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ETHICS AND PROFESSIONALISM UPDATE 2014

FEBRUARY 8, 2014

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ETHICS UPDATE 2014:

VIEWS FROM GRIEVANCE COUNSEL, A MEMBER OF THE GRIEVANCE COMMITTEE & DEFENSE COUNSEL

Saturday, February 8, 2014

Gary Casella, Esq. Chief Counsel
Grievance Committee for the 9th Judicial District

Kathleen Donelli, Esq.
McCarthy Fingar LLP, White Plains, N.Y.

Cathy Sheridan, Esq.,
Scalise & Hamilton LLP, Scarsdale, N.Y.

PART 1 - HOT TOPICS IN ETHICS AND PROFESSIONALISM

Presented by Cathy Sheridan, Esq

8:30 - 9:20 AM Overview of NYSBA Advisory Opinions

PART 2 – A. ESCROW ACCOUNTS AND RECORDKEEPING

Panel Discussion Moderated by Gary Casella, Esq.

9:20 - 9:30 AM Escrow Accounts and Recordkeeping- Rule 1.15

9:30 - 9:55 AM Film Clip – "James Bonded"

9:55 - 10:25 AM Discussion

- Best Practices
- Escrow Reconciliations

BREAK 10:25 - 10:45 AM

PART 2 – (cont.) **B. Dishonored Checks**
Panel Discussion Moderated by Cathy Sheridan, Esq.

10:45-10:55AM The Dishonored Check Rule - 22 NYCRR Part 1300

10:55-11:05 AM Judiciary Law Attorneys 497 Fiduciary Funds; IOLA Accounts

11:05–11:20 AM Film Clip - New York Lawyers Fund For Client Protection – Attorney Trust Accounts and Recordkeeping

11:20-12:00 PM Discussion

- Bookkeeping Errors
- Commingling
- Inadvertent Conversion/Misappropriation
- Venal/Intentional Conversion

PART 3 – Fees
Panel Discussion

12:00-12:05 PM Rule 1.5 Fees and Division of Fees

12:05-12:10 PM Letters of Engagement 22 NYCRR Part 1215

12:10-12:35 PM Discussion

- Excessive Fees
- Scope of Representation
- Fee Arrangements
- Non-refundable Retainers
- Division of Fees/Referral Fees

ETHICS UPDATE 2013

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This outline is submitted to briefly describe and deal with current topics of interest in ethics and professionalism. Note that this outline contains references to the Judiciary Law, Rules of Conduct in the Rules of Professional Conduct and its predecessor the Disciplinary Rules ("DR")[2] in the Lawyer's Code of Professional Responsibility (the Code),The Rules of Judicial Conduct, case law, bar association advisory opinions, and Judicial Advisory Opinions. However, this is not an exhaustive list of every case or rule in each area discussed, but merely a basis for discussion!

I. Filing, Accounting and Recordkeeping Requirements

[1] Deborah A. Scalise is the Past President of the White Plains Bar, a Past President of the Westchester Women's Bar Association and has served as Vice President of the Women=s Bar Association of the State of New York (WBASNY), where she also serves as the Co-Chair of the Professional Ethics Committee. She is also the Chair of the New York State Bar Association's Continuing Legal Education Committee. She is the former Deputy Chief Counsel to the Departmental Disciplinary Committee for the First Judicial Department. Sarah Jo Hamilton is the former Secretary to the Character and Fitness Committee and former First Deputy Chief Counsel for the First Judicial Department. She also serves as the Co-Chair of the WBASNY Professional Ethics Committee and the Chair of the New York State Bar Association's Committee on Professional Discipline. They are partners in the firm of *SCALISE & HAMILTON, LLP* in Scarsdale, New York (914) 725-2801. *SCALISE & HAMILTON, LLP,* focuses its practice on the representation of professionals (lawyers, judges, accountants, doctors, dentists, pharmacists, social workers, and government employees) in professional responsibility and ethics matters, and white-collar criminal matters.

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

1. Attorney Registration

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

2. Files and Recordkeeping

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

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

- bank account records for all IOLA, escrow, or special accounts including checkbook registers, checkbook stubs, canceled checks, deposit items and transfer items;
- retainer and compensation agreements;
- disbursement of funds documents;
- closing statements;
- OCA Retainer and Closing Statements (discussed below);
- billing records; and,
- any other records pertaining to financial transactions.

iii. Escrow Rules

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

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

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

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

Case Law

Matter of Tanella, 104 A.D.3d 94 (2d Dep't 2013) [Attorney disbarred following investigation alleging 26 charges of misconduct, including, *inter alia*, mishandling of client funds, failure to maintain required bookkeeping records, failure to safeguard funds entrusted to him as a fiduciary, allowing non-attorneys to exercise control over his law practice, sharing fees with non-attorneys, deceiving clients and third parties regarding settlement negotiations, accepting cases which he was not qualified to handle, serial neglect of client matters, and giving false and misleading testimony to the Grievance Committee, with no mitigating circumstances.]

Matter of Alejandro, 65 A.D.3d 63 (1st Dep't 2009) [Attorney disbarred for a pattern of egregious and continuing misconduct, prior disciplinary history, and 36 current charges, including serial neglect of client matters, failure to promptly return unearned legal fees and pay judgments owed to clients, misuse of escrow account to avoid creditors, submission of a false billing statement, falsely assuring clients that legal work had been performed, and giving false statements and sworn testimony to the Departmental Disciplinary Committee.]

Matter of Pritikin, 105 A.D.3d 8 (1st Dep't 2013) [Attorney suspended for two years for, *inter alia*, misuse of his IOLA account, including commingling a client's personal and business funds, conversion of client funds, and helping a client to avoid tax liens and judgments.]

Matter of Galasso, 94 A.D.3d 30 (2d Dep't 2012), lv to appeal granted, 19 N.Y.3d 832 (May 1, 2012); 19 N.Y.3d 688, 2012 N.Y. LEXIS 2740, 954 N.Y.S.2d 784, 2012 NY Slip Op 7050 (2012); on remand at Matter of Galasso, 2012 N.Y. App. Div. LEXIS 8920

(N.Y. App. Div. 2d Dep't (Dec. 19, 2012); stay granted by Chief Judge Lippman pending appeal (January 2013). [Attorney suspended for two years for transferring over $4 million from a client's escrow account to his firm's accounts for the firm's use.]

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

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

Matter of Silva, 28 A.D.3d 11 (1st Dep't 2006) [Attorney suspended for two years for commingling personal and escrow funds in order to avoid tax liens and a judgment creditor and failure to maintain proper records of escrow account transactions; his misconduct was deemed "a serious scheme of deception and evasion, and an abuse of the escrow account."]

Matter of Goldstein, 10 A.D.3d 174 (1st Dep't 2004) [Attorney suspended for two years for his intentional and improper use of his escrow account to avoid tax liens and failure to identify certain accounts as escrow accounts; his misconduct was mitigated by his advanced age, serious health issues experienced by respondent and his wife, and his unblemished disciplinary history.]

iv. Related Escrow Rules

- *The "Bounced Check Rule"*. 22 N.Y.C.R.R. § 1300 provides that when a check issued by a lawyer on an IOLA or escrow account is dishonored, the bank is required to send notification of the bounced check to the Lawyer's Fund for Client Protection which acts as a clearinghouse for all bounced check notifications. The lawyer has ten (10) days to demonstrate that the check was returned due to bank error. If there is no error, the notification is automatically sent to the grievance authorities in the department where the lawyer maintains an office. Thereafter, an investigation is initiated and the grievance authorities will subpoena the lawyer's bank account

records for at least six months prior to the bounced check. Sanction will depend on a number of factors including, *inter alia*, whether the funds were converted, whether there was harm to a client and the lawyer's disciplinary history.

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

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

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

Case Law

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

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

- Matter of Crescenzi, 51 A.D.3d 230 (1st Dep't 2008). [Attorney disbarred for conversion of client funds despite attempted mitigation of drug addiction since addiction was not causally related to the conversion.]

- *But see*, Matter of Salo, 77 A.D.3d 30 (1st Dep't 2010). [Attorney suspended for one year for misappropriating escrow funds because Court found that misappropriation was inadvertent due to his Post Traumatic Stress Syndrome and his belief that he was taking earned fees.]

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

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

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

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

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

Case Law

- Matter of Connolly, 225 A.D.2d 248 (2d Dep't 1996), motion for leave denied, 225 A.D.2d (1997). [Attorney disbarred for, *inter alia*, conversion of client funds, neglect of client matters and misuse of IOLA account to avoid creditors.]

- Matter of Pritikin, 105 A.D.3d 8 (1st Dep't 2013) [Attorney suspended for two years for, inter alia, misuse of his IOLA account, including commingling a client's personal and business

funds, conversion of client funds, and helping a client to avoid tax liens and judgments.]

- Matter of Silva, 28 A.D.3d 11 (1st Dep't 2006). [Attorney suspended for keeping personal funds in escrow account to conceal them from IRS.]
- Matter of Goldstein, 10 A.D.3d 174 (1st Dep't 2004). [Attorney suspended for two years for, *inter alia*, opening and maintaining two escrow accounts to use solely for his personal and business affairs to avoid IRS tax liens.]
- Matter of Liddy, 276 A.D.2d 100 (2d Dep't 2000). [Attorney suspended for two years for, *inter alia*, opening and maintaining two escrow accounts to use solely for his personal and business affairs to avoid creditors.]
- Matter of Betancourt, 232 A.D.2d 9 (1st Dep't 1997). [Attorney suspended for three years for, *inter alia*, neglect of client matters and misuse of IOLA account to avoid creditors.]
- Matter of Slavin, 208 A.D.2d 86 (1st Dep't 1995). [Attorney suspended for two years for, *inter alia*, opening and maintaining two escrow accounts to use solely for his personal and business affairs and keeping interest generated by client funds.]
- Matter of Dyer, 89 A.D.3d 182 (1st Dep't 2011) [Attorney publicly censured for commingling client and personal funds, failure to maintain adequate balances in his IOLA account, withdrawing cash from the same, and failure to maintain proper records of escrow funds.]
- Matter of Francis, 78 A.D.3d 106 (1st Dep't 2010) [Attorney publicly censured for commingling escrow and personal funds, disbursing personal funds from his IOLA account, and failure to maintain adequate records of transactions.]

II. Division of Legal Fees

1. Rules

22 NYCRR §1200.12 **NY RULE 1.5(g)** (formerly DR 2-107) sets forth rules governing the division of fees among lawyers. Except for specific professions,

set forth in the rules, an attorney may not divide fees with a non attorney. Essentially, a lawyer may divide fees with another lawyer who is not an associate or partner in the same firm only if the division is proportionate to the services performed or the lawyers both assume joint responsibility for the legal services; the client's consent to the retention of both lawyers and to the proportion of fees each lawyer receives is confirmed in writing, and the total fee does not exceed reasonable compensation for all services.

2. Case Law

- Matter of Harrison, 282 A.D.2d 176 (2d Dep't 2001). [Attorney suspended for one year for, *inter alia,* falsely holding himself out as a partner with another lawyer and for improperly dividing fees with another lawyer.]
- Matter of Kuslansky, 230 A.D.2d 104 (2d Dep't 1997). [Attorney censured for, *inter alia,* improper fee splitting with another lawyer.]

3. Ethics Opinions

- NYSBA Op. 806 (2007) New York lawyers may share fees with foreign lawyers where educational, training and ethical standards are comparable and the firms comply with NY Rule 1.5 (g) (formerly DR 2-107.)
- NYSBA Op. 741 (2001) Lawyer may not participate in a business network that requires reciprocal referrals.
- NYSBA Op. 651 (1993) Legal referral service offered by bar association may require lawyers to remit a percentage of fees earned from referrals.
- NYSBA 864 (2011) A lawyer is ethically permitted to work on a personal injury case with an out-of-state lawyer and share legal fees with that lawyer if the arrangement complies with Rule 1.5(g), governing fee-sharing.

III. Ethics and Legal Writing

Legal writing is more than just making a winning argument. In fact, lawyers must raise adverse authority in papers presented before the court. Also, any lack of civility in papers is not only frowned upon, but may have adverse results for the client, as well as

the lawyer. Notwithstanding the foregoing, lawyers are often surprised to learn that a failure to set forth their argument in an ethical and professional manner will not only incur the wrath of the court they are before, but may result in disciplinary sanctions as well.

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

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

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

1. Rules

   - **NY RULE 8.4 (b);(d)** (formerly DR1-102 (A)(5)) [prohibits conduct that prejudicial to the administration of justice]
   - **NY Rule 8.4 (h)** (formerly DR1-102 (A) (7) and (8)) [prohibits conduct that reflects adversely on fitness to practice]

- **NY Rule 5.2(a)** (formerly DR[1-104 (e)) [prohibits lawyer's claim that he/she acted at the direction of another person]
- **NY Rule 1.1(c) (1) & 1.2 (a)** (formerly DR 7-101 (A)(1)) [lawyer can seek lawful objectives of client but should be courteous and considerate to all persons involved in the legal process]
- **NY Rule 3.1 (a) & 3.1 (b) (2)** (formerly DR 7-102 (A)(1)) [lawyer cannot file a suit or assert a claim merely to maliciously harass or injure another]
- **NY Rule 3.1 (b) (1) (formerly DR 7-102 (A)(2))** [lawyer cannot advance a claim or defense that is unwarranted under existing law unless it can be supported by a good faith argument]
- **No replacement NY Rule referenced. (DR 7-102 (A)(3))** [lawyer cannot conceal or fail to disclose that which he/she is required to reveal by law]
- **NY Rule 3.3 (a) (3) (formerly DR 7-102 (A)(4))** [lawyer cannot knowingly use perjured testimony or false evidence]
- **NY Rule 4.1 & 3.1 (b) (3) (formerly DR 7-102 (A)(5))** [lawyer cannot knowingly make a false statement of law or fact]
- **(No NY Rule replacement referenced.) (DR 7-102 (A)(6))** [lawyer cannot create or preserve false evidence]
- **(No NY Rule replacement referenced.) (DR 7-102 (A)(8))** [lawyer cannot engage in other illegal conduct or conduct contrary to a disciplinary rule]
- **NY Rule 3.4 (c) & 3.6 (a) & (d) & (e) (formerly DR7-106(a))** [lawyer shall not disregard or advise his client to disregard a standing rule or ruling of a tribunal]
- **NY Rule 3.3 (a) (2) & 3.6 (b) (formerly DR 7-106 (b)(1))** [lawyer must disclose adverse controlling legal authority]
- **NY Rule 3.3 (e) (formerly DR 7-106 (b)(2))** [lawyer must disclose identities of clients and persons who employed the lawyer]
- **NY Rule 3.4 (d) & 3.4 (c) (formerly DR 7-106 (c)(2))** [lawyer can't ask irrelevant questions intended to degrade a witness or other person]
- **NY Rule 3.4 (d) & 3.6 (c) (formerly DR 7-106 (c)(3))** [lawyer can't assert personal knowledge unless he is testifying as a witness]

- **NY Rule 3.4 (d) & 3.6 (c) (formerly DR 7-106 (c)(4))** [lawyer can't assert personal opinion about a case]
- **NY Rule 3.3 (f) (1)-(3) (formerly DR7-106 (c)(5))** [lawyer must comply with local customs of courtesy or practice]
- **NY Rule 3.3 (f) (1) – (3) (formerly DR 7-106 (c)(6))** [lawyer can't engage in undignified or discourteous conduct before a tribunal]

See also, 22 N.Y.C.R.R. §1200 Appendix A - Standards of Civility

2. Case Law

Federal

- Revson v. Cinque & Cinque, 70 F. Supp.2d 415 (S.D.N.Y. 1999), *rev'd in part, vacated in part,* 221 F.3d 71 (2d Cir. 2000). An attorney was initially fined $50,000 and plaintiff was ordered to pay costs of $3,279.42 due to litigation which should not have been brought. The attorney was held to have engaged in "Rambo" tactics by repeatedly making inappropriate remarks to intimidate and harass the defendant. The attorney threatened to tarnish the defendant's reputation, to "subject him to the equivalent of a proctology exam", served overly broad subpoenas for banking and personal records, threatened to interfere with the defendant's clients, threatened to add a RICO charge and engaged in unfair trial tactics. However, the sanctions were reversed because the attorney's conduct was not sanctionable since some of the frauds claims were colorable and the attorney also apologized for using inappropriate language.
- Schlaifer Nance & Co. et al v. The Estate of Andy Warhol, et al., 194 F3d 323 (2d Cir. 1999). Despite district court's lack of subject matter jurisdiction on an underlying action it can still impose sanctions arising from the underlying case if the challenged claim is without colorable basis and was brought in bad faith. A claim "lacks a colorable basis when it is utterly devoid of legal or factual basis."
- Bartel v. Renard, (J. Martin S.D.N.Y.) New York Law Journal, November 3, 1999. Concerted conduct where a party acted "vexatiously, wantonly or for oppressive reasons" to "deliberately" prevent the execution of a court order warranted a joint and several sanction for one of the parties and its counsel. "While judges are often reluctant to impose sanctions on

members of the legal profession, it is important to remind ourselves that the inappropriate conduct of a lawyer may impose substantial costs on a litigant...If we are to retain society's respect for the administration of justice, sanctions must be imposed on lawyers when their inappropriate conduct causes excess costs to an adversary."

New York State

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

- Mitchell v. Kurtz, 10 Misc.3d 1063A (N.Y. Cty. 2005). Sanctions hearing ordered for attorney's filing of potentially frivolous lawsuit.

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

- Jalor v. Universal, 183 Misc.2d 294 (N.Y. Cty. 2000), *aff'd.*, 193 Misc.2d 76 (1st Dep't 2001). Court granted motion on sanctions and ordered hearing as to amount to be awarded pursuant to 22 N.Y.C.R.R. §130 for frivolous actions due to attorney's assertion that he was a former prosecutor "designed to harass plaintiff into folding its litigation hand."

Disciplinary

- Matter of Tavon, 66 A.D.3d 61 (2d Dep't 2009) [Attorney disbarred for, *inter alia,* submitting misleading documents to a Village Justice Court.]

- Matter of Weinstein, 4 A.D.3d 29, 2004 NY App. Div. LEXIS 1866 (1st Dep't 2004), rearg. denied, 2004 N.Y. App. Div. LEXIS 6673 (1st Dep't 2004); lv. denied, 3 N.Y.3d 608 (2004) [Attorney disbarred for, *inter alia*, conversion of client funds; drafting and filing false and recklessly inaccurate petitions and affidavits; improper solicitation of clients;

impermissible contacts with represented parties; false statements to the disciplinary authorities and the Court; failure to comply with local custom by failing to give notice to opposing counsel; *ex parte* contacts with the court; and false and excessive billing.]

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

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

- Matter of Yao, 250 A.D.2d 221(1st Dept. 1998) [Attorney disbarred for, *inter alia*, his misdemeanor conviction for aggravated harassment, for committing extortion and for commencing a lawsuit to merely harass or injure another and knowingly advancing an unwarranted claim by suing his former for payment to refrain from publishing embarrassing information about the relationship.]

- Matter of Shearer, 94 A.D.3d 128 (1st Dep't 2012) [Attorney suspended for two and one-half (2½) years for falsely claiming his firm entered into a retainer agreement with a client, giving a false excuse for his delay in filing the retainer, failure to disclose a fee-splitting dispute with respect to the same client, improperly notarizing documents, and testifying falsely before the Court and the Departmental Disciplinary Committee.]

- Matter of Chiofalo, 78 A.D.3d 9 (1st Dep't 2010) [Attorney was suspended for two years for, *inter alia,* filing a meritless federal lawsuit against at least 29 defendants during his divorce action, including his former wife, her mother, the wife's contemporary and prior attorneys, the judge presiding over the divorce action, three supervising judges, the American Bar Association, and the brokers who assisted with the sale of the marital home. The attorney asserted he did not "merely" intend to harass these parties, but rather wished to bring attention to issues of parental alienation, and subsequently sought, unsuccessfully, to dismiss the lawsuit. The Court found that this assertion effectively conceded that the

attorney had no expectation of gaining any type of judicial relief and offered no excuse for his indiscriminate naming of defendants.]

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

- Matter of Lowden, 44 A.D.3d 200 (1st Dep't 2007) [Attorney suspended for two years as reciprocal discipline for misconduct in Ohio involving the filing of false documents with the court, neglect of client matters, and failure to cooperate with his disciplinary investigation.]

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

- Matter of Wisehart, 281 A.D.2d 23 (1st Dep't 2001) [Attorney suspended for two years for, *inter alia*, use of privileged documents stolen by his client in an attempt to extract a settlement; failing to advise the court and his adversary that the client had stolen the documents; making reckless accusations against the court; and, disregarding the ruling of a tribunal by using documents in contravention of a court directive.]

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

IV. Civility, Discovery & Evidentiary Issues

One of the most notorious topics in the field of professional ethics today has to do with discovery and evidentiary abuses including lawyer incivility and improper demeanor by judges. The case law indicates that lawyers and judges will be sanctioned for intemperate conduct in an effort to deter such behavior in the future. An unfortunate

result of such behavior is that it also encourages a lack of respect for the legal system from the public. The Rules and case law cited below deal with how lawyers and judges should behave professionally on, off and before the bench.

1. Rules

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Case law

Federal

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

- Blauinsel Stiftung v. Sumitomo Corp. et al., 88 Fed. Appx. 443 (2d Cir. 2004). Sanctions upheld against Plaintiff's counsel for discovery abuses, bad faith conduct and misrepresentations.

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

- Matter of Monaghan, (J. Mukasey, S.D.N.Y.) New York Law Journal, April 30, 2001. Attorney publicly censured for race-based abuse of opposing counsel for engaging in conduct prejudicial to the administration of justice and unlawful discrimination in the practice of law, in violation of DR 1-102-(A)(5) and (6).

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

New York State

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

- Heller v. Provenzano, 257 A.D.2d 378 (1st Dep't 1999). Sanctions were awarded against plaintiff, an attorney, and his counsel

because of improper conduct both before and during a trial. Plaintiff entered the jury selection room and spoke with jurors without either attorney present, ignored the trial judges warnings not to wander around the courtroom during trial and not to mention another fatal accident which occurred in the same elevator and referred to the fact that his wife was Hispanic and that he spoke Spanish fluently in an effort to influence Hispanic jury members. Plaintiff's attorney was sanctioned because he asked disparaging questions of an expert without a factual basis.

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

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

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

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

Disciplinary

Lawyers

- Matter of Kramer, 247 A.D.2d 81 (1st Dep't 1998). [Attorney disbarred for pattern of misconduct that included receipt of 38

sanctions, criticisms and other forms of professional discipline over 11 years because he willfully disobeyed discovery orders, made false statements in affidavits, refused to accept being fired by clients, and filed frivolous claims.]

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

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

- Matter of Melendez, 104 A.D.3d 134 (1st Dep't 2013) [Attorney reciprocally suspended for two years following discipline by the United States District Court in Puerto Rico for withholding discovery material, failure to disclose the existence of a bankruptcy proceeding, and failure to disclose his client's standing to sue in federal court.]

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

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

- Matter of Chiofalo, 78 A.D.3d 9 (1st Dep't 2010). [Attorney suspended for two years for using obscene, insulting, sexist, anti-Semitic language, ethnic slurs, and threats in correspondence to his former wife's attorneys and others involved in his matrimonial action. The attorney also filed a meritless federal lawsuit against

29 defendants, including his former wife, her attorneys, judges, and others. The attorney continued to send derogatory and sexist e-mail correspondence to his former wife's attorneys during the pendency of his disciplinary proceeding, indicating a pattern of offensive behavior and a failure to appreciate the seriousness of his actions.]

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

- Matter of Supino, 23 A.D.3d 11 (1st Dep't 2005). [Attorney reciprocally suspended for three months in New York based on his New Jersey suspension for his actions during a contentious divorce with his former wife wherein he filed nine criminal complaints against his former wife, all but one of which were dismissed; filed at least 30 criminal complaints against seven different police officers, which were either withdrawn or dismissed; left several telephone messages with police officers, including a captain, stating that he would violate a restraining order and knock the captain on his butt; on at least eight occasions, informed various judges of his intent to file complaints against them; and left threatening messages with a court administrator, accusing her of being an idiot and doctoring evidence.]

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

- Matter of Heller, 9 A.D.3d 221 (1st Dep't 2004). [Attorney suspended for multiple instances of unprofessional conduct over a 24 year history.]

- Matter of Brecker, 309 A.D.2d 77 (2d Dep't 2003). [Attorney suspended for two years based on his use of "crude, vulgar and abusive language" in multiple telephone calls and messages to a client and a court examiner over the course of a few hours. The attorney had also been convicted of criminal contempt and had a prior admonition.]

- Matter of Wisehart, 281 A.D.2d 23 (1st Dep't 2001). [Attorney suspended for two years for, *inter alia*, use of privileged documents stolen by his client in an attempt to extract a settlement; failing to advise the court and his adversary that the client had stolen the

documents; making reckless accusations against the court; and, disregarding the ruling of a tribunal buy using documents in contravention of a court directive. The Court stated "It is tragic that respondent now finds himself the subject of disciplinary action based on actions taken and words used by him on behalf of his client/employee during the course of a litigation which, upon discovery of the privileged documents, if fairly and properly utilized, he was poised to win. But it is even more tragic that in the pursuit of victory in litigation, respondent, an attorney for nearly 50 years, apparently lost sight of his moral, ethical and legal obligations to the Court, the public, and his opposing counsels [sic], and saw fit to use any and every means and avenue available to him in his efforts to win."

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

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

- Matter of Muller, 231 A.D.2d 296 (1st Dep't 1997). [Attorney suspended for six months for making numerous harassing telephone calls to his former girlfriend over a period of time, and posing as a law clerk for a federal court judge in order to obtain information about her and harass her at her law school.]

- Matter of Mordkofsky, 232 A.D.2d 863 (3d Dep't 1996). [Attorney suspended for six months for making false accusations against judges of improper conduct and corruption, threatening a judge during a sidebar conversation, and taking legal action on his own behalf while he was represented by counsel. Noting that the attorney was unremorseful, the Court observed that "by a

combination of irresponsibility, malice, and unadulterated speculation, the respondent sees wrongdoing by judges and lawyers alike where there is none, and manufactures accusations with total recklessness."]

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

- Matter of Winiarsky, 104 A.D.3d 1 (1st Dep't 2012) [Attorney publicly censured for taking sworn testimony from unrepresented third party witnesses without notice to opposing counsel and for *ex parte* communications with court attorney assigned as a referee to one of respondent's cases.]

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

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

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

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

- Matter of Kavanagh, 189 A.D.2d 521 (1st Dep't 1993). [Attorney publicly censured for making unsupported and insulting allegations in motion papers suggesting that his opposing counsel had ties to organized crime.]

- Matter of Golub, 190 A.D.2d 110 (1st Dep't 1993). [Attorney censured for reckless comments to the press about a Supreme Court Justice after an adverse decision against his client in a highly publicized case. The court characterized the comments as "unprofessional, undignified, discourteous and degrading to the Judge and the court."

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

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

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

Lawyers and Assault

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

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

V. Lawyers and Judges Working Together

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

1. Rules of Professional Conduct

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

2. Rules of Judicial Conduct

   - **Rule 100.1** [Judge should uphold the integrity and independence of judiciary by establishing, maintaining, enforcing and personally observing high standards of conduct]

   - **Rule 100.2(a)** [Judge shall respect and comply with the law and act in a manner that promotes confidence in the integrity and impartiality of the judiciary]

   - **Rule 100.3(B)(4)** [Judge shall perform duties without bias or prejudice to any person]

   - **Rule 100.3(B)(6)** [Judge should accord every person with interest in a legal proceeding the right to be heard according to the law, and shall not engage in *ex parte* communications except to:

     - schedule a proceeding;
     - seek advice of a disinterested expert on the applicable law;
     - consult with court personnel;
     - confer separately with the consent of the parties; and
     - consider *ex parte* communications when authorized by law]

   - **Rule 100.3 (c)(1)** [Judge shall diligently discharge administrative duties without bias or prejudice and maintain professional competence]

- **Rule 100.3 (c)(2)** [Judge shall require staff to diligently discharge administrative duties without bias or prejudice and maintain professional competence]

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

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

3. Case law

New York

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

- Matter of Johnson v. Hornblass, 93 A.D.2d 732 (1st Dep't 1983). There must be a violation of express statutory provisions, bias or

prejudice or unworthy motive on the part of a judge to force disqualification.

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

Judges

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

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

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

- Matter of Canary, *Determination of the Judicial Conduct Commission,* December 26, 2002. Judge censured due to his intervention on two separate occasions with cases involving his son. In the first instance, the judge contacted the arresting officer and disputed traffic tickets issued to his son calling the charges Aridiculous@ and referenced instances where the officer had been incorrect about his estimations of vehicle speed in his court. The second episode occurred when the judge's son was arrested; the judge confronted and pushed the arresting officer proclaiming that he would get the charges "thrown out" and also requested as a "favor" that the arrest be kept out of the papers.

- Matter of Kolbert, *Determination of the Judicial Conduct Commission,* December 26, 2002. Judge censured for improper contact with the police department at the request of a friend and intervening in the execution of an arrest warrant because such misconduct was "a blatant assertion of influence for personal purposes." As a result of his actions respondent received a censure.

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

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

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

- Matter of Young, *Determination of the Judicial Conduct Commission,* December 29, 2000. Judge censured for contacting a Family Court Hearing Examiner on behalf of a friend whose case was pending before the examiner resulting in the recusal of the Hearing Examiner. Recognizing that it "may be difficult to refuse the request of a close friend or relative to 'make a call' on his or her behalf" the Commission found that the judge's misconduct warranted a Censure.

- Matter of Warren C. DeLollo, *Determination of the Judicial Conduct Commission,* July 3, 1979. Judge censured for writing letters to two other part-time lawyer-judges seeking favorable dispositions for the defendants in two traffic cases and practicing law in a case presided over by his brother.

4. Advisory Opinions

- ABA Ethics Op. 07-449 (Aug. 9, 2007). Lawyer Concurrently Representing Judge and Litigant Before the Judge in Unrelated Matter.

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

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

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

assisting the judge in her violation of the Judicial Code, and thereby, violates Model Rule 8.4(f). The lawyer (or another lawyer in the lawyer's firm), in that circumstance, is obligated to withdraw from the representation of the judge under Model Rule 1.16.

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

- N.Y. State Bar Ethics Op. 574 (Apr. 18, 1986). Disqualification of a Judge Whose Former Lawyer Represents a Party.

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

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

  (1) If the prior representation of the judge was of a character where the judge's personal integrity was at issue or involved a highly emotional situation (i.e.: bitterly contested matrimonial matter), the judge should disqualify himself, irrespective of consent from the parties, for several years.
  (2) If the representation was (a) of a routine and economic character or (b) in the course of official duties or (c) provided by an insurer with respect to a fully insured claim, it is not necessary for either the judge to disqualify himself or for remittal under Canon 3D to be obtained. Prior representation should be disclosed.

(3) Cases falling between these two situations, where there are no other special circumstances, and in cases otherwise falling into paragraph (2) where the representation was in repeated instances, the judge should disqualify himself for a period of years unless the parties remit the disqualification.

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

- N.Y. Jud. Adv. Op. 08-152 (December 4, 2008). Attorney's participation in Judge's Campaign.

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

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

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

- N.Y. Jud. Adv. Op. 07-26 (June 7, 2007). Recusal or Disclosure Where Attorney Appearing Before Judge was Political Supporter or Contributor

During Judge's Campaign for *Non-Judicial* Office

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

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

- N.Y. Jud. Adv. Op. 06-149 (October 19, 2006). Judge Should Disclose Close Social Relationship With Attorney

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

- N.Y. Jud. Adv. Op. 08-27 (March 13, 2008). Judge Need Not Disqualify When Personal Attorney Shares Office Space With Other Attorneys

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

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

  - Opinion 95-35 (Vol. XIII), "the Committee advised that a judge is disqualified in cases involving appearances by a law firm, where the judge's lawyer/spouse has a continuing relationship with the law firm, evidenced by shared letterhead or other indicia, as opposed to a mere retainer interest in occasional, separate, discrete cases";
  - Opinion 99-146 (XVIII), "the Committee advised that an appellate judge is not disqualified when a law firm that has employed the judge's spouse on an occasional, part-time, *per diem* basis, appears in the judge's court"; and

- Opinion 06-22, the Committee advised that where a judge's former campaign manager and personal attorney is "counsel" to a law firm, whether the judge is disqualified from presiding when an attorney from the law firm appears in the judge's court depends on the nature of the "counsel" relationship.

- N.Y. Jud. Adv. Op. 04-51 (April 22, 2004). Judges Recusal and/or Disclosure Required Due to Business Interests

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

- N.Y. Jud. Adv. Op. 08-36 (March 13, 2008). Judge Need Not Recuse Due to Attorneys Complaint to Judicial Conduct Commission and May Serve on Historic Landmarks Commission

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

VI. Duty To Report Fraud

What is a lawyer or judge obligated to do when he/she learns of fraud or perjury by a lawyer, a client or a witness? Although the disciplinary rules as well as the case law give guidance to the lawyer in such situations, there is tension between the lawyer's obligation to preserve client confidences and the lawyer's obligation as an officer of the court to preserve the integrity of the legal system. Moreover, when it comes to reporting misconduct by another lawyer, the rule is subjective and fails to define what constitutes "knowledge" of a "substantial question as to another lawyer's honesty, trustworthiness or fitness" and therefore it can be confusing as to what facts need be present to trigger the reporting requirement. In addition, the new rules require a lawyer to correct false

testimony before a tribunal. This section will give an overview as to the current state of the rules, case law and advisory onions for dealing with these issues.

A. *Lawyer's Fraud*

1. Rules

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

2. Rules of Judicial Conduct

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

3. Case Law

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

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

- Matter of Jochnowitz, 189 A.D.2d 342 (1st Dep't 1993). Attorney involved in parking violations scandal disbarred for participation in and failure to report other attorneys' involvement in an illegal kickback scheme.

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

4. Advisory Opinions

- N.Y. Jud. Adv. Op. 05-37 (April 21, 2005). Judges Report of Unethical and Unprofessional Attorney Conduct and Recusal

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

- N.Y. Jud. Adv. Op. 08-99 (June 6, 2008). Judges Report of Corruption by Court Personnel.

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

- N.Y. Jud. Adv. Op. 08-209 (January 29, 2009) and N.Y. Jud. Adv. Op. 03-121 (December 22, 2004) Judge Not Required to Report Self

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

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

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

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

B. ***Client Fraud or Perjury***

1. Rules

- **NY Rule 8.4 (b)-(d) [formerly DR 1-102(A)(4)]** [prohibits conduct that constitutes dishonesty, fraud, deceit or misrepresentation]
- **NY Rule 8.4 (b)-(d) [formerly DR 1-102(A)(5)]** [prohibits conduct that is prejudicial to the administration of justice]
- **NY Rule 8.4 (h) [formerly DR 1-102(A)(7)] (formerly (8)]** [prohibits conduct that reflects adversely on fitness to practice]
- **NY Rule 5.2 (a) [formerly DR 1-104(e)]** [prohibits lawyer's claim that he/she acted at the direction of another person]
- **NY Rule 1.16 9a) [formerly DR 2-109]** [prohibits lawyer from bringing a case or asserting a claim in bad faith]
- **NY Rule 1.6 (a)(1) & 1.6 (b) [formerly DR 4-101(c)(5)]** [lawyer may reveal confidences or secrets to extent necessary to withdraw a written or oral opinion he/she previously gave once the lawyer learns that the opinion or representation was based on materially inaccurate information or is being used in furtherance of a crime or fraud]
- **NY Rule 3.1() & 3.1 (b)(2) [formerly DR 7-102(A)(1)]** [lawyer cannot file a suit or assert a claim merely to maliciously harass or injure another]
- **NY Rule 3.1 (b) (1) [formerly DR 7-102(A)(2)]** [lawyer cannot advance a claim or defense that is unwarranted under existing law unless it can be supported by a good faith argument]
- **NY Rule 3.3 (a) (3) [formerly DR 7-102(A)(4)]** [lawyer cannot knowingly use perjured testimony or false evidence]
- **NY Rule 4.1 & 3.1 (b)(3) & 3.3 (a)(1) [formerly DR 7-102(A)(5)]** [lawyer cannot knowingly make a false statement of law or fact]
- **NY Rule 1.2 (d) [formerly DR 7-102(A)(7)]** [lawyer cannot counsel the client to engage in illegal or fraudulent conduct]
- **NY Rule 1.2 (e) & 4.2(b) &3.3(a)(3) second sentence & 3.3 (c) [formerly DR 7-102(B)]** [lawyer must promptly reveal fraud to

tribunal by his client or another person unless the information is protected as a confidence or secret]

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

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

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

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

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

2. Case Law

Federal

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

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

unclear that the attorneys were attempting to induce the witness to give false testimony.

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

State

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

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

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

Disciplinary

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

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

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

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

- Matter of Ballinger, 211 A.D.2d 6 (1st Dep't 1995). [Attorney convicted in federal court of making false statements in support of a loan application would normally have been suspended. However,

the attorney was disbarred because he deliberately engaged in a series of fraudulent acts with a business associate who the attorney had reason to believe was involved in criminal conduct.]

- Matter of Melendez, 104 A.D.3d 134 (1st Dep't 2013) [Attorney reciprocally suspended for two years following discipline by the United States District Court in Puerto Rico for withholding discovery material, failure to disclose the existence of a bankruptcy proceeding, and failure to disclose his client's standing to sue in federal court.]

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

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

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

- Matter of Wisehart, 281 A.D.2d 23 (1st Dep't 2001). [Attorney suspended for two years for, *inter alia*, use of privileged documents stolen by his client in an attempt to extract a settlement; failing to advise the court and his adversary that the client had stolen the documents; making reckless accusations against the court; and, disregarding the ruling of a tribunal buy using documents in contravention of a court directive. The Court stated "It is tragic that respondent now finds himself the subject of disciplinary action based on actions taken and words used by him on behalf of his client/employee during the course of a litigation which, upon discovery of the privileged documents, if fairly and properly utilized, he was poised to win. But it is even more tragic that in the pursuit of

victory in litigation, respondent, an attorney for nearly 50 years, apparently lost sight of his moral, ethical and legal obligations to the Court, the public, and his opposing counsels [sic], and saw fit to use any and every means and avenue available to him in his efforts to win."]

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

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

3. Advisory Opinions

- N.Y. State Bar Ethics Op. 837 (March 16, 2010) and N.Y. County Lawyers Ethics 741 (March 10, 2010). Confronting False Evidence and False Testimony.

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

PART 1300. DISHONORED CHECK REPORTING RULES FOR ATTORNEY SPECIAL, TRUST AND ESCROW ACCOUNTS

Table of Sections

§ 1300.1. Dishonored Check Reports

(a) Special bank accounts required by Disciplinary Rule 9–102 (22 NYCRR 1200.46) shall be maintained only in banking institutions which have agreed to provide dishonored check reports in accordance with the provisions of this section.

(b) An agreement to provide dishonored check reports shall be filed with the Lawyers' Fund for Client Protection, which shall maintain a central registry of all banking institutions which have been approved in accordance with this section, and the current status of each such agreement. The agreement shall apply to all branches of each banking institution that provides special bank accounts for attorneys engaged in the practice of law in this state, and shall not be cancelled by a banking institution except on thirty days prior written notice to the Lawyers' Fund for Client Protection.

(c) A dishonored check report by a banking institution shall be required whenever a properly payable instrument is presented against an attorney special, trust or escrow account which contains insufficient available funds, and the banking institution dishonors the instrument for that reason. A "properly payable instrument" means an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of the State of New York.

(d) A dishonored check report shall be substantially in the form of the notice of dishonor which the banking institution customarily forwards to its customer, and may include a photocopy or a computer-generated duplicate of such notice.

(e) Dishonored check reports shall be mailed to the Lawyers' Fund for Client Protection, 119 Washington Avenue, Albany, NY 12210, within five banking days after the date of presentment against insufficient available funds.

(f) The Lawyers' Fund for Client Protection shall hold each dishonored check report for ten business days to enable the banking institution to withdraw a report provided by inadvertence or mistake; except that the curing of an insufficiency of available funds by a lawyer or law firm by the deposit of additional funds shall not constitute reason for withdrawing a dishonored check report.

(g) After holding the dishonored check report for ten business days, the Lawyers' Fund for Client Protection shall forward it to the attorney disciplinary committee for the judicial department or district having jurisdiction over the account holder, as indicated by the law office or other address on the report, for such inquiry and action that attorney disciplinary committee deems appropriate.

(h) Every lawyer admitted to the Bar of the State of New York shall be deemed to have consented to the dishonored check reporting requirements of this section. Lawyers and law firms shall promptly notify their banking institutions of existing or new attorney special, trust, or escrow accounts for the purpose of facilitating the implementation and administration of the provisions of this section.

Research References

Encyclopedias
NY Jur. 2d, Attorneys at Law § 51, Generally.
NY Jur. 2d, Attorneys at Law § 55, Title Insurance Companies, Prepaid Legal Services Plans, and Other Exempt Organizations and Practices.

Forms
McKinney's Forms, Not-For-Profit Corp. Law § 400:1, Commentary.

Treatises and Practice Aids
Carmody–Wait, 2d § 3:195, Generally; Purpose of Prohibition.
Carmody–Wait, 2d § 3:196, Exempt Organizations and Practices.

§ 497. Attorneys fiduciary funds; interest-bearing accounts

1. An "interest on lawyer account" or "IOLA" is an unsegregated interest-bearing deposit account with a banking institution for the deposit by an attorney of qualified funds.

2. "Qualified funds" are moneys received by an attorney in a fiduciary capacity from a client or beneficial owner and which, in the judgment of the attorney, are too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client or beneficial owner. In determining whether funds are qualified for deposit in an IOLA account, an attorney may use as a guide the regulation adopted by the board of trustees of the IOLA fund pursuant to subdivision four of section ninety-seven-v of the state finance law.

2-a. "Funds received in a fiduciary capacity" are funds received by an attorney from a client or beneficial owner in the course of the practice of law, including but not limited to funds received in an escrow capacity, but not including funds received as trustee, guardian or receiver in bankruptcy.

3. A "banking institution" means a bank, trust company, savings bank, savings and loan association, credit union or foreign banking corporation whether incorporated, chartered, organized or licensed under the laws of this state or the United States, provided that such banking institution conducts its principal banking business in this state.

4. (a) An attorney shall have discretion, in accordance with the code of professional responsibility, to determine whether moneys received by an attorney in a fiduciary capacity from a client or beneficial owner shall be deposited in non-interest, or in interest bearing accounts. If in the judgment of an attorney any moneys received are qualified funds, such funds shall be deposited in an

IOLA account in a banking institution of his or her choice offering such accounts.

(b) The decision as to whether funds are nominal in amount or expected to be held for a short period of time rests exclusively in the sound judgment of the lawyer or law firm. Ordinarily, in determining the type of account into which to deposit particular funds held for a client, a lawyer or law firm shall take into consideration the following factors:

(i) the amount of interest the funds would earn during the period they are expected to be deposited;

(ii) the cost of establishing and administering the account, including the cost of the lawyer or law firm's services;

(iii) the capability of the banking institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.

(c) All qualified funds shall be deposited in an IOLA account unless they are deposited in:

(i) a separate interest bearing account for the particular client or client's matter on which the interest will be paid to the client; or

(ii) an interest bearing trust account at a banking institution with provision by the bank or by the depositing lawyer or law firm for computation of interest earned by each client's funds and the payment thereof to the client.

(d) Notwithstanding the deposit requirements of this subdivision, no attorney or law firm shall be liable in damages nor held to answer for a charge of professional misconduct for failure to deposit qualified funds in an IOLA account.

5. No attorney or law firm shall be liable in damages nor held to answer for a charge of professional misconduct because of a deposit of moneys to an IOLA account pursuant to a judgment in good faith that such moneys were qualified funds.

6. a. An attorney or law firm which receives qualified funds in the course of its practice of law and establishes and maintains an IOLA account shall do so by (1) designating the account as "(name of attorney/law firm IOLA account)" with the approval of the banking institution; and (2) notifying the IOLA fund within thirty days of establishing the IOLA account of the account number and name and address of the banking institution where the account is deposited.

b. The rate of interest payable on any IOLA account shall be not less than the rate paid by the banking institution on similar accounts maintained at that institution, and the banking institution shall not

impose on such accounts any charges or fees greater than it imposes on similar accounts maintained at that institution.

c. With respect to IOLA accounts, the banking institution shall:

(i) Remit at least quarterly any interest earned on the account directly to the IOLA fund, after deduction of service charges or fees, if any, are applied.

(ii) Transmit to the IOLA fund with each remittance a statement showing at least the name of the account, service charges or fees deducted, if any, and the amount of net interest remitted from such account.

(iii) Transmit to each attorney or law firm which maintains an IOLA account a statement showing at least the name of the account, service charges or fees deducted, if any, and the amount of interest remitted from such account.

(iv) Be permitted to impose reasonable service charges for the preparation and issuance of the statement.

(v) Have no duty to inquire or determine whether deposits consist of qualified funds.

7. a. Payment from an IOLA account to or upon the order of the attorney maintaining such account shall be a valid and sufficient release of any claims by any person or entity against any banking institution for any payments so made.

b. Any remittance of interest to the IOLA fund by a banking institution pursuant to this section shall be a valid and sufficient release and discharge of any claims by any person or entity against such banking institution for any payment so made, and no action shall be maintained against any banking institution solely for opening, offering, or maintaining an IOLA account, for accepting any funds for deposit to any such account or for remitting any interest to the IOLA fund.

8. Nothing contained in this section shall be construed to require any banking institution to offer, accept or maintain IOLA accounts.

9. All papers, records, documents or other information identifying an attorney, client or beneficial owner of an IOLA account shall be confidential and shall not be disclosed by a banking institution except with the consent of the attorney maintaining the account or as permitted by any law, regulation or administrative requirement.

10. An attorney or law firm that can establish that compliance with subdivision six of this section has resulted in any banking service charges or fees shall be entitled to reimbursement of such

expense from the interest on lawyer account fund by filing a claim with supporting documentation with the fund.

(Added L.1983, c. 659, § 2; amended L.1988, c. 677, §§ 1 to 3.)

Historical and Statutory Notes

L.1988, c. 677 legislation

Subd. 2–a. L.1988, c. 677, § 3, eff. Feb. 1, 1989, added subd. 2–a.

Subd. 4, par. (a). L.1988, c. 677, § 1, eff. Feb. 1, 1989, designated existing provisions as par. (a) and in par. (a), as so designated, made deposit of qualified funds in IOLA account mandatory rather than permissive and inserted language requiring IOLA account to be in banking institution of attorney's choice offering such accounts.

Subd. 4, pars. (b) to (d). L.1988, c. 677, § 1, eff. Feb. 1, 1989, added pars. (b) to (d).

Subd. 5. L.1988, c. 677, § 1, eff. Feb. 1, 1989, inserted "or law firm".

Subd. 6, par. a. L.1988, c. 677, § 2, eff. Feb. 1, 1989, included certain law firms within provisions of par., made provisions mandatory rather than permissive, substituted requirement that IOLA fund be notified within 30 days of establishment of IOLA account for requirement that IOLA fund be notified as required by regulations of board of trustees, and specified information to be provided to IOLA fund.

Subd. 6, par. c, subpar. (i). L.1988, c. 677, § 2, eff. Feb. 1, 1989, substituted "directly to the IOLA fund, after deduction of service charges or fees, if any, are applied" for "to the IOLA fund".

Subd. 6, par. c, subpar. (ii). L.1988, c. 677, § 2, eff. Feb. 1, 1989, substituted "net interest" for "interest".

Subd. 6, par. c, subpar. (iii). L.1988, c. 677, § 2, eff. Feb. 1, 1989, included law firms within provisions of subpar.

Subd. 8. L.1988, c. 677, § 1, eff. Feb. 1, 1989, deleted "attorney or" following "to require any".

Subd. 10. L.1988, c. 677, § 3, eff. Feb. 1, 1989, added subd. 10.

L.1983, c. 659 legislation

Section 6 of L.1983, c. 659, provided:

"a. This act [adding this section and State Finance Law § 97–v, amending State Finance Law § 98; and enacting provisions set out as notes under this section and State Finance Law § 97–v] shall take effect immediately [July 25, 1983]; provided, however, that the provisions of section two of this act shall not take effect until the board of trustees of the IOLA fund established under the provisions of section ninety-seven–v of the state finance law, as added by section three of this act, shall have certified to the secretary of state that the commissioner of internal revenue of the United States has ruled that interest earned on an IOLA account is not includable in the gross income of either the attorney maintaining the account or the gross income of the beneficial owner.

"b. The secretary of state shall notify the legislative bill drafting commission of the receipt of such certification in order that such commission may maintain an accurate and timely effective data base of the official text of the consolidated laws of the state of New York."

Cross References

Lawyer account (IOLA) fund, State Finance Law 97–a.
Residential real estate, contracts requiring down payments in escrow, see General Business Law § 778–a.

Law Review and Journal Commentaries

IOLA in New York State. Parker. 57 N.Y.St.B.J. 32 (January 1985).
1988 Survey of New York law: Civil practice. Jay C. Carlisle. 40 Syracuse L.Rev. 77 (1989).

L, who practices law in White Plains, New York, is representing C in the sale of his Westchester County, New York home. A contract has been entered into which provides *inter alia* that L will hold the down payment in the sum of $100,000. in escrow until closing. The closing is scheduled to occur in approximately six months. L's escrow account is maintained in the Stamford branch of the State Bank of Connecticut. The account is titled "L, IOLA Account." L keeps $5,000. of his own funds in the escrow account.

L also maintains an operating account at the State Bank of Connecticut, entitled "L, Special Account." L's secretary, S, is a signatory on the latter account.

Since L deposited the $100,000. down payment into the L, IOLA Account, an overdraft has occurred in such account.

a. Was it proper for L to deposit the down payment into the L, IOLA Account?

b. Are there any improprieties in how L maintains the L, IOLA Account and L, Special Account?

c. What are the State Bank of Connecticut's options and responsibilities with respect to the overdraft that has occurred in the L, IOLA Account?

d. What, if any, steps may/must the Grievance Committee take in light of the overdraft?

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NYSBA ETHICS OPINIONS & COLUMNS

June 2012 through present

Deborah A. Scalise and Conrad L. Horowitz

CONFLICTS OF INTEREST

Conflicts Arising from an Attorney's Other Engagements or Responsibilities

Opinion #960 (2/26/13)

A lawyer may ethically represent a client seeking payment of fees for repair services rendered to a prior prospective client, who had earlier sought advice from the lawyer regarding the damage that was later repaired by the client, unless the lawyer learned confidential information from the prospective client that would be significantly harmful to the prospective client.

Rules: 1.6, 1.9, 1.18

Opinion #963 (3/19/13)

A civil legal services attorney is not required to report to a tribunal (a) inaccuracies in an application filled out by an actual or prospective client and contained in the record of an administrative tribunal, or (b) the actual or prospective client's apparent criminal failure to register his current address as a sex offender.

Rules: 1.6(a), (b)(2); 1.9(c); 1.18; 3.3(a), (b)

Attorney Professionalism Forum, *NYSBA Journal*, October 2012

Both the NYRPC and the joint rules of the Appellate Division require that lawyers have written engagement letters and fee agreements with clients.

Rules: 1.5 (b), 1.10(e) (f), 1.7(a) Part 1215 of the Joint Appellate Division Rules

CONFLICTS OF INTEREST

Conflicts Arising from an Attorney's Other Engagements or Responsibilities (Continued)

Opinion #957 (1/14/13)

A lawyer for a *bona fide* nonprofit organization may furnish legal services to beneficiaries of the organization as part of the organization's programs as long as the agency complies with Judiciary Law § 495. However, the lawyer must: 1- obtain each client's consent to be compensated by the agency; 2- not permit the organization to direct, regulate, or otherwise interfere with the lawyer's independent professional judgment in rendering legal services for clients; and 3- the lawyer must protect the clients' confidential information. As long as the programs satisfy this criteria, the lawyer may assist the agency in seeking grants to support the agency's legal services programs.

Rules: 1.8(f), 5.4(c) & (d), 5.5(b), and 7.2(b)

Opinion #966 (5/21/13)

A Town Clerk wishing to represent a private client in a matter pending in another Town Court may be limited by law and court rules, but is not automatically prohibited from such representation by the rules, even if the client also has a matter pending before the Town Clerk's Court. However, if the Clerk has substantive responsibilities for the pending matter, and thus is in a position to influence the tribunal, then the representation may be prohibited by Rule 1.11(f)(2) unless the Clerk informs the Judge of the relationship so that the Judge may take appropriate action. If the Clerk does not participate in the pending matter or has solely ministerial duties, then the Clerk would be able to represent the client, if not barred by any personal-interest conflict, but may not use the Clerk's public office to try to influence either Town Courts (his own or the one where he is appearing) in favor of the client.

Rules: 1.7(a), 1.11(d), 1.11(f)

CONFLICTS OF INTEREST

Imputation of Conflicts to Other Lawyers in Firm/ Agency

Opinion #925 (6/29/12)

Conflicts of interest arising from business relationships between defense counsel and prosecutors and imputation of the conflict to partners of defense counsel. Criminal defense counsel may continue representation of a client being prosecuted by a part-time assistant district attorney even if his law partner is in a business relationship with another part-time assistant district attorney of the same county.

Rules: 1.7(a)(2), 1.7(b), 1.10(a), 1.10(d)

Opinion #968 (6/10/13)

A federal government lawyer subject to a mandatory furlough may bring a challenge to the furlough in an administrative tribunal if consistent with the lawyer's other ethical obligations. If the inquiring lawyer does so, however, he or she may not represent the agency in opposition to challenges to the furlough by other employees, unless permitted by a rule of necessity in which no other lawyer can defend the agency. If the inquiring lawyer does not pursue such challenge, the lawyer may represent the agency in opposition to such challenges by others, if the agency provides informed consent and the other requisites for conflict waiver are met. Other lawyers in the office may also defend the agency against such challenges if there is appropriate waiver of the conflict and those other lawyers do not pursue their own challenges.

Rules: 1.0(h); 1.1(c); 1.7; 1.10(a), (d); 1.11(d); 8.5

Opinion #973 (6/26/13)

Appellate lawyer in a legal aid organization may not represent a defendant on an appeal that will assert ineffective assistance by trial counsel employed in the same organization, unless circumstances allow defendant's waiver of the appellate lawyer's conflict of interest.

Rules: 1.7(a); 1.10(a)

CONFLICTS OF INTEREST

Conflicts Arising From Real Estate Transactions

Opinion #926 (7/31/12)

A lawyer who belongs to a union (1) may be on the panel of a union-sponsored plan that reimburses legal fees, and (2) may represent a fellow employee in a real estate transaction where the client will ask the plan to reimburse the employee for the lawyer's fees.

Rules: 1.0(j); 1.7(a) & (b); 1.8(f)

Opinion #933 (9/7/12)

A lawyer may conduct a law practice and a real estate brokerage business in the same office, and may advertise them together provided that the advertising is neither false nor misleading, but may not act as lawyer and broker in the same transaction.

Rules: 1.6 (a) and (c) 5.7, 5.8, 7.1, 1.7(a),

Opinion #952 (12/17/12)

A lawyer may not represent both lender and buyer in residential real estate transaction if part of a series of such transactions in which lawyer regularly represents that lender and lender regularly pays the buyer's legal fees.

Rules: 1.7(a), 1.7(b), 1.8(f)

CONFLICTS OF INTEREST

Simultaneous Representation

Opinion #965 (4/10/13)

A Town Attorney who has given a Town Building Inspector legal advice about issuance of a Certificate of Occupancy for a building may, ordinarily, appear for the Town Zoning Board of Appeals in an Article 78 proceeding involving issuance of a building permit for that building. However, if there are unusual circumstances that would involve the attorney in representing differing interests, then the attorney could not represent the Board absent appropriate client consent.

Rules: 1.7; 1.13(a), (d)

Attorney Professionalism Forum, *NYSBA Journal*, October 2012

The joint representation of Eddie and Paul implicates Rule 1.7 (Conflict of interest: current clients) of the New York Rules of Professional Conduct (NYRPC).

Rules: 1.7(a)(b), 1.0,

Attorney Professionalism Forum, *NYSBA Journal*, October 2012

While those confidential communications are generally protected from disclosure to third parties, as between jointly represented clients, no privilege attaches.

Rules: 1.7

CONFLICTS OF INTEREST

Spouses

Opinion #941 (10/16/12)

A lawyer on a county panel of the Attorneys for Children Program may serve as "attorney for the child" even though another party in the proceeding is represented by the lawyer's spouse (an Assistant Public Defender) or by another lawyer who works in the same office as the lawyer's spouse, unless (i) the circumstances create a conflict of interest under Rule 1.7(a)(2) or Rule 1.10(h), and (ii) the child has no legal representative who can and does consent to the conflict on the child's behalf.

Rules: 1.0(h), 1.7(a) & (b), 1.10(a), (d) & (h)

CONFLICTS OF INTERESTS

Lawyer's Business Interests

Opinion #930 (8/8/12)

A lawyer may not enter into a contractual arrangement with an insurance agency whereby the agency would offer its customers both legal and non-legal services, even if the agency and lawyer are separately paid and do not share in each other's fees.

Rules: 1.7, 5.7, 5.8(a), 5.8(c), 7.1, 7.2, 7.3

Opinion #944 (11/8/12)

On the facts given, it is permissible for two PLLCs to create a joint venture functioning as a law firm.

Rules: 1.0(h), Rule 7.1(a), Rule 7.5(a), Rule 7.5(d)

Opinion #969 (6/12/13)

A lawyer may ethically ask a client to indemnify the lawyer against potential malpractice or other claims by a third-party addressee when issuing an opinion letter to the client.

Rules: 1.8(h)

Prospective Clients

Attorney Professionalism Forum, *NYSBA Journal*, February 2013

The question whether a person is a "prospective client" is governed by Rule 1.18(e) of the Rules of Professional Conduct (RPC).

COMPENSATION AND FEES

Contingent Fee Arrangements/ Fee Collection

Opinion #954 (1/11/13)

A firm's offering of succession/contingent planning services to other lawyers is neither an "advertisement" nor "solicitation" under the Rules. One attorney's agreement to refer a matter to another attorney in the event of becoming unable to practice, would not create an association between the two attorneys for purposes of the fee-sharing rule either at the time such agreement is executed or triggered, unless and until the amount of work being transitioned to the second attorney becomes significant. An attorney's successful efforts to cultivate a client relationship are not "services" under the fee-sharing Rule and thus not a legitimate basis for dividing fees proportionately.

Rules: 1.0(a) and (h), 1.5(g), 7.3(b).

New York's Engagement Letter Rule and Fee Dispute Resolution Program: The Process of Fee Collection. NYSBA Journal, June 2012, (Article pg. 26) by Kristin Pratt.

This article explores: (1) the impact of not obtaining an engagement letter upon the ability to collect fees; (2) whether arbitration under the Dispute Resolution Program is required; and (3) the procedure to follow if the attorney is counsel of record in pending litigation.

COMPENSATION AND FEES

Non-lawyers and Referral Fees

Opinion #927 (8/2/12)

A lawyer may not ethically enter into arrangement with a non-lawyer to accept referrals for a fixed monthly fee for each case referred where case has been obtained by telephonic solicitation.

Rules: 1.0(j),1.5(a) and (b), 1.8(f), 5.3(b), 5.4(a), 7.2(b), 7.3(a)(1), 8.4(a)

Opinion #942 (11/2/12)

A lawyer may not ethically enter into arrangement with a non-lawyer firm to accept referrals of clients whose legal fees, in an amount not disclosed to the client, would be taken from the fee paid by the client to the non-lawyer firm.

Rules: 1.5(a) & (b), 1.8(f), 5.4(a), 5.5(b), 7.2(a), 8.4(b)

Opinion #958 (2/4/13)

A lawyer may accept a finder's fee for introducing clients and prospective clients to prospective investors, whether clients or not, provided that, in doing so, the lawyer complies with the Rules of Professional Conduct, including those governing protection of confidential information, avoidance of conflicts, business transactions with clients, competent advice on the applicability of privileges in the course of performing the non-legal services, and adherence to the rules on excessive fees.

Rules: 1.0(j), 1.1(a), 1.4(a), 1.4(b), 1.5(a), 1.5(b), 1.5(c), 1.5(e), 1.6(a), 1.7(a), 1.7(b), 1.8(a), 1.9(a), 1.18(b), 5.7(a), 5.7(c)

COMPENSATION AND FEES

Non-lawyers and Referral Fees (Continued)

Opinion #961 (3/13/13)

A retiring lawyer may sell his or her law practice contingent upon receipt of a percentage of legal fees collected by the purchaser for services provided after the sale, where the payment is in proportion to the services performed by the selling lawyer prior to the sale, or fairly represents the value of the "goodwill" of the retiring lawyer. A provision requiring payment of fees for business that the selling lawyer refers to the buying lawyer after the sale is not permitted.

Rules: 1.5(g); 1.5(h); 1.17; 5.4; 7.2.

Opinion #962 (3/18/13)

A lawyer may arrange a client's payment of reasonable travel expenses and legal fees of a witness if such payment is not prohibited by law and is not contingent on the witness's testimony or the outcome of the case.

Rules: 3.4(b)

COMPENSATION AND FEES

Non-lawyers and Referral Fees (Continued)

Opinion #934 (9/7/12)

A law firm may compensate a partner, associate or counsel by making a payment directly to the lawyer or to a professional services corporation as described in Article 15 of the New York General Business Law. A professional services corporation for the practice of law may not have non-lawyer shareholders. Consequently, a law firm may not pay a lawyer's compensation to a subchapter S corporation with non-lawyer shareholders. A law firm may make payments to a third party at the direction of the lawyer, as long as it does not treat such payment as payment for legal services. Thus, the firm may make payments to a Subchapter S corporation with non-lawyer shareholders, but neither the law firm nor the Subchapter S corporation may mischaracterize the payments as compensation for legal services.

Rules: 1.0(h), 1.5(g), 5.4(a) and (d), 8.4(c).

Opinion #937 (10/3/2012)

A law firm may cooperate with a local hospital to include promotional gifts branded with the law firm's logo in a welcome package distributed to all patients.

Rules: 7.1,7.3(a)

Opinion #938 (10/09/12)

A law firm that owns an entity providing nonlegal SSDI services is not subject to legal ethics rules as to those services, and no ethical violation would arise from entity's purchase of leads to market those services, if the entity includes no lawyers, operates separately from the law firm, and disclaims the provision of legal services.

Rules: 5.7, 7.2(a)

ADVERTISING

Social Networking, Internet "Solicitation", and Websites

Opinion #947 (11/14/12)

It is ethically permissible for an attorney or law firm to purchase a list of names to whom emails from the firm will be sent offering each recipient the opportunity to join the law firm's email newsletter distribution system, which offers information about current legal topics and invitations to attend educational seminars provided by the firm, provided there is no solicitation for the firm's legal services.

Rules: 7.1, 7.1 (comments 1, 7 and 9); 7.2, 7.2 (comment 1); 7.3.

Opinion #951 (12/17/12)

Offering letter writing services through website. A lawyer may not offer a web-based letter writing service on a broad range of topics unless it is clear that no legal services are rendered and the lawyer prominently disclaims the existence of a client-lawyer relationship on the website.

Rules: 5.7(a) & (c).

Opinion #955 (1/14/13)

A law firm may have an 'of counsel" relationship with a non-New York lawyer admitted in another jurisdiction and must disclose any jurisdictional limitations on the ability of any lawyer associated with the firm to practice law in this State. The form of such disclosure may be either "not admitted in New York", or "admitted only in XX State."

Rules: 5.1; 7.1; 7.5(a) (4); 7.5(d)

ADVERTISING

Social Networking, Internet "Solicitation", and Websites (Continued)

Opinion #967 (6/5/13)

Attorney blogging, the primary purpose of which is not retention of the attorney, is not advertisement.

Rules: 1.0(a) & (c), 7.1(k)

Attorney Professionalism Forum, *NYSBA Journal*, June 2013

The Use of Social Media in Connection with Handling Client Matters

"Rule 1.1 of the RPC states our ethical obligation to provide competent representation. Like it or not, this means that we must understand how technologies are utilized and become familiar with them. The use of social media by attorneys falls within this obligation."

ADVERTISING

Opinion #928 (8/9/12)

A qualified legal assistance organization can use the terms "Project" and "Law Center" in its name as long as, in the case of the term "Project," the term is associated with words indicating the organization's law-related activity.

Rules: 1.0(p), 7.5(b)

Opinion #931 (9/7/12)

Law firm of solo practitioner cannot include "and Associates" based on employment of paralegal.

Rules: 7.5(b), 7.5(c), 8.4(c)

Opinion #932 (9/7/12)

A lawyer's photograph may be on the lawyer's business card. A lawyer may recommend other service providers provided that there is an appropriate disclaimer.

Rules: 7.5(a)(i); 5.4; 7.2; 7.1(c) (3)).

Opinion #936 (9/21/12)

Whether a law firm may designate a departing name partner as "Special Counsel" after removing his name from the firm name depends on the level of his continuing involvement with the firm and its clients.

Rules: 1.10(a) & (e), 7.1(a), 7.5(a)

ADVERTISING
(Continued)

Opinion #943 (11/2/12)

The law firm business card of a firm employee who is a law school graduate but is not admitted to practice may not list the employee's J.D. degree or use the title "legal project manager" without making clear that the individual is not admitted to practice law.

Rules: 5.3, 7.1(a), 8.4(c)

Opinion #964 (4/4/13)

Advertising for legal services may not identify a mail drop as the sole address, and must include the street address of the lawyer's principal office; a lawyer's business cards and letterhead may use a mail drop as the sole address, provided they are not being used as advertising and use of the address is not misleading.

Rules: 1.0(a); 7.1(h); 7.5(a); 8.4(c)

Opinion #972 (6/26/13)

A law firm may not list its services under heading of "Specialties" on a social media site, and lawyer may not do so unless certified as a specialist by an appropriate organization or governmental authority.

Rules: 7.4

ADVERTISING
(Continued)

Opinion #929 (8/8/12)

An attorney whose registration/admission status before the United States Patent and Trademark Office is "inactive" may not use the designation patent attorney on his business card unless he notes that he is on administrative leave and as such is unable to prosecute matters for others before the USPTO.

Rules: 7.1 a and b, 7.4(b), 7.5 (a), and 8.4(c)

Opinion #948 (12/3/12)

A law firm name may not include a lawyer's initials conjoined with an abbreviation of the lawyer's surname. Firm name may not include the phrase "The Business Dispute Clinic," but use of the phrase as a motto separate from the firm name may be permissible.

Rules: 7.1, 7.5(b)

HAYES V. STATE OF NY ATTY. GRIEVANCE COMMITTEE OF THE EIGHTH JUDICIAL DISTRICT, 672 F.3D 158 (2D CIR. MARCH 5, 2012)

The Court reversed the lower Court's findings and held that Rule 7.4 of the New York Rules of Professional Conduct, codified at N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.53(c)(1) (2011) ("Rule 7.4"),[1] which requires a prescribed disclaimer statement to be made by attorneys who state that they are certified as a specialist is unconstitutionally vague.

COMMUNICATIONS WITH OTHERS

Communications with Represented/Unrepresented Parties

Opinion #956 (1/14/13)

It would be misleading for a lawyer to depose an unrepresented party to a lawsuit, who is not aware of the lawsuit without disclosing that the lawyer's client's interests are adverse to the unrepresented party. The lawyer cannot provide advice to the unrepresented party but is required to tell the party to obtain counsel.

Rules: 1.0(i), 1.2(d), 1.4 (a), 1.16(c), 4.2, 4.3, 8.4(a)(c)(d)

Opinion #959 (2/21/2013)

A lawyer who knows that an adverse party's lawyer has withdrawn from the representation or resigned from the bar may contact the adverse party to determine if he or she has retained new counsel or plans to represent himself or herself.

Rules: 4.2, 4.3

CONFIDENTIAL INFORMATION

Opinion #939 (10/16/12)

The maintaining confidentiality of client information as between independent lawyers sharing office space and computer. Independent lawyers sharing office space may share computer for client-related information if they exercise reasonable care to assure that confidential information is not disclosed

Rules: 1.6(a) & (c)

Opinion #940 (10/16/12)

The use of off-site backup tapes to store a client's confidential information; retention of files in original paper form. Lawyer may store confidential information on off-site backup tapes if lawyer takes reasonable care to ensure adequacy of systems to protect confidentiality. When records must be retained, nature of the records determines whether lawyer (i) must maintain originals, (ii) may discard originals and maintain electronic copies in particular formats, or (iii) may maintain electronic copies in any format.

Rules: 1.6(a) & (c), 1.15(d)

CONFIDENTIAL INFORMATION
(Continued)

Opinion #945 (11/07/2012)

A lawyer may not disclose that the client has been reading the opposing party's client-lawyer e-mails, although not communicating the e-mails or their contents to the lawyer, unless (1) the lawyer knows that the client is committing a crime or fraud and no other remedial measures will prevent harm to the opposing party, or (2) governing judicial decisions or other law require disclosure.

Rules: 1.6, 3.3, 4.4(b), 8.4(d).

Latest ABA Guidance: Old Wine in a Tech-Ethics Bottle? NYSBA Journal November/December 2012, Article pg. 20, by Devika Kewalramani

This article addresses the importance of lawyers and law firms in keeping up with the advancement in technology while maintaining client confidentiality and the attorney-client relationship.

"Lawyers perhaps deal with more confidential and privileged information than any other professionals. That is why it is imperative that law firms and legal departments understand how to protect and secure the information clients entrust to them. Today, every law firm and legal department maintains electronic client data in some shape or form. This makes the ABA guidance on a lawyer's use of technology critical to every lawyer's practice."

Rules: 1.1, 1.6, 4.4

RECORDKEEPING AND ESCROW

MATTER OF PETER J. GALASSO, (ADMITTED AS PETER JOHN GALASSO), RESPONDENT. GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, PETITIONER, 94 A.D.3d 30 (2nd Dept. 2012) ; *Leave to appeal granted by, Stay granted by* 19 N.Y.3d 832 (2012); *Motion granted by* 19 N.Y.3d 833 (2012); *Motion granted by, in part* 19 N.Y.3d 981 (2012);*Affirmed in part and modified in part by, Remitted by* 19 N.Y.3d 688 (2012); *Adhered to, On rehearing at* 956 N.Y.S.2d 189 (2nd Dep't, 2012); *Motion granted by* 20 N.Y.3d 1055 (2013)

Respondent failed to properly supervise his firm's bookkeeper, Anthony Galasso. (Peter Galasso's brother). Anthony Galasso misappropriaed client funds totaling $4,501,571 from the firm's Baron escrow .

Respondent was charged with 10 counts of professional misconduct by the Grievance Committee including: breach of the fiduciary duty to pay or deliver escrow funds, failure to safeguard client funds, failure to supervise a nonlawyer employee resulting in the misappropriation of client funds, and unjust enrichment by use of the Baron funds for personal benefit.

RECORDKEEPING AND ESCROW
(Continued)

Opinion #946 (11/7/12)

The Rules of Professional Conduct do not prevent a lawyer from distributing settlement proceeds to a third person at the request of the lawyer's client.

Rules: 1.0(e); 1.2(a); 1.15 (c)(4)

Opinion #950 (12/17/12)

Law firm that retains electronic copies of mail may destroy the original paper mail, except when it finds that particular items must be retained in paper form, if it follows reliable procedures to identify and retain those particular items.

Rules: 1.6, 1.15(d)

Opinion #970 (6/21/13)

If an executrix of a decedent's estate who seeks files possessed by the decedent's former attorney is legally entitled to the same access that the decedent had when alive, then the former attorney should ordinarily provide the executrix access to all those files. If, on the other hand, her status as executrix does not confer on her the same legal right as the decedent possessed, then the contents of a deceased client's file will generally not be disclosable to the executrix unless (1) the information disclosed is not "confidential information" or (2) the lawyer has grounds to conclude that release of the information is impliedly authorized.

Rules: 1.6(a), 1.9(c), 1.15(c), 1.16(e)

RECORDKEEPING AND ESCROW
(Continued)

Attorney Professionalism Forum, *NYSBA Journal*, January 2013

As long as the lawyer or law firm advises the client that the retainer payment will be treated as if it were earned at the time of the payment and that any unearned portion will be refunded to the client, New York allows the fees to be deposited into an operating account.

Rules: 1.15(a), 1.5, Simon's New York Rules of Professional Conduct Annotated 598 (2012).

Attorney Professionalism Forum, *NYSBA Journal*, March/April 2013

Recordkeeping and Escrow - Attorney Obligations to Identify, Preserve and Produce Relevant Electronically Stored Information

Rules: 1.1, 3.4, 3.3

Attorney Professionalism Forum, *NYSBA Journal*, May 2013

Recordkeeping and Escrow - Ethical Obligations and Mobile Devices

Rules: 1.1, 1.6

MISCELLANEOUS

Opinion #935 (9/18/12)

A Public Defender or Assistant Public Defender can represent private clients as part of a separate private practice in the same Criminal Court in which he or she appears in a public defender capacity.

Rules: 1.11

Opinion #949 (12/17/12)

The ethical responsibilities of "standby counsel" vary depending on the degree to which standby counsel assumes representational obligations. If standby counsel remains on the sidelines, the *pro se* party should be treated like a prospective client. If the *pro se* party invites standby counsel's participation on a limited basis, standby counsel may limit the scope of representation. If the *pro se* party makes demands on standby counsel that are irrelevant to the case and beyond the scope of matters for which counsel has assumed responsibility, standby counsel should reiterate the scope of representation and explain which requests and demands are beyond that scope.

Rules: 1.2, 1.3, 1.4(a), 1.14, 1.18, 3.1, 3.2, 3.3

Opinion #953 (1/11/13)

It is permissible for a Bar Association to solicit contributions and for its members to make contributions for the purpose of defraying the costs of commissioning portraits of retiring judges who will still serve on the bench, where the portraits are a means of honoring the judges and the actual gift is made to the court, not to an individual judge.

Rules of Professional Conduct: 3.5(a) and 8.4

Code of Judicial Conduct: § 100.4(D)(5)

MISCELLANEOUS *(Continued)*

Opinion #971 (6/26/13) – Overrules N.Y. State 524

Subject to disclosure requirements and limitations, a lawyer may donate legal services to a charitable organization for auction as a fund-raising device.

Rules: 1.1(b), 1.2(c), 1.7, 1.9, 7.1, 7.2(a)

Attorney Professionalism Forum, *NYSBA Journal*, January 2013

Actions that are undertaken to delay or prolong the resolution of the litigation or to harass or maliciously injure another constitute sanctionable frivolous conduct.

Rules: Section 130-1 of the Rules of Chief Administrator of the Courts, 22 NYCRR.

Attorney Professionalism Forum, *NYSBA Journal*, November/December 2012

Denying an opposing counsel's request for an extension violates the standards of civility but the Rules of Professional Conduct.

Rules: 22 N.Y.C.R.R. § 1200, App. A

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Matter of Galasso
2013 NY Slip Op 01269
Decided on February 27, 2013
Appellate Division, Second Department
Per Curiam
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on February 27, 2013

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

RANDALL T. ENG, P.J.
WILLIAM F. MASTRO

REINALDO E. RIVERA

DECISION & ORDER

MARK C. DILLON
DANIEL D. ANGIOLILLO, JJ.

2010-01047 ON REMITTITUR

[*1]In the Matter of Peter J. Galasso, admitted as Peter

John Galasso.
Grievance Committee for the Ninth Judicial
District, petitioner; Peter J. Galasso, respondent.

(Attorney Registration No. 1783984)

On the Court's own motion, it is

ORDERED that the decision and order on remittitur of this Court dated December 19, 2012, in the above-entitled matter is recalled and vacated, and the following decision and order on remittitur is substituted therefor:

DISCIPLINARY proceeding instituted by the Grievance Committee for the Ninth Judicial District. The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on March 10, 1982, under the name Peter John Galasso. The Grievance Committee for the Ninth Judicial District moved, inter alia, to suspend the respondent from the practice of law on an interim basis and for authorization to institute and prosecute a disciplinary proceeding in this Court. By decision and order on motion of this Court dated April 30, 2010, the Grievance Committee for the Ninth Judicial District was authorized to institute and prosecute a disciplinary proceeding, as the petitioner, against Peter J. Galasso, admitted as Peter John Galasso, as the respondent, based upon the acts of professional misconduct set forth in a petition dated January 21, 2010, and the matter was referred to Steven C. Krane, Esq., as Special Referee to hear and report. That branch of the motion which was to suspend the respondent from the practice of law on an interim basis was denied. By further decision and order on motion dated June 28, 2010, this Court, on its own motion, reassigned the matter to the Honorable Arthur J. Cooperman, as Special Referee to hear and report, following the death of Steven C. Krane, Esq.

By opinion and order of this Court dated February 21, 2012, the respondent was suspended from the practice of law for a period of two years, commencing March 21, 2012, and continuing until further order of the Court. By order dated May 1, 2012, the Court of Appeals granted both the respondent's motion for leave to appeal, and the respondent's motion for a stay. By opinion and order of the Court of Appeals dated October 23, 2012, the opinion and order of this Court dated February 21, 2012, was modified to the extent of dismissing charge five of the petition and the matter was remitted to this Court for further proceedings in accordance with the opinion and order of the Court of Appeals, to "consider whether the sanction previously imposed remains an appropriate sanction."

Upon review of whether the two-year suspension previously imposed remains an [*2] appropriate sanction in light of the Court of Appeals's opinion and order dated October 23,

2012, we conclude that the sanction remains appropriate. The modification of this Court's opinion and order dated February 21, 2012, dismissing charge five of the petition, which charge alleged that the respondent failed to comply with the lawful demands of the Grievance Committee, does not warrant a change in the sanction imposed.

In determining an appropriate measure of discipline to impose, this Court considered all of the mitigation proffered by the respondent including, but not limited to, the absence of venality; the lengths to which the respondent went to bring his brother to justice; the expense the respondent has borne seeking recovery for his clients' losses; and the substantial evidence of the respondent's good character.

Whether, and to what extent, attorneys are subject to discipline under circumstances where a defalcation was occasioned by someone other than the attorney within the attorney's firm, depends on a number of factors: (1) the subject attorney's partnership status and/or level of experience; (2) the presence (or absence) of "early warning signs" of financial improprieties, whether such signs were ignored and, if so, for how long; (3) whether the proper authorities were notified of defalcations upon their discovery; (4) the presence (or absence) of monetary loss to clients and the magnitude thereof; and (5) whether the attorney attempted to reimburse client losses caused by another (*see e.g. Matter of Dahowski,* 103 AD2d 354; *Matter of Cardoso*, 152 AD2d 157; *Matter of Forman,* 250 AD2d 116; *Matter of Ponzini*, 259 AD2d 142, *mod* 268 AD2d 478; *Matter of Felman,* 299 AD2d 15; *Matter of Fonte*, 75 AD3d 199; *Matter of Laudonio*, 75 AD3d 144; *see also Matter of Jones*, 100 AD3d 57). The foregoing factors were all considered in this matter, particularly the presence of "warning signs" and "red flags;" the extent of the clients' monetary losses; and the fact that there has been no reimbursement of the client losses caused by the respondent's brother.

The cases proffered by the respondent in support of his argument that he should be, at most, publicly censured, are inapposite. Unlike those cases, the respondent herein was charged with having been unjustly enriched by the use of clients' funds for his personal benefit, and that charge was sustained.

The most fundamental obligation of attorneys entrusted with client funds is the duty to safeguard those funds. As the Court of Appeals stated, that duty, if no other, is "crystal clear" and " a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed'" *Matter of Galasso*, 19 NY3d 688, *4, quoting *Matter*

of Holtzman, 78 NY2d 184, 191). We reiterate that the respondent failed to maintain appropriate vigilance over his firm's bank accounts, resulting in actual and substantial harm to clients.

ENG, P.J., MASTRO, RIVERA, DILLON and ANGIOLILLO, JJ., concur.

Upon remittitur, it is

ORDERED that the sanction of a two-year suspension imposed by this Court in the opinion and order dated February 21, 2012, is adhered to; and it is further,

ORDERED that the suspension from the practice of law of the respondent, Peter J. Galasso, admitted as Peter John Galasso, shall commence on March 5, 2013, and shall continue until further order of this Court. The respondent shall not apply for reinstatement earlier than September 5, 2014. In such application, the respondent shall furnish satisfactory proof that during said period he: (1) refrained from practicing or attempting to practice law, (2) fully complied with this opinion and order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (22 NYCRR 691.10), (3) complied with the applicable continuing legal education requirements of 22 NYCRR 691.11(c)(2), and (4) otherwise properly conducted himself; and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this Court, the respondent, Peter J. Galasso, admitted as Peter John Galasso, shall desist and refrain from (l) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application, or any advice in relation thereto, and (4) holding himself out in any way as an [*3]attorney and counselor-at-law; and it is further,

ORDERED that if the respondent, Peter J. Galasso, admitted as Peter John Galasso, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10(f).

ENTER:

Aprilanne Agostino

Clerk of the Court

Return to Decision List

This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 170
In the Matter of Peter J. Galasso, &c., An Attorney and Counselor-at-Law.

Grievance Committee for the Ninth Judicial District,
Respondent;
Peter J. Galasso,
Appellant.

Jeffrey L. Catterson, for appellant.
Matthew Lee-Renert, for respondent.
Nassau County Bar Association; Thomas F. Liotti, amici curiae.

PER CURIAM:

Petitioner instituted a disciplinary proceeding against respondent attorney Peter J. Galasso alleging ten charges of professional misconduct. The essence of the petition is that respondent failed to properly supervise the firm's bookkeeper resulting in the misappropriation of client funds and that he

breached his fiduciary duty by failing to safeguard those funds. Although we find the bulk of the charges were properly sustained, we modify to dismiss the charge alleging respondent's failure to timely comply with the lawful demands of the Grievance Committee.

At all times relevant to this appeal, respondent has been a partner of the law firm known as Galasso & Langione, LLP (the Galasso Langione firm).[1] Anthony Galasso, respondent's brother, was also employed by the firm and had, over the course of several years, worked his way up from an entry-level position as a file clerk and messenger to become the firm's bookkeeper and office manager.

In June 2004, respondent represented Steven Baron in a matrimonial action commenced by Wendy Baron. The parties and their attorneys entered into an escrow agreement through which respondent was the designated escrow agent for the proceeds from a sale of commercial property owned by Steven Baron. Respondent agreed to hold the sum of $4,840,862.34 in an interest-bearing escrow account, pending further order of Supreme Court in the matrimonial action. Anthony Galasso, in his capacity as office manager, deposited the funds into an escrow account at Signature Bank (the Baron escrow account). Respondent and fellow partner James Langione were the only authorized signators on the account

[1] The firm was subsequently known as Galasso, Langione & Botter, LLP and is currently known as Galasso, Langione, Catterson & LoFrumento, LLP.

application. However, Anthony Galasso apparently altered the application to permit electronic fund transfers and to include himself -- a nonlawyer -- as a signator.

Between June 23, 2004 and January 17, 2007, Anthony Galasso transferred approximately $4,501,571 from the Baron escrow account into six other firm accounts maintained at Signature Bank through the use of roughly 90 internet transfers. It seems that the Baron funds were used to replace money that Anthony Galasso had already removed from the firm accounts. Transferred funds from the Baron escrow account were then disbursed to respondent, firm employees and other entities in the course of business, all without the knowledge of the firm's principals or the consent of the Barons. In particular, approximately $360,000 in funds transferred from the Baron escrow account were used to finance the purchase of the firm's office condominium. To escape detection, Anthony Galasso had the genuine Baron escrow account statements, generated by the bank, diverted to a post office box and fabricated false statements for review by the firm. Although the Barons demanded payment of the funds held in escrow, more than $4.3 million remains due and owing to them.

In June 2006, the Galasso Langione firm received $800,000 on behalf of the Estate of George Carroll in settlement of a medical malpractice/wrongful death action and Anthony Galasso deposited the funds into the firm's IOLA (Interest on

Lawyer Account) at M&T Bank. The following month, the firm received $175,000 on behalf of Adele Fabrizio in connection with a personal injury action. Anthony Galasso also deposited these funds into the firm's M&T IOLA. Anthony Galasso misappropriated the bulk of these funds by forging the partners' signatures on IOLA checks. With respect to the IOLA, respondent's practice had been to review monthly financial reports generated by Anthony Galasso, rather than the account statements themselves. To date, despite the clients' demands for the return of their funds, the firm has returned only $85,791.36 to the Estate of Carroll; no funds have been returned to Fabrizio.

Anthony Galasso confessed to the theft of the above funds on January 18, 2007 and ultimately pleaded guilty to two counts of grand larceny in the first degree, ten counts of falsifying business records in the first degree and ten counts of criminal possession of a forged instrument in the second degree. He was sentenced to 2½ to 7½ years imprisonment, as well as $2,000,000 in restitution. Respondent cooperated fully with the criminal investigation. Indeed, the Nassau County District Attorney's Office submitted a letter to the Grievance Committee providing its conclusions that no one else in the firm had had knowledge of the theft and that nothing in the documents presented to the firm by Anthony Galasso would have raised any suspicion regarding the accounts. Respondent has also commenced civil suits against the banks involved, in an attempt to recover

the client funds.

As noted above, the Grievance Committee commenced a disciplinary proceeding against respondent alleging ten charges of professional misconduct.[2] The matter was referred to a Special Referee who sustained all ten charges. The Appellate Division granted the Committee's motion to confirm the Referee's

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[2] Charges one, two, seven and nine allege that respondent breached his fiduciary duty to pay or deliver escrow funds, by failing to safeguard client funds and by failing to promptly pay or deliver those funds to the person entitled to them (Code of Professional Responsibility DR 9-102 [a], [c][4]; DR 1-102 [a][7] [22 NYCRR 1200.46 (a), (c)(4); 1200.3 (a)(7)] and Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.15 [a], [c][4]; 8.4 [h]).

Charges six, eight and ten allege that respondent failed to supervise a nonlawyer employee resulting in the misappropriation of client funds (Code of Professional Responsibility DR 1-104 [d][2] [22 NYCRR 1200.5 (d)(2)] and Rules of Professional Conduct [22 NYCRR 1200.0] rule 5.3 [b][2][i], [ii]).

Charge three alleges that respondent was unjustly enriched by use of the Baron funds for his personal benefit (Code of Professional Responsibility DR 9-102 [a]; 1-102 [a][5], [a][7] [22 NYCRR 1200.46 (a); 1200.3 (a)(5), (a)(7)] and Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.15 [a]; 8.4 [d], [h].

Charge four alleges that respondent failed to provide appropriate accounts to the Barons with respect to their escrow funds (Code of Professional Responsibility DR 9-102 [c][3]; 1-102 [a][7] [22 NYCRR 1200.46 (c)(3); 1200.3 (a)(7)] and Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.15 [a]; 8.4 [h]).

Charge five alleges that respondent failed to timely comply with the lawful demands of the Committee (Code of Professional Responsibility DR 1-102 [a][5], [a][7] [22 NYCRR 1200.3 (a)(5), (a)(7)] and Rules of Professional Conduct (22 NYCRR 1200.0) rules 8.4 [d], [h]).

report and denied respondent's cross motion to disaffirm the report (94 AD3d 30 [2d Dept 2012]). The Court also suspended respondent from the practice of law for a period of two years. This Court granted respondent leave to appeal, and we now modify.

Few, if any, of an attorney's professional obligations are as crystal clear as the duty to safeguard client funds. Rather than establishing a new or heightened degree of liability for attorneys, we find that the Appellate Division's determination is completely consistent with existing standards pertaining to the safeguarding and oversight of client funds. In other words, "a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed" (Matter of Holtzman, 78 NY2d 184, 191 [1991]).

Respondent is not bound to his clients solely by the contractual language of the escrow agreement, but also by a fiduciary relationship. "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior" (Meinhard v Salmon, 249 NY 458, 464 [1928]; see Matter of Wallens, 9 NY3d 117, 122 [2007]). Respondent owed his clients a high degree of vigilance to ensure that the funds they had entrusted to him in his fiduciary capacity were returned to them upon request. To that end, implementation of any of the basic measures respondent has since adopted -- personal review of the bank statements, personal contact with the bank and improved

oversight of the firm's books and records -- likely would have mitigated, if not avoided, the losses.

Here, although respondent himself did not steal the money and his conduct was not venal, his acts in setting in place the firm's procedures, as well as his ensuing omissions, permitted his employee to do so. Moreover, the Baron funds were used for the benefit of respondent and the firm. That respondent has acted without venality can be a factor considered in mitigation, but is not probative of whether he has failed to preserve client funds (see e.g. Matter of Wilkins, 70 AD3d 1119, 1119-1120 [3d Dept 2010]; Matter of Abato, 51 AD3d 225, 228 [2d Dept 2008]).

Unquestionably, Anthony Galasso had devised a relatively sophisticated system and his fraud went undetected by the attorneys and accountant reviewing the documents he produced. However, respondent ceded an unacceptable level of control over the firm accounts to his brother, thereby creating the opportunity for the misuse of client funds. Had respondent been more careful in supervising the accounts and his employee, he would have been aware of the malfeasance at a much earlier time when he could have substantially mitigated the losses.

It cannot be said that there were no warning signs here. Specifically, a nearly $5,000 "discrepancy" in the escrow account was noted by Baron's accountant, which respondent permitted Anthony Galasso to resolve with the bank. Anthony

Galasso then corrected the "discrepancy" on a fabricated account statement by showing an internet transfer of funds from the firm IOLA to the Baron escrow account. In addition, when asked to obtain a $100,000 check from the escrow account payable to Wendy Baron, Anthony Galasso produced a check from the IOLA, which respondent then signed and provided to Mrs. Baron. The fabricated statement for the escrow account later reflected an expenditure of $100,000 by check number 1738, despite the fact that no checks had been written on the escrow account.

A discrepancy in an escrow account should, at a minimum, be alarming to a reasonably prudent attorney. This is not to say that attorneys are prohibited from delegating certain tasks to firm employees, but any delegation must be made with an appropriate degree of oversight. We stress that it is the ethical responsibility of the attorney -- not the bookkeeper, the office manager or the accountant -- to safeguard client funds.

To be clear, respondent is not being held responsible for the criminal behavior of his brother. Rather, it is his own breach of his fiduciary duty and failure to properly supervise his employee, resulting in the loss of client funds entrusted to him, that warrant this disciplinary action. We find that charges one through four and six through ten were properly sustained.

Respondent was also charged with the failure to timely comply with the Grievance Committee's lawful demands for information (charge five) in violation of former DR 1-102 (a)(5)

and (7) and Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4 (d) and (h). Petitioner maintains that, between May 12, 2008 and July 22, 2009, it made repeated requests for information to which respondent failed to fully and timely respond and that respondent's conduct impeded and delayed its investigation.[3]

We find the imposition of the separate charge on this basis to be unsupported by the record. It is difficult to characterize respondent's overall participation in the disciplinary process as anything other than active. Both respondent and his counsel were in regular correspondence with the Grievance Committee and provided copious documentation in response to their requests. When particular demands could not be immediately met, respondent generally acknowledged same, explained why and stated his intention to provide the information at the earliest opportunity. Under these particular circumstances, we find that respondent's level of compliance with this investigation is inconsistent with a sustained charge of failure to timely comply with the Committee's lawful demands. Upon remittal, the Appellate Division should reconsider whether the suspension previously imposed remains an appropriate

[3] In particular, the Grievance Committee took issue with the responses to its requests seeking: 1) a forensic examination conducted by outside accountants to audit all Galasso & Langione firm bank accounts in the relevant time period; 2) an accounting to trace all disbursements from the Baron escrow account; 3) detailed bookkeeping records for the firm's Signature Bank and M&T IOLA accounts; and 4) copies of documents relating to the financing and purchase of the office condominium.

sanction.

Accordingly, the order of the Appellate Division should be modified, without costs, by dismissing charge five of the petition and remitting the matter to that Court for further proceedings in accordance with this opinion and, as so modified, affirmed.

* * * * * * * * * * * * * * * * *

Order modified, without costs, by dismissing charge five of the petition and remitting the matter to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion Per Curiam. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided October 23, 2012

Matter of Galasso
2012 NY Slip Op 01460 [94 AD3d 30]
February 21, 2012
Per Curiam.
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, May 9, 2012

[*1]

In the Matter of Peter J. Galasso (Admitted as Peter John Galasso), an Attorney, Respondent. Grievance Committee for the Ninth Judicial District, Petitioner.

Second Department, February 21, 2012

APPEARANCES OF COUNSEL

Gary L. Casella, White Plains (*Eddie Still, Antonia Cipollone* and *Matthew Lee-Renert* of counsel), for petitioner.

Moran Karamouzis, Rockville Centre (*Grace Moran* of counsel), and *Galasso, Langione, Catterson & LoFrumento, LLP*, Garden City (*Jeffrey Catterson* of counsel), for respondent.

{**94 AD3d at 31} OPINION OF THE COURT

Per Curiam.

The Grievance Committee for the Ninth Judicial District (hereinafter the Grievance Committee) served the respondent with a petition dated January 21, 2010, containing 10 charges of professional misconduct.

Charge one alleges that the respondent breached his fiduciary duty by failing to promptly pay or deliver funds received pursuant to a written escrow agreement to the person

(s) entitled to receive such funds, in violation of Code of Professional Responsibility DR 9-102 (c) (4) (22 NYCRR 1200.46 [c] [4]).

The respondent was a partner of a law firm known as Galasso & Langione, LLP, [*2] and/or the successor firms known as Galasso Langione & Botter, LLP, and Galasso, Langione, Catterson &{**94 AD3d at 32} LoFrumento, LLP (hereinafter the Galasso Langione firm or the firm). The respondent and the Galasso Langione firm represented Stephen Baron in connection with an action for a divorce and ancillary relief commenced by Wendy Baron in the Supreme Court, Nassau County. Wendy Baron was represented by her own attorney.

Pursuant to a written escrow agreement dated June 8, 2004, the respondent acknowledged the receipt of funds totaling $4,840,862.32 representing the proceeds of the sale of a commercial property owned by Stephen Baron (hereinafter the Baron funds). The respondent executed the foregoing agreement as both the attorney for Stephen Baron and the escrow agent, and agreed to hold the funds on deposit in an interest-bearing escrow account under the Social Security number of Stephen Baron "subject to further order of the Supreme Court" in connection with the underlying divorce action.

On or about June 11, 2004, the respondent, through his agents and employees, arranged for the funds to be deposited into an interest-bearing account at Signature Bank entitled "Stephen Baron Galasso Langione LLP Escrow Agents" (hereinafter the Baron escrow account). The respondent had a fiduciary duty to safeguard the Baron funds and to promptly pay or deliver the funds, with accrued interest, to Stephen and/or Wendy Baron, following a decision of the Supreme Court, Nassau County, issued in or about November 2006, in connection with the underlying divorce action.

Stephen and Wendy Baron, through their respective attorneys and agents, demanded payment from the respondent of the Baron funds pursuant to the foregoing decision of the Supreme Court, Nassau County. To date, the respondent has failed to deliver or pay more than $4.3 million of the Baron funds to the respective parties to whom such funds are due and owing.

Charge two alleges that the respondent breached his fiduciary duty by failing to safeguard the Baron funds in violation of Code of Professional Responsibility DR 9-102 (a)

and DR 1-102 (a) (7) (22 NYCRR 1200.46 [a]; 1200.3 [a] [7]).

Between June 11, 2004 and mid-January 2007, there were a series of Internet transfers of Baron funds, totaling more than $4.3 million, from the Baron escrow account into various accounts maintained by the respondent and the Galasso Langione firm at Signature Bank incident to the respondent's practice of law and/or the Galasso Langione firm's practice of law.{**94 AD3d at 33}

Following the aforementioned transfers, the Baron funds were disbursed to the respondent, other members and employees of the Galasso Langione firm, various third parties, and various business entities. Stephen and Wendy Baron, the parties ultimately entitled to receive the Baron funds, did not consent to, or benefit from, these disbursements of their funds.

Charge three alleges that the respondent has been unjustly enriched by the use of misappropriated Baron funds for his personal benefit, in violation of Code of Professional Responsibility DR 1-102 (a) (5) and (7) (22 NYCRR 1200.3 [a]{**94 AD3d at 34} [5], [7]).

The respondent knew or should have known that Baron funds transferred from the Baron escrow account into the Galasso Langione firm's Signature Bank escrow account in or about September 2004 were subsequently used to finance a $100,000 down payment in connection with the respondent's purchase of a commercial office condominium unit at 377 Oak Street in Garden City. Moreover, the respondent knew or should have known that Baron funds transferred from the Baron escrow account into the Galasso Langione firm's Signature Bank account on or about September 21, 2005, were subsequently used to pay the $241,483.77 balance due and owing from the respondent to the seller in connection with the purchase of the Oak Street condominium unit, and to pay $22,622.60 in related closing costs.

Charge four alleges that the respondent breached his fiduciary duty by failing to provide appropriate accounts to Stephen and Wendy Baron with respect to the Baron funds entrusted to him in violation of Code of Professional Responsibility DR 9-102 (c) (3) and DR1-102 (a) (7) (22 NYCRR 1200.46 [c] [3]; 1200.3 [a] [7]).

Stephen and Wendy Baron, through their respective attorneys and agents, demanded an accounting from the respondent with respect to the disbursement of their misappropriated

funds. The respondent has tendered partial accountings but has failed to fully account to Stephen and Wendy Baron for the disbursements of misappropriated funds following transfers of the Baron funds from the Baron escrow account to various Galasso Langione firm accounts at Signature Bank.

Charge five alleges that the respondent failed to timely comply with lawful demands for information made by the Grievance Committee in connection with an investigation of his alleged [*3]professional misconduct, in violation of Code of Professional Responsibility DR 1-102 (a) (5) and (7) (22 NYCRR 1200.3 [a] [5], [7]) and Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4 (d) and (h).

From on or about May 12, 2008 through July 22, 2009, the petitioner made various requests for information relevant to its investigation of complaints of alleged professional misconduct by the respondent, via correspondence and subpoena.

The respondent failed to timely and fully respond and/or comply with one or more of the following requests:

(a) a written update on the status of the forensic investigation that reportedly was being undertaken by accountants hired by the Galasso Langione firm in 2007 to audit all Galasso Langione firm bank accounts for the preceding three years and to determine, inter alia, what happened to the funds misappropriated from the Baron escrow account, along with copies of any written analysis prepared by such accountants and copies of the documents used to support their findings;

(b) an accounting to trace the disbursement of Baron funds subsequent to the unauthorized transfers from the Baron escrow account to the Galasso Langione firm Signature Bank accounts for the period June 2004 through mid-June 2007;

(c) bookkeeping records for the Galasso Langione firm's Signature Bank IOLA account and the Galasso Langione firm's M&T Bank IOLA account for the period January 1, 2004 through January 31, 2007, including records identifying the date, source, and description of each item deposited as well as the date, payee, and purpose of each withdrawal or disbursement, along with information identifying whose funds were being held on deposit in the Signature Bank IOLA account as of January 1, 2004, and the amount being held on behalf of each such person or entity; and

(d) copies of documents relating to the purchase of the office condominium located at 377 Oak Street, Unit 101, in Garden City, including the contract of sale, all documents relating to the financing obtained in connection with the purchase, the loan application, and related documents submitted to the lender in connection with the financing and credit reports.

The respondent's failure to timely and fully comply with the Grievance Committee's lawful demands for the above-referenced information impeded and delayed the Grievance Committee's investigation.

Charge six alleges that the respondent failed to supervise a nonlawyer employee of the Galasso Langione firm, resulting in{**94 AD3d at 35} the misappropriation of the Baron funds, in violation of Code of Professional Responsibility DR 1-104 (d) (2) (22 NYCRR 1200.5 [d] [2]).

The respondent directed the Galasso Langione firm's former bookkeeper/office manager (hereinafter the bookkeeper) to open the Baron escrow account and to maintain and reconcile all bank account statements received from Signature Bank with respect to the Baron escrow account as well as all other Galasso Langione firm Signature Bank accounts used in connection with the respondent's practice of law and/or the Galasso Langione firm's practice of law.

The respondent failed to properly supervise the Galasso Langione firm's former bookkeeper and failed to properly review, audit, and reconcile the Galasso Langione firm's Signature Bank accounts used in connection with his practice of law and/or the Galasso Langione firm's practice of law. In the exercise of reasonable management and supervisory authority, the respondent would have been aware of the unlawful and improper transfers and disbursements of the Baron funds so that remedial action could have been taken to avoid or mitigate the misappropriations of same.

Charge seven alleges that the respondent breached his fiduciary duty by failing to safeguard funds belonging to another person or persons that had been entrusted to the Galasso Langione firm incident to the firm's practice of law and by failing to promptly pay or deliver funds, received in his and/or the firm's fiduciary capacity, to the person or persons entitled to receive such funds, in violation of Code of Professional Responsibility DR 9-102

(a), (c) (4) and DR 1-102 (a) (7) (22 NYCRR 1200.46 [a], [c] [4]; 1200.3 [a] [7]).

In or about December 2005 or January 2006, the Galasso Langione firm received the sum of $800,000 on behalf of the estate of George Carroll (hereinafter the estate) in connection with the settlement of a medical malpractice/wrongful death action. The firm's former bookkeeper was instructed to deposit the foregoing funds into an IOLA account maintained by the firm incident to the practice of law. However, the respondent failed to verify that the funds were deposited into the designated IOLA account and failed to ensure that the funds remained safely on deposit in the [*4]designated IOLA account until such time as the firm was authorized to disburse the funds to the legal representatives of the estate.

In or about January 2007, the legal representatives of the estate received written notice from the firm that the firm's former{**94 AD3d at 36} bookkeeper had misappropriated the funds entrusted to them on behalf of the estate.

In or about January 2008, the firm disbursed $85,791.36 to the estate, representing payment of a portion of the total received by the firm that remains due and owing to the estate. The representatives of the estate, through their attorneys, have demanded payment of the balance due and owing from the funds entrusted to the firm on behalf of the estate. To date, neither the respondent nor the firm has paid the balance due and owing to the estate.

Charge eight alleges that the respondent failed to supervise a nonlawyer employee of the Galasso Langione firm, resulting in the misappropriation of funds received on behalf of the estate, in violation of Code of Professional Responsibility DR 1-104 (d) (2) (22 NYCRR 1200.5 [d] [2]).

The respondent permitted his former bookkeeper to handle the firm's banking and bookkeeping responsibilities and relied on the firm's former bookkeeper to reconcile the firm's IOLA accounts. However, the respondent failed to properly supervise the firm's former bookkeeper with respect to the foregoing, and failed to properly review, audit, and/or reconcile the firm's IOLA accounts. In the exercise of reasonable management and supervisory authority, the respondent would have been aware of the inappropriate handling of the firm's IOLA accounts and the unlawful and improper disbursements of funds received on behalf of the estate so that remedial action could have been taken to avoid or mitigate the

losses suffered by the estate.

Charge nine alleges that the respondent breached his fiduciary duty by failing to safeguard funds belonging to another person or persons that had been entrusted to the Galasso Langione firm incident to the practice of law and by failing to promptly pay or deliver funds received in a fiduciary capacity to the person or persons entitled to receive those funds, in violation of Code of Professional Responsibility DR 9-102 (a), (c) (4) and DR 1-102 (a) (7) (22 NYCRR 1200.46 [a], [c] [4]; 1200.3 [a] [7]).

In or about July 2006, the Galasso Langione firm received the sum of $175,000 on behalf of Adele Fabrizio in connection with the settlement of a personal injury action. The firm's former bookkeeper was instructed to deposit the funds into an IOLA account maintained by the firm incident to the practice of law. However, the respondent failed to verify that the funds were deposited into the designated IOLA account and failed to ensure {**94 AD3d at 37} that the funds remained safely on deposit until such time as the firm was authorized to disburse them to Ms. Fabrizio.

In or about January 2007, Ms. Fabrizio received written notice from the firm that the firm's former bookkeeper had misappropriated the funds entrusted to the firm on her behalf. Ms. Fabrizio, through her agents and/or legal representative, has demanded payment of the funds entrusted to the firm that are due and owing to her. To date, the respondent and/or the firm have failed to pay over the funds entrusted to them that remain due and owing to Ms. Fabrizio.

Charge ten alleges that the respondent failed to supervise a nonlawyer employee of the Galasso Langione firm, resulting in the misappropriation of funds received on behalf of Adele Fabrizio, in violation of Code of Professional Responsibility DR 1-104 (d) (2) (22 NYCRR 1200.5 [d] [2]).

In the exercise of reasonable management and supervisory authority, the respondent would have been aware of the inappropriate handling of the firm's IOLA accounts, and the unlawful and improper disbursement of funds received on behalf of Ms. Fabrizio, so that remedial action could have been taken to avoid or mitigate the losses to Ms. Fabrizio.

Based upon the respondent's admissions and the evidence adduced, the Special Referee properly sustained all 10 charges. Accordingly, the petitioner's motion to confirm the

Special Referee's report is granted, and the respondent's cross motion to disaffirm the Special Referee's report is denied.

In determining an appropriate measure of discipline to impose, the Court notes the respondent's testimony as to the negative impact the conduct of his bookkeeper and brother, Anthony Galasso, has had on his personal and professional life; the changes he has made with respect to his business practices; his cooperation in connection with the criminal prosecution of his bookkeeper and brother, Anthony Galasso; and his pursuit of lawsuits against, among others, Signature Bank, in an effort to reclaim the misappropriated Baron funds, as well as the funds misappropriated from [*5]the estate and from Adele Fabrizio. In addition, the Court considered the 37 letters of good character submitted on the respondent's behalf. However, we find that the respondent failed to maintain appropriate vigilance over his firm's bank accounts, resulting in actual and substantial harm to clients (*cf. Matter of Forman*, 250 AD2d 116 [1998]).

Under the totality of the circumstances, the respondent is suspended from the practice of law for a period of two years.{**94 AD3d at 38}

Mastro, A.P.J., Rivera, Dillon, Angiolillo and Florio, JJ., concur.

Ordered that the petitioner's motion to confirm the Special Referee's report is granted; and it is further,

Ordered that the respondent's cross motion to disaffirm the Special Referee's report is denied; and it is further,

Ordered that the respondent, Peter J. Galasso, admitted as Peter John Galasso, is suspended from the practice of law for a period of two years, commencing March 21, 2012, and continuing until further order of this Court. The respondent shall not apply for reinstatement earlier than September 23, 2013. In such application, the respondent shall furnish satisfactory proof that during said period he: (1) refrained from practicing or attempting to practice law, (2) fully complied with this opinion and order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (22 NYCRR 691.10), (3) complied with the applicable continuing legal education requirements of 22 NYCRR 691.11 (c) (2), and (4) otherwise properly conducted himself; and it is further,

Ordered that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this Court, the respondent, Peter J. Galasso, admitted as Peter John Galasso, shall desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application, or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

Ordered that if the respondent, Peter J. Galasso, admitted as Peter John Galasso, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10 (f).

CATHERINE A. SHERIDAN

Catherine A. Sheridan is now of Of Counsel to the Law Firm of Scalise & Hamilton LLP. Her practice areas include representing attorneys in professional disciplinary matters before local grievance committees and state appellate courts; providing advice to attorneys on ethical issues; and drafting and arguing appeals, as well as related motions, before state appellate courts. She is a member of the New York State Bar Association, the Nassau County Bar Association, and the Nassau County Women's Bar Association. Ms. Sheridan received her B.S. and J.D. from St. John's University and was admitted to practice in January 1994. Since 1996 Ms. Sheridan has also been admitted to practice before the United States District Courts for the Southern and Eastern Districts of New York.

From 1993 to 1997 Ms. Sheridan was employed as a Court Attorney with the Appellate Division, Second Department, where she researched and wrote memoranda of law, as well as drafted and recommended decisions and orders of the court. During her tenure with the Appellate Division, Ms. Sheridan was promoted to the position of Senior Court Attorney and served as a Law Secretary to the Hon. Leo F. McGinity. In March 1997, Ms. Sheridan joined the law firm of Rivkin, Radler & Kremer in Uniondale, New York, where she worked as an associate in the appellate practice and business litigation departments.

In February 1999, Ms. Sheridan left private practice and rejoined the Appellate Division, Second Department, as an assistant counsel to the Tenth District Grievance Committee, where she handled the investigation and prosecution of attorney disciplinary matters. In 2001, she was promoted to Deputy Chief Counsel, and in April 2005, she joined the Appellate Division, Second Department's Office of Special Counsel for Grievance Matters, where she served in the position of Deputy Chief Counsel while continuing to work in the area of attorney discipline. Ms. Sheridan remained with the Appellate Division until January 2009 when she started her own practice.

KATHLEEN DONELLI is a partner of the law firm of McCarthy Fingar, L.L.P. in White Plains, N.Y. and concentrates her practice in matrimonial law. Ms. Donelli is the recipient of the 2014 New York State Bar Association Ruth Schapiro Award for promoting women in the legal profession. Ms. Donelli worked with the Hon. Sondra Miller to draft and promote the "No Fault" divorce bill which was enacted into law in October, 2010. In 2010, Ms. Donelli received the "Leading Matrimonial Attorney" Above the Bar Award. She is also a trained mediator and collaborative lawyer. Ms. Donelli is an Adjunct Law Professor at Pace Law School, teaching Collaborative Law and is the Vice Chair of its Board of Visitors. She is a graduate of Pace Law School ('85, *cum laude*) where she was the Articles Editor of the Pace Law School Law Review. In 2005, Ms. Donelli received the Alumni Leadership Award from Pace University School of Law. She is currently listed as a Super Lawyer in Thomas Reuter's annual list of top family law attorneys in the N.Y. Metro area.

Ms. Donelli is a former President of the Westchester Women's Bar Association ("WWBA") (2003-2005) and of the White Plains Bar Association (1998-2000). She is the Co-Chair of the WWBA's and WBASNY's Collaborative Law Committees and has been the Co-Chair of the WWBA's Judicial Screening Committee, Corresponding Secretary and Program Co-Chair. Ms. Donelli is a member of the Grievance Committee for the Ninth Judicial District and the former Co-Chair of the Westchester County Bar Association ("WCBA") Grievance Committee. She is a member of the Matrimonial Advisory Committee, which is co-chaired by the Hon. Sharon Townsend, J.S.C. and the Honorable Jeffrey Sunshine, J.S.C. Ms. Donelli currently serves on the Board of Directors of Legal Services of the Hudson Valley and is a Fellow of the American Bar Foundation. She has also served on Judicial Screening Committees for White Plains City Court Judges and the Search Committee for the Dean of Pace Law School.

In the area of matrimonial law, Ms. Donelli won a landmark Court of Appeals custody decision, T*ropea,* 87 N.Y.2d 727 (1996), which established a new rule in New York for custodial parents who seek to relocate. Ms. Donelli's additional reported cases in the area of matrimonial law include: *Seruya v. Seruya,* 107 A.D.3d 972 (2d Dep't. 2013); *Amari v. Molloy*, 293 A.D.2d 431 (2d Dep't 2002); *Amari v. Molloy*, 8/8/00 *N.Y.L.J.*, page 23, col. 5; *Amari v. Molloy*, 180 Misc.2d 664 (Kings Co. 1999); *Frayne v. Frayne*, 234 A.D.2d 545 (2d Dep't 1996).

BIOGRAPHY

GARY L. CASELLA has served as Chief Attorney to the Grievance Committee for the Ninth Judicial District since 1982. He has also, since 1990, been an Adjunct Professor at Pace University School of Law where he teaches courses in Professional Responsibility and Advanced Issues in Professional Responsibility.

Mr. Casella has been a frequent lecturer at CLE Programs and has published articles as well on legal ethics. Mr. Casella served as President of the White Plains Bar Association and is a past President of the New York State Association of Disciplinary Attorneys. He is a former Director Delegate of the Westchester County Bar Association and also served as a Director of the Columbian Lawyers of Westchester County. He is also a member of the New York State Bar Association's Committee on Professional Discipline. Mr. Casella is a recipient of the Joseph F. Gagliardi Award for Excellence in the Unified Court System of the Ninth Judicial District. He is a graduate of the New York Institute of Technology and the St. John's University School of Law.