

# For Attorneys: Test Your Knowledge of Land Use Ethics

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Land Use and Zoning matters often give rise to conflicts of interest because the lawyers who represent clients in such matters may volunteer to serve on their local community boards and/or as Part-time judges. Thus, they are allowed to handle legal matters outside of the jurisdiction where they volunteer or preside. Indeed, the smaller the city, town or village, the more likely it is that a potential conflict will arise. For purposes of this program, this outline provides a review of advisory opinions with respect to such issues. Of course, it is not an exhaustive review, so we invite members of the audience to share their knowledge of additional advisory opinions, rules or precedent.

**I. LAWYERS**

**ZONING AND LAND USE**

- Circumstances under which an attorney who serves on planning or zoning boards may not represent private clients in matters before such entities

**NYSBA # 773 (1/ 23/ 2004) – Lawyer/member of municipal board; conflict of interest; appearance of impropriety; imputation of disqualification in “of counsel” relationship**

A lawyer who serves on a municipal board is prohibited from appearing before that board on behalf of a private client. Lawyers who are “of counsel” to a law firm are “associated” with the law firm for purposes of DR 5-105(D), and so the firm is likewise disqualified from appearing before the board unless the client gives informed consent. Whether the firm is disqualified by other rules depends on the facts and circumstances, but if not and if the firm does appear, the lawyer-member must recuse him or herself. DR 1-102(A)(2),(5); 2-102(A)(4); 5-101(A); 5-105(A),(B),(D); 5-108 (A),(B); 8-101(A)(2); 9-101(B), (C); Canon 9; EC 8-8.

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**NYSBA # 603 (11/2/1989), modified by NYSBA # 629 (3/23/ 1992) - Part-Time Public Official or Employee; Assistant City Attorney; Conflict of Interest**

A part-time assistant city attorney, or any member or associate of his private law firm, may not represent clients before city agencies with which the attorney is associated; but the attorney or his law firm may represent private clients before other agencies, if the proposed representation and the agency are unrelated to the attorney's public function. Canon 9; EC 5-2, 5-14, 5-15, 8-8, 9-3, 9-6; DR 5-105(A), (B), (C), and (D); 8-101(A)(1); 9-101(B).

**NYSBA # 510 (4/16/ 1979) - Deputy Town Supervisor; conflict of interest; appearance of impropriety**

Improper for deputy town supervisor to represent clients in tax certiorari proceedings or other litigation involving town. Canon 9; EC 8-8, 9-2, 9-6; DR 8-101 (A)(2). *See also, N.Y. State 453 (December 14, 1976)* [former deputy town attorney, whose responsibilities included defending the town in tax certiorari proceedings, may represent clients in tax certiorari proceedings under certain circumstances after leaving town employment].

**NYSBA # 470 (6/6/ 1977) – Conflict of interests; city attorney; urban renewal agency**

Part-time city attorney may not appear before urban renewal agency for purpose of obtaining modification of plan which would enable him to purchase building scheduled for demolition. Canon 9; DR 5-104(A); EC 5-2, 5-3.

- **Circumstances under which an attorney who serves on planning or zoning boards may represent private clients before such entities**

**NYSBA # 630 (3/23/ 1992) – Conflict of interest; representation of private clients before town planning board or zoning board of appeals by special counsel to the town**

Absent differing interests, it is not improper for special counsel to town (retained for a particular matter, litigation or proceeding) to represent private clients before town's planning board and zoning board of appeals. A deputy or assistant town attorney is a permanent part of the town's administrative legal structure and customarily serves as a salaried employee, while a special counsel is an outside attorney who is retained as an independent contractor and who customarily is compensated on a per matter basis. A different rule would apply if the attorney frequently represented the town as special counsel, or if the extent of the current representation was such that special counsel was functionally equivalent to a part-time member of the town attorney's staff. DR 5-105(A),(C),(D); DR 5-108; EC 5-15.

**NYSBA #655 (1993) - Conflict of Interest; town zoning board member; representation against the town on personal injury claim**

Absent evidence of improper influence or impaired professional judgment, not improper for attorney-member of town zoning board of appeals to represent personal injury client in litigation against the town. DR 1-102(A), 1-102(A)(5), 5-101(A), 5-105(C), 8-101(A)(2); EC 8-8, 9-2.

**NYSBA # 484 (5/19/1978), clarifying NYSBA # 292 (4/27/1973) - Zoning Board of Appeals; lawyer-member of municipal board; conflict of interest**

Lawyer-member of town's Zoning Board of Appeals, as well as his partners and associates, may practice before other agencies of the town under certain circumstances. EC 8-8, 9-6; DR 5-105(D), 8-101(A)(1) and (2).

**NYSBA # 450 (12/13/1976) - Part-time town attorney; Conflict of interest**

Outlines conditions under which part-time town attorney may represent clients in private matters relating to the purchase and sale of real property within the town in which he holds public office, when the clients may be required to obtain building permits, zoning variances, or other similar licenses or certificates from the town. It may be possible for the attorney to negotiate a limited retainer with the client, wherein the client agrees that the attorney's representation will be limited to the private real estate contract and that outside counsel will have to be obtained by the client if representation before the municipality becomes necessary. If the client consents to this limited retainer upon full disclosure of all relevant facts, including the ethical constraints imposed upon the attorney, some of the problems hereinabove discussed, may be avoided. *See, N.Y. State 333 (1974)*. Public attorneys should also avoid situations where their professional services appear to be or are being secured as a means to influence municipal authorities or to obtain special consideration. *See, N.Y. State 392; N.Y. State 435 (1976); N.Y. State 292 (1973); N.Y. State 257 (1972); N.Y. State 430 (1976); Canon 9; EC 9-2.* An attorney should not foster or condone conduct by his private clients which is designed to obtain special consideration in securing permits based on the attorney's public office. Canons 4, 5 and 9; DR 5-101; 5-105(C) and (D); 7-101(A)(1) and (2); 8-101(A)(1); EC 5-14; 6-1; 6-4; 7-1; 7-9; 8-8; 9-2.

**RECENT NYSBA OPINIONS AND COLUMNS OF INTEREST**

- **Imputation of conflicts to other lawyers in a firm**

**NYSBA #876 (9/9/2011)**

Conflicts of interest, which cannot be waived, will be imputed to all lawyers in all firms with which a lawyer is associated as a partner, associate, or of counsel, whether or not a screen is established. Rules: 1.7 [formerly DR 5-105], 1.9 [formerly DR 5-108], 1.10(a) and (e) [formerly DR 5-105(D) and (E)]

**NYSBA #890 (11/17/2011)**

Conflicts of spouses representing clients on opposite sides of the same litigation are not automatically imputed to other lawyers in their respective firms, but imputation may arise under the particular circumstances of any given case. At least in civil matters, even if imputation occurs, the resulting conflict may be waived with informed consent, depending on the particular facts of the case. If substitute counsel from outside the firm is engaged, the originally retained lawyer may share confidential information with the substitute counsel with the affected client's informed consent or where the disclosure is impliedly authorized to serve the client's best interests. [See also, spousal conflicts and imputation of conflict to other lawyers in spouses' respective law firms, *infra.*] Rules: 1.0(j) [no former rule], 1.6(a) [formerly 4-101(A), (B) and (C)(1)], 1.7(b)(1) [formerly DR 5-101 and DR 5-105(C)], 1.10(a) and (b) [formerly DR 5-105(D) and DR 5-108(C)]

**NYSBA #909(02/28/2012)**

Where a member of a town board is barred from representing clients in certain matters in the town's Justice Court, other lawyers in the member's law firm are not disqualified unless there are particular facts that would give rise to public suspicions of improper influence or a conflict of interest between the private client and the member's duties to the town. Rules: 1.7(a)(2) [formerly DR 5-101], 1.10 [formerly DR 5-105 and DR 5-108], 8.4(d) and (e) [formerly DR 1-102(A)(5) and 9-101(C)]

**NYSBA #914 (03/23/2012)**

Members of a panel of lawyers established to provide legal assistance to indigent clients when the Legal Aid Society has a conflict are not considered members of the same firm for purposes of conflict analysis as long as the panel members are independently engaged by, and independently render legal services to, their indigent clients. [See also, conflicts arising from other engagements or responsibilities, *supra.*] Rules: 1.0(h) [formerly Definition 2], 1.6(a) and (b) [formerly DR 4-101(A), (B) and (C)], 1.7 [formerly DR 5-105], 1.8(f) [formerly DR 5-107(A)], 1.10 [formerly DR 5-105(D)]

• **Spousal conflicts**

**NYSBA #881 (10/06/2011)**

A sole practitioner may not use the address and telephone number of her spouse's law firm as contact information if the telephone is answered with the name of the spouse's

firm unless steps are taken to avoid the misleading impression that the sole practitioner is part of the spouse's firm. However, the sole practitioner's occasional use of the conference room and telephone lines at her spouse's firm does not, by itself, render her "associated in" in spouse's firm for purposes of conflicts of interest. Rules: 1.0(h) [formerly Definition 2], 1.10(a) [formerly DR 5-105(D)], 7.1(a) [formerly DR 2-101(A)], 7.5(b) [formerly DR 2-102]

**NYSBA #890 (11/17/2011)**

Conflicts of spouses representing clients on opposite sides of the same litigation are not automatically imputed to other lawyers in their respective firms, but imputation may arise under the particular circumstances of any given case. At least in civil matters, even if imputation occurs, the resulting conflict may be waived with informed consent, depending on the particular facts of the case. If substitute counsel from outside the firm is engaged, the originally retained lawyer may share confidential information with the substitute counsel with the affected client's informed consent or where the disclosure is impliedly authorized to serve the client's best interests. [See also, imputation of conflict to other lawyers in spouses' respective law firms, *supra*.] Rules: 1.0(j) [no former rule], 1.6(a) [formerly DR 4-101(A), (B) and (C)(1)], 1.7(b)(1) [formerly DR 5-101 and DR 5-105(C)], 1.10(a) and (h) [formerly DR 5-105(D) and DR 9-101(D)]

**NYSBA #895 (12/06/2011)**

Absent informed, written consent, a sole practitioner may not represent a client in a matter where the opposing party is represented by a lawyer in a five-lawyer firm in which the sole practitioner's spouse is the senior partner. The lawyer in the spouse's firm may also have a conflict which would be imputed to all lawyers in the spouse's firm, unless it is cured by informed, written consent. Rules: 1.0(h) and (j) [formerly Definition 2], 1.6(c) [formerly DR 4-101(D)], 1.7 [formerly DR 5-105 and DR 5-101], 1.10(a), (d) and (h) [formerly DR 5-105(D), DR 5-101, DR 5-105(C), and DR 9-101(D)]

• **Conflicts Arising From Real Estate Transactions**

**NYSBA #882 (10/14/2011)**

If the sales price in a residential real estate transaction has been "grossed-up" in exchange for a "seller's concession," all transaction documents containing the grossed-up sales price must disclose that the sales price has been increased by a sum equal to the seller's concession. Rules: 8.4(c) [formerly DR 1-102(A)(4)]

**NYSBA #886 (11/15/2011)**

Absent informed consent, a lawyer with a substantial investment in a closely-held, non-legal, real estate brokerage firm is precluded from representing a party to a real estate

transaction in which the brokerage firm is acting as a broker. Rules: 1.7 [formerly DR 5-105 and 5-101], 5.7 [formerly DR 5-105 and DR 1-106]

**NYSBA #891 (11/17/2011)**

An attorney may refer a client to a title abstract company or agent in which the attorney has a financial interest only where the company/agent performs only ministerial tasks. The attorney's personal financial interest may preclude the attorney from representing that client in the same transaction. Rules: 1.7 [formerly DR 5-105 and DR 5-101], 1.8 [formerly DR 5-104], and 5.7 [formerly DR 1-106]

**NYSBA #892 (11/28/2011)**

The fact that the sales price in a residential real estate transaction has been "grossed-up" must be expressly disclosed in the transaction documents containing the sales price in addition to the amount of the "seller's concession." Rules: 8.4(c) [formerly DR 1-102(A)(4)]

**NYSBA #893 (12/01/2011)**

A full-time prosecutor may accept appointment to referee foreclosure panels and may oversee foreclosure proceedings, provided there is no conflict or possibility that a party to a foreclosure is currently being or likely to be prosecuted. [*See also*, conflicts arising from an attorney's other engagements or responsibilities, *supra*.] Rules: 1.7 [formerly DR 5-105 and DR 5-101], 1.12 [formerly DR 5-105 and DR 9-101(A)]

**NYSBA #916 (03/27/2012)**

A lawyer may not offer free legal services as an add-on bonus to a party to a real estate transaction in which the lawyer is acting a broker, even if the lawyer advises the party that the party may retain separate counsel. Rules: 1.7(a) [formerly DR 5-105(A)]

**NYSBA #919 (04/13/2012)**

A lawyer may not act as an attorney for any party to a real estate transaction in which the lawyer is acting as a broker, but a lawyer who is employed part-time by a real estate office acting as a broker may be able to serve as a party's attorney even if a member of that real estate brokerage is acting as a broker for one of the parties, provided the lawyer complies with Rule 1.7. However, if a lawyer will materially benefit from the closing based on his employment at the brokerage or is personally involved with the transaction in that office, then his representation of a party to the transaction is *per se* prohibited. Rules: 1.7(a) and (b) [formerly DR 5-105(A)-(C) and DR 5-101]

**NYSBA #893 (12/01/2011)**

A full-time prosecutor may accept appointment to referee foreclosure panels and may oversee foreclosure proceedings, provided there is no conflict or possibility that a party to a foreclosure is currently being or likely to be prosecuted. Rules: 1.7 [formerly DR 5-105 and DR 5-101], 1.12 [formerly DR 5-105, DR 5-101, and 9-101(A)]

- **Communications With Others**

- i. **Circumstances Under Which A Lawyer May Communicate With A Member Of A Municipal Agency Or Board About A Pending Matter**

**NYSBA #812 (5/3/2007) – Communication with a represented party.**

Unless prohibited by state or local law, a lawyer representing a private party before a town planning board may communicate with individual planning board members about pending determinations provided: (a) the proposed communications solely concern policy issues; (b) the lawyer gives planning board counsel reasonable advance notice of the proposed communications; (c) the lawyer may not deliberately elicit information protected by the attorney-client or work product privileges; and (d) the lawyer should cease contact with a planning board member if he/she so requests. This opinion does not address communications which may violate a state statute, local ordinance, or locally adopted ethics code governing planning board procedures. Nor does this opinion address *ex parte* communications with an adjudicatory government body, such as a zoning board of appeals, which present different considerations. DR 7-104(A)(1); EC 7-15, 7-18.

- ii. **Communications With Represented Parties**

**NYSBA #879 (09/27/2011)**

Lawyers, whether acting *pro se* or being represented by their own counsel, are subject to the “no-contact” rule prohibiting communications with another party whom the lawyer knows to be represented by counsel. Rules: 4.2(a) and (b) [formerly DR 7-104(A)(1) and (B)], 8.4(c) [formerly DR 1-102(A)(4)]

**NYSBA #884 (11/14/2011)**

A lawyer may not communicate about the subject of a criminal representation with a party the lawyer knows to be represented by another lawyer in the matter without the consent of the other lawyer; but since a non-party witness in a criminal matter is not protected by Rule 4.2, a lawyer for a party may communicate with such witness without the consent of counsel who represents the witness in a related matter. This does not prevent the witness’ lawyer from advising his client not to speak with anyone about the facts of the case outside the presence of his lawyer. (This opinion does not extend to civil matters.) Rules: 1.0(k) [no former rule], 3.4(a)(2) [formerly DR 7-109(B)], 4.2(a) [formerly DR 7-104(A)(1)], 4.4 [no former rule]

***NYSBA #894 (12/01/2011)***

When authorized by statute, an attorney may personally serve process on a represented party and ask certain related questions, but may not go beyond service of process to communicate on the subject of the representation (either orally or in writing) without the consent of the party's lawyer. Rules: 1.0(l) [no former rule], 4.2 [formerly DR 7-104]

***NYSBA #904 (01/30/2012)***

A lawyer representing the victim of an alleged crime, for purposes of seeking restitution, may not communicate with the subject of a criminal investigation into the same facts if the victim's lawyer knows that the subject is represented by counsel with respect to the investigation, unless the victim's attorney has the prior consent of the other counsel, is authorized by law to communicate with the subject directly, or the criminal defense attorney, upon inquiry, disavows representation with respect to the restitution claim. Rules: 1.0(k) and (l) [no former rules], 4.2(a) [formerly DR 7-104(A)(1)]

*See also, Attorney Professionalism Forum, NYSBA Journal, September 2012 (dealing with the application of the "no contact" rule under Rule 4.2 to e-mail communications with an adversary in which a party is listed as a "cc")*

***iii. Communications With Unrepresented Parties******NYSBA #898 (12/19/2011)***

A lawyer does not give legal advice to an unrepresented person in violation of Rule 4.3 merely by including in a letter a legally mandated notice regarding the expiration of a statute of limitations on a claim. Rules: 4.3 [formerly DR 7-104(A)(2)]

*See also, Attorney Professionalism Forum, NYSBA Journal, November/December 2011 (litigating against a *pro se* party with whom the attorney has a longstanding acquaintance or friendship (Rule 4.3))*

*See also, Attorney Professionalism Forum, NYSBA Journal, June 2012 (referenced *infra*, regarding the duty to provide non-engagement letter or otherwise advise client under Rule 1.18 when attorney declines to undertake representation)*

***iv. Communications With Opposing Counsel***

*See, Attorney Professionalism Forum, NYSBA Journal, February 2012 (dealing with the duty to communicate with an adversary in a reasonably prompt manner under Rules 1.3 and 3.4)*

*See, Attorney Professionalism Forum, NYSBA Journal, May 2012 (application of Rules 1.1, 1.3, 3.1, and 3.2 with respect to an attorney's failure to engage in good faith efforts to resolve discovery disputes prior to making motions to compel discovery responses)*

### **Miscellaneous**

#### *i. Protecting confidential information*

##### *NYSBA #905 (01/30/2012)*

Rules 1.9 and 1.10 do not apply to a lawyer who acquired confidential information while acting solely as a paralegal or legal assistant with another firm before being hired by his/her current firm. However, the hiring firm is obligated to make reasonable efforts to ensure that the lawyer does not reveal the confidential information. Rules: 1.6(c) [formerly DR 4-101(D)], 1.9(b) [formerly DR 5-108(B)], 1.10(a) and (c) [formerly DR 5-105(D), DR 5-108(A)(1) and DR 5-108(B)], 5.1(a) [formerly DR 1-104(A)], and 5.3(a) [formerly DR 1-104(C)-(D)]

##### *NYSBA #907 (02/02/2012)*

An attorney may agree to make an anonymous donation on a client's behalf, but must protect the confidentiality of the identity of the client when asked by the client to do so, provided the request does not involve prohibited conduct by the lawyer. Rules: 1.4 [no former rule], 1.6(a)(3) [formerly DR 4-101(A), (B) and (C)(1)], 1.6(b)(6) [formerly DR 4-101(C)(2)], 1.15(a) (b) and (c) [formerly DR 9-102], 4.1 [formerly DR 7-102(A)(5)], 8.4(a), (b) and (c) [formerly DR 1-102(A)(1)-(4)]

#### *ii. Prohibition Against Knowingly Making False Statements*

*See, Attorney Professionalism Forum, NYSBA Journal, July/August 2012 (prohibitions against knowingly making false statements, promoting information known to be false, and knowingly making false statements to a tribunal (Rules 4.1, 3.4, 1.6, and 3.3))*

#### *iii. Declining Representation Of A Client*

*See, Attorney Professionalism Forum, NYSBA Journal, June 2012 (duty to provide non-engagement letter or otherwise advise client under Rule 1.18 when attorney declines to undertake representation)*

#### *iv. Duty to retain records*

*See, Attorney Professionalism Forum, NYSBA Journal, January 2012 (duty to retain records under Rule 1.15(d) when an attorney moves his/her practice out of state)*

## II. JUDGES

**N.Y. Jud. Adv. Op. 08-46 (March 13, 2008) (declining to modify or overrule prior opinions regarding the same)** [a part-time judge may not represent private clients before a zoning board of appeals or a planning board of the same municipality where the judge presides].

***See also, N.Y. State 632 (March 23, 1992) - Disqualification of part-time judge and the judge's partners and associates***

Part-time judges are prohibited from appearing before zoning board of appeals and planning board of the same municipality; disqualification of their partners and associates depends on facts and circumstances. *See, Canon 9; DR 5-101(A); 5-105(A); 5-105(B); 5-105(C); 5-105(D); 5-108; 8-101(A); 9-01(B); 9-101(C); CJC: Canon 2; 5(f).*

***N.Y. Jud. Adv. Op. 08-121 (September 11, 2008).***

A part-time village justice may not serve as acting town justice for the same town that employs him/her as the Director of Planning and Zoning Administration, as it would involve the judge in political or controversial issues, as well as the daily operation of town government units that are responsible for zoning and land use planning, and the administration and enforcement of zoning and land use planning rules and regulations, and would result in an impermissible appearance of impropriety.

***N.Y. Jud. Adv. Op. 05-141 (January 26, 2006).***

A part-time town justice should not continue service as co-chair of the town's Comprehensive Plan Committee, in light of the fact that (1) its mission includes recommending revisions to the town's zoning code, and (2) there is a substantial likelihood that the committee will be involved in matters of public controversy.

***N.Y. Jud. Adv. Op. 98-94 (September 10, 1998).***

A part-time judge who is also a practicing attorney should not appear on behalf of a client before the zoning authority in the jurisdiction served by the judge's court.

**N.Y. Jud. Adv. Op. 93-34 (March 11, 1993); N.Y. Jud. Adv. Op. 93-01 (January 28, 1993).**

A part-time town justice may not serve as chair or member of the town's planning board.

**N.Y. Jud. Adv. Op. 90-59 and 90-65 (June 7, 1990); see also, 22 NYCRR §§100.2 (a); 100.5.**

A part-time judge may not represent legal clients before the town planning board within the judge's jurisdiction. Because the planning board has significant influence over the uses of land, building and zoning regulations, its decisions frequently are subject to community interest and controversy. Thus, a judge representing a private client before the planning board may become involved in a controversial and public matter, which may lead to speculation, even if unfounded, of political influence and impropriety, and could reflect unfavorably on the judge's judicial office.

**N.Y. Jud. Adv. Op. 89-92 (January 18, 1990).**

A part-time town judge may not serve as a member of a village zoning or planning board, where cases involving violations of village zoning regulations are handled in the town court. Even if the judge recuses himself from zoning violation cases, an appearance of impropriety exists if the judge serves on these boards within the jurisdiction where he or she also sits as judge. This appearance of impropriety exists even where no actual conflict arises and even though no illegality attaches to the holding of both offices.

Circumstances in which a part-time judge may represent private clients before municipal agencies

**N.Y. State 252 (May 24, 1972) - Village justice representing private client before village zoning board**

Part-time village justice may represent a client before village zoning board in zoning variance and special permit applications before a zoning board of the village in which he serves as justice and only where there is no conflict of interest and no appearance of professional impropriety. The part-time village justice could not represent a client in zoning or other litigation to which the village were a party. Nor should he undertake to represent a private client in a zoning matter, if there were any possibility that his client might be charged with a violation of a village zoning ordinance. Moreover, service as a village zoning board member would, of course, likewise disqualify him from all practice involving zoning within the board's jurisdiction. But the mere fact that the village pays the justice's salary would not, however, disqualify him from representing private clients

in zoning variance and special permit applications before the village board. Canon 9; EC 8-8, 9-2, 9-3, 9-6; DR 9-101; Judicial Canon 31.

***N.Y. Jud. Adv. Op. 10-149 (October 28, 2010).***

A part-time judge who practices law may apply for certificates of occupancy and building permits on behalf of clients in the village where the judge presides where such application is ministerial in nature and does not involve an exercise of discretion by the building inspector.

***N.Y. Jud. Adv. Op. 11-68 (June 16, 2011).***

An acting village justice may continue to serve as a member of the architectural review board of the town in which the village is located. An acting village justice who is a member of a town's architectural review board must disqualify him/herself from any matters involving the review board, including zoning matters related to the review board's recommendations, when the judge is assigned to sit temporarily in the town court.

***N.Y. Jud. Adv. Op. 02-41 (June 7, 2002).***

A judge may publicly voice an opinion at local municipal board meetings and in letters to the editor concerning community matters that affect the judge's personal interests, such as a zoning change that affects the judge's real property. However, the judge may not express his/her opinion involving partisan political issues or controversial subjects that do not directly affect the judge's interests, nor may the judge express his/her opinion in any manner that would detract from the dignity of judicial office or interfere with the performance of judicial duties. *See also, N.Y. Jud. Adv. Op. 92-21 (January 30, 1992)* [part-time judge who owns two commercial properties may speak as a property owner at a Planning Board meeting about a zoning issue affecting the judge's property].

***N.Y. Jud. Adv. Op. 97-49 (September 11, 1997).***

A part-time town court justice may serve as an associate to a Village Attorney for purposes of handling Article 78 proceedings and may attend Village Zoning Appeals and Planning Board meetings. It would appear, based upon the facts presented, that the matters about which the part-time Town Justice would render advice to the Village do not normally come before the judge's Town Court. If they should, by way of recusal of the Village Justices, another Town Justice could hear these matters.

***N.Y. Jud. Adv. Op. 96-29 (March 12, 1996).***

A part-time judge may practice law before the Zoning and Planning Board of other villages and towns but not before such boards of the village where the judge sits.

*N.Y. Jud. Adv. Op. 91-90 (September 12, 1991); see also, 22 NYCRR 100.5(h).*

An acting part-time village justice may serve as the attorney for the village board of zoning appeals. An acting part-time village justice serves only in the absence or illness of their regular justice. As long as the judge does not appear before the zoning or planning boards of the village on behalf of private clients, there would be no appearance of impropriety in serving as the attorney for the zoning board of appeals, while also serving as acting village justice. Of course, the judge would be disqualified from presiding in any case involving the village zoning board of appeals.

## **Dealing With an Ethical Dilemma**

*Submitted by Deborah A. Scalise, Esq.<sup>1</sup>*

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

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

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

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

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

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

- *Consider obtaining counsel.*

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

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

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

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

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

- *Written responses.*

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

■ Aggravating and mitigating circumstances.

If you find yourself the target of a disciplinary investigation there are certain factors, which may be presented as aggravating or mitigating circumstances which can affect the sanction imposed upon a finding of misconduct.

Aggravating circumstances which considered by the grievance committees when sanctioning a lawyer include, *inter alia*, failure to cooperate with the committee, lying to the committee, lack of remorse, prior disciplinary history and untreated substance abuse. Mitigating circumstances include, *inter alia*, character references, pro bono activities, community service and treatment for substance abuse.

■ Substance Abuse.

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

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

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

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

# Ethics Resources 2012

**SCALISE & HAMILTON, LLP**  
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## **Rules of Professional Conduct (effective April 1, 2009)/Lawyer's Code of Professional Responsibility (prior to April 1, 2009)**

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

### **Judiciary Law**

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

### **Attorney Admissions**

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

### **Other Applicable Rules**

- 22 NYCRR § 1200 Appendix A Standards of Civility (Aspirational)
- 22 NYCRR § 1205 Cooperative Business Arrangements between lawyers and non-legal Professionals ("Multidisciplinary Practice")
- 22 NYCRR § 1210 Statement of Client's Rights

- 22 NYCRR § 1215 Written Letter of Engagement
- 22 NYCRR § 1220 Mediation of Attorney-Client Disputes
- 22 NYCRR § 118 Registration of Attorneys
- 22 NYCRR § 130 Costs and Sanctions
- 22 NYCRR § 137 Fee Dispute Arbitration
- 22 NYCRR § 1300 Dishonored Check Rule
- 22 NYCRR § 1400 Procedure in Domestic Relations Matters
- 22 NYCRR § 1500 Continuing Legal Education

### **Attorney Disciplinary Procedures**

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

### **Disciplinary Case Law**

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

### **Judicial Conduct**

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

### **Formal and Informal Ethics Opinions**

- ABA
- NYSBA
- Association of the Bar of the City of New York
- NY County Lawyers Association
- Nassau County Bar Association
- ABA/BNA Manual

### **Other Resources and Periodicals**

- Annotated Code and Model Rules
- ABA Standards on Imposing Lawyer Sanctions

- The New York Code of Professional Responsibility: Opinions, Commentary and Caselaw (Oceana Publications 2010) New York County Lawyer's Ethics Institute
- Simon's New York Rules of Professional Conduct Annotated (Thomson West 2009)
- Modern Legal Ethics Charles Wolfram (West Publishing)
- Legal Ethics: The Lawyers Deskbook on Professional Responsibility, Ronald D. Rotunda, American Bar Association Center on Professional Responsibility (Thomson West 2010)
- Regulation of Lawyers: Statutes and Standards Stephen Gillers and Roy D. Simon, (Aspen Publishers 2008)
- Attorney Escrow Accounts, Rules, Regulations and Related Topics (New York State Bar Association 2010) Peter Coffey and Anne Reynolds Cops, Editors
- New York Law Journal

### **Telephone Hotlines**

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

### **Websites**

- ABA Center for Professional Responsibility ([www.abanet.org/cpr/home.html](http://www.abanet.org/cpr/home.html))
- ABA/BNA Lawyer's Manual on Professional Conduct ([www.bna.com/products/lit/mopc.htm](http://www.bna.com/products/lit/mopc.htm))
- American Legal Ethics Library/Cornell Legal Information Institute ([www.secure.lawcornell.edu/ethics](http://www.secure.lawcornell.edu/ethics))
- American Judicature Society ([www.ajs.org](http://www.ajs.org))
- Association of Professional Responsibility Lawyers ([www.aprl.net](http://www.aprl.net))
- National Organization of Bar Counsel ([www.nobc.org](http://www.nobc.org))
- The New York State Lawyers Assistance Trust (NYLAT) ([www.nylat.org](http://www.nylat.org))



## ETHICAL ISSUES

By Steven M. Silverberg<sup>i</sup>

### Hypotheticals

You have an application before a planning board, is it ethically appropriate to speak with individual board members regarding the substance of your application?

You have an application before a planning board, is it ethically appropriate to speak with the (1) building inspector, (2) an in house planner or engineer or (3) municipality's retained outside planner or engineer regarding the substance of your application?

Does the answer to these questions change if you are dealing with a variance application or a zoning interpretation before the zoning board if you speak to (1) individual zoning board members or (2) the building inspector?

Does the answer to these questions change if you have an application before the municipal legislative body for an amendment to the zoning for your client's property if you speak to (1) an individual member of the council, (2) in house staff members, or (3) retained municipal consultants?

Does the answer to these questions change if you are representing someone who is opposing any of these applications?

You are a municipal attorney representing a planning board or zoning board. You have a legal opinion regarding an application. What are your ethical responsibilities to convey that opinion to the entire board, if the chair of the board wants you to only provide legal opinions to him/her for him/her to interpret for the Board?

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