WBASNY

The Women's Bar Association of the State of New York

presents

Convention 2025
Continuing Legal Education Series

Ethically Representing Clients in a Radically Changing World

May 17, 2025
10:00 am - 11:00 am

Presenter: Veronica L. Reed, Esq.

Overview:

Our social bonds are disintegrating, and we are increasingly seeing clients in criminal and family law proceedings who believe negative behavior, including violence, and self-help are the only answer. How does an attorney ethically represent clients who identify fewer options to responding to and resolving their grievances? If every disagreement is zero sum and clients are unwilling to compromise, how does an attorney balance the duty of loyalty to the client and the obligation to engage in committed (a/k/a zealous) representation with the attorney's role as "an office of the legal system with special responsibility for the quality of justice".

Learning Objectives:

At the conclusion of this session, participants will gain knowledge of:

1. Current issues impacting compliance with the professional practice rules associated with attorney competence, counseling a client, communicating with a client, and maintaining confidentiality.
2. Strategies that will help an attorney manage the impact of current issues on rule compliance, including recognizing when "burn out" is having an impact.

Resources for Further Study

NYSBA NY Rules of Professional Conduct (2025) is available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://nysba.org/wp-content/uploads/2025/03/NYSBA-NY-Rules-of-Professional-Conduct-2025-web-1.pdf

New York Law School Mendik Library Guide to Professional Responsibility and Ethics webpage is available at: https://libguides.nyls.edu/legalethics/ethics

Nysba.org/lawyer-assistance-program

Learning Materials:

I. Introduction: Duties and Obligations (5 mins)

A. What is a lawyer?

The preamble of the New York Rules of Professional Conduct defines a lawyer as "a representative of clients and an officer of the legal system with special responsibility for the quality of justice".

B. What are a lawyer's duties as an officer of the legal system?

1. Uphold the legal process
2. Demonstrate respect for the legal system
3. Seek improvement of the law
4. Promote access to the legal system
5. The administration of justice
6. Further the public's understanding of and confidence in the rule of law and the justice system

C. What are a lawyer's obligations?

1. Assert the client's position under the rules of the adversary system
2. Maintain the client's confidential information except in limited circumstances
3. Act with loyalty during the period of the representation
4. Resolve issues of conflict through the exercise of sensitive professional and moral judgment, guided by the basic principles underlying the Rules of Professional Conduct
5. Observe the Rules of Professional Conduct
6. Aid in securing the observance of the Rules of Professional Conduct by other lawyers

D. Why is the profession self-governing?

1. Abuse of legal authority is more readily challenged by a professional whose members are not dependent on government for the right to practice law

II. Overview of the Imperatives of Being a Lawyer (5 mins)

A. Some rules of professional conduct are imperatives, that is "shall" and "shall not" and define proper conduct for the purposes of professional discipline. Other rules are permissive and define circumstances and boundaries for where and how the lawyer has discretion to exercise professional judgment.

III. Current Issues in Complying with the Rules of Competency (5 mins)

1. Shall be competent (Rule 1.1 (a) and (b))

Competency is handling a legal matter with preparation appropriate for the circumstances and avoiding neglect of the matter (See, NY Eth Op 751).

If a lawyer cannot provide competent representation, then the lawyer should either not represent the client, or associate with a lawyer who is competent to handle it (See, NY Eth Op 751).

Generally, failing to practice law with competency will implicate other rules, e.g., communication with client, maintaining confidentiality, acting with diligence.

In *Matter of Cobb*, 2025 WL 908716 (2d Dept 2025), an attorney admitted to practice in New York and Vermont and focused on criminal defense, family law, and civil litigation, was found by the Disciplinary County in Vermont to have violated multiple rules when the attorney failed to obtain or review records of alleged victim interview, failed to file a motion to modify conditions of release pursuant to the client's wishes, disclosed confidential client information, misrepresented his timekeeping to disciplinary counsel, and disclosed juvenile court information for two separate matters.

The Vermont Professional Responsibility Program publicly reprimanded and suspended the attorney for one year and three months.

Some important takeaways:

- A New York admitted attorney must notify AGC of any disciplinary action in another jurisdiction (22 NYCRR 1240.13 [d])
- Attorneys must keep accurate time records made contemporaneously with the work performed
- If an attorney does not have contemporaneous time records and cannot provide same to the disciplinary committee when asked to do so, then the attorney has an obligation to notify the committee – do not create time records in response to, or to avoid, a disciplinary action
- Do not disclose confidential records or sensitive client information in court filings and, where it is necessary to disclose such information as

an advocate, the attorney must take steps to seal the documents and prevent public disclosure

- Mishandling certain records may be a crime

a) Technology in General

NYCLA Eth Op 749, February 21, 2017:

Ethical competence is more than just providing a client with substantive knowledge of the law, the lawyer must also be competent in how legal services are provided and must integrate technical knowledge into the practice of law.

Lawyers must exercise reasonable care to protect client confidential information that could be exposed electronically, through hacking or technological inadvertence and errors.

Lawyers must have a sufficient understanding of issues relating to securing, transmitting, and producing electronically stored information (ESI).

b) Artificial intelligence

NYC Eth Op 2024-5, August 7, 2024 provides a summary of AI tools with guidance on the ethical obligations of lawyers and law firms.

ABA Formal Opinion 512, July 29, 2024, is the ABA's first formal opinion with respect to generative AI (see, press release at https://www.americanbar.org/news/abanews/aba-news-archives/2024/07/aba-issues-first-ethics-guidance-ai-tools/)

c) Case files destroyed

NY Eth Op 2015-6, September 2015

An older opinion, but one that continues to be relevant as a changing environment elevates the risk that client files will get accidentally destroyed.

A lawyer's overall obligations with respect to client files are:

- Deliver to the client all papers and property to which the client is entitled at the end of representation (Rule 1.16 [e]).
- Preserve documents relating to client matters for a retention period (generally, seven years)

The opinion does not set a "bright line rule" to determine whether a lawyer is obliged to notify a client or former client that case documents have been destroyed. Instead, it advises making a determination on a case-by-case basis, taking into account:

- The relevant of the document to the matter
- The type and age of the document
- The status of the matter
- The ease of replicating the document

To a certain extent, it probably goes without saying, that if case documents are destroyed during representation, and those documents are necessary for providing competent representation, them the lawyer must make reasonable efforts to reconstruct the file, including seeking copies from other sources, such as the court, opposing counsel, or the client, and if the lawyer cannot reconstruct the file to the extent necessary to provide competent representation, the lawyer must promptly disclose that fact to the client.

d) Case loads

NY Eth Op 751, January 31, 2002:

The specific circumstance of the opinion was that of a DSS attorney asking if they must accept more matters than they felt they could competently handle, but the opinion answered with broader concepts, stating that implicit in the obligation to handle legal matters competently "is a lawyer's duty to avoid accepting more matters than the lawyer can competently handle, and a duty to reduce one's workload if it has become unmanageable".

e) Frivolous arguments

NY Eth Op 1214, January 11, 2021:

Rule 3.1 prohibits a lawyer from bringing or defending a proceeding, or asserting or controverting an issue, if there is no basis in law or fact that is not frivolous.

22 NYCRR § 130-1.1 [c] defines "frivolous" conduct as conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law, or undertaken to delay or prolong the resolution of a

case, or undertaken to harass or maliciously injure another, or the conduct asserts material factual statements that are false.

Frivolous conduct should be understood as a high standard and distinguished from arguments that are unlikely to succeed but reasonably supported by law and/or fact.

If permission to withdraw is denied by the court, the attorney must continue representation (Rule 1.16 [d]). The lawyer must find a way to competently represent the client without putting forth frivolous arguments.

f) Cite to source material
NYC Eth Op 2018-3, 2020:

The question in this opinion is whether it was a violation of Rule 8.4 [c] to copy another lawyer's writing in a brief or litigation filing.

As the opinion points out, a legal briefs are not academic papers, but arguments presented on behalf of a client, "and their value derives from their persuasiveness, not from their originality of thought or expression. A lawyer's signature on a brief is not a representation of authorship, must less of sole authorship, but rather a commitment to take responsibility for the contentions in the brief and an implied representation that the brief is not frivolous"

This leads to the conclusion that copying from other writings without attribution in a litigation filing is not *per se* deceptive and not a *per se* violation of Rule 8.4 [c].

However, some courts frown on copying prior writings without citation or attribution, and lawyers should comply with judicial decisions and rules and guard against any appearance of conduct that could be viewed as dishonest, fraudulent, deceitful or misleading.

2. Shall not intentionally fail to seek the objectives of the client (Rule 1.1 (c) (1))

3. Shall not intentionally prejudice or damage a client during the course of representation (Rule 1.1 (c) (2))

4. Shall act with reasonable diligence and promptness in representing a client (Rule 1.3 (a))

5. Shall not neglect a legal matter (Rule 1.3 (b))

6. Shall not intentionally fail to carry out a representation agreement with a client (Rule 1.3 (c))

IV. Current Issues in Complying with the Rules of Counseling a Client (15 mins)

1. Shall abide by a client's decisions with respect to the objectives of representation, whether to settle, whether to enter a plea, whether to waive a jury trial, whether to testify (Rule 1.2 (a))

In *Matter of Wellman*, 209 AD3d 53 (1st Dept 2022), the attorney was disciplined in New Hampshire, and reciprocally in New York, for, *inter alia,* failing to comply with a client's decision in a family law matter. The decision is included in the materials, as the fact pattern will be recognized as part and parcel of being a family law practitioner. The issue, which should not be part and parcel of family law practice, was that counsel proceeded to "settle" a custody and parenting time agreement without confirming with her client. In addition, counsel requested a continuance from the court, on the basis that the proceeding was resolved by settlement, also without discussing the decision with her client. The family law court was not forgiving with respect to the attorney's mistake and ordered the parenting plan that was not agreed by the attorney's client.

While the sanction in New Hampshire was public censure, New York declined to impose a reciprocal sanction and, instead, imposed a three month suspension, in part, because there were multiple instances of disciplinary action in New York that the attorney failed to report to New York in violation of 22 NYCRR 1240.13 [d].

2. Shall consult with the client on the means of pursuing the client's objectives (Rule 1.2 (a), Rule 1.4 (a) (2))

a) Impact of client's mental illness on communicating with client
NY Eth Op 1144, January 29, 2018

In this opinion, the court assigned the lawyer to represent a client who had been charged with several criminal offenses. The client had been represented by a number of other lawyers and had unsuccessfully moved to have the inquiring lawyer relieved as counsel. The client had mental health issues, was physically intimidating, verbally abusive, and often non-responsive, which was disrupting communication. The inquiring lawyer was seeking to place parameters on the communication, including limiting the communication to scheduled appointments and written communication.

According to the opinion, there are three core principles in Rule 1.4:

- A lawyer must keep a client apprised of material circumstances and developments in the matter. This must be done promptly.
- A lawyer must comply with a client's reasonable requests for information. This must also be done promptly.
- A lawyer must reasonably consult with a client about the means of accomplishing the client's objectives and about other decisions regarding the representation, some of which are within the client's province to decide.

A lawyer is required to use methods of communication that are effective, timely, and not unduly burdensome to the client.

The rule does not prevent a lawyer from selecting the manner of communication.

A lawyer has flexibility to curtail conversations or meetings that stray beyond the relevant substance of the representation.

Clients "may thrust upon their lawyers burdensome, immaterial requests for information" and lawyers "need not meet such unreasonable demands"

The "Rule does not curtail a lawyer's discretion to schedule the specific timing of lawyer-client communications" and the lawyer has "reasonable latitude to schedule the timing of client communications"

b) Vulnerable clients

Pellegrino v Grievance Committee of Fifth Judicial District, 235 AD3d 63 (4th Dept 2025), is a recent decision with a disconcerting

fact-pattern (see, copy of the decision). As noted in the decision, the attorney, who was disbarred as a sanction, "engaged in a pattern of initiating self-interested transactions with clients or breaching his legal and ethical obligations to clients, thereby causing them direct harm or substantial prejudice, in many cases for his own benefit or personal gain" and that he "targeted clients who were likely to be vulnerable to his manipulation, including elderly or individuals inexperienced in financial matters".

3. Shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent and consult with the client when the client expects assistance not permitted by the rules (Rule 1.2 (d), Rule 1.4 (a) (5)).

See, *Matter of Walters*, 228 NYS3d 538 (1st Dept 2025). In a not unusual occurrence, the criminal court issued a protective order barring the dissemination of police reports and ordering that the reports were to be maintained in defense counsel's exclusive possession, not copied, not presented to any other person, and used for the exclusive purpose of defense counsel preparing his client's defense. In *Walters*, the incarcerated client was found in possession of those police reports and the police reports were allegedly used to attempt to engage in witness tampering.

Defense counsel was convicted of criminal contempt and sentenced to 30 days incarceration. Criminal contempt is considered a "serious crime" subject to disciplinary action.

An important take away from the decision was the seriousness of the conduct in violating a protective order. What the attorney described as "negligence" in providing the police reports to his client resulted in a witness being approached and placed in fear and which could have resulted in an even more significant negative outcome for that witness.

V. Current Issues in Complying with the Rules of Client Communication (15 mins)

1. Shall promptly inform the client of:

   a) Any decision or circumstance requiring a client's informed consent (Rule 1.4 (a) (1) (i))

   b) Any information required by rule or law to be communicated to the client (Rule 1.4 (a) (1) (ii)

   c) Material developments in the matter including settlement or plea offers (Rule 1.4 (a) (1) (iii))

2. Shall keep client reasonably informed about the status of the matter (Rule 1.4 (a) (3))

   It is not unusual for the client's understanding of "reasonable" to be different from the attorney's understanding of "reasonable". Some strategies to mitigate the discrepancy are:

   - Ensuring that the client feels the attorney is being forthcoming with all information about the case, its progress, and potential outcomes.
   - Responding promptly to emails, phone calls, etc., and ensuring the client is fully informed about when an attorney can respond, e.g., communicating business hours, communicating best means of communication, communicating out of office instants, acknowledging receipt of client communication and responding with an ETA for a more detailed response.
   - Avoiding complex and difficult to understand language
   - Promptly informing the client of decisions that require consent
   - Actively listening and addressing client concerns; answering questions; acknowledging issues that the client is experiencing; and setting clear expectations for the attorney's role and capacity to address concerns and issues
   - Avoiding statements that may set unrealistic expectations about the outcome or potential of a case

3. Shall promptly comply with a client's reasonable requests for information (Rule 1.4 (a) (4))

4. Shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions with respect to representation (Rule 1.4 (b))

VI. Current Issues in Complying with the Rules Related to Confidentiality (5 mins)

1. Shall comply with the rules with respect to a client's confidential representation (Rule 1.6)

a) Disaster or accident compromises confidential information

If confidential information is compromised due to a disaster or accident, the lawyer has a duty to notify the client (See, NY Eth Op 2015-6 (2015))

b) Cybersecurity breach compromises confidential information

NYC Eth Op 2024-3, July 18, 2024

Because lawyers have an obligation of technological competence under Rules 1.1, 1.3 and 1.6, there is an affirmative obligation to protect client confidential data from events that would compromise that confidentiality.

Cybersecurity breaches that are a "material development" in representation trigger an obligation to notify the client.

Former or prospective clients who are likely to have been harmed as a result of the loss or theft of their sensitive confidential information should be informed, although Rule 1.4 does not require notice.

The decision notes that "there is no ethical prohibition against paying, or obligation to pay, a ransom" to a cyber-extortionist

Rule 1.7 may prohibit a lawyer or law firm from continuing to represent a client whose confidential information has or may be compromised in a cybersecurity incident.

Reporting the cybersecurity incident to law enforcement or cooperating in a government investigation into the incident must be cognizant of continuing confidentiality obligations.

VII. Identifying "Burn Out" and the Impact on Professional Practice (5 mins)

A. Withdrawing as counsel

Rule 1.16 [c] governs "declining or terminating representation" a/k/a "permissive withdrawal"

1. Client conduct makes it unreasonably difficult to carry out effective representation (Rule 1.16 [c] [7])

a) Client is verbally abusive or threatening

b) Client demands communication or requests information beyond what is fruitful or reasonable

B. Taking a step back when personal stress interferes with professional obligations

The attorney in *Matter of Varghese*, 228 NYS3d 544 (1st Dept 2025) was publicly censured for sending inappropriate emails to a Judge, who was presiding over the attorney's own matrimonial action. The attorney was representing himself in his matrimonial action, and sent an ex parte email to the judge's personal email address, "insisting that the judge vacate certain orders before the judge recused himself from the matter". After the judge formally recused, the attorney sent another email to the judge's work email address, copying counsel and court staff, "using discourteous language, accusing the judge of being racist and sexist". During the disciplinary investigation, the attorney acknowledged that sending the emails was wrong and that he regretted sending them. The committee and the Court found that the attorney "was under significant stress following the breakdown of his marriage and the resulting litigation".

Although, arguably, *Matter of Roth*, 207 AD3d 150 [1st Dept 2022] could be considered an instance of attorney capacity, it can also illustrate what happens when we fail to recognize how significant personal stress is impacting our ability to competently practice law. In *Roth*, the attorney was suspended for two years and required to complete LAP before applying to be readmitted, after neglecting client matters for over a decade and being charged with 35 violations of professional misconduct for representation of seven clients. It appears that the attorney started her own personal injury practice in about 2010. In multiple instances, starting in 2010, and continuing, she failed to timely commence actions on behalf of her clients and failed to timely represent them in litigation, including failing to timely file motion papers. There were four admonishments from 2010 through 2016.

In determining that a two year suspension was appropriate, the Court noted that the attorney's "misconduct directly overlapped with significant personal adversity" that impacted the attorney's mental health. From 2005 to 2020, the attorney's 18-year marriage ended in divorce, she relocated her practice to be closer to home to care for her child following the divorce and she became her mother's primary caregiver when her mother suffered loss of sight and dementia.

C. Acknowledging medical, mental health, or substance abuse issues that can render an attorney incapacitated from practicing law

The AGC is authorized to seek a determination of whether an attorney is "incapacitated from practicing law by reason of mental disability or condition, alcohol or substance abuse, or any other condition that renders the respondent incapacitated from practicing law" (22 NYCRR § 1240.14 [b]).

In a recent decision, *Matter of Schneider*, 235 AD3d 144 (1st Dept 2025), the AGC received a complaint that an attorney closed a client's case with prejudice and without the client's consent. A similar complaint had been filed previously, that resulted in a three month suspension. The attorney's treating physician confirmed that the attorney was diagnosed with dementia and was suffering cognitive decline and unable to practice law. The attorney was suspended and the disciplinary matters stayed.

There was a similar circumstance for an attorney in 2022. The attorney was 79 years old, had suffered a series of small strokes that exacerbated the beginning stages of Alzheimer's, and, at the time the incidents occurred that resulted in the complaints, the attorney was suffering cognitive impairment, negative impacts to her short-term memory and negative impacts to her judgment. At the time of the AGC investigation, the attorney was residing in an assisted living facility. Although there was evidence that the complained of misappropriations of client funds were committed by the attorney, due to her cognitive impairment, the attorney had no recollection and believed she was the victim of identity theft. There was also some proof that the attorney, while cognitively impaired, had been the victim of a third party who convinced her to transfer funds by falsely claiming to be an agent of the trust in question. The attorney was suspended from practice and the Committee determined that the attorney's infirmities made it impossible for her to defend herself against the complaints (*Matter of Roussin*, 208 AD3d 174 [1st Dept 2022]).

In *Matter of Scharf*, 219 AD3d 1602 [3d Dept 2023], AGC asked to suspend the attorney on an interim basis during the investigation and for the appointment of a custodian for the attorney's client files and to take appropriate actions on those files for the attorney's clients. The request was based on both the attorney's indication that he was suffering from physical or mental impairments and AGC's observations during the investigation.

In *Shanley v Grievance Committee of Fifth Judicial District*, 222 AD3d 26 (4th Dept 2023), the attorney was suspended for three years for multiple instances of

neglecting client matters and failing to refund unearned legal fees when he relapsed in alcohol abuse recovery during the Covid pandemic.

VIII. Questions and Discussion (5 mins)

209 A.D.3d 53
Supreme Court, Appellate Division,
First Department, New York.

In the MATTER OF Lisa A. WELLMAN, an attorney and counselor-at law: Attorney Grievance Committee for the First Judicial Department, Petitioner, v. Lisa A. Wellman, (OCA Atty. Reg. No. 2334118), Respondent.

Motion No. 2022-01858
|
Case No. 2022-01862
|
Entered August 23, 2022

Synopsis

Background: Attorney Grievance Committee (AGC) moved for order imposing discipline on attorney who received public censure and stayed suspension in New Jersey for suggesting to opposing counsel that client agreed to proposed parenting plan even though client did not entirely agree with plan, and for violating privacy rights of other client's ex-wife and children by giving client sealed copy of family evaluation, ordered as part of divorce proceeding, in violation of family court's order that report remain confidential.

Holdings: The Supreme Court, Appellate Division, held that:

three-month suspension was appropriate sanction, and

defenses to reciprocal discipline were not available.

Suspension ordered.

****211** Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent was admitted to the Bar of the State of New York at a Term of the Appellate Division of the Supreme Court for the Third Judicial Department on March 27, 1990.

Attorneys and Law Firms

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York (Denice M. Szekely, of counsel), for petitioner.

Respondent, pro se.

Dianne T. Renwick, J.P., Cynthia S. Kern, Jeffrey K. Oing, Tanya R. Kennedy, John R. Higgitt, JJ.

Opinion

Per Curiam

****212** ***54** Respondent Lisa A. Wellman was admitted to the practice of law in New York by the Third Judicial Department on March 27, 1990. The Third Judicial Department, where respondent was admitted, has ceded jurisdiction in this matter to the First Judicial Department, where respondent previously maintained a registered address for the 2000-2001 biennial period (*see* Rules for Attorney Disciplinary Matters [22 NYCRR] § 1240.7[a][2]). Respondent's current registered address is in New Hampshire.

The relevant facts of this matter arise from respondent's practice of law in the state of New Hampshire and concern two separate clients.

The first client, H.G., retained respondent to represent her in a parenting dispute with B.B. On May 16, 2019, H.G. and B.B., together with their counsel, attended a mediation concerning a parenting plan. Although H.G. and B.B. initially agreed upon a few things, the mediation ended abruptly when B.B. walked out. A follow-up hearing was scheduled for June 4, 2019. By email dated May 20, 2019 to respondent, B.B.'s counsel indicated that his client was willing to enter a partial settlement as to terms agreed upon during the mediation, leaving the issue of child transportation for the court to decide. Respondent forwarded this email to H.G. to look over so that they could discuss. H.G. later called respondent to express her disagreement with the proposed plan's summer schedule.

By email dated June 2, 2019, respondent asked B.B.'s counsel whether B.B. would agree to a transportation compromise: "either switch – my client transports on Friday and your client ***55** transports on Sunday or agree to a halfway meeting point both times."

By email dated June 3, 2019, respondent also emailed H.G. asking if she would agree to "transport on Friday and [B.B.] transport[s] on Sunday." That same day, counsel for B.B. replied to respondent's suggestion in her email dated June 2, 2019, stating:

> "I believe the following comports with your suggestion below. If this is agreeable to your client, let me know. I can notify the Court that we have settled, and I can probably get [B.B.'s] signature tomorrow and drop it off at your office for signature by you and your client."

Respondent immediately forwarded counsel's email to her client, stating, "[t]his should resolve all issues." Later that day, respondent replied to opposing counsel's email asking, "I'm at court, do you want me to tell them it's settled [?]," to which B.B.'s counsel replied, "Please advise the Court that its [sic] settled. I think you will have to file a motion to continue, and if so, I assent." Respondent replied, "I filed a motion to continue."

Among other things, respondent's motion to continue stated that the parties had reached an agreement on a parenting plan that was being circulated for signature, and that they requested that their hearing be continued, which the court did. On the evening of June 3, 2019, respondent emailed her client: "[w]e have cancelled court tomorrow in the hopes that we are going to have an agreement." Respondent's client, who assumed that it was B.B. that requested the continuance, replied the following day (i.e., the day the hearing had been scheduled) that she was "not even going to consider [B.B.'s] parenting proposal until he reimburses ½ of what [she] already spent." B.B. signed the parenting plan on June 4, 2019, and it was delivered to respondent's office on that same day. H.G. sent respondent an email of even date in which she inquired if there was a ****213** new parenting plan. Respondent replied there was no new parenting plan yet: "it has not been fully executed nor approved by the Court. The existing parenting plan remains in effect."

On June 10, 2019, respondent informed opposing counsel via email that her "client has not yet signed the new parenting plan, it appears that she has had a change of mind about it. I am working with her and need to meet with her in person to try to get her back on track." Opposing counsel responded that he was "confused" because H.G. had indicated to his client that ***56** she was not going to sign anything whereas he had understood that the case was settled. Respondent subsequently advised counsel that H.G. was unwilling to sign the new parenting plan.

On July 12, 2019, B.B. filed a Motion to Enforce Agreement and Request Attorneys' Fees, which outlined the aforementioned communications between counsel. On July 15, 2019, respondent filed a Motion to Schedule Hearing in which she stated that after "reviewing the final version of the parenting plan, [H.G.] no longer believes that the terms are acceptable nor in the best interest of [the minor child]. As such, she has elected not to proceed with the settlement."

The court held a hearing on September 5, 2019, at which time H.G. learned that it was respondent who filed the motion to continue. By order dated September 12, 2019, the court granted B.B.'s motion to approve the parenting plan without H.G.'s signature and without approval from the guardian ad litem (GAL). The court denied the request for counsel fees.

The court wrote:

> "the Court finds that the parties had been engaged in negotiations, and that the petitioner was aware of the issues, and aware of the communications taking place between her counsel and opposing counsel. There is no evidence to suggest that counsel was not authorized to enter into the settlement.
>
> "[Respondent] filed an assented to motion to continue a scheduled final hearing representing that the parties had reached an agreed-upon parenting plan which was being circulated for signature.
>
> "The Court finds that subsequent to reaching an agreement on behalf of her client, for which she was authorized, the petitioner essentially changed her mind, and seeks to retract her agreement. It is exactly this type of circumstance which the law ... seeks to deter."

Respondent and H.G. appealed the court's decision but were unsuccessful. By email dated December 8, 2019, H.G. requested a copy of her file and asked why respondent elected to cancel the hearing scheduled for June 4, 2019. Respondent replied that, "the parenting plan reflected what had been agreed upon at the mediation," and that it was her "belief that it was acceptable ***57** ... and only needed to be circulated for execution." Responded further wrote that if she "misunderstood" H.G., that may be a basis to "modify the parenting plan." H.G. then retained new counsel.

Respondent admitted that she did not confirm with H.G. that her proposed resolution of the transportation issue was acceptable before she suggested it to opposing counsel, and that she did not confirm that H.G. was still in agreement with

the parenting plan as discussed at mediation before requesting a continuance from the court. This violated New Hampshire Rules of Professional Conduct (New Hampshire Rules) 1.2(a) (requiring a lawyer to abide by a client's decisions concerning the objectives of representation and to consult with the client as to the means by which ****214** they are to be pursued) and 1.4 (requiring a lawyer to communicate with client).

In the second client matter at issue, respondent represented a father, N.J., in post-divorce proceedings concerning N.J.'s relationship with his children who, in 2017, expressed a desire to terminate their relationship with their father. By order dated November 13, 2018, the court ordered that the parties and the children complete a child-centered family evaluation conducted by Dr. B.G. to determine whether the relationship deteriorated as a result of parental alienation caused by the children's mother, A.S., or as a result of N.J.'s own actions. Dr. B.G. prepared a detailed 72-page report (Report) addressing many private matters about the parents and their children.

The mother's attorney filed a motion in February 2019, with respondent's consent, requesting that the court keep the Report confidential. The court granted the motion by order dated April 29, 2019, as follows:

> "[The] complete report may be released to [N.J.'s] individual therapist and to the family therapist who is engaged for the purpose of providing family therapy to [N.J.] and the minor children. [N.J.] and [A.S.] shall communicate to the therapists that no copies of [the] report should be made or disseminated."

Following this order, N.J. had an appointment with his individual therapist, who had not yet gotten a copy of the Report but who was entitled to a copy. On the day of the appointment, respondent put a copy of the Report in an envelope for N.J. to pick up and deliver to his therapist. According to respondent, "at the time it seemed like an efficient method for the counselor ***58** to get the report she was entitled to, sooner rather than later."

Because the court also ordered the parties to meet with a family counselor – who would also be entitled to a copy of the Report if retained – N.J. contacted a potential family counselor, J.E., who then contacted A.S. about taking on the matter. At that time, J.E. indicated to A.S. that he had received a copy of the Report from N.J.'s "Dropbox." When counsel for A.S. called respondent to inquire about how N.J. obtained a copy of the Report, respondent answered that she did not know but admitted that she gave N.J. a copy to give his individual therapist. N.J. claimed he had deleted the copy. Nevertheless, A.S. viewed the situation as an invasion of her and her children's privacy because, among other things, she could not be sure that N.J. did not keep a copy of the Report.

On April 9, 2020, counsel for A.S. filed a Motion for Contempt and Request for Evidentiary Hearing. He indicated that he intended to call respondent as a witness to determine whether she gave N.J. a copy of the Report. Respondent filed an objection. A hearing was scheduled for October 23, 2020, but then continued. It does not appear to have been rescheduled to date. N.J. has since retained new counsel.

Respondent agreed that she should not have provided N.J. with a copy of the Report to give to his individual therapist. She also agreed that she had a duty to abide by the court order, which she violated. Therefore, respondent violated New Hampshire Rule 3.4(c) (prohibiting a lawyer from knowingly disobeying an obligation under the rules of a tribunal). Respondent also admitted to violating New Hampshire Rule 8.4(a) (prohibiting a lawyer from violating or attempting to violate the New Hampshire Rules).

The parties agreed that respondent's conduct caused actual and potential injury to the affected parties: 1) H.G. is required to abide by a parenting plan that she did not entirely agree with, without the benefit ****215** of the GAL's point of view and without a hearing on the matter; and 2) A.S. and her children had their privacy rights violated, and the Report may have been altered in some way before it was received by the prospective family counselor, who had not yet been approved by the court to receive the report. The parties agreed to sanctions of a public censure for H.G.'s matter and a suspension for N.J.'s matter.

In addition to the above, there are two aggravating factors in this matter. First, a prior public censure was issued to respondent ***59** on December 11, 2018, pursuant to an approved stipulation entered into the New Hampshire Attorney Discipline Office (ADO), arising out of respondent's failure to inform another (third) client that she was on probation following her release from incarceration. Respondent never reported the 2018 discipline to our Court, as required by 22 NYCRR 1240.13(b). Notably, New York's Rules of Professional Conduct (22 NYCRR 1200.0) (NY Rules) 1.1, 1.3 and 1.4 proscribe the identical conduct for which respondent was issued the 2018 public censure in New Hampshire. Second, indisputably, respondent has substantial experience in the practice of law.

However, the Attorney Grievance Committee (AGC) notes that in both matters respondent acted without any dishonest or selfish motive, cooperated fully in the investigation, and has expressed remorse. Indeed, she explained that both matters were to some degree the result of a lack of diligence on her part due to a lack of staffing in her office. Given that the incidents giving rise to these matters occurred in approximately the same 2019-timeframe, the parties agreed that a period of monitoring was appropriate to permit respondent to address these issues. Thus, the parties agreed that "given the baseline sanction and consideration of aggravating and mitigating circumstances, a six-month suspension, stayed for one year, serves the purpose of discipline and is an appropriate sanction in this case." Respondent agreed to comply with certain conditions for one year, including providing the ADO with quarterly reports as to corrective steps taken to manage her staffing and caseload issues, and no further misconduct. By order dated February 19, 2021, the New Hampshire Supreme Court Professional Conduct Committee approved this agreement and imposed a stayed six-month suspension with conditions on respondent. Respondent complied with the terms of her six-month stayed suspension and, by order dated March 15, 2022, the matter was closed.

By motion dated May 3, 2022, the AGC moves for an order, pursuant to Judiciary Law § 90(2), 22 NYCRR 1240.13, and the doctrine of reciprocal discipline, finding that respondent has been disciplined by a foreign jurisdiction and suspending her for three months. Although this motion was served on her by email, on consent, and by regular mail at her registered address, respondent has failed to appear in this proceeding.

Respondent has not reported any of the above discipline to our Court, which is in violation of 22 NYCRR 1240.13(d). Her New Hampshire misconduct also violated the NY Rules. Indeed, the ***60** New Hampshire Rules that respondent was found to have violated contain language that is substantially similar to the NY Rules. Specifically, respondent violated: 1) rule 1.2(a), due to her failure to consult with her client about the proposed resolution of the weekend transportation issue, and her failure to obtain the client's express approval as to the final terms of the parenting plan; 2) rule 1.4, due to her failure to confirm with her client that she accepted respondent's proposed resolution to the parenting plan before communicating it to opposing counsel, ****216** and failure to confirm that she still agreed with the parenting plan before respondent requested a continuance of the hearing and advised opposing counsel that they would settle; 3) rule 3.4(c) by ignoring a court order not to make copies of or to disseminate the Report that she provided to her client and a new, unapproved therapist; and 4) rule 8.4(a) and (d), which prohibit a lawyer from violating or attempting to violate the rules of professional conduct and engaging in conduct that is prejudicial to the administration of justice, respectively.

Although this is a motion for reciprocal discipline, because "the policy of this Court is not to stay suspensions," we depart from the sanction imposed by New Hampshire upon respondent (*Matter of Hagendorf*, 17 A.D.3d 25, 27, 791 N.Y.S.2d 412 [1st Dept. 2005]). Rather, a three-month suspension of respondent, as requested by the AGC, is appropriate here (*see e.g. Matter of Kreis*, 180 A.D.3d 5, 115 N.Y.S.3d 30 [1st Dept. 2019]). As noted, respondent has defaulted in this proceeding and, therefore, does not raise any defenses to her conduct. In any event, no defenses would be available as in a proceeding seeking reciprocal discipline pursuant to 22 NYCRR 1240.13(b)(3), a respondent may only raise the following defenses: 1) lack of notice or opportunity to be heard in the foreign jurisdiction constituting a deprivation of due process; 2) an infirmity of proof establishing the misconduct; or 3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this state. Respondent cannot establish any of the foregoing because: 1) she was given proper notice and an opportunity to be heard in New Hampshire, where she fully participated and entered into a stipulation with the ADO; 2) there was ample evidence presented establishing all of the misconduct and, indeed, respondent admitted to her misconduct; and 3) as noted, the misconduct underlying her discipline in New Hampshire also ***61** constitutes misconduct in New York. There is also no dispute that respondent failed to report both her 2021 stayed suspension and her 2018 public censure in New Hampshire to this Court as required by 22 NYCRR 1240.13(d).

Accordingly, the AGC's motion should be granted and respondent is suspended from the practice of law in the State of New York for a period of three months until further order of this Court.

All concur.

IT IS ORDERED that the Attorney Grievance Committee's motion for reciprocal discipline pursuant to 22 NYCRR 1240.13, predicated upon similar discipline imposed by the New Hampshire Supreme Court, is granted, and respondent Lisa A. Wellman, is suspended from the practice of law in

the State York, for a period of three months, commencing September 23, 2022, and until further order of this Court; and

IT IS FURTHER ORDERED that during the period of suspension and until further order of this Court, pursuant to Judiciary Law § 90, respondent Lisa A. Wellman, shall desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding herself out in any way as an attorney and counselor-at-law; and

IT IS FURTHER ORDERED that respondent Lisa A. Wellman, is directed to fully comply with the rules governing the ****217** conduct of disbarred or suspended attorneys (see 22 NYCRR 1240.15), which are made part hereof; and

IT IS FURTHER ORDERED that if respondent has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith.

All Citations

209 A.D.3d 53, 173 N.Y.S.3d 210, 2022 N.Y. Slip Op. 05006

235 A.D.3d 63
Supreme Court, Appellate Division,
Fourth Department, New York.

Matter of Dominic V. PELLEGRINO, an Attorney, Respondent. v. GRIEVANCE COMMITTEE OF the FIFTH JUDICIAL DISTRICT, Petitioner.

Decided January 17, 2025

Synopsis

Background: Attorney grievance committee brought disciplinary action against attorney, alleging that attorney committed professional misconduct by neglecting client matters, engaging in self-interested business transactions with clients, failing to remit funds to clients in timely manner, and engaging in dishonest or deceitful conduct. Attorney responded to charges by admitting material allegations. Grievance committee moved to confirm referee's report and for an order of disbarment.

Holdings: The Supreme Court, Appellate Division, held that:

attorney committed multiple acts of professional misconduct, and

disbarment was appropriate sanction for attorney who engaged in a pattern of initiating self-interested transactions with vulnerable clients and repeatedly breached his legal and ethical obligations to clients.

Disbarment ordered.

****406** PRESENT: LINDLEY, J.P., OGDEN, NOWAK, DELCONTE, AND KEANE, JJ.

Opinion

Per Curiam Opinion:

***64** Respondent was admitted to the practice of law by this Court on July 9, 1975, and he maintains an office in Utica. The Grievance Committee has filed a petition and supplemental petition alleging numerous charges of professional misconduct against respondent, including neglecting client matters, engaging in self-interested business transactions with clients, failing to remit funds to clients in a timely manner, and engaging in conduct involving dishonesty or deceit. Respondent filed an answer to the petition and supplemental petition denying material allegations therein, and this Court appointed a referee to conduct a hearing. During preliminary proceedings before the Referee, respondent admitted almost all of the allegations he had previously denied, obviating the need for a fact-finding hearing. The Referee has filed reports directed to the petition and supplemental petition sustaining the disciplinary rule violations alleged therein. The Grievance Committee moves to confirm the reports of the Referee and for a final order of discipline. In response to the motion, respondent submits written materials in mitigation. Respondent also appeared before this Court on the return date of the motion, at which time he was heard in mitigation.

With respect to charge one of the petition, respondent admits that, in or around 1994, he arranged for two clients to take a mortgage loan in the total amount of $75,000 from several ***65** other clients, without advising each party to the transaction to seek the advice of independent counsel. Respondent admits that, by October 2004, all but one of the mortgagees had died or withdrawn from the transaction. Respondent further admits that, based on his advice, the sole remaining mortgagee, who had funded the transaction using funds from her individual retirement account (IRA), agreed to remain a participant in the transaction and lend IRA funds to the mortgagors in excess of $35,000. Respondent admits that the parties to the loans thereafter agreed that the mortgagors would make monthly payments, beginning on November 1, 2004, with respondent serving as receiver. Respondent admits that, although the mortgagors were habitually delinquent in making the required monthly payments from November 2004 through June 2013, he failed to disclose the delinquency to the mortgagee and failed to advise the mortgagors of the potential legal consequences of their defaults. Respondent admits that, from July through December 2013, the mortgagors made lump-sum payments to respondent satisfying their loan obligations to the mortgagee through April 1, 2015. Respondent admits that, after receiving those lump-sum payments, he failed to advise the mortgagors that they had prepaid their obligations under the loan, nor did he forward the excess funds to the mortgagee's IRA custodian. Respondent admits that, in correspondence addressed to the mortgagee dated September 7, 2015, he stated that he had

lost the ability to deposit funds with the IRA custodian. Respondent admits, however, that the correspondence was addressed to an incorrect zip code and never received by the mortgagee. Respondent further admits that his statement that he had lost the ability to deposit ****407** funds with the IRA custodian was inconsistent with other available documentation showing that a recent payment was accepted by the IRA custodian. Respondent also admits that he produced to the Grievance Committee copies of letters addressed to the mortgagee dated March 3, 2016, February 2, 2017, and January 4, 2018, wherein he stated that he had lost the ability to deposit funds with the IRA custodian and requested that the mortgagee provide guidance about how to proceed. Respondent admits that those letters were each addressed to an incorrect zip code and never received by the mortgagee, and he made no other effort to contact the mortgagee during the relevant time period. Respondent admits that, in correspondence dated May 15, 2018, the mortgagee requested that he remit all funds owed ***66** to the IRA and provide an accounting or reconciliation of accounts related to the mortgage loan, but respondent did not reply and failed to make payment or provide an accounting. Respondent admits that, in the summer of 2018, the IRA custodian ceased making disbursements to the mortgagee and that, in correspondence dated October 21, 2018, the mortgagee reiterated her request that respondent remit all funds owed to the IRA and provide documentation regarding the loans. Respondent admits that, although he was holding funds received from the mortgagors in excess of $18,000 in his attorney trust account when he received that request, he did not make any payment to the IRA custodian until February 2019.

With respect to charge two of the petition, respondent admits that, from August 2015 through February 2019, he received loan payments from the aforementioned mortgagors in excess of $21,000, which he failed to remit to the mortgagee in a timely manner. Respondent admits that, although he maintained the funds in his attorney trust account, he did not advise the mortgagors that he was holding their funds, nor did he deposit the funds into an interest-bearing account for their benefit.

The supplemental petition contains a single charge of misconduct against respondent arising from four separate client matters. With respect to the first such client matter, respondent admits that he borrowed $30,000 from a client in February 1999 pursuant to a promissory note, without providing security for the debt or advising the client to seek the advice of independent counsel. The client died in 2008. Respondent admits that, in March 2008, he prepared an instrument whereby one of the client's surviving children transferred his interest in the promissory note to his two sisters. Respondent further admits that he transferred the loan to the sisters without legal authority to do so and despite the fact that a Surrogate's Court proceeding had not been commenced on behalf of the estate of the deceased client. Respondent admits that, from 2008 through 2021, he failed to make timely payments to the two sisters or advise them of his own delinquency. Respondent further admits that, in April 2022, he sent checks to the two sisters indicating he was satisfying his obligations under the promissory note, together with a general release. Respondent admits that the two sisters consulted independent counsel, after which respondent sent payments to them that were not identified as "payment in full." Respondent admits ***67** that, as of the date of the supplemental petition, he had failed to pay the balance of the amount due and owing under the promissory note.

With respect to the second client matter specified in the supplemental petition, respondent admits that, in September 1998, he solicited a loan from two clients, a married couple, by presenting the loan as an "investment mortgage" paying interest at a rate higher than the prevailing market ****408** rate for certificates of deposit. Respondent admits that, in December 1998, he borrowed $20,000 from the clients without providing security for the loan, advising them to seek the advice of independent counsel, or executing a promissory note. The husband died in 2004. Respondent admits that, from December 2013 through December 2022, he failed to make the agreed-upon loan payments and did not disclose his delinquency to the remaining client. Respondent admits that, after the wife died in 2020, he transferred his loan obligation to the clients' two children, without legal authority to do so and despite the fact that the loan was an asset of the wife's estate and a Surrogate's Court proceeding had not been commenced on her behalf. Respondent admits that, in April 2022, he sent checks to the clients' children alleging that the debt was paid in full, together with general releases, which neither child executed.

With respect to the third client matter specified in the supplemental petition, respondent admits that, from June through November 2001, he borrowed a total of $28,000 from a client pursuant to three loan agreements, each having a five-year repayment plan. Respondent admits that he did not advise the client to seek the advice of independent counsel with respect to any of those transactions. Respondent further

admits that, in 2007, he prepared a will and revocable trust for the client, who was unmarried and had no children. Respondent admits that, from October 2011 through April 2014, he failed to make any payments to the client, but in May 2014 he made a lump-sum payment to the client in excess of $24,000. Respondent admits that the lump-sum payment did not represent the full amount he owed to the client, and that, as of the date of the supplemental petition, he had not made any payments to the client since May 2014.

With respect to the fourth client matter specified in the supplemental petition, respondent admits that, in May 2012, he accepted $10,000 from a client to assist her with estate planning issues, without executing a retainer agreement or letter ***68** of engagement. Respondent admits that he had only occasional contact with the client from May 2012 through February 2016, after which he had no contact with the client until she requested a refund of her retainer payment in April 2021. Respondent admits that, in response, he assured the client that he would reply after reviewing her file, but he did not thereafter issue a refund or otherwise respond to the client. Respondent admits that the client emailed him again in August 2021, but he did not respond to the client or issue a refund until November 2022.

We confirm the factual findings of the Referee, find respondent guilty of professional misconduct, and conclude that he has violated the following provisions of the Rules of Professional Conduct (22 NYCRR 1200.0):

rule 1.1 (c) (2)—intentionally prejudicing or damaging a client during the course of a representation;

rule 1.3 (a)—failing to act with reasonable diligence and promptness in representing a client;

rule 1.3 (b)—neglecting a legal matter entrusted to him;

rule 1.4 (a) (1) (iii)—failing to promptly inform a client about material developments in a matter;

rule 1.4 (a) (3)—failing to keep a client reasonably informed about the status of a matter;

rule 1.4 (a) (4)—failing to comply in a prompt manner with a client's reasonable requests for information;

rule 1.8 (a)—entering into a business transaction with a client where he and the ****409** client have differing interests and the client expects him to exercise professional judgment for the protection of the client;

rule 1.15 (c) (4)—failing to deliver to a client or third person in a prompt manner, as requested by the client or third person, funds in his possession that the client or third person is entitled to receive;

rule 8.4 (b)—engaging in illegal conduct that adversely reflects on his honesty, trustworthiness, or fitness as a lawyer;

rule 8.4 (c)—engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;

rule 8.4 (d)—engaging in conduct that is prejudicial to the administration of justice; and

rule 8.4 (h)—engaging in conduct that adversely reflects on the lawyer's fitness as a lawyer.

***69** We further conclude that respondent has violated 22 NYCRR 1215.1 by failing to provide to a client, within a reasonable period of time, a letter of engagement or retainer agreement setting forth an explanation of the scope of the legal services to be provided and attorneys' fees to be charged.

We note that our determinations regarding the disciplinary rule violations specified herein are based on respondent's conduct that occurred on or after April 1, 2009, the effective date of the Rules of Professional Conduct. We also decline to sustain charge three of the petition, which alleges that respondent has engaged in a course of conduct that adversely reflects on his fitness as an attorney based, at least in part, on conduct for which he previously received a letter of caution and an admonition from the Grievance Committee. As this Court has repeatedly held, "allegations that a respondent has engaged in a course of conduct based in part on conduct that has been addressed in prior disciplinary proceedings are more appropriately considered as a potential aggravating factor, rather than as a separate charge of professional misconduct" (*Matter of Cote*, 171 A.D.3d 167, 171, 96 N.Y.S.3d 453 [4th Dept. 2019], *see Matter of Berg*, 150 A.D.3d 9, 12, 51 N.Y.S.3d 762 [4th Dept. 2017]; *Matter of Horton*, 115 A.D.3d 193, 196, 979 N.Y.S.2d 918 [4th Dept. 2014]; *Matter of Ohl*, 107 A.D.3d 106, 110, 964 N.Y.S.2d 785 [4th Dept. 2013]).

In determining an appropriate sanction, we have considered numerous aggravating factors, including that the

aforementioned letter of caution and admonition arose from conduct similar to that at issue in this case, including representing differing interests in a legal matter and taking a personal loan from a client, failing to make required loan payments, and failing to adequately advise the client regarding his own defaults. Moreover, the record establishes that respondent has engaged in a pattern of initiating self-interested transactions with clients or breaching his legal and ethical obligations to clients, thereby causing them direct harm or substantial prejudice, in many cases for his own benefit or personal gain. Of particular concern is that respondent targeted clients who were likely to be vulnerable to his manipulation, including the elderly or individuals inexperienced in financial matters. We also conclude that respondent's submissions to this Court offer various explanations for his conduct at issue in this proceeding that are unpersuasive or lack credibility, which in our view demonstrates his lack of remorse and inability to acknowledge the extent of his wrongdoing. Accordingly, after consideration ***70** of all of the factors in this matter, we conclude that respondent is unfit to practice law and should be disbarred.

Order of disbarment entered.

All Citations

235 A.D.3d 63, 226 N.Y.S.3d 405, 2025 N.Y. Slip Op. 00605

2024 WL 3799720 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), NYC Eth. Op. 2024-5

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics

TOPIC: THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE BY NEW YORK LAWYERS, LAW FIRMS, LEGAL DEPARTMENTS, GOVERNMENT LAW OFFICES AND LEGAL ASSISTANCE ORGANIZATIONS

Formal Opinion Number 2024-5
August 7, 2024

DIGEST: This opinion provides general guidance on the use of tools that use generative artificial intelligence.

***1 RULES: 1.1, 1.2(d), 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 3.1, 3.3, 5.1, 5.2, 5.3, 7.1, 7.3, 8.4**

QUESTION: The availability of tools to assist lawyers in their practice that employ generative artificial intelligence has been dramatically expanding and continues to grow. What are the ethical issues that lawyers should consider when deciding whether to use these tools and, if the decision is made to do so, how to use them?

OPINION: When using generative artificial intelligence tools, a lawyer should take into account the duty of confidentiality, the obligation to avoid conflicts of interest, the duty of competence and diligence, the rules governing advertising and solicitation, the duty to comply with the law, the duty to supervise both lawyers and non-lawyers, the duty of subordinate attorneys, the duty to consult with clients, the duty of candor to tribunals, the prohibition on making non-meritorious claims and contentions, the limitations on what a lawyer may charge for fees and costs, and the prohibition on discrimination.

Introduction

Generative artificial intelligence ("Generative AI"), like any technology, must be used in a manner that comports with a lawyer's ethical obligations. General-purpose technology platforms offer AI chatbots. Legal research platforms tout ""legal generative AI" that can draft, analyze documents, and provide legal citations. Even data management vendors offer Generative AI-assisted review, analytic, and visualization capabilities. This summary of currently available tools will likely soon be outdated because of the rapid evolution of Generative AI. This guidance, therefore, is general. We expect that this advice will be updated and supplemented in years to come to cover issues not yet anticipated.

This Opinion provides guidance on the ethical obligations of lawyers and law firms relating to the use of Generative AI. It follows and is consistent with the format used by the Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law released by the California State Bar's Standing Committee on Professional Responsibility and Conduct in November 2023.[1] This Opinion is in the same format as the California State Bar's guidance and contains multiple quotations from that guidance. Like the California State Bar and other bar associations that have addressed Generative AI,[2] we believe that when addressing developing areas, lawyers need guardrails and not hard-and-fast restrictions or new rules that could stymie developments. By including advice specifically based on New York Rules and practice, this Opinion is intended to be helpful to the New York Bar.

Applicable Authorities	New York Guidance
Duty of Confidentiality Rule 1.6	Generative AI systems are able to use information that is inputted, including prompts, uploaded data, documents, and other resources, to train AI. They may also share inputted

information with third parties or use it for other purposes.[3] Even if a system does not use or share inputted information, it may lack "reasonable or adequate security."[4]

Without client consent, a lawyer must not input confidential client information into any Generative AI system that will share the inputted confidential information with third parties.[5] Even with consent, a lawyer should "avoid entering details that can be used to identify the client."[6] Consent is not needed if no confidential client information is shared, for example through anonymization of client information. Generative AI systems that keep inputted information entirely within the firm's own protected databases, sometimes called "closed" systems, do not present these risks. But a lawyer must not input any confidential information of the client into any Generative AI system that lacks adequate confidentiality and security protections, regardless of whether the system uses or shares inputted information, unless the client has given informed consent to the lawyer's doing so. Even with closed systems, a lawyer must take care that confidential information is not improperly shared with other persons at or clients of the same law firm, including persons who are prohibited access to the information because of an ethical wall.[7]

A lawyer or law firm[8] should "consult with IT professionals or cybersecurity experts to the extent necessary for the lawyer or law firm to ensure that any Generative AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols."[9]

A lawyer should review the system's Terms of Use. "A lawyer who intends to use confidential information in a Generative AI product should ensure that the provider does not share inputted information with third parties or use the information for its own use in any manner, including to train or improve its product," again without informed client consent.[10] Terms of Use can change frequently and a lawyer's obligation to understand the system's use of inputs is continuing.

Accordingly, lawyers should periodically monitor Terms of Use or other information to

	learn about any changes that might compromise confidential information.[11] A law firm may wish to consider implementing policies and control procedures to regulate the use of confidential client information in Generative AI systems if the law firm is going to make use of such systems.
Conflicts of Interest Rule 1.7; Rule 1.8; Rule 1.9; Rule 1.10; Rule 1.11; Rule 1.12	Where a Generative AI system uses client information, a law firm must ensure that the system implements any ethical screens required under the Rules. For example, if an ethical screen excludes a lawyer from any information or documents with respect to a client, the lawyer must be not exposed to such information or documents through the law firm's Generative AI systems.
Duties of Competence and Diligence Rule 1.1; Rule 1.3	A lawyer should be aware that currently Generative AI outputs may include historical information that is false, inaccurate, or biased. "A lawyer must ensure the competent use of technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law."[12] "Before selecting and using a Generative AI tool, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable [T]erms of [U]se and other policies governing the use and exploitation of client data by the product."[13] A lawyer may wish to consider acquiring skills through a continuing legal education course. Consultation with IT professionals or cybersecurity experts may be appropriate as well. Generative AI outputs may be used as a starting point but must be carefully scrutinized. They should be critically analyzed for accuracy and bias, supplemented, and improved, if necessary. A lawyer must ensure that the input is correct and then critically review, validate, and correct the output of Generative AI "to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. The duty of competence requires more than the mere detection and elimination of false [Generative AI] outputs."[14] The use of Generative AI tools without the application of trained judgment by a lawyer is

	inconsistent with the competent and diligent practice of law. "A lawyer's professional judgment cannot be delegated to [G]enerative AI and remains the lawyer's responsibility at all times. A lawyer should take steps to avoid overreliance on Generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. For example, a lawyer must supplement any Generative AI-generated research with human-performed research and supplement any Generative AI-generated argument with critical, human-performed analysis and review of authorities."[15]
Advertising and Solicitation Rule 7.1; Rule 7.3	Lawyers must not use Generative AI in a way that would circumvent their responsibilities under the Rules regarding marketing and solicitation. For example, a lawyer must not use Generative AI to make false statements, to search the internet for potential clients and send solicitations that would otherwise be prohibited under the Rules, or to pose as a real person to communicate with prospective clients.
Duty to Comply with the Law Rule 8.4; Rule 1.2(d)	"There are many relevant and applicable legal issues surrounding [G]enerative AI, including but not limited to compliance with AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity concerns."[16] A lawyer must comply with the law and cannot counsel a client to engage in, or assist a client in conduct that the lawyer knows is, a violation of any law, rule, or ruling of a tribunal when using Generative AI tools.
Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers Rule 5.1; Rule 5.2; Rule 5.3; Rule 8.4	"Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of [G]enerative AI and make reasonable efforts to ensure that the law firm adopts measures that give reasonable assurance that the law firm's lawyers and non-lawyers' conduct complies with their professional obligations when using [G]enerative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of [G]enerative AI use. A subordinate lawyer must not use Generative AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer's professional responsibility and obligations."[17] A subordinate lawyer should disclose to a supervisory lawyer the use of Generative AI

	that is not generally understood to be routinely used by lawyers.[18] A lawyer using a Generative AI chatbot for client intake purposes must adequately supervise the chatbot.[19] A high degree of supervision may be required if there is a likelihood that ethical problems may arise. For example, a chatbot may fail to disclose that it is not a lawyer or may attempt or appear to provide legal advice, increasing the risk that a prospective client relationship or a lawyer-client relationship could be created.
Communication Regarding Generative AI Use Rule 1.4; Rule 1.2	"A lawyer should evaluate ... communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with [G]enerative AI use, scope of the representation, and sophistication of the client."[20] A lawyer should consider disclosing to the client the intent to use Generative AI that is not generally understood to be routinely used by lawyers as part of the representation,[21] particularly as part of an explanation of the lawyer's fees and disbursements. The disclosure will depend on circumstances including how the technology will be used, and the benefits and risks of such use. A lawyer should obtain client consent for Generative AI use if client confidences will be disclosed in connection with the use of Generative AI. A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of Generative AI. We note that, because Generative AI currently is used routinely by lawyers, when a lawyer receives a request from a client that Generative AI not be used at all, the lawyer should consider discussing the request with the client before agreeing to it.
Candor to the Tribunal; and Meritorious Claims and Contentions Rule 1.2(c); Rule 3.1; Rule 3.3; Rule 1.16	A lawyer should recognize the risks posed by Generative AI-generated content. Generative AI tools can, and do, fabricate or "hallucinate" precedent."[22] They can also create "deepfakes"—media that appear to reflect actual events but are actually doctored or manufactured. "A lawyer must review all [G]enerative AI outputs," including but not limited to "analysis and citations to authority," for accuracy before

	use for client purposes and submission to a court or other tribunal.[23] If the lawyer suspects that a client may have provided the lawyer with Generative AI-generated evidence, a lawyer may have a duty to inquire.[24] A lawyer must correct any errors or misleading statements made to adversaries, the public, or the court.[25] "A lawyer should also check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of [G]enerative AI."[26]
Charging for Work Produced by Generative AI and Generative AI Costs Rule 1.5	"A lawyer may use [G]enerative AI to more efficiently create work product and may charge for actual time spent (*e.g.*, crafting or refining [G]enerative AI inputs and prompts, or reviewing and editing [G]enerative AI outputs)."[27] A lawyer must not charge hourly fees for the time that would otherwise have been spent absent the use of Generative AI.[28] Lawyers may wish to consider developing alternative fee arrangements relating to the value of their work rather than time spent. Costs associated with Generative AI should be disclosed in advance to clients as required by Rule 1.5(b). The costs charged should be consistent with ethical guidance on disbursements and should comply with applicable law.[29] A lawyer may wish to consider appropriate use of Generative AI tools to minimize client cost as the use of Generative AI becomes more widespread.
Prohibition on Discrimination Rule 8.4	"Some [G]enerative AI is trained on biased [historical] information, and a lawyer should be aware of possible biases and the risks they may create when using [G]enerative AI (*e.g.*, to screen potential clients or employees)."[30]

Footnotes

3 Generative AI systems that share inputted information with third parties are sometimes called "open" systems.

4 California Guidance at 2.

5 Lawyers may wish to obtain advance client consent to use Generative AI that will involve sharing of client information, but, because such consent must be knowing, the client must understand the potential consequences of such information-sharing for the consent to be effective. *See* N.Y. State Op. 1020 ¶ 10 (a lawyer "may post and share documents using a 'cloud7D data storage tool" that does not provide "reasonable protection to confidential client information" only where "the lawyer obtains informed consent from the client after advising the client of the relevant risks").

6 *Id.*

7 *See* Am. Bar Ass'n, Formal Op. 512 at 6-7 (2024).

8 Consistent with Rule 1.0(h), in this Opinion "law firm" includes a private firm as well as qualified legal assistance organizations, government law offices and corporations, and other entities' legal departments.

9 California Guidance at 2.

10 *Id.*

11 *See* N.Y. State Bar Ass'n, *supra*, at 58.

12 California Guidance at 2. There have been claims that certain Generative AI tools violate intellectual property rights of third parties. A lawyer planning to use a Generative AI tool should keep abreast of whether there are any such risks associated with the tool the lawyer plans to use.

13 *Id.*

14 *Id.* at 3.

15 *Id.*

16 *Id.*

17 *Id.*

18 Likewise, where a client provides citations to a lawyer, a lawyer must review the decisions to make sure that they are genuine and properly cited. *See United States v. Cohen*, No. 18-CR-602, 2024 WL 1193604 (S.D.N.Y. Mar. 20, 2024) (criticizing an attorney-defendant and his counsel for citing "three cases that do not exist" where client provided citations hallucinated by Google Bard and counsel failed to check them).

19 *See* Fla. Bar Bd. Rev. Comm. on Pro. Ethics, *supra* (section on Oversight of Generative AI).

20 California Guidance at 4.

21 Note that some Generative AI is routinely used. For example, Microsoft Word employs Generative AI in its auto-complete and grammar check functions. Westlaw, Lexis, and search engines also employ Generative AI. We do not mean to suggest that an attorney needs to disclose such uses of Generative AI. For a discussion of the importance of evaluating Generative AI tools based on intended users, see N.J. State Bar Ass'n, Task Force On Artificial Intelligence (Ai) And The Law: Report, Requests, Recommendations, And Findings 15-19 (2024) (discussing "AI Tools Intended for the Public" and "Tools Tailored for Legal Professionals"), https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf.

22 A Stanford University study found that Generative AI chatbots from OpenAI, Inc., Google LLC, and Meta Platforms Inc. hallucinate "at least 75% of the time when answering questions about a court's core ruling." Isabel Gottlieb & Isaiah Poritz, *Popular AI Chatbots Found to Give Error-Ridden Legal Answers*, Bloomberg L. (Jan. 12, 2024), https://news.bloomberglaw.com/business-and-practice/legal-errors-by-top-ai-models-alarmingly-prevalent-study-says. Courts are already grappling with parties' citation to hallucinated precedents. *See generally Mata v. Avianca, Inc.*, No. 22-CV-1461, 2023 WL 4114964 (S.D.N.Y. June 22, 2023) (sanctioning attorneys for "submit[ing] non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT"); *Cohen*, 2024 WL 1193604; *see also* D.C. Bar, Ethics Op. 388 (2024) (discussing the dangers of hallucinations).

23 California Guidance at 4.

24 *See* N.Y. City Op. 2018-4 (discussing a lawyer's duty to inquire when asked to assist in a transaction that the lawyer suspects may involve a crime or fraud); *see also* ABA Op. 491 (2020); Colo. Bar Ass'n Ethics Comm., Formal Op. 142 (2021). These same standards apply when a lawyer suspects that a client may have given the lawyer fabricated evidence.

25 *See* Rule 3.3.

26 California Guidance at 4.

27 *Id.*

28 *Id.*

29 *See* ABA Op. 93-379 (1993).

30 California Guidance at 4.

1 State Bar of Cal., Standing Comm. on Pro. Resp. & Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law* (Nov. 16. 2023) ("California Guidance"), https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; *see also* Am. Bar Ass'n, Formal Op. 512 (2024); Fla. Bar Bd. Rev. Comm. on Pro. Ethics, Op. 24-1 (2024); D.C. Bar Ethics Op. 388 (April 2024); N.J. State Bar Ass'n, Task Force On Artificial Intelligence (Ai) And The Law: Report, Requests, Recommendations, And Findings (2024), https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf; N.Y. State Bar Ass'n, Report & Recommendations Of The New York State Bar Association Task Force On Artificial Intelligence (2024), https://www.nycbar.org/wp-content/uploads/2024/06/20221290_AI_NYS_Judiciary.pdf. (All websites last accessed on Aug. 5, 2024).

2 In general, this Opinion is consistent with the ABA, California Bar, Florida Bar, District of Columbia Bar, and New Jersey Bar opinions cited in Footnote 1. However, the New York State Bar suggests adoption of certain rules to address Generative AI, which we believe is premature because of the rapid pace of technological development and change. *See, e.g.*, N.Y. STATE BAR ASS'N, *supra*, at 53-56.

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