rhodes, 639 NYS2d 636; Mtr. of Hodes, 469 NYS2d 371) are not defenses to conversion.

c) "The attorney need not have harbored the intent to deprive the client of the funds permanently . . . the misconduct . . . is neither excused nor mitigated by his success in obtaining funds with which

to restore the converted funds prior to discovery of the conversion." Mtr of Nitti, 705 NYS2d 47.

4) Lawyer must promptly notify a client or third person of the receipt of funds, securities or properties in which the client or third person has an interest, maintain complete records with respect to same, and render appropriate accounting regarding them. RPC 1.15(C)(1) & (3).

5) Securities, property, and other non-money items must be identified and labeled and placed in a safe deposit box or other secure place as soon as practicable upon receipt. RPC 1.15(C)(2).

6) Lawyer must promptly pay or deliver to the client or third person the funds or property held in trust upon request of the client or third person entitled to receive them. RPC 1.15(C)(4).

7) If funds are in trust which will become in part the property of the lawyer (e.g. settlement proceeds), they may be kept in the trust account and the fees may be withdrawn when earned. However, if the attorney's right to receive the funds is disputed by the client or third person, the funds may not be withdrawn until the dispute is finally resolved. RPC 1.15(B)(4).

8) If the funds are large enough to generate more than minimal interest ($150), the lawyer should invest the funds (at least open a separate, interest-bearing account). *NYSBA Op. #554*. When in doubt, seek instructions from the client. *NYSBA Op. #575*. A lawyer was disciplined in part for neglect [DR6-101(A)(3)] for having escrow funds in his IOLA account failing to take any substantial steps to "maintain the productivity of escrowed funds or to place them in an interest-bearing account" Mtr. of Ciacci, 712 NYS2d 590. *See also* Takayama v. Schaeffer, 240 AD2d 21, 669 NYS2d 656.

9) Length of time funds or property is held by the attorney is irrelevant - 5 minutes or 5 months, trust funds must be maintained in accord with RPC 1.15.

B. Commingling

1) Attorney is strictly prohibited from commingling property of clients or third persons which come into the attorney's possession incident to the practice of law with his or her own. RPC 1.15(A). Attorney must maintain such funds in an approved banking institution and preserve the identity of such funds in an account separate from other accounts of the attorney and separate from any other accounts the attorney may maintain in any other fiduciary capacity. RPC 1.15(B)(1).

2) "Because lawyers who commingle clients' funds with their own subject the

clients' funds to the claims of creditors, commingling is a serious violation .. even when the client does not suffer a loss." *ABA Standards for Imposing Lawyer Sanctions §4.12 (commentary).*

3) If funds are in trust which will become in part the property of the lawyer (e.g. settlement proceeds), they may be kept in the trust account and the fees may be withdrawn when earned. However, failure to withdraw fees from the trust account within a reasonable time after they have been earned constitutes commingling. Mtr. of Sullivan ,678 NYS2d 169; Mtr. of Elefterakis, 667 NYS2d 55. Mtr. of Schatz, [AD Fourth Dept decided March 21, 2001]

4) Lawyer who improperly deposited own funds into his IOLA account in erroneous belief that he had to maintain a minimum balance censured for commingling. Mtr. of Hammer, 687 NYS2d 71.

C. Examples of Attorney Trust Account " Don'ts"

1) Stashing the cash - attorney who asserted that he maintained funds from real estate down payment in a jewelry box in a storage locker in Queens was in "total abrogation" of his fiduciary responsibility, warranting immediate suspension pending disciplinary proceedings. Mtr. of Higginbotham, 683 NYS2d 245.

2) ATM cash withdrawals from trust account. Mtr. of Scott, 699 NYS2d 97.

3) Using trust account to circumvent levy by creditors. Mtr. of Betancourt, 661 NYS2d 208,211; Mtr of Connolly, 650 NYS2d 275; Mtr. of Schlesinger, 607 NYS2d 462.

4) Issuing trust account checks directly to attorney's own creditors to satisfy personal obligations. Mtr. of Linn, 612 NYS2d 670; Mtr. of Eckelman, 596 NYS2d 443,446.

5) Attorney who deposited his own personal funds into his IOLA account in the mistaken belief that he needed to maintain a minimum balance was censured for commingling. Mtr. of Hammer, 687 NYS2d 71.

6) Attorney issued trust account checks without confirming that her client's deposit item had been honored and without confirming client's representation that he had wire transferred other funds into the trust account, resulting in conversion of other clients' funds. Attorney disbarred for violating "fundamental obligations of a fiduciary." Mtr. of Davis, 713 NYS2d 736,738.

D. Fees Paid in Advance By Client

1) Advance payments of legal fees are **not client funds**, but belong to the attorney (absent agreement to the contrary) and should not be placed into the attorney trust account due to the prohibition against commingling. *NYSBA Op.#570.*

a) **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. It would then be appropriate to maintain the advance fees in the attorney trust account.

b) Advance payment of legal fees must be distinguished from prepayment of expenses or disbursements by client, which do **not** belong to the attorney.

2) Regardless of whether or not the advance fee is to be treated as client funds, lawyer has the obligation to promptly refund any unearned portion of fees upon completion of matter or withdrawal. RPC 1.16(E).

3) General retainers are "earned" when paid and are not client funds, and thus should not be placed in the trust account.

E. Trust Account - RPC 1.15 Requirements

1) These requirements detail many aspects of book-keeping, record-keeping, etc., but should not be viewed as mere technicalities by the practitioner. See A Practical Guide to Attorney Trust Accounts and Record keeping by the New York Lawyer's Fund for Client Protection and Attorney Trust Accounts and Law Office Record Keeping from the New York State Bar Association (also in video).

2) The account **must** contain "Attorney Trust Account", "Attorney Escrow Account", or "Attorney Special Account" in its title. RPC 1.15(B)(2).

a) "IOLA Account" without the above "magic words" is not enough. Mtr. of Scattaretico-Naber, 682 NYS2d 67.

b) Descriptive designations such as "Mortgage Closing Account" or "Real Estate Closing Account" may be included but are not sufficient by themselves.

c) 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).

d) "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

3) Funds reasonably sufficient to maintain the account may be deposited in a trust account (e.g. service charges) but anything more is commingling.

a) Lawyer may not put own funds into trust account as protection against deposited items not clearing immediately, dishonored deposit items, etc.

b) Lawyer may not have a line of credit or other overdraft protection relating to the attorney trust account due to prohibition against commingling and the Dishonored Check Notice Rule.

4) 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) 4th Dept. found misconduct by attorney who "... failed to maintain a running balance of his trust account activity and failed to maintain individual client ledger sheets reconciled with his trust account obligations." Mtr. of Capobianco, 639 NYS2d 242(4th Dept., 1996). *See also* Amisano, *supra*; Mtr. of Ohl, 646 NYS2d 465 (4th Dept., 1996).

c) No specific accounting system is prescribed under the Code, 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.

d) All withdrawals from attorney trust account must be made by check made out to a named payee and not to cash. RPC 1.15(E)

i) Bank transfers, electronic funds transfers, wire transactions, etc. are prohibited unless there is **prior written approval** from the person entitled to the proceeds. *See* Mtr. of

Tesseyman, 698 NYS2d 386.

ii) Checks for withdrawal of fees should be clearly labeled as such and designate the client or transaction involved.

e) Forms of record keeping / electronic storage

i) RPC 1.15(D)(10)- "For purposes of RPC 1.15(D), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document **that cannot be altered without detection."** (emphasis added) 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)(8) 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 Op. # 680.*

f) Failure to maintain the required bookkeeping records or to produce them upon demand of the AGC constitutes an independent basis for disciplinary action. RPC 1.15(H) & (I).

g) Rewritten RPC 1.15(D)(1) also applies bookkeeping requirements to " any other bank account which concerns or affects the lawyer's practice of law" - appears to include general/operating accounts, payroll, and other non-fiduciary types of account.

5) Withdrawal of legal fees from trust account must be properly documented and accounted for. Court will carefully scrutinize any claim of legal fees as a defense to misappropriation. Examples:

a) "Respondent did not enter into a retainer agreement with the executrix and did not submit any billing statements to her for his legal services. Additionally, he neither discussed with the executrix the issuance of the checks payable to himself nor sought court approval for the advance payment of attorney's fees or commissions for his services as executor of her estate for those checks issued following her death." Mtr. of Embser, 639 NYS2d 240 (4th).

b) " Although respondent claimed that funds used to pay personal expenses were legal fees owed to him in one estate matter, the Referee found that he failed to obtain court approval for the advance payment of fees pursuant to SCPA 2110, 2111, 2310, and 2311." Mtr.of Ursitti, 651 NYS2d 839 (4th) .

c) " ... he had no express retainer or other agreement with his client permitting him to take such fees and ... failed to maintain contemporaneous records, issue billing statements, or prepare other records reflecting the distribution of the client's assets." Mtr. of Alessi, 651 NYS2d 805 (4th)

6) "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. *See, e.g.* Mtr. of Eades, 533 NYS2d 155 (4th); Mtr. of Rosenberg, 596 NYS2d 564; Mtr. of Abbatine, 700 NYS2d 211; Mtr. of Rabine, 687 NYS2d 654.

c) Respondent attorney converted trust account funds by issuing a disbursement check in anticipation of a wire transfer into the account; respondent never made inquiry to confirm that wire transfer took place, resulting in bounced check. Mtr. of Ferguson, 694 NYS2d 113.

d) *NYSBA Op. # 737* underscores that a lawyer may not issue an attorney trust account check drawn against a deposited check that has not cleared, **even if the deposited check is certified**. Although there are practical considerations, particularly in real estate transactions, these do not outweigh the lawyer' s fundamental fiduciary obligation which prohibits using one client's funds on behalf of another.

7) Duty to Oversee - 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 & employees of the firm.

a) Lawyer censured for failure to oversee when his law partner converted trust funds even though the lawyer had no involvement or even knowledge of the partner's misconduct. Mtr. of Falanga, 180 AD2d 83 (2d); Mtr. of Linn 612 NYS2d 670; Mtr.of Orseck

692 NYS2d 766.

b) Attorney who provided her co-signatory on trust account with pre-signed blank checks guilty of "complete abdication of her responsibilities as a fiduciary to supervise the escrow account", not negated by her unawareness of her co-fiduciary's conversion. Mtr. of Latimore, 683 NYS2d 526,528.

c) Lawyer censured for failing 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. Mtr. of Collins, 607 NYS2d 999 (4th Dept.); *see also* Mtr. of Bushorr, 709 NYS2d 326 (4th Dept. 2000 - failure to supervise paralegal).

d) Recent cases indicate that an attorney can be subject to interim suspension (Mtr. of Wallman, 696 NYS2d 164) or disbarment Mtr. of Spencer, 694 NYS2d 426) for failure to oversee where a partner committed conversions and other trust account violations even though no venality on part of the attorney**.**

e) Only an attorney admitted in New York can be a signatory on an attorney trust account [RPC 1.15(E)] and the account must be in attorney's own name or that of the firm by whom attorney is employed [RPC 1.15(B)(1)].

i) Non-lawyer office staff may not be authorized signatories or given "permission" to sign the attorney's name on trust account checks.

ii) 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 Op. # 693.*

8) Dishonored check notice rule

a) Attorney trust account must be maintained in a participating banking institution (Lawyers' Fund has list). 22 NYCRR 1300.1(a).

b) A check written on an attorney trust account which is dishonored due to insufficient funds will trigger a report to the Lawyers' Fund; the report is held for ten days to allow for withdrawal of the report on the grounds of **bank error only**.

c) The report is then forwarded to the AGC for investigation. The

attorney will be required to submit a written explanation and provide appropriate records pursuant to RPC 1.15.

9) Interest earned on client funds

a) Interest earned on client funds belongs to the **client**, unless client has otherwise agreed. *NYSBA Op. #554.*

b) Lawyer's failure to credit clients with interest due to them and retaining interest for own use constitutes a conversion. Mtr.of Collins, 607 NYS2d 999; Mtr.of Abbott 594 NYS2d 855.

c) Attorney may not even retain interest earned for period between the date of deposit and date deposited check clears. *NYSBA Op. #582.*

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 to indigent & to improve administration of justice.

V. Preventative Measures

A. Communication/Client Relations

1) This area gives rise to the majority of the complaints filed against lawyers which could have been prevented.

2) Client should be fully educated as to the relative merits of the case, the length of time it will take to complete, and what it will cost in terms of the fee arrangement and expenses. Avoid unrealistic expectations by client.

3) Fee arrangements and billing procedures should be unmistakably clear to the client. *See* Ethical Consideration 2-23 . Consider having written a fee agreement in all cases, even where not required by rules, to minimize potential fee complaints.

a) Client should understand that although you will return phone calls, time expended on them is part of the attorney's legal services to

client and will be billed accordingly.

b) Consider billing that specifies time/work performed on behalf of client even if fee is not on hourly basis and include time and services that you are not charging for.

4) Client should be kept advised of the status of the case and client's inquiries/phone calls should be answered promptly.

a) Sending client copy of all correspondence, pleadings, etc. is a simple way to show that attention is being given to their case.

b) If nothing is happening, 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.

5) Client Selection

a) Exercise discretion in accepting employment which is likely to produce dissatisfaction based upon the nature of the client or the matter.

b) For example, prospective clients who persist in unrealistic expectations despite your advice, who are adamant about quick results, who are not truthful with you, or who do not want you to talk with their previous counsel 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.

6) Conclusion of Representation

a) 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.

b) 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 AGC.

7) Be aware of increasing frequency of clients and others making tape recordings of telephone calls and in-person conversations with attorneys.

B. Law Office Procedures

1) Management of telephone and written communications (including return of calls by staff when attorney 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 unpleasantness yourself.

C. Know Your Ethical Responsibilities

1) Know the Lawyer's Code of Professional Responsibility - ignorance of the law is no excuse for anyone, but especially not for attorneys.

2) Be familiar with all applicable statutes and court rules which pertain to the areas in which you practice.

3) Attorney must educate support staff as to pertinent ethical requirements such as trust account management and preserving confidences and secrets of clients.

VI. How to Respond if a Complaint is Filed Against You

A. Remain calm.

1) Vast majority of complaints filed with AGC result in dismissal.

2) Even larger proportion of AGC files remain private and confidential pursuant to Judiciary Law §90(10).

3) Staff counsel at AGC will discuss with you any questions regarding the complaint, procedures, etc. - do not hesitate to call.

4) A merit less complaint is not a "black mark" against the attorney - it can happen to any lawyer, even the most ethical.

5) The filing of a grievance by the client does not constitute automatic discharge of the lawyer. You must continue to represent your client's interests until you are discharged or have withdrawn.

B. Cooperate in the AGC's investigation - " Full and forthright cooperation with the Committee is the lawyer's obligation." Mtr. of Fraser, 515 NYS2d 361(4th);

NYSBA Op. # 348.

1) Rules call for respondent attorney to submit written explanation within fourteen days.

   a) Never ignore AGC correspondence - if more time is needed, ask for extension.

   b) Because disciplinary proceedings are civil in nature, Fifth Amendment privilege against self-incrimination is not applicable. Zuckerman v. Greason 20 NY2d 430,285 NYS2d 1. Therefore, invoking Fifth can result in adverse inference against a respondent attorney.

   c) Be aware that normally the complainant will be sent a copy of your initial written explanation.

2) Response should address the ethical issues raised by the complaint.

   a) Resist temptation to respond in kind to any personal attacks which may have been made in the complaint against you.

   b) Refrain from attempts to intimidate the complainant with threats of libel/defamation suits or disclosure of embarrassing or incriminating client confidences/ secrets.

   c) Do not seek to have complainant "drop the complaint" or allege that the complainant does not have "standing". Once AGC receives complaint alleging prima facie violation of a Disciplinary Rule, respondent attorney must provide written explanation.

C. Respond with accuracy & thoroughness

1) Review your file and all pertinent records beforehand, even if you have to get them out of storage - do not rely on memory alone.

2) Attach all pertinent exhibits to illustrate your response since AGC will probably ask for them anyway.

3) If you have been asked to provide answers to specific questions or specific records, do not simply ignore it. If you don't have the answer or the document, say so.

4) Assume that the AGC will seek to verify the relevant factual allegations of both the complainant and respondent attorney.

5) Rules of Professional Conduct allow attorney to reveal confidences or secrets necessary to defend the lawyer (and his/her associates or employees) against an accusation of wrongful conduct. RPC 1.6(B)(5).

6) Respondent attorney has right to be represented by counsel at all stages of the proceedings, but there are no provisions for assignment of counsel for indigent respondent attorneys.

7) Seek any necessary help from the County Bar Foundation, Lawyers Helping Lawyers, Lawyers' Assistance Program, etc.

Ethics Resources 2017

SCALISE & HAMILTON LLP
670 White Plains Road
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Scarsdale, N.Y. 10583
(914)725-2801
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Rules of Professional Conduct (effective April 1, 2009)/Lawyer s Code of Professional Responsibility (prior to April 1, 2009)

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

Judiciary Law

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

Attorney Admissions

- Judiciary Law § 53
- Judiciary Law § 56
- Judiciary Law § 90(1)
- Judiciary Law § 460-466
- CPLR §§ 9401-9406
- General Obligations Law § 3-503
- 22 NYCRR § 520
- 22 NYCRR § 602 (1st Dept.)
- 22 NYCRR § 690 (2nd Dept.)
- 22 NYCRR § 805 (3rd Dept.)
- 22 NYCRR § 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 § 90
- 22 NYCRR §1240 (effective October 1, 2016)

Disciplinary Case Law

- Appellate Division Reporters (for attorneys)
- Court of Appeals and Judicial Conduct Committee Website (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
- Legal Ethics: The Lawyers Deskbook on Professional Responsibility, Ronald D. Rotunda, American Bar Association Center on Professional Responsibility (Thomson West 2016)

- Regulation of Lawyers: Statutes and Standards, Stephen Gillers and Roy D. Simon, (Aspen Publishers 2016)
- Attorney Escrow Accounts, Rules, Regulations and Related Topics, Peter Coffey, Editor and Anne Reynolds Copps, Assistant Editor (New York State Bar Association 2016)
- Simon's New York Rules of Professional Conduct Annotated, Roy Simon and Nicole Hyland (Thomson West 2016)
- The New York Code of Professional Responsibility: Opinions, Commentary and Caselaw, New York County Lawyer's Ethics Institute (Oxford 2012)
- Modern Legal Ethics: Charles Wolfram (West Publishing)
- 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
- Nassau County Bar Association LAP(516)747-4070
- NY State Bar Association LAP 1-800-255-0569
- American Bar Association (800) 285-2221or 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)
- ABA/BNA Lawyer□s Manual on Professional Conduct (www.bna.com/products/lit/mopc.htm)
- 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)

ETHICS UPDATE 2017

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This outline is submitted to briefly outline 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")[2] in the Lawyer's Code of Professional Responsibility (the Code), 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!

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

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[2] 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 bar association advisory opinions can be found at the website of the bar association cited.

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 Tanella, 104 A.D.3d 94 (2d Dep't 2013). [Attorney disbarred following investigation alleging 26 charges of misconduct, including, *inter alia*, mishandling of client funds, failure to maintain required bookkeeping records, failure to safeguard funds entrusted to him as a fiduciary, allowing non-attorneys to exercise control over his law practice, sharing fees with non-attorneys, deceiving clients and third parties regarding settlement negotiations, accepting cases which he was not qualified to handle, serial neglect of client matters, and giving false and misleading testimony to the Grievance Committee, with no mitigating circumstances.]

Matter of Alejandro, 65 A.D.3d 63 (1st Dep't 2009). [Attorney disbarred for a pattern of egregious and continuing misconduct, prior disciplinary history, and 36 current charges, including serial neglect of client matters, failure to promptly return unearned legal fees and pay judgments owed to clients, misuse of escrow account to avoid creditors, submission of a false billing statement, falsely assuring clients that legal work had been performed, and giving false statements and sworn testimony to the Departmental Disciplinary Committee.]

Matter of Sheehan, 48 A.D.2d 163 (1st Dep't 2007). [Attorney disbarred for intentional conversion of client funds from escrow, making disbursements from the escrow account by debit memos instead of checks payable to a named payee, making misleading statements to the court and the Committee, failing to cooperate with the Committee's investigation, and failing to file retainer and closing statements with the OCA.]

Matter of Pritikin, 105 A.D.3d 8 (1st Dep't 2013). [Attorney suspended for two years for, *inter alia*, misuse of his IOLA account, including commingling a client's personal and business funds, conversion of client funds, and helping a client to avoid tax liens and judgments.]

Matter of Galasso, 94 A.D.3d 30 (2d Dep't 2012), lv to appeal granted, 19 N.Y.3d 832 (May 1, 2012); 19 N.Y.3d 688, 2012 N.Y. LEXIS 2740, 954 N.Y.S.2d 784, 2012 NY Slip Op 7050 (2012); on remand at Matter of Galasso, 101 A.D.3d 1002 (2d Dep't 2012); lv

to appeal denied, 20 N.Y.3d 1055 (2013); recalled and vacated, 105 A.D.3d 103 (2d Dep't 2013). [Attorney suspended for two years for failing to ensure that his client funds were properly maintained and failing to supervise and oversee the actions of his bookkeeper brother who transferred over $4 million from a client's escrow account to his own use as well as the firm's accounts for the firm's use. "Few, if any, of an attorney's obligations are as crystal clear as the duty to safeguard client funds"… 19 NY3d at 694).

Matter of Langione, 131 A.D.3d 199 (2d Dept 2015). This case is related to the Galasso case cited above. Langione was suspended for six months because he likewise failed to ensure that his client funds were properly maintained and failing to supervise and oversee the actions of the firm's bookkeeper brother who transferred over $4 million from a client's escrow account to his own use as well as the firm's accounts for the firm's use. However, the Court imposed a lesser sanction because he, inter *alia*: was less responsible for a large escrow fund: was not "unjustly enriched" by the bookkeeper's defalcations; and attempted to make restitution to his clients from his own funds. "…the Court of Appeals held that an attorney's obligation to safeguard funds is not controlled "solely by the contractual language of the escrow agreement, but also by a fiduciary relationship" (id.). With respect to the Baron funds, we recognize that the respondent—a signatory to the account, with an attendant fiduciary obligation—was not Baron's attorney, or the designated escrow agent. To the extent that this particular escrow account was maintained in an independent, interest-bearing escrow account, due to its size and the anticipated duration of the escrow obligation, the respondent had a lesser responsibility toward the funds than his partner, Peter Galasso, who was the attorney, as well as the designated escrow agent… However, with respect to the invasion of other escrow funds, which belonged to the respondent's clients (e.g. the Carroll Estate, Adele Fabrizio, and Theresa Halloran), the respondent's level of responsibility was greater. Had the respondent properly fulfilled his fiduciary obligations with respect thereto, red flags would have alerted him to irregularities at a time when ongoing thefts by Anthony Galasso could have been prevented or ameliorated."

See also, Galasso, Langione & Botter LLP v. Anthony P. Galasso and Signature Bank, et. al., 53 Misc.3d 1202(A), 2016 Misc. LEXIS 3312, 2016 NY Slip Op 51308(U) (Supreme Court, Nassau County; Index Nos. 010038-07, 19198-07, 014211-07 and 001510-09; September 19, 2016)[civil action by Firm against bank in which the Court found that the bank was not liable under the UCC for actions

by Anthony Galasso because he had apparent authority to act on behalf of the law firm].

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.]

Matter of Silva, 28 A.D.3d 11 (1st Dep't 2006). [Attorney suspended for two years for commingling personal and escrow funds in order to avoid tax liens and a judgment creditor and failure to maintain proper records of escrow account transactions; his misconduct was deemed "a serious scheme of deception and evasion, and an abuse of the escrow account."]

Matter of Goldstein, 10 A.D.3d 174 (1st Dep't 2004). [Attorney suspended for two years for his intentional and improper use of his escrow account to avoid tax liens and failure to identify certain accounts as escrow accounts; his misconduct was mitigated by his advanced age, serious health issues experienced by respondent and his wife, and his unblemished disciplinary history.]

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

Federal

- Fisher v. Committee on Grievances for the United States District Court for the Southern District of New York, 2014 U.S. App. LEXIS 14058 (2d Cir. 2014) [Attorney disbarred by SDNY for receiving monies from his client for payment of restitution, placing the funds in a general operating account, and then knowingly withdrew client funds without permission or authority and used $180,000 of the funds for personal purposes].

New York State

- Matter of Taylor, 113 A.D.3d 56 (1st Dep't 2013). [Attorney disbarred for her intentional conversion of guardianship funds, her grossly inadequate recordkeeping, and cash withdrawals. Included as aggravation were the ward's vulnerability, the attorney's failure to acknowledge her misconduct and lack of remorse, and a prior admonition issued to the attorney.]

- Matter of Maruggi, 112 A.D.3d 180 (1st Dep't 2013). [Attorney disbarred for intentional conversion of escrow funds, fraudulent execution of a deed and other conveying documents, misrepresentations to and failure to cooperate with the DDC's investigation. Attorney did not present any exceptional mitigating

circumstances.]

- Matter of Katz, 109 A.D.3d 143 (1st Dep't 2013). [Attorney disbarred for commingling personal and client funds, intentional conversion of client funds for his own personal use, misappropriation of client funds to pay other clients, and attempting to conceal misconduct by backdating checks and submitting false closing statements to the Office of Court Administration. The "venal intent" necessary to support intentional conversion is established where the evidence shows that the attorney knowingly withdrew client funds without permission or authority and used said funds for his own personal purposes.]

- Matter of Brusch, 105 A.D.3d 124 (1st Dep't 2013). [Attorney reciprocally disbarred for misappropriating client funds by (1) failing to refund the unused portion of a retainer to a client, and (2) failing to remit all of the funds due to a client from a settlement.]

- 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 Barrett, 88 A.D.3d 177 (1st Dep't 2011). [Attorney was reciprocally disbarred for converting corporate funds for personal use. In his capacity as the CEO and sole director of the corporation, the attorney also made false representations to induce an investor to loan money to the attorney, created false documents to conceal his misconduct, and provided bar counsel with false documents.]

- Matter of Holubar, 84 A.D.2d 100 (1st Dep't 2011). [Attorney disbarred for 50 counts of misconduct including, *inter alia*, intentional and knowing conversion of client funds, failure to answer disciplinary charges, and failure to appear in the disciplinary proceeding against him.]

- 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 Kennedy, 99 A.D.3d 75 (1st Dep't 2012). [Attorney disbarred for intentional conversion of escrow funds held for a real estate transaction, namely by using funds in his IOLA account, belonging to the buyer, amounting to $155,000 over a two-year period. The lawyer's expectation of receiving fees and his

intention to make restitution were not considered extraordinary mitigating circumstances sufficient to rebut disbarment.]

- Matter of Bernstein, 41 A.D.3d 49 (1st Dep't 2007). [Attorney disbarred for conversion of client funds, allowing the balance of his firm's IOLA account to fall below the amount required to be kept on deposit, failing to attend to the recordkeeping for that account, causing the unauthorized use of IOLA funds, and failing to maintain a contemporaneous and separate ledger or accounting record for each transaction in the account.]

- Matter of Connolly, 225 A.D.2d 248 (2d Dep't 1996), motion for leave denied, 90 N.Y.2d 803 (1997). [Attorney disbarred for, *inter alia*, conversion of client funds, neglect of client matters, and misuse of IOLA account to avoid creditors.]

- Matter of Pritikin, 105 A.D.3d 8 (1st Dep't 2013) [Attorney suspended for two years for, inter alia, misuse of his IOLA account, including commingling a client's personal and business funds, conversion of client funds, and helping a client to avoid tax liens and judgments.]

- 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 Betancourt, 232 A.D.2d 9 (1st Dep't 1997). [Attorney suspended for three years for, *inter alia*, neglect of client matters and misuse of IOLA account 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.]

- Matter of Dyer, 89 A.D.3d 182 (1st Dep't 2011) [Attorney publicly censured for commingling client and personal funds, failure to maintain adequate balances in his IOLA account, withdrawing cash from the same, and failure to maintain proper records of escrow funds.]

- Matter of Francis, 78 A.D.3d 106 (1st Dep't 2010) [Attorney publicly censured for commingling escrow and personal funds, disbursing personal funds from his IOLA account, and failure to maintain adequate records of transactions.]

3. DISCIPLINARY CONSEQUENCES FOR PRIVATE CONDUCT

Pursuant to Judiciary Law § 90(2) attorneys are subject to discipline for both professional and personal misconduct including criminal conduct. We are required to self- report a misdemeanor and felony convictions under Judiciary Law Section § 90(4) and are subject to automatic disbarment if convicted fa NY felony or its equivalent. The report must be made within 30 days of the plea or verdict. Moreover, attorneys may be subject to discipline for conduct engaged in during the bar admission process and prior to admission to practice.

- 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.]

- Matter of Dolphin, 240 NY 89, 92-93 [Attorney may be disciplined for misconduct "outside of and not a part of his professional acts".]

- Matter of Green, 32 AD3d 36 (2nd Dept 2006) [attorney who pled guilty of operating a motor vehicle while intoxicated publicly censured for engaging in "conduct that adversely reflected on his fitness as a lawyer".]

- Matter of Abram, 304 Ad2d 123 (2nd Dept 2003) [attorneys suspended for two years for a variety of misconduct, including his failure to make child support payments pursuant to an order of the Family Court. Court rejected his argument that the "child support proceedings against him . . . were personal in nature and did not affect the interests of any clients" and that he had ultimately paid all arrears.]

- Matter of McDougall, 2015 NY Slip Op 10639 (2nd Dept 2015) [attorney admitted to practice in 2006 publicly censured making a "materially false statement, or having deliberately failed to disclose a material fact, on her application for admission to the New York Bar" based on her failure to disclose her arrest in 1993.]

- Matter of Chernyy, 2014 NY slip Op 01451 (2nd Dept 2014) [failure to disclose conviction of driving while intoxicated on bar application resulted in six month suspension.]

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-lawyer. 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.]

- Matter of Kuslansky, 230 A.D.2d 104 (2d Dep't 1997). [Attorney censured for, *inter alia,* improper fee splitting 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. 741 (2001) Lawyer may not participate in a business network that requires reciprocal referrals.
- 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]
- **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 N.Y.C.R.R. §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."

- Mitchell v. Kurtz, 10 Misc.3d 1063A (N.Y. Cty. 2005). Sanctions hearing ordered for attorney's filing of potentially frivolous lawsuit.

- Forstman v. Arluck, 149 Misc.2d 929 (Suffolk Cty. 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. Cty. 2000), *aff'd.*, 193 Misc.2d 76 (1st Dep't 2001). 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) [Attorney 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 Shearer, 94 A.D.3d 128 (1st Dep't 2012) [Attorney suspended for two and one-half (2½) years for falsely claiming his firm entered into a retainer agreement with a client, giving a false excuse for his delay in filing the retainer, failure to disclose a fee-splitting dispute with respect to the same client, improperly notarizing documents, and testifying falsely before the Court and the Departmental Disciplinary Committee.]

- 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 Lowden, 44 A.D.3d 200 (1st Dep't 2007) [Attorney suspended for two years as reciprocal discipline for misconduct in Ohio involving the filing of false documents with the court, neglect of client matters, and failure to cooperate with his disciplinary investigation.]

- 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 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.]

- 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.]

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.

- Blauinsel Stiftung v. Sumitomo Corp. et al., 88 Fed. Appx. 443 (2d Cir. 2004). Sanctions upheld against Plaintiff's counsel for discovery abuses, bad faith conduct and misrepresentations.

- 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.

- Matter of Monaghan, (J. Mukasey, S.D.N.Y.) New York Law Journal, April 30, 2001. Attorney publicly censured for race-based abuse of opposing counsel for engaging in conduct prejudicial to the administration of justice and unlawful discrimination in the practice of law, in violation of DR 1-102-(A)(5) and (6).

- 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.

- *Parnes v. Parnes,* 80 A.D.3d 948 (3rd Dept. 2011). In this matrimonial action the wife discovered, on her spouse's desk in their joint home office, a note containing her husband's e-mail password and user name. She used this information to access her husband's e-mails including communications with his attorney. Her counsel used those e-mails to amend the complaint to include a further cause of action based on the communications. As repeatedly noted, M&S did not use the information.

- 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. 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 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 Nash, 135 A.D.3d 159 (1st Dept 2015) [Attorney was suspended for two years for misconduct established based upon five prior court decisions, including her participation in a fraudulent conveyance to defeat enforcement of a judgment, thereby flouting prior court orders, frivolous litigation and motions, disparaging comments regarding an adversary for which she was twice sanctioned, and a contempt finding for refusing to comply with two subpoenas (which she purged). Among the aggravating circumstances was that she repeatedly and steadfastly refused to acknowledge any wrongdoing and failed to express any remorse and that her argument that her behavior was attributable to inexperience was not persuasive because the underlying litigation went on for a decade].

- Matter of Melendez, 104 A.D.3d 134 (1st Dep't 2013) [Attorney reciprocally suspended for two years following discipline by the United States District Court in Puerto Rico for withholding discovery material, failure to disclose the existence of a bankruptcy proceeding, and failure to disclose his client's standing to sue in federal court.]

- 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 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 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 a 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 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 buy 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 unremorseful, 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 Winiarsky, 104 A.D.3d 1 (1st Dep't 2012) [Attorney publicly censured for taking sworn testimony from unrepresented third party witnesses without notice to opposing counsel and for *ex parte* communications with court attorney assigned as a referee to one of respondent's cases.]

- 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 disregard 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."]

V. 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 Jochnowitz, 189 A.D.2d 342 (1st Dep't 1993). Attorney involved in parking violations scandal disbarred for participation in and failure to report other attorneys' involvement in an illegal kickback scheme.

   - 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

   - N.Y. Jud. Adv. Op. 05-37 (April 21, 2005). Judges Report of Unethical and Unprofessional Attorney Conduct and Recusal

     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 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).

   - N.Y. Jud. Adv. Op. 08-99 (June 6, 2008). Judges Report of Corruption by Court Personnel. 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.

- N.Y. Jud. Adv. Op. 08-209 (January 29, 2009) and N.Y. Jud. Adv. Op. 03-121 (December 22, 2004) Judge Not Required to Report Self. Judges are not required to report self to Judicial Conduct Commission 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 Melendez, 104 A.D.3d 134 (1st Dep't 2013) [Attorney reciprocally suspended for two years following discipline by the United States District Court in Puerto Rico for withholding discovery material, failure to disclose the existence of a bankruptcy proceeding, and failure to disclose his client's standing to sue in federal court.]

- 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 buy 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

- N.Y. State Bar Ethics Op. 837 (March 16, 2010) and N.Y. County Lawyers Ethics 741 (March 10, 2010). Confronting False Evidence and False Testimony.

  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. 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.

C. PROSECUTORIAL MISCONDUCT

Advisory Opinions

- ABA Formal Opinion 467 (September 8, 2014). Managerial and Supervisory Obligations of Prosecutors Under Model Rules 5.1 And 5.3.

  Recognizing an increase in reported instances of prosecutorial misconduct, the ABA recommended implementation of office-wide policies and procedures by prosecutors to address issues such as confidentiality obligations, conflicts of interest, meeting deadlines, prevention of discovery violations, the training and supervision of lawyers and non-lawyers in a prosecutor's office, and internal discipline for violations of such procedures. The ABA emphasized that all prosecutors must adhere to Model Rules 5.1 (regarding the responsibilities of managers and supervisory lawyers in a law office), 5.3 (imposing responsibilities on lawyers regarding the

conduct of non-lawyer assistants), and 3.8 (addressing prosecutors' special responsibilities).

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 Ethics 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 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 grievance

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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 NYCRR §1240.9. Moreover, the Committee can move for an interim suspension based on an admission under oath of misconduct failure to comply with the Committee's directives; failure or refusal to pay fees or s judgment owed to a client; and other uncontroverted evidence of misconduct.

- *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 Rule 1.6(b) (5) (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 are 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. 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 (800)255-0569 or lap@nysba.org
  - New York City Bar Association LAP, Eileen Travis (212)302-5787
  - Brooklyn Bar Association LAP (718)624-4001
  - Nassau County Bar Association LAP (888)408-6222
  - ABA Co-LAP 800-238-2667 or 1-866-LAW-LAPS(1-866-529-5277)
  - ABA Judicial Assistance 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!

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Lisa Shrewsberry is a partner in the firm's Connecticut and New York offices and practices in the firm's professional liability, employment practices liability and directors and officers liability areas. She has represented lawyers, accountants, actuaries, insurance agents, broker/dealers, registered representatives, architects and engineers in all phases of litigation and arbitration. In addition to serving as counsel of record in such professional liability matters, Ms. Shrewsberry has supervised defense counsel on a national basis in litigation and arbitration on behalf of directors and officers liability insurers, and life insurance carriers, life insurance agents, securities brokers/dealers and registered representatives, and their errors and omissions carriers. In insurance coverage matters, Ms. Shrewsberry's practice includes policy drafting and policy interpretation, through coverage and bad faith litigation.

Ms. Shrewsberry served as an Adjunct Professor of Law at New York Law School from 1994-1996, where she taught courses in legal research and analysis, legal writing, oral argument and drafting litigation documents. Ms. Shrewsberry received her Juris Doctor from the University of Connecticut School of Law in 1988, and she graduated from Central Connecticut State University with a Bachelor of Science in Accounting, cum laude in 1985.

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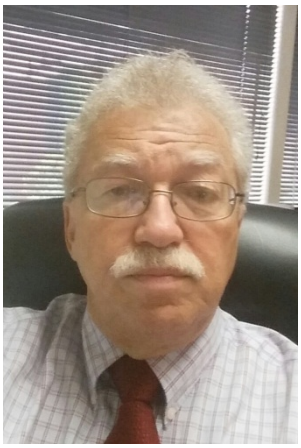

Jack Babchik is one of the principals of Babchik & Young LLP. He graduated from St. John's University School of Law in 1977 with a Juris Doctorate, and was admitted to practice in New York in March 1978. His other admissions include:

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- United States District Courts for the Southern, Eastern and Northern Districts of NY
- United States Supreme Court
- United States Court of Appeals for the Second Circuit

Other Accomplishments:
He has also been registered to practice before the United States Patent & Trademark Office since 1978, and is a Certified Mediator, United States District Court for the Northern District of New York. He is the author of articles for the profession and a lecturer on professional liability, legal ethics and construction litigation to professional groups and insurance companies. He was also a certified mediator for the U.S. District Court for the Northern District. He has more than 30 years of experience, including trial and appellate practice and has argued before the First and Second Departments, the Second Circuit Court of Appeals and the New York State Court of Appeals. His areas of concentration include:

- Insurance Defense
- Professional Liability (including Architects and Engineers, Accountants, Attorneys, Insurance Brokers, Real Estate Brokers and Appraisers) Directors and Officers
- Construction Litigation
- Employment Discrimination
- Products Liability
- Toxic Torts
- General Liability Defense

He was formerly associated with Kenyon & Kenyon, a patent and trademark litigation firm that represented Fortune 500 companies, and Hart & Hume, a professional liability and construction litigation firm catering to the insurance industry. In 1983, along with two partners from Hart & Hume, he formed the firm of Bergadano, Zichello & Babchik and expanded the firm's services to include not only professional liability, but also products liability, labor and employment law. In 1996, he founded Babchik & Mond, LLP and established a successful practice geared to the insurance industry, professionals, and corporate clients. In 1999, the firm became Babchik & Young, LLP and continued the practice of its predecessor while incorporating new areas of expertise in vertical transportation and general liability.

Jack Babchik is a member of:

- The American Bar Association (Section on Torts and Insurance Practice)
- New York State Bar Association (Section on Insurance, Negligence and Compensation Law)
- The Westchester County Bar Association
- The Professional Liability Underwriting Society (PLUS)

He became Chairman of the Ethics Committee of the Westchester County Bar Association ("WCBA") from 2009 to 2011 and was included in the New York and Westchester County editions of Super Lawyers® in the areas of professional liability and insurance defense. He has attained Martindale Hubbell's highest rating of AV Preeminent. He has successfully tried professional malpractice cases to verdict, directed verdict or had his clients dismissed or discontinued mid-trial. He lectures on behalf of the New York State Bar Association with regard to claims against lawyers and for the WCBA in the area of legal ethics. He understands his clients' needs and works diligently on their behalf at reasonable cost. He has received high praise from carriers and clients.

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Melissa Demmon is Vice President, Claims Counsel, Professional Liability for Endurance Services, Ltd., handling legal malpractice, architects and engineers, real estate management and title, and insurance agents and brokers' claims. Prior to joining Endurance, Melissa was Claims Counsel for The Bar Plan Mutual Insurance Company in St. Louis, Missouri where she managed a large caseload of legal malpractice claims.

Before joining The Bar Plan, Melissa was Counsel with Ropers Majeski Kohn & Bentley, serving as coverage counsel to insurers with regard to D&O, PL, and FI liability insurance policies. Her work included representing insurers as monitoring counsel and coverage counsel for claims against FI and D&O insurerd's arising out of regulatory investigations and civil litigations. Melissa spent seven years with the firm Ohrenstein & Brown in New York as an associate and counsel, again serving as coverage and monitoring counsel to insurers in connection with D&O/PL insurance policies. Prior to joining Ohrenstein & Brown, Melissa was an associate with Mendes & Mount, representing insurers' interests in claims made against insured's under LPL and miscellaneous E&O insurance policies.

Melissa is a member of the New York, New Jersey and Missouri Bars, and is also admitted to the United States District Courts for the Southern and Eastern Districts of New York and the District of New Jersey. She received a J.D. from St. Johns University School of Law, and a B.A. from Columbia College, Columbia University.

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Lisa Kaplan has worked for the last ten years at Zurich North America as a professional liability claims specialist handling professional liability claims. Prior to Zurich Lisa was a commercial litigator in New Jersey and was a member of the office of Attorney Ethics. She received her JD from Benjamin Cardozo School of Law and BA from Boston University.

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Tom Leghorn defends professional liability claims against lawyers and is one of New York's most experienced attorneys in this area. Tom's practice also encompasses the defense of insurance agents and brokers, securities broker-dealers, and other professionals. In addition, he handles intellectual property, cyber and complex commercial litigation, including representing European companies in U.S.-based matters.

In addition, Tom has handled criminal financial cases ranging from investigation of embezzlement, self-dealing, mishandling of tax money and insider trading before New York's Attorney General, the U.S. Attorney and the SEC. He also has handled coverage cases on fidelity bonds for embezzlement and insider theft.

Tom has defended legal malpractice claims for 30 years. His extensive experience enables him to quickly assess a malpractice claim and recommend effective strategies for its resolution. Law firm defendants as well as their insurers also appreciate the added value Tom provides by putting procedures in place to help them avoid repeat claims. His understanding of the nuances of intellectual property law is an added benefit for IP law firms seeking professional liability counsel. With the dramatic increase in cyber exposures, Tom has been able to advise law firms as to such exposures for them and to jump in knowledgeably when a cyber claim arises.

Areas of Focus:
Professional Liability
Tom's legal practice places an emphasis on the defense of attorneys in lawyer liability matters. He has defended law firms throughout the United States, trying cases in both the state and federal courts. In addition to trial work and appeals, Tom has been retained by many firms to conduct risk management audits and to act as outside general counsel.

As part of his professional liability practice, Tom has been involved in the defense of insurance agents and brokers against claims that run the gamut from alleged failure to secure homeowners coverage to multimillion-dollar lawsuits against the world's largest brokers. Tom's practice also has involved insurance coverage matters in the professional liability area involving lawyers, accountants, and insurance agents errors and omissions policies.

Intellectual Property
As former chair of the firm's Intellectual Property practice, Tom has addressed matters of copyrights, trademarks, and the defense of patent claims, as well as all aspects of e-commerce and media liability/defamation. He has experience at the U.S. Patent and Trademark Office, including proceedings before the Trademark Trial and Appeal Board. Tom handles coverage matters with an intellectual property focus. In addition, he has acted as an expert witness in federal court on the scope of coverage for intellectual property claims under a CGL's advertising injury provisions.

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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 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 10 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 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.

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Deborah A. Scalise is a partner in the firm SCALISE & HAMILTON LLP in Scarsdale, New York which focuses its practice on the representation of professionals (primarily lawyers and judges) in professional responsibility and ethics matters and white-collar criminal matters. Since 2002, Ms. Scalise has appeared before the Character and Fitness Committees, New York State and Federal Grievance Committees, and the Judicial Conduct Commission.

Prior to 2002, Ms. Scalise was Deputy AAG General in Charge of Public Advocacy for the Westchester Region for the NY Attorney General's Office and handled cases involving consumer frauds, civil rights and public integrity matters. Before that, she was Deputy Chief Counsel to the Departmental Disciplinary Committee for the First Judicial Department where she investigated and litigated complex disciplinary matters. She began her career as an ADA in Kings County, where she handled economic crimes and arson cases. Ms. Scalise received a Juris Doctor from Brooklyn Law School, a Bachelor of Arts Degree from John Jay College, CUNY and also earned a Master of Arts Degree in Forensic Psychology from the John Jay College Graduate School, CUNY.

In 2016, Ms. Scalise was appointed to the NYS OCA CLE Board by Chief Judge Janet DiFiore. She also testified before the 2105 OCA State Commission on Professional Discipline with regard to attorney mental health issues and the materials she authored were annexed to the Commission's Report which issued recommendations as to the unification of the NYS disciplinary process.

Active in several bar associations, she is a member of the New York State Bar Association (NYSBA), where she Chaired the Continuing Legal Education (CLE) Committee for five years and serves as a member on the Attorney Professionalism Committee. She is a past Vice President of the Women's Bar Association of the State of New York (WBASNY), where she currently Co-chairs the Professional Ethics Committee. She is a past President of the Westchester Women's Bar Association (WWBA), Co-chairing its Grievance/Ethics

Committee and a past President of the White Plains Bar Association (WPBA). She serves as Outreach Co-chair for both the WPBA and the WWBA and is actively involved in educational programs, including Take Your Children to Work Day, Law Day and Career Day. A member of the American Bar Association (ABA), she served on its Public Sector Lawyer's Division's Ethics and CLE Committee. She is also a member of the New York County Lawyers Association (NYCLA), serving as a Board Member of its Ethics Institute. She served as the Westchester County Bar Association's (WCBA) Co-chair of the Ethics and Professional Responsibility Committee for two years. As a member of the New Rochelle Bar Association (NRBA), she serves as a Small Claims Court Arbitrator in the New Rochelle City Court. She is also a member of the Federal Bar Council (FBC), the New York State Trial Lawyers Association (NYSTLA), the Brooklyn Columbian Lawyers Association, the Westchester Columbian Lawyers Association and the Eastchester Bar Association.

Ms. Scalise is a frequent CLE lecturer for the: Appellate Division, First, Second and Third Departments; NYS Judicial Institute; NYSBA; NYSTLA; PLI; WBASNY; NYCLA, WWBA; WCBA; WPBA; NRBA; FBC; Brooklyn Women's Bar Association; Rockland County Women's Bar Association; NYS Supreme Court Judges Association; NYS Magistrate's Association; NYC Civil and Housing Court Judges; Association; Pace University Law School CLE Program; St. John's University Law School CLE Program; Fordham Law School CLE Program; CUNY Law School CLE Program; NY Civil and Criminal Trial Attorneys Association; NYS Association of Disciplinary Attorneys; and NY County Supreme Court Arbitrators.

In 2016, Ms. Scalise coached Pace Law School's Team in the National Ethics Trial Competition Team at the Pacific McGeorge School of Law in Sacramento, California. She was an Adjunct Professor at Fordham Law School, where she taught Professional Responsibility; a faculty member of the Cardozo Law School Intensive Trial Advocacy Program; and a guest lecturer on professional responsibility and ethics at Brooklyn Law School, Columbia Law School, Cardozo Law School, Pace Law School and John Jay College.

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Jeffrey G. Steinberg is a partner in Steinberg & Cavaliere, LLP, based in White Plains, New York. His practice focuses primarily in the areas of professional liability defense and insurance coverage. He has spoken and written extensively on those subjects for numerous professional organizations and insurance carriers.

Bar Admissions:
New York – 1977
U.S. District Court, Southern District of New York – 1978
U.S. Court of Appeals, Second Circuit -1980
U.S. District Court, Eastern District of New York – 1986
U.S. District Court, District of Connecticut – 1988

Education:
Cornell University (B.S., 1973)
Fordham University (J.D., 1976)
Member, Fordham Law Review (1974-1976)

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Dennis McCoy is a senior litigation partner who has used his advocacy skills and analytical judgment to guide clients through strategically sensitive legal problems for over three decades. The mainstay of Dennis's career has been representation of clients in major, complex litigation at trial. He has tried cases from one end of New York State to the other, as well as other states in the Northeast. As Chair of our Professional Liability Practice Area, a major emphasis of his practice has been the representation of professionals in malpractice actions, primarily legal and health care professionals. He has served as a national and regional counsel for two major companies either managing or directly litigating their highest exposure cases throughout the United States.

In recognition of his standing in the Western New York legal community, Dennis was asked by the Chief Judge of the Western District of New York, to become a mediator on the court's panel of mediators. This experience has helped Dennis further refine his skills as an advocate representing companies in a variety of alternative dispute venues. Given the risks involved with high stakes litigation, mediation has become an increasingly important option to litigation.

In 2014, Dennis was recognized as the Defense Trial Lawyer of the Year by the Western New York Defense Trial Lawyers Association. In 2015, he received the Distinguished Alumnus Award for Private Practice from his alma matter, SUNY Buffalo Law School.

Dennis is a widely sought-after lecturer on litigation and professional liability topics. He has presented lectures throughout New York and the United States on these topics. In 2014, Dennis co-chaired the American Conference Institute's biennial conference on Lawyer Professional Liability in New York City. Dennis has also served as an expert witness in cases involving trial practice, ethics and lawyer liability.

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Robert is the firm's Chief Ethics Officer and Risk Management Partner and is responsible for all ethics, conflicts, loss prevention and continuing legal education activities at the firm. In this senior leadership position, Robert counsels firm attorneys and provides analysis and advice on ethical questions involving conflicts of interest, privileges and legal issues implicating the Rules of Professional Conduct. He also supervises the firm's continuing legal education programs and lectures on a wide variety of ethics and practice management topics. In addition, Robert is responsible for designing and implementing programs and policies to improve the provision of high quality legal services for firm clients.

Robert has over 33 years of trial and appellate experience in the state and federal courts. He also serves as a mediator for court-directed and private mediation clients. Over the course of his career, Robert represented large and small corporations, governmental and agency clients as well as individuals in a wide variety of matters.

In recognition of his trial experience, Robert was elected as a member of the American Board of Trial Advocates. As part of his commitment to serve the legal profession and his high ethical standards, Robert served by appointment of the Chief Judge of the Appellate Division as a member of, and then Chair of the Fifth District Grievance Committee, the body charged with adjudicating misconduct complaints against attorneys. In 2010, Robert received the Pro Bono Service Award from the N.D.N.Y. Federal Court Bar Association for his extensive and successful service as a mediator in the District Court's Alternate Dispute Resolution program.

Robert is a frequent lecturer to clients and attorneys on legal ethics, professional responsibility and federal practice issues and won the Burton Award for excellence in legal writing, presented at the Library of Congress, in recognition of his article "Unintended Consequences: Avoiding and Addressing the Inadvertent Disclosure of Documents."

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Jim Bradley, Vice President, Professional Liability of Crum & Forster Insurance, brings over thirty years of experience in insurance product development, marketing and management. He began his insurance career in 1984 with Wausau Insurance Company focusing on all lines of Property & Casualty insurance. Joining Marsh & McLennan, Inc. in 1987 he continued his focus in the area of Property & Casualty insurance while also developing and implementing specialty niche insurance products and programs. Mr. Bradley continued to refine his focus in the area of specialty lines insurance programs when he moved to JLT Services Corp, in 1992. This allowed him to create, implement and expand many professional liability insurance products and programs designed for specific types of professionals. These professionals include Lawyers, Investment Advisors, Risk Managers, Financial Planners, Executive Search Consultants, Management Consultants as well as many other miscellaneous professions. Mr. Bradley then joined Aon Affinity Insurance Services as part of their Lawyers Professional Liability Division. He was directly responsible for the development and implementation of a state specific Lawyers Professional Liability Insurance program. This program quickly became the largest lawyer's professional liability insurance program within Aon Affinity, representing over a third of their business nationwide. Prior to joining Crum & Foster, Mr. Bradley was instrumental in the creation of Valiant Insurance Company. He then joined Crum & Forster as part of their acquisition of Valiant in 2011.

In addition to the above, Mr. Bradley is also a member of the Professional Liability Underwriting Society and is active in supporting the Professional Insurance Agents Association and the New York State Bar Association.

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Greg Cooke is the Senior Lawyer's Professional Liability Advisor for USI Affinity. He is responsible for working with firm's on changing (or obtaining) their Professional Liability Coverage.

Greg has 7 years of experience in the insurance industry, specifically handling Professional Liability Insurance. Prior to joining USI Affinity, Greg spent over 5 years with Aon in a variety of different roles within Errors & Omissions Insurance. He handled both Lawyers and Insurance Agents, in both the admitted and non-admitted segments. Greg currently specializes in Lawyers Malpractice Insurance, as he has vast knowledge in handling many different law firms' insurance needs.

Greg has both his Property and Casualty Insurance License and his Life & Health Insurance License in Pennsylvania and many non-resident Producer Licenses in a variety of other states. He graduated from Pennsylvania State University with a Bachelors Degree in Business Management.

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Sanjeev Devabhakthuni focuses his practice on appellate advocacy, litigated tort defense, and insurance coverage disputes. Sanjeev represents individuals and businesses in a broad range of tort defense matters, ranging from simple accidents to complex exposure-related cases. Sanjeev also actively litigates insurance coverage disputes in declaratory judgment actions throughout the state.

Prior to joining Barclay Damon, Sanjeev served as an Appellate Court Attorney at the New York State Supreme Court, Appellate Division, Fourth Judicial Department. Since joining the firm, Sanjeev has worked on numerous appeals in state and federal courts, including successful appeals before the New York State Appellate Division, the New York Court of Appeals, and the United States Court of Appeals for the Second Circuit.

Sanjeev's education and background allow him to understand the complex issues facing his clients and to effectively represent those interests in both litigated and non-litigated matters. Sanjeev graduated summa cum laude from Albany Law School where he received the Cameron-Danaher Prize as the graduate with the highest standing in the subjects of Civil Procedure and Evidence.

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LEGAL EXPERIENCE:
July 1990-present---Principal Counsel, Seventh Judicial District Attorney Grievance Committee, Fourth Dept., Appellate Division of the Supreme Court of New York.
1980-June 1990-------Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois:
Senior Counsel-in-Charge (1985-1990)
Senior Counsel (1983-1985)
Staff Counsel (1980-1983)
1979-1980----------Associate Counsel, Allied Products Corporation - Chicago, Illinois

COURT ADMISSIONS:
New York--1988
Illinois--1979
U.S. Supreme Court--1986
U.S. Dist. Courts--N.D. of Ill.--1979; Cent. D. of Ill.—1986

BAR ASSOCIATIONS:
New York Association of Disciplinary Attorneys--1990 to present.
(Past-President)
New York State Bar Association--1990 to present.
National Organization of Bar Counsel--1980 to present.
(No. 8 on N.O.B.C.'s nation-wide list of attorneys with over 25 years of service in discipline field.)

EDUCATIONAL BACKGROUND:
J.D.– Illinois Institute of Technology/Chicago Kent College of Law-1979.
B.A.S. (Economics) – University of Illinois at Urbana--1976.

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Ms. Marlow-Jones joined the firm as an associate in August of 1999. She became a partner in January 2006. Her practice includes liability defense, insurance coverage, appellate law and commercial litigation. A primary area of her practice has been the representation of professionals, predominantly lawyers, in civil actions.

Marlow-Jones received her bachelors degree from the State University of New York at Geneseo in 1994 and her law degree, magna cum laude, from Syracuse University College of Law in 1997. She was selected to the Order of the Coif and the Justinian Honor Society. Prior to joining the firm, Ms. Marlow-Jones served as an appellate court attorney at the Supreme Court, Fourth Department. During this two-year period, she assisted members of the intermediate appellate court on pending civil and criminal appeals. She also served as a confidential law clerk to the Honorable John P. Balio prior to his retirement.

Ms. Marlow-Jones is admitted to practice before all New York State Courts and the U.S. District Court for the Northern and Western Districts of New York. She is a member of the Onondaga County, New York State and American Bar Associations.

Ms. Marlow-Jones serves on the board of directors of the Central New York Chapter of the Juvenile Diabetes Research Foundation. In her role as Advocacy Chair, she fosters relationships between local advocates and elected legislators to ensure Congress continues to support the funding of Type 1 Diabetes research.

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Mr. Perley is chair of the Litigation Department and a member of the firm's Board of Directors. He focuses his practice in municipal law, product liability, professional liability, complex litigation and catastrophic injury litigation. Mr. Perley has significant experience defending corporations, municipalities, employers, building owners, contractors and insurance carriers in a wide range of litigated matters including labor law, premises and product liability. Mr. Perley also has extensive experience in trucking litigation, having represented numerous truck lines in his career. He leads the firm's 24-Hour Emergency Response Team and is regularly engaged in complex catastrophic property damage, fire loss and bodily injury litigation. Mr. Perley counsels on issues pertaining to lien resolution and Medicare Secondary Payer issues and has testified as an expert witness on the applicability of the Medicare Secondary Payer Act.

An accomplished trial attorney and client advocate, Mr. Perley served as a Town Attorney with 22 years of governmental experience in zoning and land development. In addition to extensive experience in the full range of court proceedings in state and federal court, Mr. Perley's practice also includes extensive counseling on matters including zoning, environmental review, land development, variances, legislative drafting, tax certiorari and eminent domain representing clients before town and village boards, planning boards, zoning boards of appeals and assessment boards of review.

Mr. Perley was the Town Attorney of Boston from 1986-2003. In 1991 he was a member of the Citizen's Reapportionment Advisory Committee for the Erie County Legislature which redrew the legislative districts based on the 1990 census. Mr. Perley is a Trustee of Buffalo Seminary. Mr. Perley formerly served as President of the Orchard Park Symphony Orchestra and of the Youth Orchestra Foundation of Buffalo.

Highly regarded by his peers and in the courts, in 2008 Mr. Perley was named one of the Top 10 lawyers in New York State (outside of New York City) by New York Super Lawyer's

Magazine which conducted a survey of all practicing attorneys in the state. He has also been named to the list of the Best Lawyers in America and the Business First list of Who's Who in Law. Mr. Perley was presented with the Pro Bono Service Award by Hon. William Skretny of the U.S. District Court of the Western District of New York for his dedicated service to the federal court. Mr. Perley was appointed to the Eighth Judicial District Committee on Character and Fitness for admission of applicants to the New York State Bar Association.

Mr. Perley served on the Board of Directors of the Bar Association of Erie County and as President of the Western New York Trial Lawyers Association. He is the National Board Member of the Buffalo Chapter of the American Board of Trial Advocates where he previously served as President. He is a member of the Municipal and School Law Committee and the Committee on Eminent Domain and Tax Certiorari of the Erie County Bar Association, and is a member of the Municipal Law and the Torts, Insurance and Compensation Law Sections of the New York State Bar Association.

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Michael Furman, born in Brooklyn, NY, is a partner focusing on the defense of lawyers, insurance brokers and other professionals in complex professional liability litigation in Federal and State courts. Mr. Furman has extensive trial and appellate experience, having tried numerous jury trials in both Federal and State Courts throughout his career, and argued numerous appeals involving professional liability and insurance coverage matters.

Prior to entering private practice, Mr. Furman served as an assistant district attorney in the Trial Division of the New York County District Attorney's Office under Hon. Robert M. Morgenthau from 1989 to 1994.

Mr. Furman is a member of the Executive Committee and is the current Chair of the Trial Lawyers Section of the New York State Bar Association, and has previously served as Secretary (2012-13) and Treasurer (2011-12).

Mr. Furman is also a member of the Professional Liability Committee of the Torts, Insurance & Compensation Law Section of the New York State Bar Association, and the author of "Professional Liability Insurance," Insurance Law Practice, §37 (2d Ed 2006, NYSBA). Mr. Furman previously served as Chair of the Lawyers Professional Liability and Ethics Committee (Trial Lawyers Section) of the New York State Bar Association from 2009 to 2013, and is a member of the Association of Professional Responsibility Lawyers (APRL).

Mr. Furman is the Overall Planning Chairman of the Bi-Annual New York State Bar Association-sponsored bi-annual CLE statewide Legal Malpractice Seminar (2003, 2005, 2007, 2009, 2011 and 2013) and editor in- chief of the NYSBA CLE Legal Malpractice course-book.

Mr. Furman also drafts insurance policies and represents insurers in coverage disputes involving financial institutions, professional liability, marine and non-marine risks. From 1997 to 1999, he worked in London for a major Lloyd's syndicate, served on various London market committees, and was co-chair of the Int'l/London Sub-committee of the Insurance Coverage Committee of the ABA Section of Litigation.

Mr. Furman has been involved in high exposure matters throughout his career, and represents the Lloyd's insurance market in the World Trade Center/September 11, 2001 liability insurance coverage litigation in the Southern District of New York.

Mr. Furman has lectured extensively in the United States and Europe on various insurance related topics, including professional liability issues and insurance coverage, and has written several insurance-related articles.

Education
Brooklyn Law School, J.D. – 1989
St. John's University, B.S. – 1986

Bar and Court Admissions
U.S. District Courts – Southern, Eastern and Northern Districts of New York,
District of New Jersey
U.S. Court of Appeals – Second Circuit

State Admissions
New York
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Other Professional Affiliations
Professional Liability Underwriting Society (PLUS)
Chair, Lawyers Professional Liability and Ethics Committee (Trial Lawyers Section) of the New York State
Bar Association
Insurance Coverage Committee of the Section of Litigation, American Bar Association
Torts and Insurance Practice Section, American Bar Association
Professional Liability Committee, NYSBA Torts, Insurance & Compensation Law Section
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Brian has nearly 20 years' experience working in claims and as a litigator. He joined our senior management team in February 2011 to manage professional lines. Brian's previous roles include Assistant Vice President of Professional Programme claims at Zurich American Insurance Company and associate at Wilson, Elser, Moskowitz, Edeleman & Dicker. He started his career as an auditor with KPMG-Peat Marwick after completing an internship at the New York State Attorney General's office. Brian is licensed to practice law in New York and New Jersey.

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Jonathan Bruno focuses his practice on the defense of professionals. He has represented lawyers, accountants, insurance agents and brokers, real estate agents and brokers, title agents, claims adjusters, third-party administrators, securities broker/dealers, investment advisors, collection agencies, not-for-profit directors and officers, and other professionals in complex professional liability and commercial litigation. A member of the firm's Directors & Officers Liability, Employment & Labor, and Professional Liability Practice Groups, Jonathan also defends employers in employment litigation and counsels them on employment-related issues and compliance with federal, state, and local laws.

An experienced litigator, Jonathan has tried cases in federal and state courts, and has litigated cases before the Equal Employment Opportunity Commission, the New York State Division of Human Rights, the New York City Commission on Human Rights, attorney disciplinary committees, and the Financial Industry Regulatory Authority (FINRA). He has also argued numerous appeals before the Appellate Division of the New York State Supreme Court and the Second Circuit Court of Appeals involving legal malpractice, professional liability, and employment law cases.

Jonathan is an author and speaker on various topics, including legal malpractice litigation and risk management, legal malpractice claims against employed lawyers, bankruptcy and lawyer liability, FDIC claims against professionals, employment practices liability, Wage and Hour law, Sarbanes-Oxley whistleblower actions, cyberbullying, and alternative dispute resolution. He has also served as a program coach for the New York City Bar's Center for CLE Litigation Skills Workshop.

New York SuperLawyers magazine named Jonathan as one of the top attorneys in professional liability defense in the greater Metropolitan New York area for the years 2013-2016, recognition awarded to only 5% of lawyers in the state. He is also rated "AV

Preeminent" by Martindale-Hubbell, the highest level designation in professional excellence.

Jonathan has been featured numerous times in the "And the Defense Wins" section of The Voice, DRI's weekly e-newsletter.

A runner, Jon has recently completed his first 1/2 marathon and already has his eyes set on his second 1/2 marathon later this year.

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Since 2013, Alexandra Fridel has worked at CAN Insurance in New York, NY. She started her career at CAN Insurance as a Claims Consultant in Lawyers Professional Liability Claims, and now is the Claims Consulting Director of Lawyers Professional Liability Claims. Previously she was an Attorney at Haworth Coleman and Gerstman, LLC and Martin Clearwater & Bell. She has a Bachelor of Arts in English Language and Literature from Brandeis University and a J.D. from Benjamin N. Cardozo School of Law, Yeshiva University.

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Colleen McNicholas, Esq. is the Director of Professional Program Claims for Zurich North American Insurance Company in their New York City location. She was admitted to the New York State bar in 1997 and received her J.D. from Albany Law School.

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 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 10 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 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.

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Harold Neher, Esq. is the Vice President, AXIS PNP Claims Manager, of the Berkeley Heights Claims department. He been with AXIS Insurance since July 2006, handling complex D&O and Financial Institutions E&O matters in addition to supervising Fiduciary Liability claims. Prior to AXIS, Harold spent almost three years with Gulf Insurance and Travelers handling both D&O and E&O, seven years at Risk Enterprise Management involved in D&O, Miscellaneous Professional Liability and Complex Casualty claims and seven years prior to that in private practice. Harold is a cum laude graduate of The Benjamin N. Cardozo School of Law and the City University of New York.

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For more than 35 years, Ms. Rice has concentrated her practice on the representation of attorneys and risk management for lawyers. Ms. Rice holds the AV® Peer Review Rating from Martindale- Hubbell, its highest rating for ethics and legal ability, has been designated a Super Lawyer annually since 2008 and was assigned a "superb" AVVO rating. In 2012, Long Island Business News named Ms. Rice as one of the 50 most influential women on Long Island.

Ms. Rice is the Chair of the New York State Bar Association Law Practice Management Committee, a member of the NYSBA Bar Journal editorial board and an alternate member of the NYSBA Nominating Committee. In addition to having authored a column for the American Bar Association Law Practice Management Magazine, Ms. Rice is a Past President of the 5,000 member Nassau County Bar Association, the largest suburban bar association in the country. In 2014, Ms. Rice was awarded the NCBA President's Award for service to the Association and in 2015, she was honored by the St. John's Law School Alumni Nassau Chapter.

Ms. Rice also served as an ABA Presidential appointee to the ABA Standing Committee on Lawyer's Professional Liability from 2009 through 2012 and was Chair of the New York State Bar Association - Committee for Insurance Programs from 2008 to 2013. Ms. Rice is a member of the Professional Liability Underwriting Society; the Defense Association of New York and the Defense Research Institute.

In addition to being a New York State Bar Association Presidential appointee to the Task Force on Non-Lawyer Ownership and the Special Committee on Legal Specialization, Ms. Rice has served on the Torts, Insurance and Compensation Law Section. Her prior roles at the Nassau County Bar Association include President 2012-2013, President Elect 2011-2012, First Vice President 2010-2011, Second Vice President 2009-2010, Treasurer 2008-2009, Secretary 2007-2008, Director 2004-2007, Judiciary Committee (Chair 2015-2016 and 2006-2007), Vice-Chair (2005-2006), Strategic Planning Committee (Chair 2005-2006) (Vice-Chair 2003-2005), Nassau Lawyer/Publications Committee (Editor in Chief 2006

2007) (Co- Managing Editor 2005-2006). She is also a member of Nassau-Suffolk Trial Lawyers and the Suffolk County Bar Association.

Ms. Rice has authored materials for numerous publications and newsletters, including the New York Law Journal, BNA publications, the New York State Bar Journal and Nassau Lawyer, and has lectured for the Professional Liability Underwriting Society, the ABA Standing Committee on Lawyer's Professional Liability, PLI, the National Legal Malpractice and Risk Management Conference, the Nassau and Suffolk County Bar Associations, the New York State Bar Association, the New York City Bar and the American Conference Institute, as well as for various law firms, insurers, law schools and trade associations, at seminars covering such diverse topics as Risk Management and Loss Prevention for Attorneys, The Elements of and Defenses to a Legal Malpractice Action, Legal Malpractice Principles and Trial Strategy, The Anatomy of a Disciplinary Proceeding, What Damages are Recoverable and What are the Limitations?, What Makes Lawyers Happy?, Representing the Client with Greater Concerns, Ethical Issues with Email, Cyber-Security and Law Firms, Federal Statutes Affecting Attorneys, Preparing, Defending and Preventing Claims Stemming From Tax Shelter Advice, Social Media and Ethics, Whither Privity?, Defending Attorneys with Psychological Difficulties, Can the Jury Award That? Beyond Out of Pocket Damages in Professional Liability Cases, Avoiding Malpractice and Client Grievances, Protecting Your Practice, Top Ten Traps (resulting in malpractice claims and grievances), Disqualification of Legal Malpractice Experts, Identification and Resolution of Conflicts of Interest, Risk Management for Defense Attorneys, Ethics in the Wake of the New Rules of Professional Conduct; Law Practice Management under the New York Rules of Professional Conduct; Ethics in the Profession, Anatomy of a Legal Malpractice Action, Don't Make Malpractice Your Nightmare, Improving Communication Skills with Clients, Legal Malpractice Issues and Trends, Risks Presented by Law Firm Mergers, Risk Management Techniques for Real Estate Attorneys, Risk Management Techniques for Matrimonial Attorneys, Risk Management Techniques for Trust and Estate Attorneys, Starting Your Own Law Practice, Ethical Issues Confronting Claims Attorneys in Handling and Evaluating Claims and Attorney Liability under the Fair Debt Collection Practices Act.

From 1999 to 2003, Ms. Rice administered the Attorney Loss Prevention Hotline Service for the broker responsible for the NYSBA sponsored professional liability insurer.

Ms. Rice received her Juris Doctorate from St. John's University School of Law, Jamaica, New York in 1979 and a Bachelor of Arts degree from Fordham College at Fordham University in 1976. She was admitted to practice before the Courts of the State of New York in 1980 and is also admitted before the United States District Courts for the Southern and Eastern Districts of New York, and the United States Court of Appeals for the Second Circuit, as well as several other jurisdictions on a pro hac vice basis.

From 1984 to 2000, Ms. Rice was a Governor-appointed member of the Council for the State University of New York Maritime College at Fort Schuyler.

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Michael S. Ross is the principal of the Law Offices of Michael S. Ross, where he concentrates his practice in attorney ethics and criminal law. He is a former Assistant United States Attorney in the Criminal Division of the Southern District of New York and also served as an Assistant District Attorney in Kings County. Mr. Ross has been an Adjunct Professor at Benjamin N. Cardozo Law School since 1980 (where he teaches Fall and Spring Semester courses in Litigation Ethics). Mr. Ross has also taught a variety of trial practice and judicial administration courses as an Adjunct Associate Professor at Brooklyn Law School since 2005 (where he teaches a Fall course in Professional Responsibility, and has taught Spring and Summer courses over the years as well). In addition, in three and a half decades of teaching at Cardozo Law School, he has taught a variety of ethics, trial practice and judicial administration courses.

Mr. Ross is a frequent lecturer and author on topics involving ethics, trial practice and criminal law for such organizations as the Practicing Law Institute, the Appellate Divisions, First and Second Departments, the Association of the Bar of the City of New York, the New York State Judicial Institute, the National Institute of Trial Advocacy, the New York State Bar Association, the New York County Lawyers' Association, the New York State Association of Trial Lawyers and the New York State Academy of Trial Lawyers.

Mr. Ross currently serves as a member of the New York State Bar Association's Committee on Professional Discipline; the New York County Lawyers' Association Committee on Professional Discipline; the New York State Bar Association's Special Committee on the Unlawful Practice of Law; and the New York State Bar Association's Committee on Mass Disasters. He previously served for a number of terms on the Association of the Bar of the City Of New York's Committee on Professional Discipline, the New York State Bar Association Special Committee on Procedures for Judicial Discipline, and the New York State Bar Association's Task Force On Lawyer Advertising.

Mr. Ross completed a five-year tenure as an appointed member of the New York State Continuing Legal Education Board, which, among other things, formulates CLE guidelines in the State. Mr. Ross has chaired the American Bar Association ("ABA") Grand Jury Committee and the City Bar Association's Committee on Criminal Advocacy. He previously served as the ABA Criminal Justice Section's liaison to the ABA Standing Committee on Ethics and Professional Responsibility and was an appointed member of the ABA's Special Criminal Justice In Crisis Committee.

Among his writings, Mr. Ross has co-authored a chapter on "Client and Witness Perjury," for the ABA's Section of Litigation ethics training course book entitled "Litigation Ethics: Course Materials For Continuing Legal Education." The course book was developed for use nationally by law firms, bar associations and other groups which provide ethics training.

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Brett A. Scher is a partner at Kaufman Dolowich & Voluck, LLP. His practice includes litigation in the fields of professional liability, insurance coverage disputes, commercial matters, and class action defense. Mr. Scher's practice addresses litigation on the trial and appellate levels throughout the United States in both state and federal courts. In the area of professional liability, his practice includes complex attorney malpractice claims arising from underlying commercial litigation, securities law, real estate, personal injury, corporate governance, entertainment law, and patent/trademark issues. He also represents several companies with respect to the defense of individual and class action claims under the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Telephone Consumer Protection Act and the Racketeer Influenced and Corrupt Organizations Act.

Mr. Scher also represents accountants, actuaries and insurance brokers/agents, and third party administrators on errors and omissions claims. He also focuses on claims involving real estate issues, including the defense of home appraisers, surveyors, home inspectors, real estate agents, lenders, building management companies, co-op and condo boards, and real estate brokers. His insurance coverage practice focuses on policy drafting and coverage services with respect to professional liability policies, technology policies, investment management policies and commercial general liability policies.

Mr. Scher has served as international coverage/monitoring counsel for two of the largest domestic insurers, supervising securities law class actions and professional negligence claims, for more than 10 years.

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Philip Touitou has extensive experience representing clients in complex commercial litigation matters. His practice focuses on business disputes, including corporate class actions, breach of contract, breach of fiduciary duty, business torts, professional liability, directors and officers' liability, captive insurance liability and insurance coverage matters.

Mr. Touitou joined Hinshaw & Culbertson LLP in July 2004. Previously, he was a partner at a mid-sized New York law firm, where he served as chair of the firm's Continuing Legal Education Committee and as a member of the Partner-Associate Liaison Committee. From 1989 to 1992, Mr. Touitou was an associate with the Newark, New Jersey, firm of Saiber Schlesinger Satz & Goldstein. In 1988, he worked as a judicial clerk/intern for Hon. Alfred M. Wolin of the U.S. District Court in Newark, New Jersey. Mr. Touitou is a member of the New York City Bar. He holds a Certificate of Proficiency in French from RutgersCollege.

Clients that Mr. Touitou has represented include Chubb Insurance Group; American International Group, Inc.; Gulf Insurance Group; Zurich N.A.; Westport Insurance (GE), Renaissance Re, CCC Insurance Co. (Bermuda), Ltd.; Western Union Corp., Inc.; Herbert Mines Associates, Inc.; Hallmark Entertainment Inc.; and Crowne Media Holdings, Inc.

Mr. Touitou has been quoted in a number of publications, including The Wall Street Journal, New York Law Journal and Risk & Insurance Magazine. His publications include "Directors and Officers: The Role of Motive in Defining the Line Between Good Faith and Bad," published in Bloomberg Law Reports®, Vol. 4, No. 2, February 7, 2011.

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EMPLOYMENT HISTORY
Member of the firm of Corrigan, McCoy & Bush, PLLC - January, 2009 to the present
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Jim Bradley, Vice President, Professional Liability of Crum & Forster Insurance, brings over thirty years of experience in insurance product development, marketing and management. He began his insurance career in 1984 with Wausau Insurance Company focusing on all lines of Property & Casualty insurance. Joining Marsh & McLennan, Inc. in 1987 he continued his focus in the area of Property & Casualty insurance while also developing and implementing specialty niche insurance products and programs. Mr. Bradley continued to refine his focus in the area of specialty lines insurance programs when he moved to JLT Services Corp, in 1992. This allowed him to create, implement and expand many professional liability insurance products and programs designed for specific types of professionals. These professionals include Lawyers, Investment Advisors, Risk Managers, Financial Planners, Executive Search Consultants, Management Consultants as well as many other miscellaneous professions. Mr. Bradley then joined Aon Affinity Insurance Services as part of their Lawyers Professional Liability Division. He was directly responsible for the development and implementation of a state specific Lawyers Professional Liability Insurance program. This program quickly became the largest lawyer's professional liability insurance program within Aon Affinity, representing over a third of their business nationwide. Prior to joining Crum & Foster, Mr. Bradley was instrumental in the creation of Valiant Insurance Company. He then joined Crum & Forster as part of their acquisition of Valiant in 2011.

In addition to the above, Mr. Bradley is also a member of the Professional Liability Underwriting Society and is active in supporting the Professional Insurance Agents Association and the New York State Bar Association.

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EMPLOYMENT HISTORY
Member of the firm of Corrigan, McCoy & Bush, PLLC - January, 2009 to the present
Member of the firm of Roche, Corrigan, McCoy & Bush, PLLC - January, 2007 to December, 2008

Member of the firm of Roche, Corrigan, McCoy & Bush - May, 1985 to December, 2006
Member of the firm of Roche & Wolkenbreit - 1983 to May, 1985
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Karin Kruidenier is a senior claim executive at Travelers. She has been employed at Travelers handling professional liability claims for 24 years - for the last 15 years - legal malpractice. Ms. Kruidenier handles primary and surplus line LPL claims throughout the US with a focus on the Northeast region. She has worked with small, medium and large size firms but more recently, last 5 years, works with smaller firms: 2-20 attorneys

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For more than 35 years, Ms. Rice has concentrated her practice on the representation of attorneys and risk management for lawyers. Ms. Rice holds the AV® Peer Review Rating from Martindale- Hubbell, its highest rating for ethics and legal ability, has been designated a Super Lawyer annually since 2008 and was assigned a "superb" AVVO rating. In 2012, Long Island Business News named Ms. Rice as one of the 50 most influential women on Long Island.

Ms. Rice is the Chair of the New York State Bar Association Law Practice Management Committee, a member of the NYSBA Bar Journal editorial board and an alternate member of the NYSBA Nominating Committee. In addition to having authored a column for the American Bar Association Law Practice Management Magazine, Ms. Rice is a Past President of the 5,000 member Nassau County Bar Association, the largest suburban bar association in the country. In 2014, Ms. Rice was awarded the NCBA President's Award for service to the Association and in 2015, she was honored by the St. John's Law School Alumni Nassau Chapter.

Ms. Rice also served as an ABA Presidential appointee to the ABA Standing Committee on Lawyer's Professional Liability from 2009 through 2012 and was Chair of the New York State Bar Association - Committee for Insurance Programs from 2008 to 2013. Ms. Rice is a member of the Professional Liability Underwriting Society; the Defense Association of New York and the Defense Research Institute.

In addition to being a New York State Bar Association Presidential appointee to the Task Force on Non-Lawyer Ownership and the Special Committee on Legal Specialization, Ms. Rice has served on the Torts, Insurance and Compensation Law Section. Her prior roles at the Nassau County Bar Association include President 2012-2013, President Elect 2011-2012, First Vice President 2010-2011, Second Vice President 2009-2010, Treasurer 2008-2009, Secretary 2007-2008, Director 2004-2007, Judiciary Committee (Chair 2015-2016 and 2006-2007), Vice-Chair (2005-2006), Strategic Planning Committee (Chair 2005-2006) (Vice-Chair 2003-2005), Nassau Lawyer/Publications Committee (Editor in Chief 2006

2007) (Co- Managing Editor 2005-2006). She is also a member of Nassau-Suffolk Trial Lawyers and the Suffolk County Bar Association.

Ms. Rice has authored materials for numerous publications and newsletters, including the New York Law Journal, BNA publications, the New York State Bar Journal and Nassau Lawyer, and has lectured for the Professional Liability Underwriting Society, the ABA Standing Committee on Lawyer's Professional Liability, PLI, the National Legal Malpractice and Risk Management Conference, the Nassau and Suffolk County Bar Associations, the New York State Bar Association, the New York City Bar and the American Conference Institute, as well as for various law firms, insurers, law schools and trade associations, at seminars covering such diverse topics as Risk Management and Loss Prevention for Attorneys, The Elements of and Defenses to a Legal Malpractice Action, Legal Malpractice Principles and Trial Strategy, The Anatomy of a Disciplinary Proceeding, What Damages are Recoverable and What are the Limitations?, What Makes Lawyers Happy?, Representing the Client with Greater Concerns, Ethical Issues with Email, Cyber-Security and Law Firms, Federal Statutes Affecting Attorneys, Preparing, Defending and Preventing Claims Stemming From Tax Shelter Advice, Social Media and Ethics, Whither Privity?, Defending Attorneys with Psychological Difficulties, Can the Jury Award That? Beyond Out of Pocket Damages in Professional Liability Cases, Avoiding Malpractice and Client Grievances, Protecting Your Practice, Top Ten Traps (resulting in malpractice claims and grievances), Disqualification of Legal Malpractice Experts, Identification and Resolution of Conflicts of Interest, Risk Management for Defense Attorneys, Ethics in the Wake of the New Rules of Professional Conduct; Law Practice Management under the New York Rules of Professional Conduct; Ethics in the Profession, Anatomy of a Legal Malpractice Action, Don't Make Malpractice Your Nightmare, Improving Communication Skills with Clients, Legal Malpractice Issues and Trends, Risks Presented by Law Firm Mergers, Risk Management Techniques for Real Estate Attorneys, Risk Management Techniques for Matrimonial Attorneys, Risk Management Techniques for Trust and Estate Attorneys, Starting Your Own Law Practice, Ethical Issues Confronting Claims Attorneys in Handling and Evaluating Claims and Attorney Liability under the Fair Debt Collection Practices Act.

From 1999 to 2003, Ms. Rice administered the Attorney Loss Prevention Hotline Service for the broker responsible for the NYSBA sponsored professional liability insurer.

Ms. Rice received her Juris Doctorate from St. John's University School of Law, Jamaica, New York in 1979 and a Bachelor of Arts degree from Fordham College at Fordham University in 1976. She was admitted to practice before the Courts of the State of New York in 1980 and is also admitted before the United States District Courts for the Southern and Eastern Districts of New York, and the United States Court of Appeals for the Second Circuit, as well as several other jurisdictions on a pro hac vice basis.

From 1984 to 2000, Ms. Rice was a Governor-appointed member of the Council for the State University of New York Maritime College at Fort Schuyler.

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Victoria Chen is a Claims Consultant at CNA handling lawyers professional liability claims. Victoria has over 10 years of experience in professional liability claims and over 13 years of experience in the insurance industry. She began her career as a summer associate at Allstate Insurance Company in Northbrook, Illinois followed by a few years litigating as an insurance defense associate at a small law firm in Chicago. Victoria joined CNA in 2005 and has moved to the New York office while taking on various roles on CNA's legal malpractice team. Victoria has also managed claims at LVL Claims Services and Liberty International Underwriters, focusing on Directors & Officers, Employment Practices Liability, Accounting and miscellaneous professional liability claims. Victoria earned her B.S. in Business Administration from the University of Illinois at Urbana-Champaign and her Juris Doctor from the DePaul University College of Law.

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Sal G. Concu is Managing Director & Counsel for Travelers' Bond & Specialty Insurance Claim. He has worked for Travelers since 2003 in both specialty claim management and legal/product development roles. In his current role, he manages all Lawyers Professional Liability and Accountants Professional Liability claims handled across Travelers' U.S. offices. He has been working in-house for insurance companies since 1997, and practiced as an attorney for several years in private practice before then.

Mr. Concu is admitted as an attorney in New York. He received his Juris Doctor from Fordham University School of Law and his Bachelor of Science from the State University of New York at Albany.

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Janice J. DiGennaro defends professional liability cases in state and federal courts.

A partner in Rivkin Radler's Professional Liability and Directors & Officers Liability Practice Groups, Janice represents attorneys for claimed malpractice, fiduciary breaches, and fraud in the handling of matters including employment discrimination, bankruptcy, commercial transactions, tax law, trusts and estates, matrimonial conflicts, entertainment law, criminal law, trademark and patent infringement, Uniform Commercial Code violations, litigation, and real estate.

She also represents architects, engineers, insurance agents and brokers, accountants, real estate brokers, appraisers, and corporate directors and officers.

Janice defends complex class actions, multi-district litigations, and mass actions and has successfully litigated claims presented under federal and state statutes, including the federal securities laws, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the federal Fair Debt Collection Practices Act. She also provides consulting and advisory services to attorneys and other professionals in the areas of legal ethics, risk management, and professional responsibility. Additionally, she represents attorneys in professional disciplinary proceedings on the state and federal levels.

Janice was the first woman to sit on Rivkin Radler's executive committee, which manages the firm's affairs.

Janice was named one of the Top 50 Women in Business by Long Island Business News and is a member of the Association of Professional Responsibility Lawyers ("APRL") and the Professional Liability Underwriting Society ("PLUS").

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Matthew Flanagan is a 1989 graduate of Fordham University and received a Juris Doctorate degree from St. John's University School of Law in 1992. He is a skilled litigator with extensive trial and appellate experience in the area of legal malpractice defense, professional liability and general litigation. He has successfully argued numerous appeals in the Appellate Divisions for the First, Second and Third Departments, and New York's highest court: the Court of Appeals.

Mr. Flanagan has been named annually to the New York Super Lawyers list as one of the top attorneys in the New York Metropolitan area since 2012, and has been awarded a rating of AV PreeminentTM by Martindale-Hubbell. The Rating is the Highest Possible Rating in both Legal Ability and Ethical Standards, and was awarded following a Peer Review Rating Process, which included surveys of judges and other attorneys. He has also been named annually as one of the top professional liability and legal malpractice defense attorneys on Long Island by LexisNexis Martindale-Hubbell, and has been given an AVVO rating of "Superb" (10.0 out of 10.0).

Mr. Flanagan is admitted to practice before the Courts of the State of New York, the United States District Courts for the Southern and Eastern Districts of New York, and the United States Court of Appeals for the Second Circuit. He is a member of the American Bar Association, New York State Bar Association, the Nassau County Bar Association and the Theodore Roosevelt American Inn of Court.

Mr. Flanagan is a frequent lecturer regarding legal malpractice prevention and defense, and ethics and professional liability.

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George has been practicing insurance and risk management for over 7 years. George renews various insurance licenses every few years (or as the states may require.)

George Landrove is an insurance agent/broker in New York, NY for Zurich North America. George can help folks with their insurance needs in the entire state of New York.

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Lisa R. Midkiff is the Director of Claims for B&B Protector Plans, Inc. d/b/a Lawyer's Protector Plan (LPP), a nationwide lawyers professional liability program. For over 13 years, she has specialized inlawyers professional liability claims. Prior to joining the LPP, Ms. Midkiff was engaged in private practice and primarily handled medical malpractice and general insurance defense cases. Ms. Midkiff is a member of The Florida Bar and holds the CPCU and RPLU designations.

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Peter B. Skelos (Fordham Law School J.D. 1980) retired from the judiciary on July 31, 2015 and joined the law firm of Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP. He directs the Appellate Practice Group and is a member of the Litigation Department.

Judge Skelos was admitted to practice law in the State of New York in 1981. He is also admitted to practice before the United States Supreme Court, the U.S. Court of Appeals for the Second Circuit, the U.S, District Courts for the Eastern and Southern Districts of New York, and the State of Florida.

In November 1994, Skelos was elected to the New York State District Court. He served as president of the Nassau County District Court Judges Association and vice president of the New York State District Court Judges Association. He was elected as a Justice of the Supreme Court of the State of New York for the 10th Judicial District in November 1998. Effective January 1, 2002, Skelos was appointed as an Associate Justice of the Appellate Term of the Supreme Court. Effective April 26, 2004, Skelos was appointed by Governor George Pataki as an Associate Justice of the Appellate Division, Second Judicial Department, one of the busiest appellate courts in the country. In December, 2007, Skelos was appointed by Governor Elliot Spitzer to be a member of the constitutional court of the Appellate Division. In 2012, Skelos was found "Highly Qualified" for the position of Justice of the Supreme Court by the New York State Independent Judicial Election Qualification Commission. He was reelected to the Supreme Court and re-designated to the constitutional court. Judge Skelos was known for his incisive questioning from the bench and is the author of numerous scholarly opinions

Skelos has received awards for his exemplary public and professional service from many professional organizations. He is a career-long member of the Nassau County Bar Association. In 2015, the Bar Association presented Skelos with the President's Award for

his leadership on behalf of the Lawyers Assistance Program. Skelos was elected to the Board of Directors in 2015. Skelos served three terms as the administrative chair of the We Care Fund Advisory Board of the Bar Association of Nassau County and continues to be an active member of the Advisory Board.

Judge Skelos was an editor of the two volume practice guide, Civil Trials in New York (West Group) and authored Chapter 7 - Evolution of the Labor Law: A View from the Bench, Construction Site Personal Injury Litigation, 2d ed. (New York State Bar Association Publications). He regularly serves as a panel member at continuing legal education programs and was a member of the adjunct faculty at LIU-Post.