

PROFESSIONAL RESPONSIBILITY

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INTRODUCTION

This *Survey* year has not produced the same level of significant change as last year. The year, however, did produce noticeable developments in the interpretation of the recently adopted Rules of Professional Conduct, the long-awaited Second Circuit Opinion on the rules regarding attorney advertising, and further developments under the Judiciary Law section 487 regarding deceitful conduct by attorneys. Ethics opinions addressed the rules governing the practice of law within New York by attorneys admitted in other jurisdictions; the year also had the usual decisions in disciplinary matters. These developments continue to demonstrate our profession's responsibility to itself as the

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only self-regulated profession in New York State.

I. THE PROTECTION OF CONFIDENCES

Perhaps the most noteworthy change in professional responsibility in New York occurred on April 1, 2009 with the adoption of the Rules of Professional Conduct.¹ The new Rules brought a dramatic shift in the rules governing confidential communications between attorney and client and created occasions when the disclosure of information given by a client to his lawyer in the furtherance of the lawyer-client relationship may be disclosed outside the confidential relationship.² Rule 3.3 (a) provides the familiar admonition to attorneys:

A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; and . . . (3) offer or use evidence that the lawyer knows to be false.³

This Rule contains the long-standing obligation imposed upon attorneys to avoid misleading any tribunal. Prior to the change, the rule was limited in its scope and did not require any corrective action once clients had given information to a tribunal. However, the new rule continues: “If a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”⁴

Rule 3.3 (c) makes clear that the duties in the new Rule apply “even if compliance requires disclosure of information otherwise protected by Rule 1.6.”⁵

It has become clear that a lawyer’s obligation to the truth-finding function of a particular tribunal in most cases trumps the obligation to maintain the confidentiality of client communications. Comment 12 under Rule 3.3 makes this responsibility clear, “lawyers have a special obligation as officers of the court to protect the tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicated process.”⁶

1. *See generally*, N.Y. COMP. CODES R. & REGS., tit. 22, § 1200 (2009).

2. For a general discussion of the changes from the Disciplinary Rules to the Rules of Professional Conduct, see James T. Townsend, *Professional Responsibility, 2008-09 Survey of New York Law*, 60 SYRACUSE L. REV. 1062-71 (2010).

3. N.Y. RULES OF PROF’L CONDUCT R. 3.3(a) (2009).

4. *Id.*

5. *Id.* Rule 1.6 contains the general prohibition against disclosure of client confidences. *Id.* R. 1.6.

6. *Id.* R. 3.3 cmt.12.

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In the past, the only circumstance in which an attorney might permit the introduction of testimony he believes to be false without disclosing knowledge of its falsity is the well-known and recognized narrative testimony by a defendant in a criminal matter. The use of the narrative technique may be a well-known signal to the opposing attorney, the jury and the court, but, nonetheless, it has been a recognized technique to balance the rights of a defendant in a criminal matter to testify on his or her own behalf, without compromising or creating an ineffective assistance of counsel claim.⁷

Although the Rule and the Comments make broad statements of principles, they do not address the timing, method, or manner of “reasonable steps” to correct a falsity. They set up the ethical dilemma lawyers will face when considering the new obligations and the potential of injuring their clients. Attorneys will ask themselves, “Will my client still confide in me if she knows I may be required to disclose information given to me in confidence?” If clients withhold information from their attorneys for fear of disclosure under the Rule’s “reasonable remedial measures” test, will the tribunal’s truth-finding process be subjected to more cover-up and fraud than before the enactment of the new Rule? What a lawyer can disclose pursuant to this Rule and what are reasonable measures under the circumstances provides potential room for argument and gives some latitude to lawyers in practice so they may gain greater leverage with their clients. The familiar remonstrations from the past may become more useful as lawyers explain the consequences if the client fails to correct misstatements on her own.

The New York State Bar Association Committee on Professional Ethics has had two opportunities within the *Survey* year to address the new Rule and to change the emphasis toward potential disclosure. The first question it addressed is simple and straightforward. The new Rules of Professional Conduct went into effect on April 1, 2009. The question presented to the Committee concerned the obligation of a lawyer who learns after the effective date of the new Rule that prior to its effective date the client had made a misleading statement to a tribunal.⁸ The specific question arose in the sentencing portion of a criminal proceeding; the defendant was allowed to plead guilty and avoid incarceration based in part on the representation that “she [the client]

7. See *People v. DePallo*, 96 N.Y.2d 437, 442, 754 N.E.2d 751, 754-55, 729 N.Y.S.2d 649, 652 (2001); see also *People v. Andrades*, 4 N.Y.3d 355, 362, 828 N.E.2d 599, 604, 795 N.Y.S.2d 497, 501 (2005).

8. N.Y. State Bar Ass’n. Comm. on Prof’l Ethics, Op. 831, ¶ 1 (2009).

had ‘stayed out of trouble’ since the misdemeanor arrest.”⁹ That representation was made prior to April 1, 2009. Shortly after April 1, 2009, the client told her attorney that she had, in fact, been arrested in a different county before the plea agreement was made.¹⁰ The statement was exactly opposite to the representation made to the court. The attorney inquired of the Committee if the attorney had an obligation to disclose the misrepresentation under the new Rule.¹¹ The Committee discussed and dismissed an argument that the new Rule would apply retroactively.¹² That argument is based upon the view that the Rule’s reference to the lawyer’s “knowledge”¹³ (of the fraudulent or misleading conduct) is written in the present tense and therefore is a continuing obligation to the court. The Committee concluded though that:

Where the rules have changed, a client—even a client who is engaged in fraud—should be able to rely on the advice or warnings he or she may have received, or the correct understanding he or she had, regarding the “rules of the road” that govern the lawyer-client relationship.¹⁴

The Committee concluded, “[w]here a lawyer learns that prior to April 1, 2009, a client had committed fraud on a tribunal, the lawyer’s obligation to disclose the fraud is governed by DR 7-102(B)(1) of the former Code of Professional Responsibility, and not by Rule 3.3 of the new Rules of Professional Conduct.”¹⁵

What are appropriate “reasonable remedial measures” a lawyer may take when confronted by a client’s admission that a certain piece of evidence is false? In a second opinion reviewed during the *Survey* year, the Committee on Professional Ethics was asked whether an attorney was required to disclose the falsity of a certain document submitted in an arbitration proceeding.¹⁶ After the conclusion of that proceeding, the lawyer determined that the document was forged and that some of the client’s testimony concerning the document was false.¹⁷ The inquiring counsel asked whether he was required to inform the arbitration panel and, if not, what other remedial measures might be taken and whether

9. *Id.* ¶ 2.

10. *Id.* ¶ 3.

11. *Id.* ¶ 1.

12. *Id.* ¶ 16.

13. N.Y. RULES OF PROF’L CONDUCT R. 1.0(k) (2009).

14. Op. 831, *supra* note 8, ¶ 13.

15. *Id.* ¶ 16.

16. N.Y. State Bar Assn. Comm. On Prof’l Ethics, Op. 837, ¶ 3 (2010).

17. Op. 837, *supra* note 16, ¶ 2.

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counsel was required to withdraw as an additional remedial measure.¹⁸ After a review and comparison of the former Code and Rule 3.3, the Committee sanctioned an intermediate approach. The Committee stated, “disclosure of the falsity, however, is required only ‘if necessary.’”¹⁹ This answer addressed the first question—whether disclosure was required—in the negative. The Committee then considered the remedial measures which may correct the falsity and concluded that those measures may be pursued before disclosure or withdrawal of counsel.²⁰

Addressing the second question, and approving intermediate remedial steps, the Committee likened its approach to the same disclosure which permits a criminal defendant to testify in narrative form.²¹ The Committee discussed the limitations imposed on an attorney’s disclosure of client confidences under CPLR 4503(a)(1) and, without reference to any case law, stated, “the attorney-client privilege takes precedence over the rules because the rules are court rules rather than statutory enactments.”²² In comparing the obligation of CPLR 4503 and Rule 3.3, the Committee noted the former applies to the production of evidence in a litigated setting, and Rule 3.3 guides a lawyer’s conduct in all settings.²³ Nonetheless, the existence of the attorney-client privilege, and its expected protective shield, is substantial argument for a lawyer to employ intermediate steps to correct a client’s testimony. In the inquiry before the Committee, “inquiring counsel has suggested an intermediate means of proceeding—he would inform the tribunal that the specific items of evidence in a related testimony are being withdrawn, but he would not expressly make any statement regarding the truth or falsity of the withdrawn items.”²⁴ The Committee concluded that such withdrawal was a reasonable remedial measure, “less harmful to the client than disclosure,” and, thus, “disclosure to the tribunal is not ‘necessary’ to remedy the falsehood and the attorney must use measures short of disclosure.”²⁵

18. *Id.* ¶ 3.

19. *Id.* ¶ 19.

20. Op. 837, *supra* note 16, ¶¶ 23, 24.

21. *Id.* ¶ 20. “It may lead the court or opposing counsel to draw an inference adverse to the lawyer’s client, but would not involve counsel’s actual disclosure of the falsity.” *Id.* (citing *People v. Andrades*, 4 N.Y.3d 355, 358, 828 N.E.2d 599, 601, 795 N.Y.S.2d 497, 499 (2005)).

22. Op. 837, *supra* note 16, ¶ 12.

23. *Id.*

24. *Id.* ¶ 20.

25. *Id.* ¶ 24.

The New York County Lawyers Association followed this approach in answering an inquiry concerning a client's false statements during a deposition. In Opinion 741, the Committee concluded that a deposition falls within the definition of a tribunal.²⁶ That Opinion followed the earlier State Bar Committee's opinion regarding permissive intermediate steps and set out in clear terms the steps expected of counsel following the dictates of Rule 3.3.²⁷ First, remonstration may be effective, especially in circumstances where the client is merely mistaken or has poor recall; remonstration should be pursued before the other party relies upon the falsity.²⁸ Thereafter, or failing in the attempt at self-correction, the lawyer, "must disclose the false testimony."²⁹ "However, the disclosure of client confidential information should be limited to the extent necessary to correct the false testimony."³⁰

The State Bar Committee's opinion arose in the context of an arbitration proceeding, clearly a litigated matter before a "tribunal" as defined by the Rules.³¹ Does a "tribunal" include the rule-making or rate-making proceeding before a state administrative agency? The definition of "tribunal" extends to a "legislative body, administrative agency, or other body acting in an adjudicative capacity"; "adjudicative capacity" occurs when, "a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interest in the particular matter."³² In another opinion, the Committee on Professional Ethics did an extended review of other ethical obligations to "tribunals" that might include administrative proceedings³³; for instance, the obligation of candor to a tribunal, disclosure of the identity of the party whose interests are at stake, and *ex parte* rules preserving the impartiality of tribunals.³⁴ The Committee concluded:

Whether a rule-making or rate-making proceeding by an administrative agency or one of its officials could be considered a proceeding before a "tribunal" for the purposes of the New York Rules of Professional Conduct, is a question of fact. Principles that would apply to the determination include (a) whether the individual

26. N.Y. Cnty. Comm. Prof'l Ethics, Formal Op. 741, at 3 (2010).

27. See Op. 837, *supra* note 16.

28. Op. 741, *supra* note 26 at 4.

29. *Id.*

30. *Id.*

31. N.Y. RULES OF PROF'L CONDUCT R. 1.0(w) (2009).

32. *Id.*

33. N.Y. Bar Ass'n. Comm. On Prof'l Ethics, Op. 838 (2010).

34. *Id.*; N.Y. RULES OF PROF'L CONDUCT R. 3.3, 3.5 (2009).

parties will be affected by the decision; (b) whether the parties have the opportunity to present evidence and cross-examine other providers; and (c) whether the ultimate determination will be made by a person in a policy-making role or instead by an independent trier of facts such as an administrative law judge.³⁵

Thus, whether a particular administrative body qualifies as a tribunal will turn on the nature of the proceeding and the rules governing the particular commission or agency.

A. Does the Obligation Under Rule 3.3 Expire?

The Committee on Professional Ethics in the two opinions discussed here also addressed the Rule as proposed by the New York State Bar Association's Committee on Standards of Attorney Conduct³⁶ (COSAC) proposal and the American Bar Association model rules; COSAC proposed that the obligation under Rule 3.3 "continue to the conclusion of the proceeding."³⁷ However, that language was not adopted in the Joint Board Rule 3.3(c) as adopted.

The State Bar Committee noted: "There is thus an argument that the courts in adopting the rule intended the obligation to continue past the end of the proceeding and, potentially, indefinitely."³⁸ Neither Opinion 831 or 837 had such specific facts that forced the Committee to express its opinion on the application of the Rule in such an unlimited fashion. The Committee did note, in a lengthy discussion in both opinions, that there must be an endpoint of the obligation.³⁹ It concluded the remedial duties extend only for the period during which intermediate remedial measures might still be available; in Opinion 831, the Committee stated, "[w]e believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding—but not forever."⁴⁰ Thus, it is a difficult decision for a lawyer if none of the intermediate remedial steps short of disclosure would be effective. As the Committee noted, "disclosure which exposes the client to jeopardy

35. Op. 838, *supra* note 33 ¶ 17. The Committee also noted the references to "tribunal" within the Rules of Professional Conduct in other areas such as conflicts of interest, the appearance of impartiality, the lawyer "as witness" rule, and reporting misconduct to a tribunal. *Id.* ¶ 3.

36. N.Y. State Bar Ass'n. Comm. on Standards of Attorney Conduct, Rules of Professional Conduct (Proposed 2008).

37. *Id.* R. 3.3(c).

38. Op. 831, *supra* note 8, ¶ 7 n.4.

39. *Id.*; Op. 837, *supra* note 16, ¶ 16.

40. Op. 831, *supra* note 8, ¶ 7, n.4.

without serving a remedial purpose is not authorized under Rule 3.3.”⁴¹ Some factors which may enter into a lawyer’s consideration of available intermediate measures may include the expiration of applicable appeal periods, recoverability of any amounts paid in the satisfaction of a judgment. The Committee, at least, would conclude that disclosure is not required if it is the only remaining remedial action.

II. ADVERTISING AND SOLICITATION

A. *Second Circuit Decides Alexander v. Cahill*

The history of the New York State Bar Association’s report on attorney advertising and the Appellate Division Presiding Justices’ adoption of that report and the rules promulgated in response have been reported in prior *Surveys*.⁴² The background begins with the New York State Bar Association House of Delegates’ approval of the Report and Recommendations on the Task Force on Lawyer Advertising.⁴³ Thereafter, the four presiding justices adopted amendments and new rules, after a period of public comment, which appeared as Disciplinary Rule 2-101⁴⁴ and have appeared unchanged in the Rules of Professional Conduct as Rule 7.1⁴⁵ since April 1, 2009. The final version of the amended Rules became effective February 1, 2007. Almost immediately, the Rules were challenged on constitutional grounds by James L. Alexander, Esq., managing partner of Alexander & Catalano, LLC; although neither he nor his firm had been charged under the updated and amended Rules, Alexander sought a declaratory judgment claiming that the substantive content-based Rules violated the First Amendment.⁴⁶ Mr. Alexander was successful in his challenge at the District Court. Judge Scullin validated the ban on the use of testimonials about a lawyer, the portrayal of a judge or fictitious law firm, on attention-getting techniques, and the use of nicknames or monikers.⁴⁷ In the same decision, Judge Scullin upheld a group of

41. *Id.*

42. Lydia Arnold Turnipseed, *Professional Responsibility, 2006-07 Survey of New York Law*, 58 SYRACUSE L. REV. 1101, 1109 (2008).

43. See generally N.Y. STATE BAR ASS’N, HELPING LAWYERS, HELPING CLIENTS: 2008-2009 REPORT TO MEMBERSHIP (2009), available at http://www.nysba.org/Content/NavigationMenu/AboutNYSBA/AnnualReport/NYSBA_AnnualReport_08-09.pdf.

44. N.Y. CODE OF PROF’L RESPONSIBILITY DR 2-101 (2007).

45. N.Y. RULES OF PROF’L CONDUCT R. 7.1 (2009).

46. *Alexander v. Cahill*, 634 F. Supp. 2d 239, 242 (N.D.N.Y. 2007), *aff’d in part, rev’d in part*, 598 F.3d 79 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 820 (2010).

47. *Id.* at 247.

amendments that imposed a thirty-day moratorium on the solicitation of claims for personal injury within thirty days of the incident.⁴⁸ The losing sides on each of these issues appealed determinations which were adverse to them. The State defendants appealed the ban on content-based restrictions on attorney advertising and the plaintiffs sought to overturn that portion upholding the moratorium on specific targeted solicitation. The previous *Survey* article in 2006-2007 ended with an encouragement to the parties to move on and accept the results and urged the Bar, in particular, not to re-litigate additional decisions.⁴⁹ The parties did not follow these urgings. Both sides did appeal to the Court of Appeals for the Second Circuit.⁵⁰

The appeals were argued before the adoption of the Rules of Professional Conduct, but as the Circuit Court noted, the changes from the Disciplinary Rules to the Rules were not material, stating: “The parties have not briefed the relevance, if any, of this change. We accordingly read the change to be immaterial to this appeal.”⁵¹ The Second Circuit decision came nearly a year after the adoption of the new Rules of Professional Conduct. The long-awaited decision upheld and reaffirmed the District Court’s Memorandum–Decision and Order granting partial summary judgment to the plaintiffs and partial summary judgment to the defendants.⁵² The District Court, as noted in the previous *Survey*, treated the plaintiff’s advertising as commercial speech and examined the restrictions using the four-pronged test set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.⁵³ The Second Circuit reviewed the record before the District Court *de novo* and framed the case: “This case calls on us once again to assess the scope of the First Amendment protection accorded to commercial speech, and the measure of evidence a state must present in regulating such speech.”⁵⁴ The lengthy review of each provision by the Second Circuit began with a review of the thirty-year old Supreme Court decision in *Bates v. State Bar of Arizona*.⁵⁵ The Second Circuit noted: “In so doing, the Court reserved the question of whether similar protection would extend to ‘advertising claims as to

48. *Id.* at 253.

49. Turnipseed, *supra* note 42, at 1109.

50. *Alexander*, 598 F.3d at 83.

51. *Id.* at 86 n.3.

52. *Id.* at 86.

53. 447 U.S. 557, 566 (1980).

54. *Alexander*, 598 F.3d at 87.

55. 433 U.S. 350 (1977) (opening the door to advertising by attorneys regarding fees for certain “routine” real estate services).

the quality of services [that] are not susceptible of measurement or verification.”⁵⁶

The court further noted that intervening Supreme Court decisions “‘have created some uncertainty as to the degree of protection for commercial advertising that lacks precise informational content.’”⁵⁷

The Second Circuit then separated and addressed the first prong of the *Central Hudson* test, which “clearly excludes from protection . . . speech that is false, deceptive or misleading, and speech that concerns unlawful activities.”⁵⁸ The state defendants attempted to equate advertising claims that are irrelevant, non-informational, and unverifiable with those that are actually false, deceptive, and misleading.⁵⁹ However, the Second Circuit found this argument unpersuasive, pointing to the State Bar’s “own press release [that] described its proposed rules as protecting consumers against ‘potentially misleading ads,’”⁶⁰ and concluded that this argument is “insufficient to place these restrictions beyond the scope of First Amendment scrutiny.”⁶¹

The next prong the court examined was the requirement that “the State must identify a ‘substantial interest in support of its regulation[s].’”⁶² The Bar Association’s Task Force Report “‘identified protecting the public by ‘prohibiting advertising and solicitation practices that disseminate false or misleading information’ as one of its key concerns.”⁶³ The court found this supported the new and amended provisions of the Code and found additional bases for the regulations in the interest of the Bar “‘in preventing the erosion of confidence in the [legal] profession,’”⁶⁴ and maintaining “attorney professionalism and respect for the bar.”⁶⁵

Under the third prong of the *Central Hudson* test, the court examined the content-based regulations and whether they “‘directly advance[d] the state interest involved.’”⁶⁶ The court found each of the claims in support of the content-based restrictions failed to demonstrate

56. *Alexander*, 598 F.3d at 88 (quoting *Bates*, 433 U.S. at 383).

57. *Id.* at 88 (quoting *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998)).

58. *Id.* at 89.

59. *Id.* at 88.

60. *Id.* at 89.

61. *Alexander*, 598 F.3d at 89.

62. *Id.* at 90 (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995)).

63. *Id.* at 90-91 (citation omitted).

64. *Id.* at 91 (quoting *Fla. Bar*, 515 U.S. at 635).

65. *Id.*

66. *Alexander*, 598 F.3d at 91 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

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a real threat or that the restrictions would advance the State's interest to a material degree.⁶⁷ The court, in emphatic language, found that each failed this prong of the *Central Hudson* requirements. As to client testimonials, the court stated: "Nor does consensus or common sense support the conclusion that client testimonials are inherently misleading. Testimonials may, for example, mislead if they suggest that past results indicate future performance—but not all testimonials will do so, especially if they include a disclaimer."⁶⁸ As to the portrayal of judges, the court said: "Although it seems plainly true that implying an ability to influence a court is likely to be misleading, Defendants have failed to draw the requisite connection between that common sense observation and portrayals of judges in advertisements generally."⁶⁹ Citing irrelevant techniques: "Defendants have introduced no evidence that the sorts of irrelevant advertising components proscribed by subsection 1200.50(c)(5) are, in fact, misleading and so subject to proscription."⁷⁰ And: "[In] the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe—purely as matter of 'common sense'—that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics."⁷¹ Regarding nicknames or monikers: "Defendants have once again failed to provide evidence that consumers have, in fact, been misled by the sorts of names and promotional devices targeted by § 1200.50(c)(7), and so have failed to meet their burden for sustaining this prohibition under *Central Hudson*."⁷²

The court also found that the regulations failed the fourth prong of the *Central Hudson* test which requires that any restriction on potentially-protected commercial speech be no broader than reasonably necessary to accomplish its purpose.⁷³ The Second Circuit, with a direct reference to the Task Force Report, held:

On this basis, even if we were to find that all of the disputed section 1200.50(c) restrictions survived scrutiny under *Central Hudson*'s third prong, each would fail the final inquiry because each wholly prohibits a category of advertising speech that is *potentially* misleading, but is not inherently or actually misleading in all cases. Contrary to Defendants' assertions, the fact that New York's rules do also permit

67. *Id.* at 91-95.

68. *Id.* at 92.

69. *Id.* at 93.

70. *Id.* at 94.

71. *Alexander*, 598 F.3d at 94.

72. *Id.* at 95.

73. *Id.* at 95.

substantial information in attorney advertising does not render the disputed provisions any less categorical.⁷⁴

Thus, *Alexander* permits lawyers to use testimonials or endorsements as long as they are accompanied by a disclaimer stating that past results are not indicative of future performance.⁷⁵ While the appeal of Judge Scullin's decision was pending, the Committee on Professional Conduct received an inquiry about the requirement of a disclaimer with use of testimonials. The Committee reaffirmed the need for the standard disclaimer, "prior results do not guarantee a similar outcome" and added that *Alexander* addressed only the restriction on the content of testimonials, not whether a disclaimer was required.⁷⁶ In light of the Second Circuit's affirmance, this opinion remains consistent with the Rule and case law.

Alexander also permits the use of an actor in advertising, provided there is a disclaimer identifying the person as a paid spokesperson; advertisements portraying judges, so long as the ad does not imply the ability to influence a judge; and the use of attention-getting visual devices.⁷⁷

What remains of the Rules after *Alexander*? The Second Circuit did not invalidate several other practices of lesser concern, such as the portrayal of a fictitious law firm or the implication that attorneys are associated within a firm if that is not the case⁷⁸ and the use of "a name that is misleading as to the identity of the lawyer or lawyers practicing under such name,"⁷⁹ whether on print ads, websites, or other electronic media. *Alexander* also did not challenge that portion of the regulations which exempt not-for-profit legal services organizations from the advertising restrictions.⁸⁰

Last, and importantly, the Second Circuit upheld the District Court's decision on the thirty-day moratorium, including the expanded prohibition against contacting accident victims, by any means.⁸¹ The Second Circuit extended the Supreme Court's holding in *Florida Bar v. Went For It, Inc.*⁸² by upholding New York's expansion of the prohibition to other forms of media beyond direct-mail. In supporting

74. *Id.* at 96.

75. *Id.* at 92.

76. N.Y. Bar Ass'n Comm. on Prof'l Ethics, Op. 834, ¶ 3 (2009).

77. *Alexander*, 598 F.3d at 92-93.

78. N.Y. RULES OF PROF'L CONDUCT R. 7.1(c)(3) (2009).

79. *Id.* R. 7.5(b).

80. N.Y. RULES OF PROF'L CONDUCT R. 7.1 cmt. 6 (2009).

81. *Alexander*, 598 F.3d at 97.

82. *Id.* at 98; *see Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995).

the broader approach, the Second Circuit recognized that as technology evolves, there are new and different methods of approaching accident victims and that each may be as offensive as direct mail:

In the context before us, we eschew the technology-specific approach to the First Amendment and conclude that New York's moratorium provisions—as we construe them—survive constitutional scrutiny notwithstanding their applicability across the technological spectrum Thus, to us, the affirmative act of walking to one's mailbox and tearing open a letter seems no greater than walking to one's front step and picking up the paper or turning on a knob on a television or a radio.

. . . .

. . . . To the extent that the attorney advertisements, regardless of the media through which they are communicated, are directed toward the same sensitive people, there is no reason to distinguish among the mode of communication. Depending on the individual recipient, the printed word may be as [sic] likely to offend as images on a screen or in newspapers.⁸³

B. Other Forms of Solicitation

The Second Circuit's affirmance of the thirty-day moratorium in *Alexander* acknowledges that the media available to attorneys to make their general presence known has taken new forms and continues to evolve. Since the 1995 Supreme Court *Florida Bar* decision, the use of facsimile transmissions, websites, blogs, electronic mail, and social media has exploded; these media have replaced the traditional direct mail and telephone book advertising. The expansion of these technological marvels and their intrusion into the practice of law has presented new challenges. Where is the line between casual online conversation and attorney advertising and solicitation? How and when should a lawyer add a disclaimer to a thread of social media exchanges that develop into testimonials? Is one who freely accepts an invitation to join a group on a social network site a personal friend who is then exempt from solicitation restrictions?⁸⁴ As these practices evolve from the more formal written and static communications to the free-flowing electronic world, lawyers need to be vigilant and concerned about honesty and accuracy.

These changes have twisted the rules and challenged prior opinions

83. *Id.* at 99-100.

84. See N.Y. RULES OF PROF'L CONDUCT R. 7.3(a) (1) (2009) (prohibiting solicitation by "real-time or interactive computer-accessed communication . . . unless the recipient is a close friend, relative, former client or current client.").

and decisions. For instance, attorneys have been permitted to send unsolicited facsimiles to attorneys.⁸⁵ The Court of Appeals recently held that such “blast faxes” by a malpractice attorney to other attorneys did not constitute an unsolicited advertisement in violation of the Telephone Consumer Protection Act of 1991.⁸⁶ In *Stern v. Bluestone*, the Court of Appeals held that facsimile transmissions entitled, “Attorney Malpractice Report,” which also included defendant’s contact information and website address were not unsolicited advertisements prohibited by the text of the federal statute.⁸⁷

The solicitation rule was addressed by the Committee on Professional Ethics in response to an inquiry from an attorney who asked about the propriety of sending e-mails to other lawyers asking them to refer products liability cases to the attorney.⁸⁸ The opinion begins with the crucial understanding of the relationship between solicitation and advertising under the Rules. To be covered by Rule 7.3, the solicitation must be an “advertisement.”⁸⁹ The Committee noted that the definition of “advertisement” specifically excludes communications to other lawyers and thus, opined, “[s]ince the communication . . . will be sent only to other lawyers, it is not an ‘advertisement.’ Therefore, it is also not a ‘solicitation’ within the meaning of Rule 7.3(b).”⁹⁰

Having become “friends” on a social networking site, do the future communications between a lawyer and friends, who may be potential clients, fall within or out of the prohibitions of the solicitation rule? Communications flowing in the other direction, that is from the general public to a lawyer through his e-mail, website, or social media site, might also appear as a lawyer-client communication and create a number of confidentiality issues for the unsuspecting lawyer.⁹¹ Judges have not been immune from the temptations of a social media site; the New York Committee on Judicial Ethics issued a cautionary opinion which criticized the participation by judges’ on social networking sites.⁹² The Committee noted,

There are multiple reasons why a judge might wish to be part of a

85. N.Y. Bar Ass’n Comm. on Prof’l Ethics, Op. 841 (2010).

86. 47 U.S.C. § 227 (2006).

87. 12 N.Y.3d 873, 876, 911 N.E.2d 844, 846, 883 N.Y.S.2d 782, 784 (2009).

88. Op. 841, *supra* note 85, ¶ 8.

89. *Id.* ¶ 4 (quoting N.Y. RULES OF PROF’L CONDUCT R. 1.0(a) (2009)).

90. *Id.* ¶ 5; *see* N.Y. RULES OF PROF’L CONDUCT R. 7.3 cmt. 1 (“By definition, a communication that is not an advertisement is not a solicitation.”).

91. *See, e.g.*, N.Y. RULES OF PROF’L CONDUCT R. 1.18 (2009).

92. N.Y. Adv. Comm. on Jud. Ethics, Op. 08-176 (2009).

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social network: reconnecting with law school, college, or even high school classmates; increased interaction with distant family members; staying in touch with former colleagues; or even monitoring the usage of that same social network by minor children in the judge's immediate family.⁹³

The Committee found nothing "inherently inappropriate" about participation.⁹⁴

However, Facebook and the widespread use of social networking sites has created a verb out of a noun (those who connect with others said to "friend" them); that term, being near universal usage, creates problems of appearance for judges and lawyers. Thus, the New York Committee on Judicial Ethics cautioned judges who use social network sites:

[T]he judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different than adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e. others can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond.⁹⁵

This cautionary approach seems to concern other states as well. In Florida, the Judicial Ethics Advisory Committee went further than its New York counterpart and advised judges that they should not add lawyers as "friends" on their social networking site if those lawyers appear before the judge.⁹⁶

Attorneys must also be conscious of the vulnerability of the various media used to communicate with, for, or about clients, to unwanted access. The Supreme Court raised this concern in *City of Ontario v. Quon*, a case involving the search of an employee's text messages, the contents of which eventually lead to disciplinary action against the employee.⁹⁷ The Supreme Court's opinion upheld the reasonableness of the search and thus the discipline imposed on the employee for the improper personal use of text messaging.⁹⁸ But this

93. *Id.* at 1.

94. *Id.*

95. *Id.* at 2.

96. Fla. Sup. Ct. Jud. Ethics Adv. Comm., Op. 2009-20 (2009).

97. 130 S. Ct. 2619, 2625 (2010).

98. *Id.* at 2633.

decision is important to lawyers for other reasons; it points out the significant difference between text messaging and e-mail. Emails go through and are stored on the firm's or company's internal network while text messages are stored on the telecommunication service provider's servers.⁹⁹ The importance of this concept for attorneys is that the servers do not have the same level of encryption that an attorney's firm might or should have for its own in-house e-mail service. Thus, using text messages for sensitive lawyer-client or other confidential communication may fall short of the obligation to protect these communications and their confidentiality.

Last, the use of Facebook, MySpace, Twitter, and other social media has drawn criticism because of its informality and the liberally-granted permissions to become friends. This ability has given rise to a concern over an activity sometimes called "pre-texting" by which the user can pretend to be another asking to "friend" someone with whom there is no logical connection. In the litigation setting, pre-texting is no different from a lawyer contacting a witness or another party and hiding his identity as a lawyer, a practice that in general has been severely criticized. With the advent of social media, attorneys must be reminded that pre-texting should be a violation of the rules against using false or misleading techniques.¹⁰⁰ In fact, the Philadelphia Bar Association criticized an attorney for using a third party to "friend" a witness.¹⁰¹ The conclusion is that attorneys should not be prohibited from using all means and media to gain publicly-available information; however, using deception or trickery to obtain information not publicly-available will violate the attorney's ethical responsibilities.¹⁰²

III. JUDICIARY LAW

A. Section 487

Last year's *Survey* had a detailed discussion of a Court of Appeals opinion which gave renewed attention to a little-used section of the Judiciary Law.¹⁰³ That section creates a misdemeanor offense and

99. *Id.* at 2625.

100. See MODEL RULES OF PROF'L CONDUCT R. 8.4 (2004).

101. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009).

102. After the close of the *Survey* year, the New York State Bar Association Committee on Professional Ethics issued Opinion 843 along the same logic in prohibiting the use of deceptive devices through social media. N.Y. Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010). See also Ass'n of the Bar of the City of N.Y., Comm. on Prof'l & Jud. Ethics, Formal Op. 2010-2 (2010).

103. See generally *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 903 N.E.2d 265, 874 N.Y.S.2d 868 (2009).

makes attorneys liable for treble damages if they are guilty of any deceit or collusion, or of willful delay with a view to their own gain.¹⁰⁴ This year, this section is again in the judicial spotlight. In *Scarborough v. Napoli, Kaiser & Bern, LLP*,¹⁰⁵ the Fourth Department upheld a claim under Judiciary Law section 487. The defendant law firm had been retained to handle a medical malpractice action; during their representation, the action was dismissed for failure to file a timely note of issue.¹⁰⁶ Thereafter, the defendant lawyers and law firm deceived the plaintiff by telling her that the case had no merit, asking her to sign a stipulation of discontinuance, and hiding the fact that the case had been dismissed.¹⁰⁷ The Fourth Department upheld the lower court's ruling that the defendants were not entitled to summary judgment dismissing the Judiciary Law section 487 claim, stating:

That statute provides in relevant part that an attorney who is "guilty of deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and . . . he [or she] forfeits to the party injured treble damages, to be recovered in a civil action." A violation of section 487 may be established "either by the defendant's alleged deceit *or* by an alleged chronic, extreme pattern of legal delinquency by defendant."¹⁰⁸

The second standard, "chronic legal delinquency," is not found in the statute, but has been repeated over the years in several cases applying the statutory provisions. Reading these cases leads to the conclusion that "chronic legal delinquency" is not an additional test but one used by courts to measure the level of opprobrium and justifying the harsh assessment of treble damages.

B. Section 478

It is unlawful to render legal services or hold oneself out as being entitled to practice law unless "duly and regularly licensed" and admitted to practice.¹⁰⁹ Section 484 of the Judiciary Law lists the services that constitute the practice of law as:

[A]ppearing for a person other than himself as attorney in any court or before any magistrate, or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property

104. N.Y. JUD. LAW § 487 (McKinney 2005).

105. 63 A.D.3d 1531, 1531, 880 N.Y.S.2d 800, 801 (4th Dep't 2009).

106. *Id.*

107. *Id.*

108. *Id.* at 1533, 880 N.Y.S.2d at 802 (citations omitted).

109. N.Y. JUD. LAW § 478 (McKinney 2009).

after death, or decedents' estates, or pleadings of any kind in any action brought before any court of record in this state, or make it a business to practice for another as an attorney in any court.¹¹⁰

For years these prohibitions have frustrated the ability of large corporations' legal departments in New York to hire lawyers admitted in other states to work in New York and provide advice to them from New York-based offices. In the proposed rules submitted to the Joint Board by The New York State Bar Association, COSAC recommended the adoption of a multi-jurisdictional practice rule similar to and consistent with the Model Rule 5.5 in effect in many other states.¹¹¹ Proposed Rule 5.5(d) allowed:

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in New York State that: (1) are provided to the lawyer's employer or its organizational affiliates and are not are services for which the forum requires *pro hac vice* admission; or (2) services that the lawyer is authorized to provide by federal law or other law of New York State.¹¹²

It is important to keep in mind that this addition to the rules addressed only the ethical standards and would not have changed the Judiciary Law or the rules governing admission to practice.¹¹³ Therefore, the COSAC proposal did not reach the essence of the Judiciary Law section 478: one must be "duly and regularly admitted" to be able to advise others on deeds, leases and other enumerated matters. Section 484 does not list corporate transactional matters among these activities. Thus, what else constitutes the practice of law outside the listed activities is not clear and was not addressed by the proposed rule. The change was intended to extend the ability of corporations to bring in-house lawyers to their New York offices and meet the reciprocity requirements of other states for New York lawyers employed by other large out-of-state corporations.¹¹⁴ The Joint Board, however, did not adopt the full proposal of Rule 5.5 and, in particular, did not adopt sub-section (d), leaving New York in the minority of

110. *Id.* § 484.

111. AM. BAR ASS'N, STATE IMPLEMENTATION OF ABA MJP POLICIES (Oct. 27, 2010), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/recommendations.authcheckdam.pdf>.

112. N.Y. State Bar Ass'n, Comm. Standards of Atty. Conduct, R. 5.5(d) (Proposed 2008) (emphasis added).

113. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.1 (1998).

114. *See, supra* note 112.

jurisdictions regarding multi-jurisdictional practice limitations.

After the adoption of the new Rules on April 1, 2009, the dilemma was presented to the Committee on Professional Ethics with the hope that it would craft a solution. The Committee was asked:

May a person who is not admitted to practice law in New York but who is admitted to practice law and is in good standing in another U.S. jurisdiction serve as general counsel for a corporation headquartered in New York and maintain an office in New York for that purpose?¹¹⁵

The Committee's opinion began with a short review of the legal principles¹¹⁶ before concluding "the question of whether an out-of-state lawyer is engaged in the unauthorized practice of law in New York is *exclusively* a matter of law."¹¹⁷ Thus, it became quickly apparent that the multi-jurisdictional practice question would not be answered. The Committee's conclusion was more emphatic, "[t]he question . . . is a question of law, and is not answered by the New York Rules of Professional Conduct."¹¹⁸

Where will the answer be? The Committee left it to the Legislature (presumably by clarifying Judiciary Law sections 478 or 484) or the courts. The latter route is currently under study by COSAC and a proposal to address the dilemma by adopting amendments to the rules on admission¹¹⁹ may reach the courts in the future.¹²⁰

C. Section 470

This section of the Judiciary Law provides:

Attorneys Having Offices in this State May Reside in Adjoining States. A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such

115. N.Y. State Bar Ass'n. Comm. On Prof'l Ethics, Op. 835, ¶ 5 (2009).

116. *Id.* The Opinion notes the paucity of cases but refers to two: *El Gemayel v. Seamans*, 72 N.Y.2d 701, 707, 533 N.E.2d 245, 249, 536 N.Y.S.2d 406, 410 (1988); *Spivak v. Sachs*, 16 N.Y.2d 163, 167-68, 211 N.E.2d 329, 331, 263 N.Y.S.2d 953, 956-57 (1965) (concluding that certain minor and incidental work did not constitute the practice of law within New York).

117. Op. 835, *supra* note 115, ¶ 5 (emphasis added). Ethics committees are limited in scope and routinely do not opine on matters of law.

118. *Id.* ¶ 8.

119. N.Y. COMP. CODES R. & REGS. tit. 22, § 520 (1998).

120. After the close of the *Survey* year, the State Bar House of Delegates did adopt a recommendation from COSAC to permit admission of out-of-state attorneys in very limited circumstances. Delegates Take Action on Important Issues, NYSBA ST. B. NEWS, Nov. 2010, at 1.

attorney or counsellor, although he resides in an adjoining state.¹²¹

This section is often referred to as the office requirement and, although the section is written in permissive language, it has been interpreted as mandating that a non-resident attorney maintain an in-state presence.¹²² An interesting constitutional challenge to this section was raised by a New Jersey attorney in *Schoenefeld v. State of New York*,¹²³ claiming that section 470 of the Judiciary Law violated her constitutionally-protected privileges and immunities of citizenship¹²⁴ by effectively imposing a residency requirement on non-resident attorneys that forced her to maintain a full-time office in order to practice law in the State of New York.¹²⁵ The Attorney General, on behalf of the State of New York, moved to dismiss several grounds including the plaintiff's failure to show any likelihood of her practicing law in New York or that section 470 would be used against her.¹²⁶

The Privileges and Immunities Clause has been used by the Supreme Court to invalidate residency requirements in other jurisdictions.¹²⁷ Plaintiff in this action argued that the office requirement in section 470 was the equivalent of a residency requirement and should be likewise invalid.¹²⁸ The District Court held that plaintiff alleged a constitutionally-protected interest: "A non-resident attorney, who passes a state's bar exam and otherwise qualifies to practice law within that state, has an interest in practicing law that is protected by the Privileges and Immunities Clause."¹²⁹ In addition, other states have invalidated their own bar residency requirements.¹³⁰ "The [Privileges and Immunities] Clause [however] does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the

121. N.Y. JUD. LAW § 470 (McKinney 2009).

122. See, e.g., *Lichtenstein v. Emerson*, 251 A.D.2d 64, 64, 674 N.Y.S.2d 298, 298 (1st Dep't 1998).

123. No. 1:09-CV-0504, 2010 WL 502758, at *1 (N.D.N.Y. Feb. 8, 2010).

124. U.S. CONST. art. IV, § 2, cl. 1.

125. *Schoenefeld*, 2010 WL 502758, at *2.

126. *Id.* at *3.

127. See *New Hampshire v. Piper*, 470 U.S. 274, 288 (1985); *Virginia v. Friedman*, 487 U.S. 59, 67 (1988).

128. *Schoenefeld*, 2010 WL 502758 *5.

129. *Id.* at *4.

130. *In re Gordon*, 48 N.Y.2d 266, 274-75, 397 N.E.2d 1309, 1314, 422 N.Y.S.2d 641, 646 (1979); *Noll v. Alaska Bar Ass'n*, 649 P.2d 241, 246 (Alaska 1982); *In re Jadd*, 461 N.E.2d 760, 766 (Mass. 1984).

State's objective."¹³¹ Judge Kahn reviewed the history of *Friedman*, which invalidated Virginia's residency requirement, and, noting that Virginia had imposed an impermissible burden on a protected privilege, stated, "the residency requirement did not bear a close relationship to [a State's rights to control the practice of law within its borders] because other legislative choices not implicating constitutional protections were available."¹³² Thus, Judge Kahn believed that the office requirement might be an acceptable alternative to residency and that there should be a further refinement to separate from the general group of out-of-state lawyers, "nonresident attorneys . . . who have shown commitment and familiarity with state law by passing the state bar and complying with all other state requirements."¹³³ Judge Kahn allowed only the Privileges and Immunities portion of Schoenefeld's claims to proceed, and only because the State had "offered no substantial reason for [section] 470's differential treatment."¹³⁴

But in that portion of his decision in which he found that plaintiff had not stated a Fourteenth Amendment Equal Protection claim, he cited the First Department language upholding the validity of section 470, "New York state courts have suggested a number of rational bases for the office requirement."¹³⁵ In *Lichtenstein*, the First Department had adopted a familiar justification:

Certainly, a State has an interest in ensuring that a lawyer practicing within its boundaries is amenable to legal service and to contact by his or her client, as well as opposing and other interested parties, and a State may, therefore, reasonably require an attorney, as a condition of practicing within its jurisdiction, to maintain some genuine physical presence therein.¹³⁶

Judge Kahn also distinguished the Third Circuit decision in *Tolchin v. Supreme Court of the State of New Jersey*,¹³⁷ that affirmed a New Jersey office requirement on similar grounds to those used by the First Department in *Lichtenstein*.¹³⁸ In spite of these decisions, Judge Kahn failed to apply the same rational justification for New York's office

131. *Piper*, 470 U.S. at 284.

132. *Schoenefeld*, 2010 WL 502758, at *5.

133. *Id.*

134. *Id.*

135. *Id.* at *6. *See, e.g.*, *Lichtenstein v. Emerson*, 251 A.D.2d 64, 674 N.Y.S.2d 298 (1st Dep't 1998).

136. *Lichtenstein*, 251 A.D.2d at 64-65, 674 N.Y.S.2d at 298. After the close of the *Survey* year, section 470 was upheld in *In re Garrasi*, 29 Misc. 3d 822, 826, 907 N.Y.S.2d 821, 826 (Surr. Ct. Schenectady Cnty. 2010).

137. 111 F.3d 1099, 1116 (3d Cir. 1997).

138. *Schoenefeld*, 2010 WL 502758, at *6.

requirement under the Privileges and Immunities challenge as he supported dismissal from an Equal Protection Claim.¹³⁹ It is hard to predict the outcome of this matter, but it does seem that Judge Kahn's opinion will not withstand the weight of authority from the Circuits and other New York courts.

IV. DISCIPLINARY MATTERS

A. Grievance Committees

Two related Grievance Committee actions demonstrate the fiduciary responsibility that partners in a law practice have for the conduct of each other.¹⁴⁰ The level of responsibility may be measured or tempered by the years of experience and internal responsibilities within the partnership, but the defense of "he deceived me too" will not rescue a partner from the defalcations of another partner. Two attorneys found themselves before the Ninth District Grievance Committee to address charges that they had ignored their responsibility for the firm's trust account.¹⁴¹ They practiced as a partnership under the name "Belletieri Fonte & Laudonio" and carried on an extensive transactional real estate practice.¹⁴² All three attorneys were signatories on the firm's trust account.¹⁴³ For approximately eighteen months, "partner Anthony Belletieri engaged in a pattern of dishonest and fraudulent manipulation of BF & L's attorney special accounts which resulted in the misappropriation, larceny and/or conversion of more than \$17 million from those accounts."¹⁴⁴ These misappropriations, as expected, made headline news stories in the New York press in 2007. Attorney Belletieri resigned and was disbarred.¹⁴⁵ The Ninth Judicial District Grievance Committee pursued investigations against Attorney Belletieri's partners, Mr. Fonte and Ms. Laudonio, leveling five charges against each of them for violations of the Disciplinary Rules, alleging that they failed to take adequate efforts to supervise the attorneys' special accounts, failed to supervise their partner's work, and otherwise

139. *Id.*

140. *In re Fonte*, 75 A.D.3d 199, 203, 905 N.Y.S.2d 173, 175 (2d Dep't 2010); *In re Laudonio*, 75 A.D.3d 144, 145, 904 N.Y.S.2d 696, 697 (2d Dep't 2010).

141. *In re Fonte*, 75 A.D.3d at 200, 905 N.Y.S.2d at 175; *In re Laudonio*, 75 A.D.3d at 145-46, 904 N.Y.S.2d at 697.

142. *Id.*

143. *In re Fonte*, 75 A.D.3d at 201, 905 N.Y.S.2d at 175; *In re Laudonio*, 75 A.D.3d at 145-46, 904 N.Y.S.2d at 697.

144. *In re Fonte*, 75 A.D.3d at 201, 905 N.Y.S.2d at 175; *In re Laudonio*, 75 A.D.3d at 146, 904 N.Y.S.2d at 697.

145. *In re Belletieri*, 42 A.D.3d 53, 55, 837 N.Y.S.2d 876, 877 (2d Dep't 2007).

engaged in conduct prejudicial to the administration of justice, and which conduct called into question their fitness to practice law.¹⁴⁶ The special referee appointed by the Grievance Committee found the charges sustained, but recommended that those partners only be censured.¹⁴⁷ In considering the special referee's report in both matters, the "Grievance Committee has expressed strong disagreement with the . . . conclusion and the respondents' contention that [they] w[ere] [] victim[s] of Belletieri's fraudulent scheme."¹⁴⁸ Mr. Fonte was an experienced real estate practitioner and was drawing a very comfortable salary from the firm.¹⁴⁹ Furthermore, the Court was persuaded by the grievance Committee's contention "that the respondent displayed a long-term, near total ignorance of his fiduciary duties as attorney and escrowee. He ignored multiple warning signs and blatantly apparent indicators of criminality which could have forestalled such a massive escrow fraud by Belletieri."¹⁵⁰ The Second Department imposed a two-year suspension on Mr. Fonte stating, "[w]hile the respondent was, to some extent, victimized by Belletieri, he was also uniquely positioned to put an end to Belletieri's scheme and thereby minimize the damage to clients who had entrusted funds to BF&L. In this regard, he failed to uphold his non[-]waivable fiduciary duty."¹⁵¹ Ms. Laudonio was suspended for six months based on her more limited role in the firm; she had been with the firm for fewer years, and took steps at each closing to confirm that the required funds existed in the trust account before closing.¹⁵² "Moreover, the high volume of transactions engaged in on a weekly basis, together with the onerous schedule of closings [the] respondent was required to attend, would have made it a practical impossibility for her to reconcile the firm's accounts while continuing to meet her duties to clients."¹⁵³

In re Tavon demonstrates how small and manageable problems can accumulate and overwhelm a practitioner.¹⁵⁴ In this matter, the Second Department Grievance Committee considered allegations of thirty-four separate claims of neglected matters in small claims and local courts,

146. *In re Fonte*, 75 A.D.3d at 200-02, 905 N.Y.S.2d at 175-76; *In re Laudonio*, 75 A.D.3d at 145-47, 904 N.Y.S.2d at 697-98.

147. *In re Fonte*, 75 A.D.3d at 202, 905 N.Y.S.2d at 176; *In re Laudonio*, 75 A.D.3d at 147, 904 N.Y.S.2d at 698.

148. *Id.*

149. *In re Fonte*, 75 A.D.3d at 203, 905 N.Y.S.2d at 177.

150. *Id.*

151. *Id.* at 204, 905 N.Y.S.2d at 177.

152. *In re Laudonio*, 75 A.D.3d at 147-48, 904 N.Y.S.2d at 698-99.

153. *Id.* at 148, 904 N.Y.S.2d at 699.

154. 66 A.D.3d 224, 225, 884 N.Y.S.2d 111, 111 (2d Dep't 2009).

none of which was terribly complicated.¹⁵⁵ The accumulated weight, though, led the attorney to neglect these matters and by the time the complaints became part of a disciplinary proceeding, he offered no defense to the charges.¹⁵⁶ The Second Department disbarred Tavon.¹⁵⁷

Another serious example of the results of ignoring a disciplinary proceeding occurred in *Matter of Green*.¹⁵⁸ Attorney Green had been convicted on two counts of criminal contempt in violation of an order of protection.¹⁵⁹ The Fourth Department temporarily suspended Green and directed him to appear on charges relating to the contempt conviction.¹⁶⁰ However, even though he had notice of the proceeding, he failed to respond to the investigation or appear at the disciplinary proceedings.¹⁶¹ There is no indication why he used such poor judgment. His failure only drew more attention and disciplinary counsel took the opportunity to conduct further investigation and found “other acts of misconduct that included failing to maintain a current attorney registration, failing to respond to requests for information from a client in a criminal matter, and changing his residence without leaving any forwarding information”¹⁶² Green failed to answer these charges and this failure, added to his failure to appear before the court in response to the earlier order, gave the court grounds to disbar him for conduct which adversely reflected on his fitness to practice law.¹⁶³

Another lesson in co-operation with disciplinary authorities came in *Matter of Barry*.¹⁶⁴ In an earlier proceeding, Attorney Barry had been suspended for three years for neglecting matters entrusted to him and misrepresenting the status of legal matters to his clients.¹⁶⁵ While the investigation was underway for the earlier matters, additional matters arose leading to a new petition for neglect of other matters, and the conversion of clients’ funds.¹⁶⁶ When all of these matters were brought to the Grievance Committee and the court, the attorney failed to appear at the hearings and was disbarred.¹⁶⁷

155. *Id.*

156. *Id.* at 231, 884 N.Y.S.2d at 115.

157. *Id.* at 232, 884 N.Y.S.2d at 116.

158. 72 A.D.3d 142, 893 N.Y.S.2d 773 (4th Dep’t 2010).

159. *Id.* at 143, 893 N.Y.S.2d at 773.

160. *Id.*

161. *Id.*

162. *Id.*

163. *In re Green*, 72 A.D.3d at 143-44, 893 N.Y.S.2d at 773-74.

164. 69 A.D.3d 1, 885 N.Y.S.2d 682 (4th Dep’t 2009).

165. *In re Barry*, 47 A.D.3d 288, 289, 850 N.Y.S.2d 727, 728 (4th Dep’t 2007).

166. *In re Barry*, 69 A.D.3d at 3, 885 N.Y.S.2d at 682.

167. *Id.*

Matter of Rodeman provides an interesting insight into the grievance process.¹⁶⁸ The disciplinary charge against Attorney Rodeman arose from his violation of a trial court's order not to speak with an expert trial witness during the trial; the aggravating circumstance here was that when confronted by the trial court, Rodeman denied having spoken with the witness and only later admitted that he had.¹⁶⁹ The attorney's primary defense was not to these charges but rather, a claimed breach of Judiciary Law section 90(10) that makes all disciplinary proceedings confidential.¹⁷⁰ Rodeman alleged that, during the proceedings' investigation, the grievance counsel showed the attorney's letter responding to the charge against him not to the complainant, but to a witness.¹⁷¹ The court censured Rodeman, and found no merit to his claim of a breach of confidentiality because there had been no public disclosure in the counsel's showing the attorney's responding letter to a witness involved in the proceeding and, therefore, no violation of Judiciary Law section 90(10).¹⁷²

B. Independent Disciplinary Authorities

Each of the federal district and circuit courts has its own admissions process and also has independent and parallel disciplinary bodies. For example, the Second Circuit has a Committee on Attorney Admissions and Grievances which is empowered to review claims of neglect and shoddy work product and other ethical breaches committed before the courts under its supervision. The Committee, in *Matter of Jaffe*, was presented with a long history of allegations of failure to comply with court scheduling orders, false statements regarding her inability to appear before the court for argument, and a number of deficient briefs and other filings.¹⁷³ Attorney Jaffe had an extensive history before the Second Circuit's Committee on Attorney Admissions and Grievances, as well as the First Department's Grievance Committee and had been temporarily suspended from practice before the Second Circuit Court of Appeals in 2006 and ordered to maintain her caseload at a fixed number.¹⁷⁴ Based on that finding, the First Department

168. 65 A.D.3d 350, 883 N.Y.S.2d 835 (4th Dep't 2009).

169. *Id.* at 352, 883 N.Y.S.2d at 837.

170. N.Y. JUD. LAW § 90(10) (McKinney 2002).

171. *In re Rodeman*, 65 A.D.3d at 351, 883 N.Y.S.2d at 837. It is customary in the investigatory process for complainants to receive and comment upon an attorney's response to a complaint; however, that was not the procedure here—the letter had been shown to a witness rather than a complainant.

172. *Id.* at 352, 883 N.Y.S.2d at 837.

173. 585 F.3d 118, 120 (2d Cir. 2009).

174. *Id.* at 132-33.

censured Ms. Jaffe as a matter of reciprocal discipline.¹⁷⁵ Two years later, Ms. Jaffe was again referred to the Second Circuit's Committee on Admissions and Grievances for further investigation of matters covered by the 2006 order and subsequent deficiencies and violations similar to her previous breaches.¹⁷⁶ In her defense, Attorney Jaffe made several interesting arguments. First, she argued that the 2006 proceedings were *res judicata* and, therefore, closed to further action on those matters; and furthermore, she asked for permission to voluntarily withdraw from practice before the Second Circuit believing that doing so might avoid reciprocal discipline by the First Department.¹⁷⁷ The Second Circuit ruled against her arguments on all counts, ordered that Ms. Jaffe be "publicly reprimanded and removed from the Bar of this court."¹⁷⁸ Addressing her *res judicata* argument, the Second Circuit noted that the power to sanction, even where a previous action has been sanctioned, was not limited, particularly if the prior action was not a final sanction.¹⁷⁹ In addition the Court noted that "since attorney disciplinary proceedings are primarily remedial, the Double Jeopardy Clause of the Fifth Amendment does not apply."¹⁸⁰ Last, the court noted that it may "impose further discipline if the individual instances of misconduct are found to be part of a sanctionable pattern that has not itself been addressed."¹⁸¹ Addressing her request for voluntary withdrawal, the court observed that her request was not clearly understood by the Committee or Ms. Jaffe.¹⁸² An order permitting voluntary withdrawal accompanying the public reprimand as suggested by the Committee, would clearly trigger investigation and reciprocal discipline by any of the state grievance committees.¹⁸³ In addition, the court noted that "Jaffe herself is obligated to inform those authorities of this order under New York law."¹⁸⁴ The notion that the discipline imposed by the Second Circuit Committee might escape notice was misplaced; in September 2010, Jaffe was disbarred by the First Department.¹⁸⁵

175. *In re Jaffe*, 40 A.D.3d 96, 98, 832 N.Y.S.2d 177, 179 (1st Dep't 2007).

176. *In re Jaffe*, 585 F.3d at 124-25.

177. *Id.* at 120, 125.

178. *Id.* at 125. Removal is the federal equivalent of disbarment.

179. *Id.* at 121.

180. *Id.*

181. *In re Jaffe*, 585 F.3d at 121.

182. *Id.* at 124.

183. *Id.*

184. *Id.*

185. *In re Jaffe*, 78 A.D.3d 152, 159, 908 N.Y.S.2d 623, 628 (1st Dep't 2010).

V. DISQUALIFICATION FOR CONFLICT OF INTEREST

Frequently, motions are made in litigated matters where one party seeks to disqualify the other's counsel on grounds including conflict of interest, attorney as a fact witness, or prior relationships with some or all of the parties. In each of these claims, courts seek to balance the right of a party to be represented by counsel of his or her own choosing against the possibility of substantial prejudice to the opposing party or truth-finding process of the court.¹⁸⁶ The Preamble to the Rules of Professional Conduct urges that the Rules not be used for advantage in litigation because of the potential for abuse or tactical advantage.¹⁸⁷

When an attorney represents more than one family member in a criminal matter, it may be proper to disqualify that attorney despite the waiver of any conflict. *People v. Carncross* came before the Court of Appeals as an ineffective assistance of counsel claim.¹⁸⁸ In this case, defendant argued he had been denied the counsel of his choice because the county court at the trial level had disqualified his counsel; it had done so because that counsel had also represented defendant's father and girlfriend when they were witnesses before the grand jury.¹⁸⁹ They had given their testimony regarding defendant's activities at the time underlying the criminal charges and were mentioned during jury selection, but never called as witnesses.¹⁹⁰ The Court noted, at the time the disqualification motion was made, the parties were operating under the assumption that the father and girlfriend might well be called as prosecution witnesses.¹⁹¹ The Court granted the People's motion to disqualify defendant's counsel even though the defendant, after consulting with independent counsel, decided to waive the conflict.¹⁹² The Court of Appeals held that, "willingness to waive the conflict at an early stage does not end the inquiry"¹⁹³ and added, "the trial court had the independent obligation to ensure the defendant's right to effective representation was not impaired."¹⁹⁴ The father and girlfriend had differing interests from defendant because, had they been called, defense counsel "would have been required to cross-examine them" and

186. See, e.g., *Intelli-Check, Inc. v. Tricom Card Techs., Inc.*, No. 03 CV 3706, 2008 WL 4682433, at *3 (E.D.N.Y. Oct. 21, 2008).

187. N.Y. RULES OF PROF'L CONDUCT pmb1. cmt. 12 (2009).

188. 14 N.Y.3d 319, 927 N.E.2d 532, 901 N.Y.S.2d 112 (2010).

189. *Id.* at 326, 927 N.E.2d at 536, 901 N.Y.S.2d at 116.

190. *Id.* at 326-27, 927 N.E.2d at 535-36, 901 N.Y.S.2d at 115-16.

191. *Id.* at 328, 927 N.E.2d at 535, 901 N.Y.S.2d at 117.

192. *Id.* at 327, 927 N.E.2d at 536, 901 N.Y.S.2d at 116.

193. *Carncross*, 14 N.Y.3d at 327, 927 N.E.2d at 536, 901 N.Y.S.2d at 116.

194. *Id.* at 328, 927 N.E.2d at 537, 901 N.Y.S.2d at 117.

be forced “to impeach the credibility of [the] witness[es] to whom he . . . owe[s] a duty of loyalty”¹⁹⁵ Defense counsel’s predicament made it clear that a conflict in fact existed that was more real than theoretical and defense counsel’s ability to assess the best defense strategy was impaired.¹⁹⁶ The Court of Appeals noted that the disqualification of defense counsel by the county court was based on a careful balancing of the “defendant’s right to counsel of his own choosing against his right to effective assistance of counsel.”¹⁹⁷ This case also illustrates the dilemma for a trial court; here, the county court might have been criticized if it had accepted the waiver, not disqualified defense counsel and, later, the defendant upon conviction might have claimed that the impermissible conflict was in fact unconsentable and that his counsel should have been disqualified. To answer these issues, the Court of Appeals, as well as the trial courts must be given broad latitude in the use of their discretion whether or not to disqualify defense counsel.

Representation of successive clients regarding separate claims against the same employer where one was a witness regarding the other’s claim, did not create grounds for disqualification of counsel. In *Radder v. CSX Transportation, Inc.*, the Appellate Division, Fourth Department, refused to disqualify plaintiff’s counsel for alleged violations of their professional responsibilities contained in former DR 7-104(a)(1) and 5-105(b), or to suppress evidence obtained by plaintiff’s counsel from its second client.¹⁹⁸ Plaintiff had retained counsel to bring an action against CSX seeking damages for personal injuries.¹⁹⁹ Subsequently, the same firm represented a second plaintiff against CSX for injuries in a separate incident.²⁰⁰ The lawyers interviewed the second employee regarding the first action and obtained some damaging testimony about certain official reports.²⁰¹ CSX counsel sought to disqualify counsel for claimed conflicts of interest and for interviewing a represented party.²⁰² The second plaintiff had been an employee of CSX; however, at the time of the interview the second plaintiff was no longer an employee and was on long-term

195. *Id.*

196. *Id.*

197. *Id.* at 329, 927 N.E.2d at 538, 901 N.Y.S.2d at 118.

198. 68 A.D.3d 1743, 1744, 893 N.Y.S.2d 725, 727 (4th Dep’t 2009).

199. *Id.*, 893 N.Y.S.2d at 726.

200. *Id.*, 893 N.Y.S.2d at 726-27.

201. *Id.*, 893 N.Y.S.2d at 727.

202. *Radder*, 68 A.D.3d at 1743, 893 N.Y.S.2d at 727.

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disability benefits from the Railroad Retirement Board.²⁰³ Based on longstanding principles set forth by the Court of Appeals, the court found no impropriety in plaintiff's counsel interviewing the second employee.²⁰⁴

Turning to the contention that plaintiff's firm violated the conflict of interest provisions by representing two clients with differing interests, the court noted:

When K & G initially began to represent both plaintiff and Pauley [the second plaintiff], there was no apparent conflict. After Pauley disclosed that he had forged a document that was critical to plaintiff's case, however, K & G was placed in a position in which it was required to impugn Pauley's credibility in order to strengthen plaintiff's case. Doing so necessarily affected the credibility of Pauley in his own personal injury action.²⁰⁵

Therefore the attorneys were required to make the choice between loyalty to one or the other client, and thus appearing to advance conflicting interests. Nonetheless the court refused to disqualify counsel saying that "even assuming that K & G had an impermissible conflict of interest, we conclude that any breach of duty would be to K & G's clients, and the remedy for the breach of that duty would be an award of damages to the clients"²⁰⁶

Rule 3.7(a) provides that a lawyer should not appear as an advocate in a matter where the lawyer might be a witness on a significant issue of fact.²⁰⁷ The application of this rule had an interesting lesson for transactional lawyers who are often embroiled in litigation over the very documents they drafted. In *Uribe Bros. Corp. v. 1840 Washington Avenue Corp.*,²⁰⁸ counsel who had drafted a lease agreement, and was in the best position to explain the parties' intentions was able to represent his client, at least through the pre-trial proceedings.²⁰⁹ That court balanced a party's right to be represented by a lawyer of his choosing against prejudice to the other party and the tribunal, and subjected the disqualification motion to strict scrutiny.²¹⁰

203. *Id.* at 1745, 893 N.Y.S.2d at 727-28.

204. *Niesig v. Team I*, 76 N.Y.2d 363, 372-73, 558 N.E.2d 1030, 1034, 559 N.Y.S.2d 493, 497 (1990); *Muriel Siebert & Co., Inc. v. Intiut*, 8 N.Y.3d 506, 511, 868 N.E.2d 208, 210, 836 N.Y.S.2d 527, 530 (2007).

205. *Radder*, 68 A.D.3d at 1746, 893 N.Y.S.2d at 728.

206. *Id.*, 893 N.Y.S.2d at 728 (citation omitted).

207. MODEL RULES OF PROF'L CONDUCT R. 3.7(a) (2010).

208. No. 303479-2009, 2010 NY Slip Op. 50408(U), at 3 (Sup. Ct. Bronx Cnty., 2010).

209. *Id.* at 3.

210. *Id.* at 2.

The lawyers in *Decker v. Nagel Rice, LLC* were not so fortunate.²¹¹ Their counsel had represented some class action members who because of certain decisions made at counsel's suggestion chose to opt out of class membership.²¹² The counsel who had advised them at this earlier stage was disqualified from representing them in further proceedings.²¹³

CONCLUSION

These developments, decisions and opinions demonstrate that professional responsibility is a challenging field. The core principles governing our conduct have not changed but the application to the problems of an ever-changing world require careful analysis. The resources cited in this Article are important but also helpful are the various bar association's ethics committees. All practitioners should be encouraged to consult with them and seek counsel from these resources.

211. 716 F. Supp. 2d 228 (S.D.N.Y. 2010).

212. *Id.* at 230.

213. *Id.*