THEODORE ROOSEVELT INN OF COURT

PRESENTS

Professional Liability and Grievances:

Avoiding the Road from the Closing Table to the Grievance Committee

Nassau County Bar Association
Monday, December 15, 2014
5:30 pm
2 CLE Credits in Ethics

With Presenters:

Matthew K. Flanagan, Esq.

Evelyn Kalenscher, Esq.

Hon. John L. Kase

Abraham B. Krieger, Esq.

PROGRAM OVERVIEW

During our presentation, we will address ethical issues which may arise during the course of an attorney's representation of clients in connection with a sale of a residential property. Using a hypothetical involving a divorcing couple's sale of their marital residence, we will look at the Rules of Professional Conduct which are implicated by the conduct of our fictional attorney, whom we have named John Smith. Smith represents both husband and wife after receiving the referral from the couple's real estate broker, and neither husband nor wife is pleased with the outcome. Ultimately, Smith is the subject of a grievance filed by the wife, and a malpractice action filed by the husband.

As will be evident through the hypothetical, Smith has engaged in conduct which, from an ethics point of view, is questionable at best. We will address the specific Rules of Professional Conduct which apply to Smith's conduct. We will also address the ethical obligations of the buyer's attorney, who, although he has done nothing wrong himself, stands witness to some of Smith's misdeeds. What duty does that attorney have to report possible ethical violations by another attorney?

With one of our panelists, who is Chairman of the Grievance Committee for the Tenth Judicial District, we will then examine the Grievance Process in which Smith finds himself. We will discuss how the process gets initiated and how grievances are handled by the Committee. We will also examine statistics regarding the Tenth District Committee's disposition of grievances, and the factors which the Committee considers in deciding the appropriate penalties for attorneys who are found to have violated the Rules of Professional Conduct.

Finally, with one of our panelists whose practice involves the defense of attorney malpractice matters, we will look at the differences between the grievance process and the malpractice action which Smith must defend. We will also discuss how attorneys who are the subject of grievances can protect their rights under their professional liability insurance policies in the event that they are later sued for malpractice. And, finally, we will look at statistics regarding malpractice claims, the areas of law from which they arise, and their disposition.

HYPOTHETICAL

A husband and wife are divorcing and selling their house to a third-party for $1 million. They are both represented by the same attorney, John Smith, who was recommended by the real estate broker. The attorney has a successful plaintiff's personal injury practice, and is an old college friend of the broker. He had handled two or three closings in the past, all referred by the broker who told him that he will steer all of his real estate clients to him in the future - estimated at hundreds of transactions a year - with the "understanding" that the lawyer [1] would do all of the legal work on the buy or sale for a fixed fee of $950; [2] would use the title agency with whom the broker had a "relationship"; [3] would refer the client to a mortgage broker also connected with the real estate broker for the financing portion of any transaction; and [4] finally, for pre contract inspections, would refer his clients to a home inspection company "recommended " by the broker.

The buyer in this transaction offers to make a 3 percent down payment, and the attorney accepts that. The buyer's down payment is placed into the attorney's escrow account which is entitled "John Smith, Esq., and Account #2". The attorney has a college tuition payment coming due the following week, and knows that he is about to receive a substantial settlement from one of his personal injury matters within the next week. He withdraws $20,000 from his escrow account to make the tuition payment, and receives the settlement check from the personal injury matter the following day. He promptly deposits $20,000 into his escrow account, well in advance of the closing. The escrow withdrawals and deposits are documented in the check ledger, but without designating the transaction itself.

A pre-contract inspection is performed and the report, among other things, reflects that the inspector could not inspect the basement and was advised by the seller and broker who were present at the inspection, hovering over the inspector at every turn, that the basement was filled with moving boxes and that the basement itself was in good condition.

We now fast forward to the closing…….. The buyers pay the balance of the purchase price to John Smith, as attorney for the divorcing, selling couple. The attorney deposits the $970,000 check into his escrow account, and promptly pays himself $12,500 for his services and, after asking the broker what his fee is, pays the broker $80,000, equal to an 8% commission. The wife calls a day later and says that she is coming by to pick up her $750,000 check representing her portion of the proceeds. The attorney, sensing a problem, calls the husband to advise him of the wife's intentions. He also leaves seven unanswered messages for the broker. The husband, when told what his wife expects to receive, replies: "over my dead body." (Which, presumably, the soon to be ex-wife was perfectly willing to arrange….had she known). The attorney decides it would be best to keep the balance of the sales proceeds in his escrow account.

The wife does not get her check, is furious with the broker and the attorney and distraught with not being able to accommodate her soon to be ex-husband's wishes. She files a grievance against the attorney in the Tenth Judicial District. The husband does not get the $750,000 which he believes is his rightful share of the proceeds and files a malpractice action against the attorney in the Supreme Court, Nassau County.

IMPORTANT NOTICE

THE POLICY FOR WHICH YOU ARE APPLYING IS WRITTEN ON A CLAIMS-MADE BASIS. IT PROVIDES NO COVERAGE FOR CLAIMS ARISING OUT OF INCIDENTS, SITUATIONS OR ACTS OR OMISSIONS WHICH TOOK PLACE PRIOR TO THE PRIOR ACTS DATE, IF ANY, STATED IN THE POLICY.

IT COVERS ONLY CLAIMS ACTUALLY MADE AGAINST AN INSURED UNDER THE POLICY WHILE THE POLICY REMAINS IN EFFECT OR WHILE THE AUTOMATIC EXTENDED REPORTING PERIOD, OR ANY ADDITIONAL REPORTING PERIOD THE NAME INSURED MAY PURCHASE, IS IN EFFECT.

DURING THE FIRST SEVERAL YEARS OF THE CLAIMS-MADE RELATIONSHIP, CLAIMS-MADE RATES ARE COMPARATIVELY LOWER THAN OCCURRENCE RATES. SUBSTANTIAL ANNUAL PREMIUM INCREASES CAN BE EXPECTED, INDEPENDENT OF OVERALL RATE LEVEL INCREASES, UNTIL THE CLAIMS-MADE RELATIONSHIP REACHES MATURITY.

UPON TERMINATION OF COVERAGE FOR ANY REASON, A 60-DAY AUTOMATIC EXTENDED REPORTING PERIOD WILL BE GRANTED AT NO ADDITIONAL CHARGE. THE NAMED INSURED WILL BE ABLE TO PURCHASE AN ADDITIONAL EXTENDED REPORTING PERIOD UNLESS, DURING THE FIRST YEAR OF COVERAGE, THIS POLICY IS TERMINATED FOR NON-PAYMENT OF PREMIUM OR FRAUD. WITHIN 30 DAYS AFTER THE TERMINATION OF COVERAGE, THE COMPANY WILL GIVE WRITTEN NOTIFICATION TO THE NAMED INSURED THAT THE AUTOMATIC EXTENDED REPORTING PERIOD APPLIES, WHICH NOTICE SHALL STATE THE IMPORTANCE OF PURCHASING AN ADDITIONAL EXTENDED REPORTING PERIOD AND THE PREMIUM FOR SUCH COVERAGE. NO NOTICE SHALL BE SENT IF THIS POLICY HAS BEEN IN EFFECT FOR ONE YEAR OR MORE AND HAS BEEN TERMINATED FOR NONPAYMENT OR FRAUD.

THE NAMED INSURED SHALL HAVE THE GREATER OF SIXTY DAYS FROM THE EFFECTIVE DATE OF TERMINATION OF COVERAGE OR THIRTY DAYS FROM THE DATE OF MAILING OR DELIVERY OF THE NOTICE MENTIONED ABOVE TO SUBMIT WRITTEN ACCEPTANCE OF THE EXTENDED REPORTING PERIOD.

ABOUT THE FIRM

1. The precise registered name of the applicant firm to be insured, as reflected on the firm's letterhead:

   Name: _____

   Attach a sample of the firm's letterhead to this application. Inconsistencies between it and the application, including attorneys named, address, and other offices, etc. should be explained on a separate sheet of paper

2. a. Primary Location of the firm:

   Street Address: _____

   City: _____ County: _____ State: _____ Zip: _____

   Telephone: _____ Fax: _____

   Email Address: _____ Web site Address: _____

   b. Is this location a work-at-home or Virtual Office Arrangement (i.e. mailing address only, reserved office space on a shared basis)? ☐ Yes ☐ No

   c. Is this location where the firm meets with clients? If no, please explain via Question 7 below. ☐ Yes ☐ No

FIRM COVERAGE INFORMATION

(For any yes answers please contact your agent for an additional supplement or provide an explanation on a separate piece of paper)

3. Coverage is requested to be effective on: ____ / _____ / _____

4. What year was the firm established? _____

5. Type of Entity? ☐ solo practitioner ☐ individual attorney with employee attorney(s)
   ☐ partnership ☐ PC ☐ PA ☐ LLC ☐ LLP ☐ other _____

6. Is the firm office or suites shared with attorneys other than firm members? ☐ Yes ☐ No

7. Does the firm have offices at locations other than the primary location listed above? ☐ Yes ☐ No

8. Does the firm practice in states other than the primary location? ☐ Yes ☐ No

9. Is the ratio of support staff to attorneys greater than 3 to 1? ☐ Yes ☐ No

10. For how many years has the firm been continuously insured for malpractice claims? _____

11. a. Enter the firm prior acts exclusion date, if applicable: ____ / _____ / _____

    b. If the firm is a spin-off from another firm include the number of years that firm has been continuously insured. _____

12. Has the firm ever purchased an Extended Reporting Period (Tail) option? ☐ Yes ☐ No

13. Has the firm's coverage ever been non-renewed, cancelled, rescinded or declined by another carrier? ☐ Yes ☐ No

14. Does the firm desire coverage for any previously-dissolved predecessor firms and those attorneys affiliated therewith? ☐ Yes ☐ No

15. Is there an attorney listed on the letterhead not covered by the firm's insurance? ☐ Yes ☐ No

16. Enter the firm's insurance history for the last five years:

Eff Date mm/dd/yy	Insurance Company	Limits (per claim / agg)	Deductible (per claim/agg)	Covered # of attys	Annual Premium

ATTORNEY INFORMATION

17. **Total number of attorneys:** List all of the firm's attorneys. Differences between the date attorney began practicing law for other than a corporate or governmental entity and the date the attorney was admitted to the Bar must be explained on a separate sheet of paper following the same format. List additional attorneys on a separate sheet in the same format.

	Attorney Name	Attorney Desig.	Average # of hours per week				States licensed to practice law	Number of Years			Prior acts date	CNA Risk Mgmt * Seminar Date	NY State Bar Association Member?	
			0	1-10	11-25	26 +		In practice	with this firm	continuous malpractice coverage			Y	N
1													☐	☐
2													☐	☐
3													☐	☐
4													☐	☐
5													☐	☐
6													☐	☐
7													☐	☐
8													☐	☐
9													☐	☐
10													☐	☐

Attorney Designations:

A	Associate
CC	Co-counsel
D	Director
E	Employee
IC	Independent Contractor
MEM	Member of Firm
MGR	Manager
O	Owner
OC	Of Counsel
OF	Officer
SP	Solo Practitioner
SPC	Special Counsel
STC	Staff Counsel
SHH	Shareholder
STH	Stockholder

Partner Designations:

EP	Equity Partner
NP	Non-equity Partner
P	Partner
LLP	Limited Liability Partner
RP	Retired Partner

* does not include courses taken on West Legal Ed website

AREAS OF PRACTICE

18. Guidelines for completing this section:

a. Express percentages of time devoted (billable hours) in each area during the previous year.
b. Indicate percentages in whole numbers next to the type of law you practice, not the business client you represent.
c. Be as accurate as possible, as casual estimates may cause inappropriate evaluation of your practice.
d. All litigation should be coded as "civil litigation" with the exception of "criminal", "personal injury-plaintiff" and "intellectual property" which should be coded to their respective Area of Practice.

_____% Admiralty / Marine – Defense	_____% Criminal	_____% Natural Resources / Oil & Gas
_____% Admiralty / Marine – Plaintiff	_____% Environmental	_____% Pers Inj / Prop Dam - Defense
_____% Anti-Trust / Trade Regulation	_____% Family Law	* _____% Pers Inj / Prop Dam - Plaintiff
_____% Banking / Financial Institutions	_____% Government Contracts / Claims	_____% Real Estate/Title - Commercial
_____% Business Transaction – Comm'l Law	_____% Immigration / Naturalization	_____% Real Estate/Title- Residential
_____% Civil/Comm'l Litigation – Defense	*_____% Intellectual Prop –	* _____% Securities (S.E.C.)
_____% Civil/Comm'l Litigation – Plaintiff	(Copyright/Trademark/Patent)	_____% Taxation
_____% Civil Rights / Discrimination	_____% International Law	_____% Wills, Estate, Trust & Probate
_____% Collection / Bankruptcy	_____% Labor Management Rep	_____% Workers Comp - Defense
_____% Construction (Building Contracts)	_____% Labor Union Rep	_____% Workers Comp - Plaintiff
_____% Consumer Claims	_____% Local Government	_____% Other (describe below)
_____% Corporate Business Organization		

TOTAL: _____% must equal 100%

** If any percentage, complete the Intellectual Property, Plaintiff and/or Securities Supplemental Applications.*

"OTHER" Description Area: _____

FIRM OPERATIONS AND MANAGEMENT

19. Does the firm or any attorney of the firm have clients in the Entertainment industry? ☐ Yes ☐ No

If "yes" complete the Entertainment Supplemental Application.

20. At any time in the past five years, has the firm, or any attorney of the firm (regardless of what firm they were with at the time) provided legal services in any way related to a security or securities transaction? ☐ Yes ☐ No

If "yes" complete the Securities Supplemental Application.

21. Does the firm have any one client in which the firm's attorneys have an equity interest greater than 10% combined? ☐ Yes ☐ No

If "yes" complete the Equity / Outside Interests / Gross Billings Supplemental Application.

22. Does the firm have any one client which represents more than 25% or more of the firm's billings? ☐ Yes ☐ No

If "yes" complete the Equity / Outside Interests / Gross Billings Supplemental Application.

23. Does anyone in the firm serve as a director, officer or employee or in any other management capacity for a client? ☐ Yes ☐ No

If "yes" complete the Equity / Outside Interests / Gross Billings Supplemental Application.

24. Does the firm have procedures for identifying and resolving potential or actual conflicts of interest including cross-checking of former, existing or potential clients? ☐ Yes ☐ No

25. Does the firm have at least two independently maintained docket controls? ☐ Yes ☐ No

FIRM OPERATIONS AND MANAGEMENT (CON'T)

26. a. Does the firm regularly confirm representations in writing via use of formal engagement letters? ☐ Yes ☐ No
Please attach a sample engagement letter on firm letterhead

b. Does the engagement letter include the following:
- Identity of the Client? ☐ Yes ☐ No
- Scope of Representation that includes key terms of legal representation? ☐ Yes ☐ No
- Fee structures and billing agreements? ☐ Yes ☐ No
- Termination agreement that includes file retention and destruction terms? ☐ Yes ☐ No

c. Does the firm ensure that a countersigned engagement letter is received from the client before work begins on a new matter? ☐ Yes ☐ No
If "no", to a., b. or c, please explain via attachment.

27. Does the firm regularly acknowledge in writing the declination or termination of representations? ☐ Yes ☐ No

28. For firms greater than 5 attorneys: Does the firm require that at least two attorneys in the firm be informed of the initiation of a representation? ☐ Yes ☐ No

29. If you are a solo practitioner, do you have a procedure in place regarding provisions of services if you are incapacitated or otherwise unavailable? ☐ Yes ☐ No

30. Has the firm initiated lawsuits or arbitration procedures during the last two years to enforce the collection of unpaid fees for the firm? ☐ Yes ☐ No
If "yes", complete the Fee Suit Supplemental Application.

31. Has the Firm or any lawyer in the Firm represented publicly traded clients with services rendered involving Sarbanes-Oxley Act (SOX) compliance including but not limited to Securities, Accounting, Financial/Investment Services or Tax work? ☐ Yes ☐ No
If "yes", please complete the Client Information supplement.

32. Has the firm been involved in any mass tort / class action cases within the past five years? ☐ Yes ☐ No
If "yes" complete the Mass Tort / Class Action Supplemental Application.

33. Provide the firms gross revenues:

Year	Year End Date	Gross Revenues
Current fiscal		$
Prior fiscal		$
2 Years Prior		$

34. What percentage of accounts receivable are outstanding more than 90 days? _____%

CLAIM / INCIDENT / DISCIPLINARY INFORMATION

35. After inquiry, is any attorney in the firm aware of:

a. a professional liability claim made in the past five years against them, the firm, any predecessor firm, or against any current or former attorney of the firm while affiliated with the firm? ☐ Yes ☐ No

b. an actual or alleged act, omission, circumstance, or breach of duty that a reasonable attorney would recognize might reasonably be expected to result in a claim being made against the firm, any predecessor firm, or against any attorney currently or formerly affiliated with the firm or any predecessor firm, regardless of whether any such claim would be meritorious? ☐ Yes ☐ No
If "yes" to a, or b above complete the Claims Supplemental Application for each claim or incident

36. a. Within the past five years, has any attorney been subject to any disciplinary inquiry, complaint or proceeding for any reason *including* non-payment of dues? ☐ Yes ☐ No

b. Has any attorney *ever* been refused admission to practice, disbarred, suspended, formally reprimanded, or sanctioned in any other way? ☐ Yes ☐ No
If "yes" to a or b above complete the Disciplinary Supplement unless the matter was reported under a prior CNA policy term and supplement was completed. The Disciplinary – Status Update Supplement should be completed for renewal policies where the matter was previously reported but was still open at the last renewal.

REQUESTED COVERAGE

(Some limits / deductibles / optional coverages may not be available in all states and all are subject to underwriting qualification. Your quote will reflect the coverage and options for which your firm qualifies.):

37. a. Select the Each Claim/Aggregate Limit the firm desires:

☐ $ 100,000/$ 300,000 ☐ $ 500,000/$ 1,000,000 ☐ $ 1,000,000/$ 2,000,000 ☐ $3,000,000/$ 3,000,000
☐ $ 250,000/$ 500,000 ☐ $ 750,000/$ 750,000 ☐ $ 2,000,000 / $ 2,000,000 ☐ $4,000,000/$ 4,000,000
☐ $ 500,000/$ 500,000 ☐ $1,000,000/$1,000,000 ☐ $ 2,000,000/$ 4,000,000 ☐ $5,000,000/$ 5,000,000
☐ Other: $_____ / $_____

b. Select the Aggregate Deductible the firm desires:

☐ $ 1,000 ☐ $ 2,500 ☐$4,000 ☐$10,000 ☐ $25,000 ☐ $75,000
☐ $ 2,000 ☐ $ 3,000 ☐ $5,000 ☐$15,000 ☐ $50,000 ☐ $100,000 ☐ Other: $_____

38. Select the optional coverages the firm desires:

☐Per Claim Deductible ☐ Claims Expenses Outside Limit – 50% ☐ Claims Expenses Outside Limit – 100%
☐ First Dollar Defense – 50% ☐ First Dollar Defense – 100% ☐ Title Insurance Agency

NOTE: The Title Insurance Agency optional coverage extends coverage to a specific title agency as a separate entity. A supplemental application is required.

SIGNATURE AND REPRESENTATION

Applicant hereby represents, after inquiry, that the information contained herein and in any supplemental applications or forms required hereby, is true, accurate and complete and that no material facts have been suppressed or misstated. Applicant acknowledges a continuing obligation to report to the Company as soon as practicable any material changes in all such information, after signing the application and prior to issuance of the policy, and acknowledges that the Company shall have the right to withdraw or modify any outstanding quotations and/or authorization or agreement to bind the insurance based upon such changes.

Further, Applicant understands and acknowledges that:

1. If a policy is issued, the Company will have relied upon, as representations: this application, and any supplemental applications, and any other statements furnished to the Company in conjunction with this application, all of which are hereby incorporated by reference into this application and made a part hereof.
2. This application will be the basis of the contract and will be incorporated by reference into and made part of such policy; and
3. Applicant's failure to report to its current insurance company, during the current policy period, either any claim made against any insured, or any act or omission known to any insured that may reasonably be expected to be the basis of a claim against any insured may create a lack of coverage.
4. Any attorney currently or formerly affiliated with the firm or any predecessor firm, has disclosed in this Application any actual or alleged, act, omission, circumstance or breach of duty that a reasonable attorney would recognize might reasonably be expected to result in a claim being made against the firm, any predecessor firm, or any attorney currently or formerly affiliated with the firm or any predecessor firm, regardless of whether any such claim would be meritorious.

Applicant hereby authorizes the release of claim information to the Company from any current or prior insurer of the Applicant.

FRAUD NOTICE

Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance or statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime AND MAY BE SUBJECT TO CIVIL FINES AND CRIMINAL PENALTIES and shall also be subject to a civil penalty not to exceed five thousand dollars and the stated value of the claim for each such violation.

Applicant:

By _____ _____ _____

SIGNATURE OF OFFICER OR PARTNER OF THE FIRM	PRINT NAME OF OFFICER OR PARTNER	DATE

REMINDER

Please attach a sample of your letterhead to this application

Matthew K. Flanagan, Esq.
Catalano, Gallardo & Petropoulos, LLP
100 Jericho Quadrangle, Suite 326
Jericho, New York 11753
516-931-1800
mflanagan@cgpllp.com
www.cgpllp.com

Matthew K. Flanagan is a partner in the Jericho, New York law firm of Catalano, Gallardo & Petropoulos, LLP, where his practice is devoted almost exclusively to the defense of attorney liability matters. Before joining CG&P seven years ago, he was a partner and trial attorney in the attorney liability group at L'Abbate, Balkan, Colavita & Contini, LLP in Garden City, New York. He has extensive trial and appellate experience in that area, and has successfully argued appeals in the United States Court of Appeals for the Second Circuit, the New York State Court of Appeals, and the Appellate Divisions for the First, Second and Third Judicial Departments. He has lectured on legal malpractice prevention, civil procedure and ethics before the New York State Bar Association, the Nassau County Bar Association, and the Suffolk Academy of Law.

Mr. Flanagan has been named to the *New York Super Lawyers – Metro* List as one of the top professional liability defense attorneys in the New York metropolitan area for three consecutive years, and has been awarded a rating of AV Preeminent™ by Martindale-Hubbell. He has also been named one of the top professional liability attorneys on Long Island by LexisNexis Martindale-Hubbell.

Among the many attorney liability cases he has handled are the following reported cases, all of which resulted in the dismissal of the claims against the attorney-defendant (the names of the defendant-attorneys have been omitted):

- *Specialized Industrial Development Corp. v. Carter,* 99 A.D.3d 692, 952 N.Y.S.2d 97 (2d Dept. 2012)
- *Breytman,* 30 Misc.3d 1219 (A), 2011 WL 40791 (Kings Co., 2011), *affirmed*, 101 A.D.3d 783, 957 N.Y.S.2d 145 (2d Dept. 2012);
- *Engler v. Kalmanowitz,* 60 A.D.3d 540, 876 N.Y.S.2d 366 (1st Dept. 2009);
- *Beagle Developers, LLC,* 63 A.D.3d 607, 882 N.Y.S.2d 79 (1st Dept. 2009);
- *Kim,* No. 04 Civ. 3755, 2007 WL 1649902 (S.D.N.Y. 2007);
- *Goldberg v. Lenihan,* 38 A.D. 3d 598, 832 N.Y.S.2d 68 (2d Dept. 2007);
- *Gumbs*, 35 A.D.3d 362, 828 N.Y.S.2d 103 (2d Dept. 2006);
- *Blaize-Sampeur v. McDowell*, 2006 WL 3903927, RICO Bus.Disp.Guide 11,184 (E.D.N.Y.2006);

- *Lory,* 17 A.D.3d 541, 793 N.Y.S.2d 499 (2d Dept. 2005)
- *Mann v. Rusk,* 14 A.D.3d 909, 788 N.Y.S.2d 686 (3d Dept. 2005)
- *Jedlicka,* 14 A.D.3d 596, 787 N.Y.S.2d 888 (2d Dept. 2005)
- *Knecht,* 15 A.D.3d 626, 789 N.Y.S.2d 904 (2d Dept. 2005)
- *Teachers Placement Group v. Konrad,* 2/17/05 N.Y.L.J. p. 20, col. 3 (Nass. Co., 2005)
- *Pistilli,* 10 A.D.3d 353, 780 N.Y.S.2d 293 (2d Dept. 2004)
- *Lyons,* 8 A.D.3d 347, 777 N.Y.S.2d 912 (2d Dept. 2004) *lv to appeal den.,* 4 N.Y.3d 705, 794 N.Y.S.2d 300 (2004)
- *Ferdinand,* 5 A.D.3d 538, 774 N.Y.S.2d 714 (2d Dept. 2004), *lv to*
- *appeal den.,* 3 N.Y.3d 609, 786 N.Y.S.2d 812 (2004) (Table)
- *Artese*, 2 Misc.3d 1008, 784 N.Y.S.2d 918, 2004 WL 749885 (Nassau Co., 2004)
- *D'Amato*, 83 Fed.App. 359, 2003 WL 22955858 (2d Cir. 2003)
- *O'Brien*, 290 A.D.2d 544, 737 N.Y.S.2d 297 (2d Dept. 2002)
- *Albin v. Pearson*, 289 A.D.2d 272, 734 N.Y.S.2d 564 (2d Dept.2001)
- *Andino*, 287 A.D.2d 425, 730 N.Y.S.2d 864 (2d Dept. 2001)
- *Macholz*, 279 A.D.2d 557, 719 N.Y.S.2d606 (2d Dept. 2001), *mot. for lv to appeal dismissed,* 96 N.Y.2d 853 (2001)
- *Reilly v. North Shore News Group*, 12/11/01 N.Y.L.J. p. 21, col. 6 (Suffolk Co., 2001)
- *Firestar Estates South, Inc.*, 9/26/01 N.Y.L.J., p. 25, col. 3 (Nassau Co. 2001)
- *Best v. Law Firm of Queller and Fisher*, 278 A.D.2d 441, 718 N.Y.S.2d 397 (2d Dept. 2000), *cert. denied sub nom Best v. Sears Roebuck & Co.*, 534 U.S. 1080, 122 S.Ct. 812, 151 L.Ed.2d 696 (2002).

He has also handled the following noteworthy attorney liability cases:

- *Rudolf,* 8 N.Y.3d 438, 835 N.Y.S.2d 534 (2007)
- *Goldman,* 445 F.3d 152 (2d Cir. 2006)
- *Nesenoff*, 12 A.D.3d 427, 786 N.Y.S.2d 185 (2d Dept. 2004)
- *Gravel,* 297 A.D.2d 620, 747 N.Y.S.2d 33 (2d Dept. 2002)
- *Pollicino v. Roemer and Featherstonhaugh P.C.*, 260 A.D.2d 52 (3d Dept. 1999)

Mr. Flanagan graduated from St. John's University School of Law, with distinction, in 1992, and 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. He can be reached at 516-931-1800 or mflanagan@cgpllp.com.

EVELYN KALENSCHER

Ms. Kalenscher received a B.B.A. from Hofstra University in 1966, and a J.D. from Hofstra Law School in 1989. She was a partner in Genoa, Kalenscher & Noto, P.C. where her practice concentrated in matrimonial and real estate law. In 1995, she retired to spend more time with her family.

Since 2010, Ms. Kalenscher has worked two days per week for the Volunteer Lawyer Project, Landlord/Tenant Attorney of the Day Program, representing indigent tenants facing eviction. For her efforts on behalf of her clients, Ms. Kalenscher was named Pro Bono Attorney of the Month by the Nassau County Bar Association in April, 2011, and received the Nassau County Pro Bono Attorney of the Year award in 2012. She also was chosen as an Access to Justice Champion in 2013, by the Nassau County Bar Association, was the recipient of the New York State Bar Association President's Pro Bono Award for the Tenth Judicial District in 2014, and received the Legal Services Corporation Pro Bono Service Award in 2014.

An active member of the Nassau County Bar Association, Ms. Kalenscher is a member of the Ethics Committee, acting as Vice Chair from 2008 to 2010 and Committee Chair from 2010 to 2012. She is also a member of the District Court Committee and the Bar's House Domus Committee which she chaired from 2012 to 2014. Ms. Kalenscher is a member of other organizations including the New York State Bar Association, where she is on the Real Property Committee, the Theodore Roosevelt American Inn of Court, where she is a member of the Board, and Yashar, the Attorney's and Judge's Chapter of Hadassah, where she is also a Board member.

In addition to her legal affiliations, Ms. Kalenscher is active in her community. She has been a member of the Board of Managers in her condominium community for the past twelve years, and President of that body since 2009.

Personally, Ms. Kalenscher is a proud mother of two accomplished daughters and the grandmother of four wonderful grandchildren. She enjoys her time with her family and friends.

CURRICULUM VITAE
OF
JOHN LAURENCE KASE

Office

KASE & DRUKER
1325 Franklin Avenue, Suite 225
Garden City, New York 11530
(516) 746-4300

Professional Licenses

Admitted: New York State Bar, December 7, 1967
United States District Court for
The Southern District, June 4, 1970
United States Circuit Court of
Appeals, 2nd Circuit, December 12, 1975
Supreme Court of the United States, March 20, 1978

Employment

2012 – Present: Senior Partner, Kase & Druker, Esqs.

2005 – 2012: AJSC – Supervising Judge of Criminal Courts Nassau County

1978 – 2005: Senior Partner, Kase & Druker, Esqs.

Private practice of law in criminal defense and commercial matters.
Trial and appellate attorney in federal and state courts. Emphasis on criminal and commercial representation, including anti-trust, anti-monopoly, tax evasion and state sales tax defense; also, representation of individuals and corporations before federal and state grand juries.

1990: Nassau County, Special Prosecutor, felony case
1986: Nassau County, Special Prosecutor, felony case
1980 to 1999: Counsel to the Agriculture and New York State
Horse BreedingDevelopment Fund

Accomplishments

Recipient, Nassau County Bar Association Director's Award for Outstanding Service as Chair of the Judiciary Committee

Delegate to New York State Bar Association

President, Theodore Roosevelt Chapter, American Inns of Court

President, Former District Attorney's Association

Accomplishments *(continued)*

Member, New York State Bar Association, Criminal Justice Committee; Long Island Coordinator, Practical Skills Court on Criminal Law Practice; Lecturer, handling the DWI case in New York

Recipient, Nassau County Criminal Courts Bar Association Award for outstanding service as Supervising Judge

Member, Nassau County Bar Association, Judiciary Committee, Grievance Committee, Criminal Law and Procedure Committee

Lecturer, Nassau Academy of Law, Criminal Trial Advocacy Program

Member, National Association of Criminal Defense Lawyers

Charter Member, New York State Association of Criminal Defense Lawyers

Member, New York Council of Defense Lawyers

Author, "Insanity Defense", Newsday, May 9, 1998

Author, "The Second Noble Experiment: Re-evaluation Our Current Narcotic Laws, 1990

Community Service

2000 - 2003:	Member, Board of Directors, Nassau County Bar Association
2001 – 2002:	Chairman, Nassau County Bar Association Judicial Screening Committee
1976 – Present:	Member, Temple Emanuel of Great Neck
1989 – 1990:	Temple President, Temple Emanuel of Great Neck
1986 – 1996:	Member, Board of Directors United Community Fund of Great Neck
1976 – 1984:	Member, Board of Directors, Long Island Jewish Community Services

Lecturer

1972 – 1980:	Person-Wolinsky Review Course in Civil Law
1974 – 1975:	Adjunct Assistant Professor, Pace University, Department of Sociology and Political Science

Prior Employment

1975 – 1978:	Office of the District Attorney of Nassau County 262 Old Country Road, Mineola New York 11501
	Chief, District Court Bureau Chief, Narcotics Bureau Chief, Rackets Bureau
May 1972 to February 1975:	Assistant Attorney General New York State Organized Crime Task Force
January 1971 to May 1972:	Special Attorney, U.S. Department of Justice Organized Crime and Racketeering Strike Force (Newark, New Jersey)
January 1970 to December 1970:	Assistant House Counsel J. Clarence Davies, Inc.
January 1967 To December 1969:	Assistant District Attorney Office of the District Attorney, Bronx County

Legal Education

St. John's University School of Law, Juris Doctorate (LL.B. 1967)
Honors & Awards: The American Jurisprudence Award for Trial Practice
The American Jurisprudence Award in Wills

Pre-Legal Education

New York University, College of Arts and Sciences
Bachelor of Arts Degree, 1964

Employment While in Law School

Case worker for the Society for the Prevention of Cruelty to Children

New York City Emergency Relief Coordinator for the American Red Cross

Law Clerk, Hawkins Delafield & Wood, Esqs., New York, New York

Abraham B. Krieger

Member of the Firm

990 Stewart Avenue
Garden City, New York 11530
(516) 741-6565
akrieger@msek.com

Practice Areas

Real Estate Law

Corporate Finance

Corporate Law

Education

Hofstra University Law School
J. D., 1975

Queens College, City of New York
B.A., 1972

Memberships

Second Department Appellate Division
10th Judicial District Grievance Committee Chair

New York State Bar Association

Nassau County Bar Association,
Real Property Committee,
Commercial Litigation Committee,
Of Counsel Mentor Program

Nassau County District Court Arbitration Panel

Historical Society of the Courts
of the State of New York

Nassau Suffolk Law Services Advisory Council

Admissions

New York State

U.S. District Court, Eastern and Southern
District of New York

U.S. Supreme Court

U.S. Tax Court

Abraham B. Krieger is Chair of the Real Estate practice group and is a Member of the Corporate Finance Law practice of Meyer, Suozzi, English & Klein, P.C. located in Garden City, Long Island, N.Y. Mr. Krieger's practice includes representing businesses and individuals in commercial and residential real estate lending, sale, and lease transactions and real estate, lease and commercial litigation. An integral part of his practice includes representing commercial lenders and borrowers on real estate fiduciary transactions and title insurance companies on defending fee title and mortgage validity claims.

Notable Decisions:

- LZG Realty LLC and Tissa Funding, et al. v. H.D.W. 2005 Forest LLC, et al., Richmond County, Supreme Court, Appellate Division Second Department Decision addressing validity and enforceability of mortgages and presumptive authority to execute and deliver mortgages

- Emigrant Mortgage Co., Inc. v. Anthony J. Corcione and Jane Corcione, Suffolk County Supreme Court, Retained as Of Counsel to represent Emigrant Mortgage Co., Inc. on vacating lower court's adverse decision

- Higgins et al v. Jackson Campbell, Nassau County Supreme Court, 2002, CPLR 1006 Stakeholder action involving forum non conveniens and federal depository issues

- Liberty Theaters v. Local 91 Realty, New York County Supreme Court, 3/10/04, Right of First Refusal, Break-up fees and conspiracy issues in commercial real estate transaction

- Kay-Pine Enterprises v. 80 Pine LLC, 1/17/06, New York County Supreme Court, decision on consolidation of a Civil Court commercial Summary Proceeding with the Supreme Court action

Mr. Krieger has been named to the New York Super Lawyers list as one of the top attorneys in New York for 2013 and 2014. In March 2012, Mr. Krieger was appointed to the Grievance Committee for the Tenth Judicial District and was appointed in 2012 as Chairman of the Grievance Committee for a two year term. Mr. Krieger currently serves on the NYSBA Real Property Law Executive Committee

representing the 10th Judicial District, the Executive Committee on Professional Conduct, and has served on the Sub-Committee on Due Diligence Lease Checklists. He has been appointed as an Expert Witness and Mediator in various real estate litigations by appointment of the District Federal Court, NYS Supreme and District Courts. He has served as Receiver and counsel to Receiver on major Nassau, Suffolk and Queens County foreclosures. He received the Nassau Suffolk Law Services Pro Bono Attorney of the Month (January 2000), and Nassau County Bar Association's Pro Bono Award, Volunteers Lawyers Project (2001). In 2008, 2009, 2010, 2011, and 2012, Mr. Krieger was recognized in the *Long Island Business News* Who's Who in Commercial Real Estate Law, and in LIBN's Ones to Watch in Commercial Real Estate Law. He is rated "AV Preeminent" by Martindale-Hubbell, the highest level in professional excellence, and recognized by *Long Island Pulse Magazine* in 2010, 2011, 2012, and 2013 as one of the region's "Top Legal Eagles".

Mr. Krieger serves as an adjunct Professor at Hofstra University School of Law and a current Contributing Editor of the NYSBA publication on Commercial Leasing, authoring the chapter on the 'Commercial Lease Rider.' He has published numerous legal and scholarly articles throughout his career in The Nassau Lawyer, The New York Law Journal, Real Property Law Journal, and The ISLA Journal of International and Comparative Law. Mr. Krieger is also frequently invited to speak and present at programs on various legal topics. In March 2009, Mr. Krieger along with other members of the World Jewish Congress Assembly (WJC) , met in New York with the German Ambassador to the United Nations to discuss human rights issues.

Additionally, Mr. Krieger is highly involved in his community and has served for many years on Great Neck Chambers of Commerce Executive Board. Since 1978, he has served as Counsel to the American Gathering of Jewish Holocaust Survivors. He also served for 10 years on the Advisory Committee of the United States Holocaust Memorial Museum. In January of 2009, Mr. Krieger traveled to Jerusalem to participate in the 13th Plenary of the WJC. While there, Mr. Krieger joined 400 affiliated international Jewish delegates representing Jewish communities in over 80 countries and organizations. In November of 2008, he presented at the Nassau County Bar Association a program to the Yashar, Attorneys' and Judges' Chapter of Hadassah of Nassau County. His program, titled, "Stories of Hope and Survival as Told By a Child of Survivors," recounting his personal and professional perspectives. In the summer of 2002, he served at the University of Berlin, Germany on the Wannsee Conference Advisory Committee on The Corruption of the Rule of Law in Germany.

Prior to joining the firm, Mr. Krieger was in private practice since 1976. From 1995 until 2002, Mr. Krieger was senior partner in a Great Neck-based law firm and also a partner in a New York City firm of in which he was a principal partner from 1989-1993. Mr. Krieger served as General Counsel to Safeco Title Insurance Company of New York from 1985-1988 and Assistant Adjunct Professor, Department of Law at Baruch College, City University of New York from 1985-1990.

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NEW YORK RULES OF PROFESSIONAL CONDUCT

Effective April 1, 2009
As amended through January 1, 2014

TABLE OF CONTENTS

NEW YORK RULES OF PROFESSIONAL CONDUCT
(Effective April 1, 2009)

PREAMBLE:
A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.

[2] The touchstone of the client-lawyer relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation.

[3] A lawyer's responsibilities in fulfilling these many roles and obligations are usually harmonious. In the course of law practice, however, conflicts may arise among the lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Nevertheless, within the framework of the Rules, many difficult issues of professional discretion can arise. The lawyer must resolve such issues through the exercise of sensitive professional and moral judgment, guided by the basic principles underlying the Rules.

[4] The legal profession is largely self-governing. An independent legal profession is an important force in preserving government under law, because abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice law. To the extent that lawyers meet these professional obligations, the occasion for government regulation is obviated.

[5] The relative autonomy of the legal profession carries with it special responsibilities of self-governance. Every lawyer is responsible for observance of the Rules of Professional Conduct and also should aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves. Compliance with the Rules depends primarily upon the lawyer's understanding of the Rules and desire to comply with the professional norms they embody for the benefit of clients and the legal system, and, secondarily, upon reinforcement by peer and public opinion. So long as its practitioners are guided by these principles, the law will continue to be a noble profession.

SCOPE

[6] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These Rules define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in

which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules. The Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

[7] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[8] The Rules provide a framework for the ethical practice of law. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.

[9] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[10] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide whether to agree to a settlement or to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and in their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[11] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[12] 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. In addition, violation of a Rule

does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, because the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[13] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

RULE 1.1:
COMPETENCE

(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.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] [Reserved.]

[4] A lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client may limit the scope of the representation if the agreement complies with Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject. *See* 22 N.Y.C.R.R. Part 1500.

RULE 1.7:
CONFLICT OF INTEREST: CURRENT CLIENTS

(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.

Comment

General Principles

[1] Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise professional judgment on behalf of each client. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "differing interests," "informed consent" and "confirmed in writing," see Rules 1.0(f), (j) and (e), respectively.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of interest exists, *i.e.*, whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation, (iii) decide whether the

representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is consentable under paragraph (b); and if so (iv) consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include all of the clients who may have differing interests under paragraph (a)(1) and any clients whose representation might be adversely affected under paragraph (a)(2).

[3] 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). *See* Rule 1.10(e), which requires every law firm to create, implement and maintain a conflict-checking system.

[4] 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].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is acquired by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rules 1.16(d) and (e). The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* Rule 1.9(c).

Identifying Conflicts of Interest

[6] The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client's informed consent. For example, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is adverse is likely to feel betrayed and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken may reasonably fear that the lawyer will pursue that client's case less effectively out of deference to the other client, that is, that the lawyer's exercise of professional judgment on behalf of that client will be adversely affected by the lawyer's interest in retaining the current client. Similarly, a conflict may arise when a lawyer is required to cross-examine a client appearing as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Differing interests can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

[8] Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. For example, the professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be adversely affected by responsibilities to former clients under Rule 1.9, or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal-Interest Conflicts

[10] The lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. *See* Rule 5.7 on responsibilities regarding nonlegal services and Rule 1.8 pertaining to a number of personal-interest conflicts, including business transactions with clients.

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. Thus, a lawyer who has a significant intimate or close family relationship with

another lawyer ordinarily may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(j).

[12] A lawyer is prohibited from engaging in sexual relations with a client in domestic relations matters. In all other matters a lawyer's sexual relations with a client are circumscribed by the provisions of Rule 1.8(j).

Interest of Person Paying for Lawyer's Services

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's exercise of professional judgment on behalf of a client will be adversely affected by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. As paragraph (b) indicates, however, some conflicts are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client's consent nor provide representation on the basis of the client's consent. A client's consent to a nonconsentable conflict is ineffective. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, a representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 regarding competence and Rule 1.3 regarding diligence.

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, federal criminal statutes prohibit certain representations by a former government lawyer despite the informed consent of the former governmental client. In addition, there are some instances where conflicts are nonconsentable under decisional law.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to mediation (because mediation is

not a proceeding before a "tribunal" as defined in Rule 1.0(w)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] 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 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.

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one client refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation is that each party obtains separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests. Where the fact, validity or propriety of client consent is called into question, the lawyer has the burden of establishing that the client's consent was properly obtained in accordance with the Rule.

Client Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of (i) a document from the client, (ii) a document that the lawyer promptly transmits to the client confirming an oral informed consent, or (iii) a statement by the client made on the record of any proceeding before a tribunal, whether before, during or after a trial or hearing. *See* Rule 1.0(e) for the definition of "confirmed in writing." *See also* Rule 1.0(x) ("writing" includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. The Rule does not require that the information communicated to the client by the lawyer necessary to make the consent "informed" be in writing or in any particular form in all cases. *See* Rules 1.0(e) and (j). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to

avoid disputes or ambiguities that might later occur in the absence of a writing. *See* Comment [18].

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] 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.

[22A] Even if a client has validly consented to waive future conflicts, however, the lawyer must reassess the propriety of the adverse concurrent representation under paragraph (b) when an actual conflict arises. If the actual conflict is materially different from the conflict that has been waived, the lawyer may not rely on the advance consent previously obtained. Even if the actual conflict is not materially different from the conflict the client has previously waived, the client's advance consent cannot be effective if the particular circumstances that have created an actual conflict during the course of the representation would make the conflict nonconsentable under paragraph (b). *See* Comments [14]-[17] and [28] addressing nonconsentable conflicts.

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(1). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal as well as civil cases. Some examples are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs or co-defendants in a personal injury case, an insured and insurer, or beneficiaries of the estate of a decedent. In a criminal case, the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, multiple representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case; for example, when a decision favoring one client will create a precedent likely to weaken seriously the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of this risk include: (i) where the cases are pending, (ii) whether the issue is substantive or procedural, (iii) the temporal relationship between the matters, (iv) the significance of the issue to the immediate and long-term interests of the clients involved, and (v) the clients' reasonable expectations in retaining the lawyer. Similar concerns may be present when lawyers advocate on behalf of clients before other entities, such as regulatory authorities whose regulations or rulings may significantly implicate clients' interests. If there is significant risk of an adverse effect on the lawyer's professional judgment, then absent informed consent of the affected clients, the lawyer must decline the representation.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1). Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraph (a)(1) arise in contexts other than litigation. For a discussion of such conflicts in transactional matters, see Comment [7]. Regarding paragraph (a)(2), relevant factors in determining whether there is a significant risk that the lawyer's professional judgment will be adversely affected include: (i) the importance of the

matter to each client, (ii) the duration and intimacy of the lawyer's relationship with the client or clients involved, (iii) the functions being performed by the lawyer, (iv) the likelihood that significant disagreements will arise, (v) the likelihood that negotiations will be contentious, (vi) the likelihood that the matter will result in litigation, and (vii) the likelihood that the client will suffer prejudice from the conflict. The issue is often one of proximity (how close the situation is to open conflict) and degree (how serious the conflict will be if it does erupt). *See* Comments [8], [29] and [29A].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present at the outset or may arise during the representation. In order to avoid the development of a disqualifying conflict, the lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared (and regardless of whether it is shared, may not be privileged in a subsequent dispute between the parties) and that the lawyer will have to withdraw from one or both representations if one client decides that some matter material to the representation should be kept secret from the other. *See* Comment [31].

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to one another, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. Examples include helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, and arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In civil matters, two or more clients may wish to be represented by a single lawyer in seeking to establish or adjust a relationship between them on an amicable and mutually advantageous basis. For example, clients may wish to be represented by a single lawyer in helping to organize a business, working out a financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution of an estate or resolving a dispute between clients. The alternative to common representation can be that each party may have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation that might otherwise be avoided, or that some parties will have no lawyer at all. Given these and other relevant factors, clients may prefer common representation to separate representation or no representation. A lawyer should consult with each client concerning the implications of the common representation, including the advantages and the risks involved, and the effect on the attorney-client privilege, and obtain each client's informed consent, confirmed in writing, to the common representation.

[29A] Factors may be present that militate against a common representation. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, absent the informed consent of all clients, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. *See* Rule 1.9(a). In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between or among commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, it is unlikely that the clients' interests can be adequately served by common representation. For example, a lawyer who has represented one of the clients for a long period or in multiple matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. It must therefore be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. At the outset of the common representation and as part of the process of obtaining each client's informed consent, the lawyer should advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the commonly represented clients. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the two clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitation on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client's affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client's overall mode of doing business, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances, the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

[34A] Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer's client.

[34B] Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer's ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer's corporate client.

Lawyer as Corporate Director

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the

directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

RULE 1.8:
CURRENT CLIENTS:
SPECIFIC CONFLICT OF INTEREST RULES

(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:

(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.

(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.

(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.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative, or individual with whom the lawyer or the client maintains a close, familial relationship.

(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.

(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:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

(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:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and

(3) the client's confidential information is protected as required by Rule 1.6.

(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.

(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.

(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.

(j) (1) 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.

(2) 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.

(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.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer's investment on behalf of a client. For these reasons business transactions between a lawyer and client are not advisable. If a lawyer nevertheless elects to enter into a business transaction with a current client, the requirements of paragraph (a) must be met if the client and lawyer have differing interests in the transaction and the client expects the lawyer to exercise professional judgment therein for the benefit of the client. This will ordinarily be the case even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale

of goods or services related to the practice of law, such as the sale of title insurance or investment services to existing clients of the lawyer's legal practice. *See* Rule 5.7. It also applies to lawyers purchasing property from estates they represent.

[2] Paragraphs (a)(1), (a)(2) and (a)(3) set out the conditions that a lawyer must satisfy under this Rule. Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated in writing to the client in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised in writing of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement and the existence of reasonably available alternatives, and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(j) for the definition of "informed consent."

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially adversely affected by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the client's expense. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction. A lawyer has a continuing duty to monitor the inherent conflicts of interest that arise out of the lawyer's business transaction with a client or because the lawyer has an ownership interest in property in which the client also has an interest. A lawyer is also required to make such additional disclosures to the client as are necessary to obtain the client's informed consent to the continuation of the representation.

[3A] The self-interest of a lawyer resulting from a business transaction with a client may interfere with the lawyer's exercise of independent judgment on behalf of the client. If such interference will occur should a lawyer agree to represent a prospective client, the lawyer should decline the proffered employment. After accepting employment, a lawyer should not acquire property rights that would adversely affect the lawyer's professional judgment in representing the client. Even if the property interests of a lawyer do not presently interfere with the exercise of independent judgment, but the likelihood of interference can be reasonably foreseen by the lawyer, the lawyer should explain the situation to the client and should decline employment or withdraw unless the client gives informed consent to the continued representation, confirmed in writing. A lawyer should not seek to persuade a client to permit the lawyer to invest in an undertaking of the client nor make improper use of a professional relationship to influence the client to invest in an enterprise in which the lawyer is interested.

[4] If the client is independently represented in the transaction, paragraph (a)(2) is inapplicable, and the requirement of full disclosure in paragraph (a)(1) is satisfied by a written disclosure by either the lawyer involved in the transaction or the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client, as paragraph (a)(1) further requires.

[4A] Rule 1.8(a) does not apply to business transactions with former clients, but the line between current and former clients is not always clear. A lawyer entering into a business transaction with a former client may not use information relating to the representation to the disadvantage of the former client unless the information has become generally known. *See* Rule 1.9(c).

[4B] The Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[4C] This Rule also does not apply to ordinary fee arrangements between client and lawyer reached at the inception of the client-lawyer relationship, which are governed by Rule 1.5. The requirements of the Rule ordinarily must be met, however, when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee. For example, the requirements of paragraph (a) must ordinarily be met if a lawyer agrees to take stock (or stock options) in the client in lieu of cash fees. Such an exchange creates a risk that the lawyer's judgment will be skewed in favor of closing a transaction to such an extent that the lawyer may fail to exercise professional judgment as to whether it is in the client's best interest for the transaction to close. This may occur where the client expects the lawyer to provide professional advice in structuring a securities-for-services exchange. If the lawyer is expected to play any role in advising the client regarding the securities-for-services exchange, especially if the client lacks sophistication, the requirements of fairness, full disclosure and written consent set forth in paragraph (a) must be met. When a lawyer represents a client in a transaction concerning literary property, Rule 1.8(d) does not prohibit the lawyer from agreeing that the lawyer's fee shall consist of a share of the ownership of the literary property or a share of the royalties or license fees from the property, but the lawyer must ordinarily comply with Rule 1.8(a).

[4D] An exchange of securities for legal services will also trigger the requirements of Rule 1.7 if the lawyer's ownership interest in the client would, or reasonably may, affect the lawyer's exercise of professional judgment on behalf of the client. For example, where a lawyer has agreed to accept securities in a client corporation as a fee for negotiating and documenting an equity investment, or for representing a client in connection with an initial public offering, there is a risk that the lawyer's judgment will be skewed in favor of closing the transaction to such an extent that that the lawyer may fail to exercise professional judgment. (The lawyer's judgment may be skewed because unless the transaction closes, the securities will be worthless.) Unless a lawyer reasonably concludes that he or she will be able to provide competent, diligent and loyal representation to the client, the lawyer may not undertake or continue the representation, even

with the client's consent. To determine whether a reasonable possibility of such an adverse effect on the representation exists, the lawyer should analyze the nature and relationship of the particular interest and the specific legal services to be rendered. Some salient factors may be (i) the size of the lawyer's investment in proportion to the holdings of other investors, (ii) the potential value of the investment in relation to the lawyer's or law firm's earnings or other assets, and (iii) whether the investment is active or passive.

[4E] If the lawyer reasonably concludes that the lawyer's representation of the client will not be adversely affected by the agreement to accept client securities as a legal fee, the Rules permit the representation, but only if full disclosure is made to the client and the client's informed consent is obtained and confirmed in writing. *See* Rules 1.0(e) (defining "confirmed in writing"), 1.0(j) (defining "informed consent"), and 1.7.

[4F] A lawyer must also consider whether accepting securities in a client as payment for legal services constitutes charging or collecting an unreasonable or excessive fee in violation of Rule 1.5. Determining whether a fee accepted in the form of securities is unreasonable or excessive requires a determination of the value of the securities at the time the agreement is reached and may require the lawyer to engage the services of an investment professional to appraise the value of the securities to be given. The lawyer and client can then make their own advised decisions as to whether the securities-for-fees exchange results in a reasonable fee.

[5] A lawyer's use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or a business associate of the lawyer, at the expense of a client. For example, if a lawyer leans that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. But the rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits use of client information to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. Rules that permit or require use of client information to the disadvantage of the client include Rules 1.6, 1.9(c) and 3.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client if the transaction meets general standards of fairness. If a client offers the lawyer a gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client. Before accepting a gift offered by a client, a lawyer should urge the client to secure disinterested advice from an independent, competent person who is cognizant of all of the circumstances. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a gift be made to the lawyer or for the lawyer's benefit.

[6A] This Rule does not apply to success fees, bonuses and the like from clients for legal services. These are governed by Rule 1.5.

[7] If effectuation of a gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is related to the donee and a reasonable lawyer would conclude that the transaction is fair and reasonable, as set forth in paragraph (c).

[8] This Rule does not prohibit a lawyer or a partner or associate of the lawyer from being named as executor of the client's estate or named to another fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will adversely affect the lawyer's professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary or Media Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the subject matter of the representation creates a conflict between the interest of the client and the personal interests of the lawyer. The lawyer may be tempted to subordinate the interests of the client to the lawyer's own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from the client television, radio, motion picture, newspaper, magazine, book, or other literary or media rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of the literary or media rights to the prejudice of the client. To prevent this adverse impact on the representation, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the representation, even though the representation has previously ended. Likewise, arrangements with third parties, such as book, newspaper or magazine publishers or television, radio or motion picture producers, pursuant to which the lawyer conveys whatever literary or media rights the lawyer may have, should not be entered into prior to the conclusion of all aspects of the matter giving rise to the representation.

[9A] Rule 1.8(d) does not prohibit a lawyer representing a client in a transaction concerning intellectual property from agreeing that the lawyer's fee shall consist of an ownership share in the property, if the arrangement conforms to paragraph (a) and Rule 1.5.

Financial Assistance

[9B] Paragraph (e) eliminates the former requirement that the client remain "ultimately liable" to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer's fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer's own account. However, like the former New York rule, paragraph (e) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of

investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's professional judgment and there is informed consent from the client. *See also* Rule 5.4(c), prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another.

[12] Sometimes it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest may exist if the lawyer will be involved in representing differing interests or if there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing. *See* Rules 1.0(e) (definition of "confirmed in writing"), 1.0(j) (definition of "informed consent"), and 1.0(x) (definition of "writing" or "written").

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consents. In addition, Rule 1.2(a) protects each

client's right to have the final say in deciding whether to accept or reject an offer of settlement. Paragraph (g) is a corollary of both these Rules and provides that, before any settlement offer is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement is accepted. *See also* Rule 1.0(j) (definition of "informed consent"). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are currently represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for the lawyer's own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that

recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil matters are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is often unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that if the sexual relationship leads to the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairing the lawyer's exercise of professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client evidentiary privilege. A client's sexual involvement with the client's lawyer, especially if the sexual relations create emotional involvement, will often render it unlikely that the client could rationally determine whether to consent to the conflict created by the sexual relations. If a client were to consent to the conflict created by the sexual relations without fully appreciating the nature and implications of that conflict, there is a significant risk of harm to client interests. Therefore, sexual relations between lawyers and their clients are dangerous and inadvisable. Out of respect for the desires of consenting adults, however, paragraph (j) does not flatly prohibit client-lawyer sexual relations in matters other than domestic relations matters. Even when sexual relations between a lawyer and client are permitted under paragraph (j), however, they may lead to incompetent representation in violation of Rule 1.1. Because domestic relations clients are often emotionally vulnerable, domestic relations matters entail a heightened risk of exploitation of the client. Accordingly, lawyers are flatly prohibited from entering into sexual relations with domestic relations clients during the course of the representation even if the sexual relationship is consensual and even if prejudice to the client is not immediately apparent. For a definition of "sexual relations" for the purposes of this Rule, see Rule 1.0(u).

[17A] The prohibitions in paragraph (j)(1) apply to all lawyers in a firm who know of the representation, whether or not they are personally representing the client. The Rule prohibits any lawyer in the firm from exploiting the client-lawyer relationship by directly or indirectly requiring or demanding sexual relations as a condition of representation by the lawyer or the lawyer's firm. Paragraph (j)(1)(i) thus seeks to prevent a situation where a client may fear that a willingness or unwillingness to have sexual relations with a lawyer in the firm may have an impact on the representation, or even on the firm's willingness to represent or continue representing the client. The Rule also prohibits the use of coercion, undue influence or intimidation to obtain sexual relations with a person known to that lawyer to be a client or a prospective client of the firm. Paragraph (j)(1)(ii) thus seeks to prevent a lawyer from exploiting the professional relationship between the client and the lawyer's firm. Even if a lawyer does not know that the firm represents a person, the lawyer's use of coercion or intimidation to obtain sexual relations with that person might well violate other Rules or substantive law. Where the representation of the client involves a domestic relations matter, the restrictions stated in paragraphs (j)(1)(i) and (j)(1)(ii), and not the per se prohibition imposed by paragraph (j)(1)(iii), apply to lawyers in a firm who know of the representation but who are not personally

representing the client. Nevertheless, because domestic relations matters may be volatile and may entail a heightened risk of exploitation of the client, the risk that a sexual relationship with a client of the firm may result in a violation of other Rules is likewise heightened, even if the sexual relations are not per se prohibited by paragraph (j).

[17B] A law firm's failure to educate lawyers about the restrictions on sexual relations – or a firm's failure to enforce those restrictions against lawyers who violate them – may constitute a violation of Rule 5.1, which obligates a law firm to make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

[18] Sexual relationships between spouses or those that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the sexual relationship and therefore constitute an impermissible conflict of interest. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) applies to sexual relations between a lawyer for the organization (whether inside counsel or outside counsel) and a constituent of the organization who supervises, directs or regularly consults with that lawyer or a lawyer in that lawyer's firm concerning the organization's legal matters.

Imputation of Prohibitions

[20] Where a lawyer who is not personally representing a client has sexual relations with a client of the firm in violation of paragraph (j), the other lawyers in the firm are not subject to discipline solely because those improper sexual relations occurred. There may be circumstances, however, where a violation of paragraph (j) by one lawyer in a firm gives rise to violations of other Rules by the other lawyers in the firm through imputation. For example, sexual relations between a lawyer and a client may give rise to a violation of Rule 1.7(a), and such a conflict under Rule 1.7 may be imputed to all other lawyers in the firm under Rule 1.10(a).

RULE 1.15:
PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

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

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 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.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

Comment

[1] A lawyer should hold the funds and property of others using the care required of a professional fiduciary. Securities and other property should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts,

including an account established pursuant to the "Interest on Lawyer Accounts" law where appropriate. *See* State Finance Law § 97-v(4)(a); Judiciary Law § 497(2); 21 N.Y.C.R.R. § 7000.10. Separate trust accounts may be warranted or required when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which portion of the funds belongs to the lawyer.

[3] Lawyers often receive funds from which the lawyer's fee will or may be paid. A lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed to the lawyer. However, a lawyer may not withhold the client's share of the funds to coerce the client into accepting the lawyer's claim for fees. While a lawyer may be entitled under applicable law to assert a retaining lien on funds in the lawyer's possession, a lawyer may not enforce such a lien by taking the lawyer's fee from funds that the lawyer holds in an attorney's trust account, escrow account or special account, except as may be provided in an applicable agreement or directed by court order. Furthermore, any disputed portion of the funds must be kept in or transferred into a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds is to be distributed promptly.

[4] Paragraph (c)(4) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

RULE 2.1:
ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. Nevertheless, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibilities as advisor may include the responsibility to indicate that more may be involved than strictly legal considerations. For the allocation of responsibility in decision making between lawyer and client, see Rule 1.2.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial or public relations specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the

representation. Similarly, when a matter is likely to involve litigation, it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

OVERVIEW OF DISCIPLINARY PROCESS

GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT

THE DISCIPLINARY PROCESS

I. Attorney Conduct

A. **Rules of Professional Conduct** (22 NYCRR 1200) effective April 1, 2009
Available online at: www.courts.state.ny.us/attorneys

1. No more Code of Professional Responsibility, no more Canons, Ethical Considerations

2. Follows the format of the ABA Model Rules - but has some uniquely New York provisions.

a. Commentaries for the rules have been drafted by the NYS Bar Association

b. Many of the substantive Code Disciplinary Rules are carried over into the new New York Rules of Professional Conduct, but now follow the general format of the Model Rules.

3. More expanded definitions of important terminology

4. Codifies into rules some of the ethical considerations under the former code

B. The Rules are divided into eight areas relating to attorney conduct and professional responsibility:

Rule 1 - pertains to the attorney-client relationship
Rule 2 - pertains to the attorney as an advisor or counselor.
Rule 3 - pertains to the attorney as an advocate/litigator
Rule 4 - pertains to the attorney dealing with non clients
Rule 5 - pertains to law firm structure
Rule 6 - pertains to pro bono and other public legal services
Rule 7 - pertains to advertising
Rule 8 - pertains to misconduct and maintaining the integrity of the profession

A. **Judiciary Law § 90 subsection 2** expressly delegates to the Appellate Division the power and control over attorneys and authorization to discipline attorneys for acts of "professional misconduct."

1. The Appellate Division is specifically vested with the authority to "censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice."

2. Each Appellate Division has promulgated rules governing the Conduct of Attorneys who are admitted to practice in, reside in, commit acts in or who have offices within that department. (Second Department Rules - 22 NYCRR Part 691) The rules vary among the departments.

3. In the Second Department, pursuant to 22 NYCRR 691.2:

   a. An attorney may be subjected to discipline for personal misconduct as well as professional misconduct, and

   b. An Attorney may be subject to discipline for violations of any Appellate Division Rules governing the conduct of attorneys or violations of disciplinary rules of the Code of Professional Responsibility.

4. An attorney may be disciplined for misconduct "even though such misconduct was outside of and not a part of his professional acts" [Matter of Dolphin, 240 NY 89 (1925)] and the Court's power to discipline extends to conduct which "adversely reflects upon the legal profession and is not in accordance with the high standards imposed on members of the Bar." [In re Cohen, 190 A.D.2d 179 (2d Dept., 1993)]

II. **Grievance Committees - Second Department**

A. Three Grievance Committees in the Second Department are each charged with the duty and power to investigate and prosecute matters involving attorneys within their judicial district. Each committee has twenty appointed members - 16 of whom must be attorneys. Members are appointed from lists submitted by the Bar Associations.

1. The Grievance Committee for the Tenth Judicial District oversees investigations and prosecutions of matters involving Nassau and Suffolk attorneys. [As of December 31, 2012 there were 21,776 licensed attorneys in the Tenth Judicial District.]

B. Investigations of professional misconduct may be commenced:

1. upon the filing of a written complaint, signed by the complainant (who must be notified of the actions taken), or

2. sua sponte

upon notification by the Lawyers' Fund for Client Protection of a dishonored escrow account check; notification by the Office of Court Administration of the failure of an attorney to register in compliance with Judiciary Law 468-a, 22 NYCRR 118-1; referrals by judges, law enforcement or governmental agencies, etc., or conduct brought to the Committee's attention by other sources, i.e., newspaper articles.

III. The Disciplinary Process in the Tenth Judicial District

A. Every complaint is assigned to a staff counsel for review

B. Intake and Screening of complaints may result in:

1. Transfer to other agencies such as Bar Association Grievance Committees, mediation, bar association fee dispute resolution committees (parts 136, 137), bar association fee conciliation committee

2. Determination that an investigation not warranted:

a. Failure to state a complaint (i.e. no basis to conclude the attorney engaged in unprofessional conduct);

b. Complainant is merely seeking advice;

c. Allegations intertwined with pending litigation (if evidence of professional misconduct is established during litigation, matter may be opened at a later time);

d. The complainant has a legal remedy.

3. Open an Investigation

C. Investigation of allegations of professional misconduct

1. The respondent is sent a copy of the complaint and a background questionnaire (copy of the questionnaire is annexed). The Respondent is requested to submit two copies of his/her answer within fifteen days along with the completed background questionnaire.

a. Duty of Cooperation and Candor

(1) Every attorney has the duty to respond promptly to inquiries from a disciplinary committee and the failure to do so constitutes misconduct independent of the merits of the complaint and could lead to immediate suspension. [22 NYCRR Section 691.4(l)(1)(a)]

(a) Failure to cooperate includes - failure to answer a complaint, respond to a written inquiry of the Committee, appear or produce records in response to a judicial subpoena.

(b) Failure to respond to a Petition containing charges of professional misconduct could result in disbarment. In re Jacobs, 185 AD2d 61 (2d Dept., 1993)

(2) An attorney has the duty to be candid in a disciplinary proceeding and there is "no justification for false or evasive testimony." In re Ushkow, 34 AD2d 159 (2d Dept., 1970)

2. A copy of the respondent's answer is forwarded to the complainant who has fifteen days to submit a reply.

3. The respondent may be asked to submit to interviews, an examination under oath, provide documents including files and escrow records. (The Committee is authorized to seek a judicial subpoena for attendance by a respondent and production of records. 22 NYCRR 691.5)

4. The Committee may also subpoena production of books or records by other entities (e.g. banks) or for the attendance of witnesses.

5. A subcommittee hearing consisting of three committee members may be convened to take evidence during an investigation.

6. The pendency of an investigation does not sever the attorney-client relationship, particularly in a litigated matter, and the respondent must take appropriate steps to ensure that his/her client's rights are protected.

7. At the conclusion of the investigation, the Committee meets, reviews the facts of the investigation and makes a determination.

D. Committee Dispositions

1. Dismissals - where no finding of misconduct

2. Dismissals with Advisements - where no finding of misconduct but advice to respondent appropriate to address issue noted during the investigation.

3. Letter or Caution - not discipline, but utilized when attorney acted in a manner not constituting clear professional misconduct, but involving behavior requiring comment. (Respondent may request a hearing to appeal Committee's determination 22 NYCRR 691.6)

4. Admonition - Constitutes discipline privately imposed by letter, sometimes personally served by Committee Chairperson. Letter will specify particular rule(s) violated. (Respondent may request a hearing to appeal Committee's determination 22 NYCRR 691.6)

5. Subcommittee Hearing consisting of three committee members will hear appeals of Letters of Caution and Admonitions.

6. Reprimand - Constitutes discipline imposed after subcommittee hearing. (This is the same level of discipline as an Admonition)

7. Recommendation to refer the matter to the Appellate Division for formal Disciplinary Proceedings.

E. Formal Disciplinary Proceedings in the Appellate Division

1. Upon authorization by the Appellate Division to institute formal charges, a Special Referee is appointed to preside over the matter.

2. Formal disciplinary proceedings are civil in nature and the process is akin to a Special Proceeding under CPLR Article 4.

a. The proceeding begins with the filing of a Notice of Petition and Petition served on the respondent containing specific charges of misconduct. The Respondent then serves an answer to the Petition. Staff counsel prosecute the matter on behalf of the Committee.

3. A hearing is conducted before a Special Referee

a. The standard of proof in a disciplinary proceeding is fair preponderance of the evidence. Matter of Capoccia, 59 NY2d 549 (1983)

b. The parties may submit post-hearing memoranda

c. The Special Referee issues a report of his/her findings to the Appellate Division.

4. After the Special Referee's report is issued, the parties make motions to the Appellate Division to confirm or disaffirm the findings in the report of the Special Referee. (At this point, the prior disciplinary history of the respondent is presented to the Court)

5. If charges are sustained by the Appellate Division, discipline includes: Public Censure, Suspension, or Disbarment of an attorney.

IV. **Direct Appellate Division Discipline (not referred by action of the Grievance Committee)**

A. Criminal convictions -

1. An attorney convicted of a NY felony or foreign or federal felony "essentially similar" to a NY felony ceases to be a lawyer at the moment of plea or verdict and is subject to automatic discipline directly from the Appellate Division. A motion is made by staff counsel to strike the attorney's name from the roll of attorneys. Judiciary Law §90 (4). See, Matter of Ginsberg, 1 NY2d 144 (1956); Matter of Barash, 20 NY2d 154 (1967)

2. An attorney convicted of a "serious crime" [Judiciary Law 90 (4)(d), 22NYCRR 691.7(b)] which is defined as a foreign or federal felony not essentially similar to a NY felony or a crime in which a necessary element involves criminal contempt, false swearing, fraud, deceit, bribery, theft, moral turpitude, etc. is subject to formal disciplinary charges at a hearing held before a Special Referee appointed by the Appellate Division.

   a. At the hearing, the respondent may not offer evidence inconsistent with the essential elements of the crime for which (s)he was convicted, but may offer mitigation.

B. Reciprocal Discipline (22 NYCRR 691.3)

1. Any attorney disciplined in another jurisdiction may be disciplined in NY based on the finding of misconduct in the other jurisdiction. The attorney is subject to a formal disciplinary hearing before a Special Referee appointed by the Appellate Division.

   a. The respondent may defend by demonstrating that (s)he was deprived of due process in that jurisdiction, or that there was an infirmity of proof in the other jurisdiction, or that the imposition of discipline by the Appellate Division would be unjust.

C. Resignations by attorneys under investigation (22 NYCRR 691.9)

1. An attorney may tender a resignation of his/her license to practice law while subject to an investigation. (S)he must submit an affidavit including a statement that the resignation is freely and voluntarily rendered, that (s)he is aware of the implications; (s)he is aware of the investigation into misconduct, the nature of which is set forth; and (s)he acknowledges that (s)he could not successfully defend himself/herself on the merits of the charges under investigation. If the Court accepts the resignation, an order is issued disbarring the attorney.

D. Interim Suspension [22 NYCRR 691.4(l)(1)]

1. An attorney under investigation by a grievance committee or the subject of a formal disciplinary proceeding may be suspended from the practice of law until the disciplinary matters have been concluded (even where there has not yet been a determination of the charges) upon a finding that (s)he is guilty of professional misconduct immediately threatening the public interest.

a. The suspension may be based on: the attorney's failure to cooperate with an investigation; a substantial admission under oath that (s)he has committed serious misconduct; or uncontroverted evidence of professional misconduct.

E. Diversion Program - 22 NYCRR 691.4 (m)

1. An attorney who is suffering from alcoholism or substance abuse dependency may apply, while the subject of an investigation or formal disciplinary proceeding, to have the investigation or proceeding stayed while (s)he completes a monitoring program sponsored by a lawyer's assistance program approved by the court.

a. Determination to permit diversion will be based on consideration of: whether the alleged misconduct occurred during period when the attorney was suffering from alcohol or drug abuse or dependency; whether the alleged misconduct is related to the alcohol or drug abuse or dependency; the seriousness of the allegations; and whether diversion is in the best interests of the public, the legal profession and the attorney.

2. Upon successful completion of the monitoring program, the Court may direct the discontinuance or resumption of the investigation or proceeding or take other appropriate action.

V. Confidentiality [Judiciary Law 90 (10); 22 NYCRR 691.4(j)]

A. Complaints, investigations, proceedings conducted by a grievance committee relating to the conduct of attorneys are sealed and deemed private and confidential, unless ordered unsealed by the Appellate Division for good cause shown.

B. However, if charges are sustained by the Appellate Division after a formal disciplinary proceeding, the records and documents are deemed "public records."

A BRIEF OVERVIEW OF THE DISCIPLINARY PROCESS

Complaints, Investigations and Dismissals

The disciplinary process usually commences with the filing of a complaint against an attorney, who is referred to as a "respondent." Some 2883 matters were opened in 2012, primarily based on complaints from clients, but also from other attorneys and members of the public at large. The Committee also opened *sua sponte* investigations based on information which appeared in judicial opinions, professional journals, referrals from the judiciary, dishonored check notifications from the Lawyers' Fund for Client Protection, newspaper accounts and other sources.

Complaints are date-stamped, numbered and entered into the Committee's computer system, which generates a printout of the respondent's disciplinary history with the Committee, as well as current information from the respondent's registration with the Office of Court Administration. The complaint is then screened by a staff attorney, who makes a preliminary recommendation as to whether the Committee has jurisdiction, or whether the complaint should be referred to another public agency or disciplinary committee. If it appears that there is no substantial misconduct, but there has been a breakdown of communication between the lawyer and the client, staff may refer the matter for mediation by the mediation panel of the New York County Lawyers' Association, the Association of the Bar of the City of New York, or the Bronx County Bar Association.

The screening attorney may also recommend rejection of a complaint for any one of several reasons, e.g., the complaint seeks legal advice, is an attempt to collect a debt, or involves a fee dispute. In 2002, a mandatory mediation/arbitration program was instituted to deal with fee disputes in civil and matrimonial matters, where the representation began after January 1, 2002 and involves a dispute of more than $1,000 and less than $50,000.

If the complaint involves the same substantial and material allegations that will be decided in pending litigation, the Committee may defer the matter pending resolution of the litigation, which may result in a judgment binding on the respondent. Staff's recommendation to close a matter pending resolution of an ongoing litigation must be approved by a lawyer member of the Committee. In such cases, the Committee will independently monitor the progress of the litigation with a view to reopening the complaint upon resolution of the litigation. If it otherwise appears that the complaint has no merit, a lawyer member of the Committee may dismiss the matter after the initial screening.

If it appears from the complaint that a respondent may have engaged in serious professional misconduct, the "first screening attorney" brings the matter to the attention of the Chief Counsel for direct assignment to a staff attorney. If the misconduct appears to be

very serious, e.g., conversion of escrow funds, the Chief Counsel instructs the assigned attorney to expedite it. During the initial screening, a matter may also be directly assigned to a staff attorney investigating other complaints involving the same respondent.

If a matter is not closed following the initial screening, a paralegal monitors the case while preliminary information is obtained from the respondent, who is required to file an answer to the complaint, and from the complainant who is sent a copy of the respondent's answer for a reply. The paralegal then writes a summary of the allegations and defenses and refers the file to the initial or "first screening attorney" who performs a "second screening" or further evaluation of the complaint, answer and reply. The staff attorney may also recommend referral to mediation/arbitration at this point. If the staff attorney recommends dismissal, a lawyer member of the Committee reviews that written recommendation together with the file, and a draft letter to the complainant explaining why the case is being closed. A matter that warrants additional investigation is forwarded to the Chief Counsel for review and assignment to a staff attorney.

The staff attorney who is assigned to the matter may obtain further documentation, using subpoenas when necessary, may interview witnesses, including the complainant, and may question the respondent on the record and under oath (examination under oath, deposition).

When the investigation is complete, the staff attorney recommends dismissal, an admonition (which is private discipline), or formal charges. The Chief Counsel reviews all staff attorney recommendations to dismiss a matter from their assigned caseload before the recommendation is reviewed by a Committee member. A Committee member must approve each recommendation for dismissal. When matters are dismissed on the merits, the closing letter to the complainant indicates the complainant's right to request reconsideration of the dismissal within 30 days.

The Committee's investigations are confidential pursuant to Judiciary Law 90(10) unless the Court orders otherwise.

Admonitions

The Committee issues a Letter of Admonition when an investigation reveals that a respondent has violated the New York Rules of Professional Conduct (Rules), but not seriously enough to warrant a public sanction. For example, an admonition might be issued if a respondent neglected only one legal matter and there were mitigating factors.

The New York Rules of Professional Conduct, which became effective April 1, 2009, were promulgated by a Joint Order of the Appellate Divisions of the State of New York,

dated December 30, 2008, signed by the Presiding Justice of each of the four departments. These rules replaced the Lawyer's Code of Professional Responsibility, previously referred to as the "Disciplinary Rules."

Although it is private and remains confidential, an admonition is a finding of professional misconduct and becomes a part of the respondent's permanent disciplinary record. The admonition will be considered in determining the extent of discipline imposed in the event that there are future charges of misconduct against a respondent (see 22 NYCRR 605.5[b]). A staff attorney's recommendation to issue an admonition is reviewed by a Deputy Chief Counsel and the Chief Counsel, and must be approved by two Policy Committee members. Admonitions are not given without admissible and substantial proof of misconduct. If a respondent refuses to accept an admonition, he or she may request that the Committee file formal charges instead. In that case, staff must be able to prove the misconduct, by a preponderance of the evidence, before a Referee; or, the respondent may ask for reconsideration of the admonition by the Chair. In that case the Chair sustains, or vacates the admonition. In 2012, the Committee issued 71 Letters of Admonition, covering 84 separate complaints. (An admonition may be based on more than one complaint against a respondent.) Seldom do respondents demand a hearing; more often they accept the admonition, or request reconsideration from the Chair.

Formal Charges

A staff attorney's recommendation that formal charges be filed must be based on a demonstration of professional misconduct reviewed by the staff attorney's supervisor, a Deputy Chief Counsel, and approved by the Chief Counsel and two lawyer members of the Policy Committee. When formal charges are approved, the Chief Counsel requests that the Court appoint a Referee to hear the charges. Under the Court's rules, all hearings on formal charges are conducted by Court-appointed Referees. Respondents have the right to appear, to be represented by counsel, to cross-examine staff witnesses, and to present their own witnesses and exhibits. The proceedings before the Referee are transcribed, and are conducted in two separate parts, liability hearing and sanction (mitigation and aggravation evidence) hearing. A Referee cannot proceed with a sanction hearing until he or she indicates that at least one charge will be sustained. A Referee should make a finding on the charges shortly after the end of the liability hearing. The Referee almost always asks the parties to submit memoranda regarding liability and sanction. When the hearing, liability and sanction, is concluded, the Referee must file a written Report and Recommendation within 60 days containing findings of facts, conclusions of law and, charges sustained or dismissed, and recommendation as to sanction (Report).

The Chair then refers the Referee's Report to a Hearing Panel, usually consisting of at least six lawyers and a non-lawyer member of the Committee. The Hearing Panel reviews

the full record of the proceedings as well as the Referee's Report. It then convenes to hear oral argument to determine whether to confirm, disaffirm, or modify the findings of fact, conclusions of law and sanction in the Referee's Report. No additional evidence may be considered at the oral argument, which is not transcribed. The Hearing Panel is required to issue a Hearing Panel Determination in writing (Determination) within 40 days of the argument or 10 days from the submission of briefs, whichever is shorter.

A formal hearing may result in a recommendation of disbarment, suspension, public censure, private reprimand, or dismissal. The first three, which are public discipline, are imposed only by the Court. A private reprimand may be imposed by the Committee on its own or by referral from the Court. The Chair issues the private reprimand. (see 22 NYCRR 605.5[a][4]).

Serious Crimes

In cases where the Court, on the Committee's motion, has determined that a lawyer has been convicted of a crime which is not a felony, but is a "serious crime" under New York's Judiciary Law 90(4)(d), the Court may assign the case to a Referee or directly to a Hearing Panel on the sole issue of sanction. In the latter case, the Hearing Panel, as the trier of fact, conducts a hearing which is transcribed, and then renders a recommendation as to what action should be taken by the Court. Serious crime cases may result in the same range of sanctions imposed in charges cases. The Court assigns most serious crimes cases directly to a hearing panel.

Applications to the Appellate Division

Public discipline requires an order of the Court. The Committee applies to the Court by motion or petition which includes the record of the disciplinary proceedings and the Court action requested. When the Court decides to impose a public sanction, it issues an order and a written opinion which is almost always published in the New York Law Journal and is otherwise public. In matters involving a hearing on charges, the Committee files a petition, reviewed and signed by the Chair, with the Court to confirm a Hearing Panel's Determination; or, the Chief Counsel files a motion to disaffirm a Hearing Panel's Determination.

Rather than formal charges, the Committee may seek a Court order in an appropriate case applying the doctrine of collateral estoppel and finding a lawyer guilty of violating the Rules solely on the basis of prior civil or criminal court decisions without a further hearing. The petition may be granted where the findings and issues in the prior action are identical to the disciplinary issues against a respondent and where a respondent has had a full and fair opportunity to litigate in the prior proceeding. In such cases, a hearing will be held before a

Referee/Hearing Panel on the issue of sanction only. Mostly, the Court assigns collateral estoppel cases directly to a Hearing Panel.

Certain other matters are also filed directly with the Court. For example, when a respondent fails to cooperate with a Committee investigation and the respondent's conduct otherwise poses an immediate threat to the public, the Committee may file a motion for an interim suspension, pending a hearing under 22 NYCRR 603.4(e). If the Committee obtains uncontroverted evidence that the attorney has continued to engage in the practice of law during the period of suspension, the Committee will petition the Court to disbar the attorney for violating its order.

The Committee also files a petition directly with the Court when an attorney has been convicted of a felony in New York, or the equivalent of a New York felony in another jurisdiction (see Judiciary Law 90[4]). The Committee files similar applications if an attorney has been found guilty of an ethical violation in another jurisdiction and "reciprocal discipline" is warranted (see 22 NYCRR 603.3); if an attorney has violated a court-ordered suspension; or, has become incapacitated due to a mental or physical infirmity (see 22 NYCRR 603.16).

Hearings before Referees and Hearing Panels are normally closed to the public, except in rare cases when a respondent waives confidentiality. The Referees conduct hearings like trials, taking testimony and receiving exhibits in accordance with the rules of evidence. The Referees have broad discretion as to what is considered relevant and admissible evidence. A transcript is made of the entire proceeding. If the Court imposes public discipline, the entire record is available for public inspection at the First Department Committee on Character and Fitness located at 41 Madison Avenue, 26th Floor, New York, New York 10010.

MISUSE OF ESCROW FUNDS
RETAINER AGREEMENTS, BILLING & FEES
NEGLECT AND PERSONAL CONDUCT

MISUSE OF ESCROW FUNDS

I. The Rules of Professional Conduct

A. Which Rules are used for charges

(i) There is no Rule explicitly prohibiting "intentional conversion." Rule 8.4(c) (formerly DR 1-102[a][4], and having the identical language) is therefore used to charge respondents with intentional conversion of funds. That section prohibits attorneys from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." To establish liability, we must prove by a preponderance of the evidence that respondent intentionally used escrow funds for personal purposes without permission or authority. Replacement of the funds is not a defense. "Venal intent," a phrase you may hear from respondent's counsel, has been defined as the knowing withdrawal by an attorney of escrow funds without permission or authority for the attorney's personal use. Thus, "venal intent" is not an added element of intentional conversion. See e.g., Matter of Kirschenbaum, 29 A.D3d 96 (1st Dept 2006); Matter of Nitti, 268 A.D.2d 41 (1st Dept 2000.) Cf. Matter of Salo 77 A.D.3d 30 (1st Dept 2010) (finding that the attorney lacked the intent to be liable for violating DR 1-102(a)(4) where his post traumatic stress disorder, arising from the 9/11 attacks, negated intent.)

(ii) Rule 1.15(a)] (formerly DR 9-102[a], with identical language) states that an attorney "in possession of any funds or other property belonging to another, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own." This section does not contain specific intent as an element. Thus, an attorney violates it if funds that the attorney is holding on another's behalf incident to the practice of law fall below the amount required to be held by the attorney. A common reason is inadequate record keeping for the escrow account by the attorney. See e.g., Matter of Francis, 78 A.D.3d 106 (1st Dept 2010).

II. The Case As Presented

A. A number of fact patterns can be presented.

(i) **The dishonored escrow check:** 22 NYCRR §1300 codifies the requirement that banking institutions which hold attorney escrow funds report a dishonored "payable instrument" from such accounts to the Lawyers' Fund for Client Protection, which then reports to the appropriate Grievance/Disciplinary Committee. This triggers an audit of the account, where Committee Staff demands required bookkeeping records from the attorney (usually six months preceding the date of the dishonored check), and an explanation for the dishonored check. The Committee has an accountant on staff.

(a) For the audit, Committee Staff demands bank records, canceled checks, deposit slips, and a ledger or similar record, in order to reconcile the account transactions. Often we will subpoena the bank records from the bank as well. Required bookkeeping records are listed in Rule 1.15(d) (formerly DR 9-102[d], with identical language) and must be maintained for 7 years from the date of the connected transaction.

(b) Not having some or all of the records required by Rule 1.15(d) is in itself a disciplinary violation. Rule 1.15(j) (formerly DR 9-102[j]).

(c) Reconciliation by client matter will show whether the funds of any particular client have been misappropriated. Even if the dishonored check is satisfactorily explained, the audit can reveal other unrelated misappropriation of funds.

(d) Frequently, the attorney will assert that he/she did not maintain the required bookkeeping records and invaded client or third-party escrow funds by mistake. As discussed below, this will lead to a sanction far lower than for intentional conversion. Evidence of intent, if not obtained by attorney admissions, can be gleaned from circumstantial evidence such as multiple checks to "cash" (prohibited by Rule 1.15 [e], formerly DR 9-102[e]), checks clearly for the attorney's

personal expenses, or checks payable to the attorney that cannot be explained as fees or other legitimate client-related expenditures.

(ii) **Client or Third-Party Complaints:** Typical cases are where a client or third-party entitled to receive escrow funds from the attorney will assert that the attorney has not turned over the required funds for a lengthy period of time without adequate explanation. This will trigger the same audit as discussed above, and the same type of investigation.

III. Sanction

A. Intentional Conversion

(i) **General Rule:** "absent extremely unusual mitigating circumstances, an attorney who has intentionally converted client funds is presumptively unfit to practice law, and should be disbarred." Matter of Bernstein, 41 A.D.3d 49 (1st Dept 2007); See also Matter of Crescenzi, 51 A.D.3d 230 (1st Dept 2008).

(ii) For about the past eleven years the Appellate Division has greatly narrowed the list of factors that will be accepted as "extremely unusual mitigating circumstances." Factors such as personal financial problems, replacement of the funds, unblemished disciplinary record, cooperation with the Committee, self-reporting to the Committee, or even self-imposed suspension from the practice of law have been found insufficient to avoid disbarment. See Kirschenbaum, supra.

(iii) Evidence of psychological or other serious personal problems can serve as sufficient mitigation if a causal nexus is established between the asserted problem and the intentional conversion. See Matter of Salo, supra.; Matter of Molinini-Rivera, 24 A.D.3d 36 (1st Dept 2005) (suspending attorney for 5 years for intentional conversion where attorney showed causally connected and serious personal/psychological problems involving, inter alia, a marriage where she was physically abused.).

(iv) Some Older Aberrational Cases: Matter of Albanese, 274 A.D.2d 284 (1st Dept 2000) (attorney suspended for 4 years for intentional conversion of real estate down payment and other misconduct where attorney had unblemished disciplinary record, the misconduct was aberrational, and the complainant's intent in filing the complaint was malevolent); Matter of Munzer, 261 A.D.2d 87 (1st Dept 1999) (attorney suspended for 1 year for intentional conversion where the misconduct was mitigated by the fact that the attorney and his wife had been burned out of their apartment and used the funds to pay for repairs to the apartment. The attorney also had no disciplinary history, he exhibited great remorse and shame for his actions, and he showed that the seller would have loaned the money to him had he asked).

B. Unintentional/Negligent Misappropriation

(i) Sanctions can range somewhat widely depending upon the magnitude of the misappropriation.

(iii) General Rule: public censure is appropriate where the respondent expresses remorse and cooperates with the Committee. See e.g., Matter of Francis, supra, at 110; Matter of Dalley, 16 A.D.3d 90 (1st Dept 2005).

(iii) Suspension is more likely if the misconduct was relatively greater in its magnitude and also depends on any mitigating or aggravating factors. See, e.g., Matter of Salo, supra, at 37-38; Matter of Tepper, 286 A.D.2d 79 (1st Dept 2001) (suspending the attorney for two years for unintentional misappropriation of escrow funds and other misconduct in connection with escrow account maintenance); See also Matter of Whitehead, 37 A.D. 3d 86 (1st Dept 2006).

Retainer Agreements, Billing, and Fees

Neglect and Personal Conduct

NEGLECT

I. The Rules

A. Diligence

Rule 1.3(a) affirmatively requires an attorney to represent a client with reasonable diligence and promptness; (b) prohibits a lawyer from neglecting a client matter [formerly DR 6-101(A)(3) of the Code]; and (c) prohibits a lawyer from intentionally failing to carry out a contract of employment with a client [formerly DR 7-101(A)(2)].

B. Communication

Rule 1.4 (a)(1) requires an attorney to promptly inform a client of: (i) any issue requiring a client's informed consent; (ii) any information required to be relayed to the client by court rule or law; (iii) material developments in the case, such as settlement or plea offers.

Rule 1.4(a)(2) requires a lawyer to reasonably consult with the client about the means by which the client's objectives are to be accomplished;

Rule 1.4(a)(3) and (4) require a lawyer to keep the client reasonably informed about the status of a matter and respond promptly to reasonable requests for information;

Rule 1.4(a)(5) If the client expects assistance from the lawyer not permitted by the Rules or by law, the lawyer must inform the client about the relevant prohibitions.

Rule 1.4(b) requires a lawyer to explain a matter to the extent reasonably necessary for the client to make informed decisions.

[An attorney's general failure to communicate with a client was deemed to be a violation of the former DR 6-101(A)(3) of the Code. The specific failure to communicate a settlement offer to a client was deemed to be an intentional failure to seek the lawful objectives of the client, in violation of the former DR 7-101(A) (1) of the Code. *Matter of Dixon*, 241 AD2d 93 (1st Dept 1998); *Matter of Yagman*, 263 AD2d 151(1st Dept 1999)]

II. The Case as Presented

A. Typical case: bare bones complaint – "I hired Mr. X to bring a personal injury action after my accident two years ago – I signed a retainer and authorizations, never heard from him again, and now he won't take my calls"

B. Merely a failure to communicate, or is there more to it?

C. Additional facts: pattern of misconduct; misrepresentations to clients; statute of limitations; misrepresentations to Committee or foot-dragging during investigation stage; abandonment of practice
Matter of Kuhnreich, 21 AD3d 1 (2005) (2 years);
Matter of Leavitt, 291 AD2d 37 (2002) (18 months)

III. Typical Defenses

- Case had no merit anyway/ "no harm no foul"
Matter of Chasin, 183 AD2d 366 (1992) (3 months)
- Poor office management
- Client said "not interested"
- "I never agreed to litigate"
- Alcohol/drug abuse/mental or personal problems
  - Sanction only, not defenses
  - Must be directly and causally linked to misconduct
Matter of Kleefield, 22 AD3d 94 (2005)
  - Must be diagnosed by a qualified professional
Matter of Teschner, 7 AD3d 46 (2004)
- Delay was "strategic" *Matter of Kovitz, 118 AD2d 285 (1986)*

IV. Mitigating Factors

- No prior discipline
- Inexperience *Matter of Hartman, 259 AD2d 131 (1999)* (censure)
- Isolated incident see *Matter of Harley, 305 AD2d 13 (2003)*
- Character testimony: limited to reputation
- Pro bono work *Matter of Lenoir, 287 AD2d 243 (2001)* (censure)
- Genuine contrition *Matter of Flynn, 39 AD3d 116 (2007)* (one year)
- Depression *Matter of Rosenkrantz, 305 AD3d 13 (2003)* (6 months)
- Restitution *Matter of Danas, 236 AD2d 44 (1997)* (6 months)
- Corrective steps *Matter of Salomon, 78 AD3d 115 (2010)* (censure)

V. Aggravating Factors

- No contrition
- Pattern or duration of misconduct *Matter of Samuely, 80 AD3d 163 (2010)* (two years)
- Prior disciplinary history *Matter of O'Shea, 25 AD3d 203 (2005)* (two years)
- Misrepresentations to client *Matter of Berkman, 32 AD3d 39 (2006)* (9 months)
- Failure to return unearned fee *Matter of Benick, 293 AD2d 176 (2002)* (18 months)
- Conduct at hearing, especially evasiveness, lack of candor, delays
  Matter of Nuzzo, 846 NYS2d 108 (2007) (one year)
  Matter of Rabinowitz, 189 AD2d 402 (1993) (three years)

VI. The Worst Case Scenarios

Matter of Evangelista, 233 AD2d 1 (1997) - multiple neglects, failure to return fees, alteration of documents to the Committee (disbarred)

Matter of Furtzaig, 305 AD2d 7 (2003) - multiple lies to multiple clients, forgery as part of cover-up (5 year suspension)

Matter of Day, 29 AD3d 240 (2006) - lengthy pattern of neglect plus two forgeries, non-cooperation (disbarred)

ATTORNEY DISCIPLINARY ACTIVITIES
SUMMARY JANUARY-DECEMBER 2013

UCS-176

ATTORNEY DISCIPLINARY ACTIVITIES

PERIOD COVERED (Annual)
JANUARY - DECEMBER 2013

TENTH JUDICIAL DISTRICT — SECOND DEPARTMENT

I. MATTERS PROCESSED:

A. Matters Pending at Start of Period	1,099	
B. New Matters During Period	1,632	
C. Closed Matters Re-activated During Period	31	
D. Total Matters to be Processed During Period		2,762
E. Total Matters Disposed of During Period		1935
F. Matters Pending at End of Period		827

II. MATTERS DISPOSED OF BY COMMITTEE

	Cases	Matters
A. Rejected as Failing to State a Complaint	830	830
B. Referred to Other Disciplinary Committees	272	272
C. Referred to Other Agencies	111	111
D. Dismissed or Withdrawn	312	312
E. Dismissed through Mediation	48	48
F. Letter of Caution	86	97
G. Letter of Admonition	45	61
H. Reprimand	0	0
I. Referred to Appellate Division (DPs)	40	73
J. Other	75	131
Total Disposed of During Period	1819	1935

III. CASES PROCESSED IN ALL COURTS

A. Cases Pending at Start of Period	100
1. Disciplinary Proceedings	48
2. Other	52
B. Cases Received During Period	116
1. Disciplinary Proceedings	40
2. Other	76
C. Total to be Processed During Period	216

ATTORNEY DISCIPLINARY ACTIVITIES

D. Cases Closed

1. Disbarred	9
2. Disciplinary Resignations	8
3. Suspended	15
4. Censured	6
5. Privately Censured	0
6. Remanded to Grievance Committee	6
7. Discontinued	8
8. Dismissed	8
9. Reinstatements Granted	6
10. Reinstatements Denied	5
11. Non-Disciplinary Resignation	23
12. All Other Dispositions	42
13. Total Closed	136

E. Total Cases Pending at End of Period 80

1. Disciplinary Proceedings	53
2. Other	27

Dated: January 7, 2014
Hauppauge, New York

Respectfully Submitted,

ROBERT A. GREEN, Chief Counsel

EXAMPLES OF COMMITTEE LETTERS

STATE OF NEW YORK
GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT
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DOUGLAS K. KRONENBERG
INVESTIGATORS

Shortly thereafter the [illegible]

After deliberation, the Committee determined that there was no violation of the rules and laws governing attorney conduct, and the underlying complaint was dismissed. However, an Admonition was issued to the attorney for engaging in conduct prejudicial to the administration of justice, in violation of Rule of Professional Conduct 8.4(d) and engaging in conduct that adversely reflects on his fitness as a lawyer, in violation of Rule of Professional Conduct 8.4(h), by failing to promptly or completely cooperate with the Committee's disciplinary investigation. This sanction becomes a permanent part of the attorney's disciplinary record maintained by the Committee.

With this action the matter is concluded. The determination does not preclude you from pursuing any legal remedy which may be available to you.

The Committee wishes to thank you for bringing this matter to our attention.

Very truly yours,

ABRAHAM B. KRIEGER
Chairman

ABK:RHC:nj

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NANCY B. GABRIEL
ELIZABETH A. GRABOWSKI
STACEY J. SHARPELLETTI
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IAN P. BARRY
CAROLYN MAZZU GENOVESI
ASSISTANT COUNSEL

CHRISTOPHER C. KERN
DOUGLAS K. KRONENBERG
INVESTIGATORS

engagement outside matter w/o expertise

After deliberation, the Committee determined that the attorney's conduct constituted a breach of the Rules of Professional Conduct and directed that an ADMONITION be issued to the attorney for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of former Disciplinary Rule 1-102(A)(4) of the Lawyer's Code of Professional Responsibility (now Rule of Professional Conduct 8.4[c] effective April 1, 2009); engaging in conduct that is prejudicial to the administration of justice, in violation of former Disciplinary Rule 1-102(A)(5) of the Lawyer"s Code of Professional Responsibility (now Rule of Professional Conduct 8.4[d] effective April 1, 2009); accepting employment and acting as an advocate on issues of fact where he knew, or it was obvious, that he ought to be called as a witness in a tribunal, in violation of former Disciplinary Rule 5-102 of the Lawyer's Code of Professional Responsibility (now Rule of Professional Conduct 3.7[a] effective April 1, 2009); engaging in an improper conflict of interest, in violation of former Disciplinary Rule 5-105(A) and 5-108(A)(1) of the Lawyer's Code of Professional Responsibility (now Rule of Professional Conduct 1.9[c] and 1.18[b] effective April 1, 2009); and engaging in conduct that adversely reflects on his fitness as a lawyer, in violation of former Disciplinary Rule 1-102(A)(7) of the Lawyers Code of Professional Responsibility (now Rule of Professional Conduct 8.4[h] effective April 1, 2009).

This sanction becomes a permanent part of the attorney's disciplinary record maintained by the Committee.

With this action the matter is concluded. The determination does not preclude you from pursuing any legal remedy which may be available to you.

The Committee wishes to thank you for bringing this matter to our attention.

Very truly yours,

ABRAHAM B. KRIEGER
Chairman

ABK:RHC:nj

STATE OF NEW YORK
GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT
150 MOTOR PARKWAY
SUITE 102
HAUPPAUGE, N.Y. 11788
(631) 231-3775

ABRAHAM B. KRIEGER, ESQ.
CHAIRMAN

FREDERICK C. JOHS, ESQ.
VICE-CHAIRMAN

ROBERT A. GREEN
CHIEF COUNSEL

MITCHELL T. BORKOWSKY
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ASSISTANT COUNSEL

CHRISTOPHER C. KERN
DOUGLAS K. KRONENBERG
INVESTIGATORS

After deliberation, the Committee found that while this matter did not rise to the level warranting discipline, a LETTER OF CAUTION was issued to the attorney, cautioning him to hereafter: 1) ensure that non-lawyers with whom he is doing business do not state or give the impression that an attorney/client relationship exists; and 2) affirmatively and in writing, notify any person for whom non-legal work is being performed, that no attorney/client relationship exists; and 3) refrain from allowing documents bearing his firm's letterhead to be issued by a non-lawyer without first being reviewed by an attorney in his firm; and 4) ensure that non-lawyers with whom he is doing business do not engage in practices which constitute illegal conduct.

This determination becomes a permanent part of the attorney's record maintained by the Committee.

With this action the matter is concluded. The determination does not preclude you from pursuing any legal remedy which may be available to you.

The Committee wishes to thank you for bringing this matter to our attention.

Very truly yours,

ABRAHAM B. KRIEGER
Chairman

ABK/LBA/jm

ABRAHAM B. KRIEGER, ESQ.
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FREDERICK C. JOHS, ESQ.
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DOUGLAS K. KRONENBERG
INVESTIGATORS

After deliberation, the Committee found that while this matter did not rise to the level warranting discipline, a LETTER OF CAUTION was issued to the attorney based on his failure to maintain adequate communication with you, his failure to promptly inform you that he would not be continuing his representation in your legal matter, and his failure to promptly refund the unearned portion of his retainer fee. This determination becomes a permanent part of the attorney's record maintained by the Committee.

With this action the matter is concluded. The determination does not preclude you from pursuing any legal remedy which may be available to you.

The Committee wishes to thank you for bringing this matter to our attention.

Respectfully,

ABRAHAM B. KRIEGER
Chairman

ABK:MMF:pel

STATE OF NEW YORK
GRIEVANCE COMMITTEE FOR THE
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CHRISTOPHER C. KERN
DOUGLAS K. KRONENBERG
INVESTIGATORS

Escrow for personal

After deliberation, the Committee found the attorney's conduct constituted a breach of the Rules of Professional Conduct and directed that an ADMONITION be issued to the attorney for having you cash his personal check and then refusing to satisfy his obligation to make good on the check after it was dishonored for insufficient funds, and for thereafter willfully failing to satisfy the judgment you obtained against him. This sanction becomes a permanent part of the attorney's disciplinary record maintained by the Committee.

With this action the matter is concluded. The determination does not preclude you from pursuing any legal remedy which may be available to you.

The Committee wishes to thank you for bringing this matter to our attention.

Respectfully,

ABRAHAM B. KRIEGER
Chairman

ABK:MMF:pel

STATE OF NEW YORK
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ASSISTANT COUNSEL

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DOUGLAS K. KRONENBERG
INVESTIGATORS

After deliberation, the Committee found that while this matter did not rise to the level warranting discipline, a LETTER OF CAUTION was issued to the attorney, cautioning him to hereafter ensure that he does not neglect legal matters entrusted to him. This LETTER OF CAUTION becomes a permanent part of the attorney's record maintained by the Committee.

With this action the matter is concluded. The determination does not preclude you from pursuing any legal remedy which may be available to you.

The Committee wishes to thank you for bringing this matter to our attention.

Respectfully,

ABRAHAM B. KRIEGER
Chairman

ABK:NBG:pel

STATE OF NEW YORK
GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT
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ASSISTANT COUNSEL

CHRISTOPHER C. KERN
DOUGLAS K. KRONENBERG
INVESTIGATORS

After deliberation, the Committee found the attorney's conduct constituted a breach of the Rules of Professional Conduct and directed that an ADMONITION be issued to the attorney for neglecting a legal matter entrusted to him, for failing to keep you apprised of your legal matter, and for engaging in conduct prejudicial to the administration of justice. This ADMONITION becomes a permanent part of the attorney's disciplinary record maintained by the Committee.

With this action the matter is concluded. The determination does not preclude you from pursuing any legal remedy which may be available to you.

The Committee wishes to thank you for bringing this matter to our attention.

Respectfully,

ABRAHAM B. KRIEGER
Chairman

ABK:NBG:pel

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DOUGLAS K. KRONENBERG
INVESTIGATORS

After deliberation, the Committee found the attorney's conduct constituted a breach of the Lawyer's Code of Professional Responsibility and directed that an ADMONITION be issued to the attorney for failing to adequately supervise attorneys and non-attorneys in his firm. This ADMONITION becomes a permanent part of the attorney's disciplinary record maintained by the Committee.

With this action the matter is concluded. The determination does not preclude you from pursuing any legal remedy which may be available to you.

The Committee wishes to thank you for bringing this matter to our attention.

Respectfully,

ABRAHAM B. KRIEGER
Chairman

ABK:MF:pel

STATE OF NEW YORK
GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT
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After deliberation, the Committee determined that there was no violation of the rules and laws governing attorney misconduct, and the complaint was dismissed.

The determination does not preclude you from pursuing any legal remedy which may be available to you. The Committee wishes to thank you for bringing this matter to our attention.

Respectfully,

ABRAHAM B. KRIEGER
Chairman

ABK:MF:pel

The Lawyers' Fund for Client Protection

of the State of New York

Helpful Telephone Numbers

Attorney Disciplinary Committees

(For complaints of lawyer misconduct)

Manhattan & Bronx.....212/401-0800

Brooklyn, Staten Island, Queens....718/923-6300

Nassau & Suffolk.....631/231-3775

Westchester area.....914/824-5070

Albany area.....518/285-8350

Syracuse area.....315/471-1835

Rochester area.....585/530-3180

Buffalo area.....716/845-3630

Office of Court Administration

(For lawyer licensing information)

Official Register of Attorneys.....212/428-2800

Lawyer Referral Services

Contact your local county or city bar association; or call the New York State Bar Association at 800/342-3661.

Fee Dispute Services

Contact the county bar association in the county or borough where the lawyer's office is located for information about the bar association's fee conciliation committee.

The Lawyers' Fund for Client Protection

of the State of New York

Rev. 10/10

What is the Lawyers' Fund?

The Lawyers' Fund for Client Protection was established in 1982 to provide reimbursement to law clients who have lost money or property because of a lawyer's dishonest conduct in the practice of law. The Fund is a remedy for law clients who cannot get reimbursement from the lawyer who caused the loss, or from insurance or other sources.

Why was the Fund Established?

The legal profession depends upon the trust of clients. Very few lawyers violate that trust. Nonetheless, it's important to protect the profession's reputation for honesty, and help injured clients recover their losses.

How is the Fund Financed?

No tax dollars are used. The Fund is financed by registration fees and contributions from more than 200,000 members of the New York bar. Since 1982, more than $102 million in awards have been paid to eligible law clients.

Who Administers the Fund?

A Board of Trustees appointed by the Court of Appeals, New York's high court. The seven Trustees, both lawyers and nonlawyers, serve as a public service and without compensation.

What Losses are Covered?

The Trustees may reimburse losses caused by the dishonest conduct of lawyers admitted to the practice of law in New York, up to a maximum of $300,000 for each client loss.

Dishonest conduct means the wrongful taking of clients' money or other property, *in the practice of law,* after June 1,1981. Clients must apply for reimbursement within two years after they discover their loss.

Typical losses covered by the Fund include the theft of money from estates; escrow funds in real property transactions; and settlements in personal injury actions.

The Trustees cannot discipline lawyers for professional misconduct, resolve fee disputes, or determine legal malpractice claims. Fee disputes and complaints of misconduct or malpractice should be pursued by notifying an Attorney Disciplinary Committee or by civil lawsuit against the lawyer.

County bar associations also have fee conciliation committees to resolve disputes over legal fees. The client should contact the county bar association in the county or borough where the lawyer's office is located.

The Lawyers' Fund for Client Protection
of the State of New York

119 Washington Avenue + Albany, NY 12210
Telephone 518/434-1935 + 800/442-FUND
E-mail: info@nylawfund.org
Web Site: www.nylawfund.org

Where Does a Client File a Claim?

Application forms and other information and help is available from the Fund's office at 119 Washington Avenue, Albany, NY 12210. Telephone 518/434-1935 or 800/442-FUND. Theft by a lawyer must also be reported to the local District Attorney and Attorney Disciplinary Committee.

Are there any Fees Involved?

No. The Fund charges no fees, and claimants are not required to be represented by lawyers to process claims. But, if you feel you need legal help, you should consult counsel.

Court rules in New York State do not permit lawyers to charge legal fees for helping clients process claims with the Fund.

How are Claims Processed?

Each claim is screened to see if the loss is eligible. Ineligible claims are dismissed promptly with an explanation why the loss cannot be reimbursed. Eligible claims are investigated and reports prepared for the Trustees. The Trustees meet four times each year to evaluate claims, and determine the amount of reimbursement that will be allowed.

Losses are not generally reimbursed until disciplinary or other court proceedings involving the accused attorney have been completed. It's important, therefore, that clients cooperate fully in all official investigations involving dishonesty in the practice of law. Once a claim is approved, payment of the award follows in about six weeks.

"Another Bar Exam"

- ☐ 1. Are my associates, clients, secretary or family alleging that my depression, stress, or drug or drinking use is interfering with my work?
- ☐ 2. Do I drink or take drugs alone?
- ☐ 3. Do I ever feel I need to drink or take drugs to face certain situations?
- ☐ 4. Do I isolate and avoid contact with others?
- ☐ 5. Have I ever had a loss of memory when apparently functioning (e.g., a blackout) because of my drinking/drugging?
- ☐ 6. Do I ever drink or use drugs before a meeting or court appearance to calm my nerves or improve my performance?
- ☐ 7. Have I ever missed or adjourned a court appearance, closing, or other appointment because of my drinking/drug use, depression, anxiety or just feeling too overwhelmed to handle responsibilities?
- ☐ 8. Am I overwhelmed by fear, remorse, guilt, loneliness, rage, anxiety, panic, terror or a sense of doom?
- ☐ 9. Is my alcohol/drug use making me careless about my family's welfare, professional obligations or personal responsibilities?
- ☐ 10. Have I ever lied, cheated or stolen to support or cover up my drinking/drug use?

If you have answered *yes to one* or more questions, you owe it to yourself, your family, your clients and your profession to contact the NCBA Lawyers Assistance Program at (888) 408-6222.

NOTE: Any compulsion may fit this questionnaire (ie., eating, gambling, shopping, etc.)

Think about your answers!

Facts About Alcoholism, Drug Abuse, Depression and Stress:

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

Nassau County Bar Association Fund, Inc.

LAP
LAWYER ASSISTANCE PROGRAM

Lawyer Assistance Program

Confidential Help for
Alcoholism, Drug Abuse, Depression and other Mental Health Problems

To make confidential contact, call:

Nassau County Bar Association
Lawyer Assistance Program
Confidential Hotline
1-888-408-6222

All LAP Services are Strictly Confidential

LAP is confidential and protected under **Section 499 of the Judiciary Law.**

Judiciary Law

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

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

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

Please be assured that your confidentiality, and/or that of the individual about whom you are calling, will be protected.

LAP Statement of Purpose

The Nassau County Bar Association Lawyer Assistance Program, NCBA LAP, provides confidential assistance to attorneys, judges and law school students who are struggling with alcohol, drug and/or mental health problems or are affected by the problem of substance abuse, stress, or depression. The program services are free and completely confidential.

We provide these services to our colleagues through our Director Kathleen Devine and a network of volunteer attorneys. We address the problem, identify the appropriate resources, and help you to begin the recovery process.

If you are in crisis, feel you have a problem with alcohol or drugs, or suffer from depression, call us.

We can help.
We want to help.

LAP
LAWYER ASSISTANCE PROGRAM

LAP Hotline
(888) 408-6222

Confidential and Free LAP Services Include

- Referral of impaired attorneys to appropriat local resources, including self-help group out-patient counseling,and detoxificatio and rehabilitation services.
- Information and referral for depression an other mental health problems.
- Early identification of impairment.
- Intervention and motivation of impaire attorneys to seek help.
- Assessment, evaluation and developmer of an appropriate treatment plan.
- Attorney Sobriety Monitoring Program -- referrals from appellate courts and grievance committees.

We are independent of th grievance committees of the Appellat Division and Bar Association.

The LAP is available to all attorneys an judges, as well as their family members whether or not the attorney or judge is member of the Nassau County Bar Associatior

Publication of this brochure was made possible by a grant from the NYS Lawyers Assistance Trust.

THE LAWYERS' PROFESSIONAL LIABILITY INSURANCE POLICY

New York State Bar Association

Risk Management 2014

October 24, 2014
Melville, New York

Presented By:

Matthew K. Flanagan, Esq.
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RISK MANAGEMENT

The Lawyers' Professional Liability Insurance Policy

Any discussion of risk management should start with a discussion of the lawyers' professional liability insurance policies which the vast majority of 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" policies, which means that coverage is triggered by the 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, some policies contain "Prior Acts Exclusions," which state that there is no 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 oftentimes 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.