

Ethics Research Made Easy, Or, at Least, Easier

BY JEREMY R. FEINBERG

For all of the scholarly and practical literature written about ethics issues, there is relatively little guidance on how best to research questions of ethics and professional responsibility. The goal of this article is to provide the reader with some landmarks and navigational tools for ethics research, and hopefully save numerous hours in the library or in front of a computer screen looking for the key authority.

NYPRR ran two articles on the subject over five years ago, in which Dean Mary Daly addressed both New York sources (researching ethics issues – A List of Sources, NYPRR, March 2003), and non-New York sources (researching ethics issues – A List of general Sources, NYPRR, May 2003). But given the passage of time, and with the recognition that there is more than one way to solve an ethics problem, I propose to revisit, and update, guidance on how to research New York ethics issues. Internet resources have grown exponentially in the time since NYPRR last examined the topic, and so I will spend some time addressing a few new computer-based materials as well. I will not address the research tool you already have in your hands, or on your computer screen – NYPRR.

Two Basic Research Principles

Researching ethics is, by its nature, different from traditional legal research. First, one cannot expect to simply jump onto a standard computer-assisted legal research service such as LEXIS or Westlaw, type in a few search terms, and have an answer within a few moments. A seasoned researcher looking for key cases under the CPLR, for example, may be able to find an answer this way. The likely result of a similar approach for an ethics question would be either no hits or far too many hits to sift through in a reasonable time, depending on the question.

The reason for this is simple: the courts do not typically reach most issues of legal ethics or professional responsibility in their reported decisions. There are, of course, many decisions defining the scope of the attorney-client privilege, plenty of opinions examining motions to disqualify a lawyer or law firm, and, recently, more and more cases addressing the inadvertent disclosure of confidential materials. On the one hand, running an online search for any of these central issues is likely to generate too many results. On the other hand, searching in the case law for other disciplinary rules, or for ethics issues generally is likely to turn up very little – and then, most likely, only a few appeals to the Appellate Divisions from disciplinary determinations. These may or may not provide analysis relevant to your issue.

Another general principle that underlies ethics research is that you should not face any issue alone, even if it may seem a solitary enterprise as you research it. Very often, you will not find a definitive answer to your problem. Whether you look at case law, ethics opinions, treatise entries, or some combination of all of these, there is usually more than one answer (or even several conflicting answers) to a question. Although frustrating, perhaps, this ambiguity compels a decision informed by your tolerance for risk. Here, remembering that you're "not in this alone" is important. Make sure, within the limits of the attorney-client privilege, to involve other people in your research. In other words, spread the tolerance

for risk among others whose judgment you trust, particularly if discipline could follow from a given choice. Engaging in this type of discussion, especially with the office's ethics specialist or committee (again, within the privilege) diversifies the judgments involved, and can often lead to a better answer. If you do not have a fellow practitioner to consult, some bar associations have "ethics help lines" through which callers can get informal guidance from attorneys knowledgeable about ethics issues. The New York City Bar Association helpline (212-382-6624) is one example.

Materials To Consult In Researching Ethics Issues

Where to begin your research is usually an easy question. For most ethics issues, starting with the applicable rules, and, if appropriate, with the statutory authority, is the right way to go. The New York Code of Professional Responsibility (Code) can be found online in several places, including the New York State Bar Association website. Visit www.nysba.org and then click on "For Attorneys" and then on "Professional Standards for Attorneys." Although the Disciplinary Rules (DRs) and ethical Considerations (ECs) in the Code are vital guideposts for an ethics question, they are not the only relevant rules for a lawyer. Depending on which Department of the Appellate Division the lawyer was admitted in, there are additional rules governing lawyer conduct that may cover more specific issues than the Code itself does. See, e.g., 22 NYCRR 603 (Rules of the Appellate Division, First Department on the Conduct of Attorneys); 22 NYCRR 806 (Third Department rules); 22 NYCRR 1022 (Fourth Department Rules). These rules can also be found at the NYSBA website above.

Statutes are also potentially relevant to ethics research – most notably the Judiciary Law. Although most practitioners know to consult the CPLR annotations and practice commentaries to expand their knowledge of the attorney-client privilege, they may not know that they should examine Section 475 of the Judiciary Law if they have a question about when, and under what circumstances, they can invoke an "attorney's lien" against a non-paying client. Similarly, if they are looking for guidance on the use of IOLA accounts for their escrow funds, they may (or may not) know to consult Section 497 of the Judiciary Law.

For Interpretative Authority, Start With Treatises

Once you have identified the Code provisions, rules or statutes relevant to your inquiry, the next task is to find interpretative authority. For that, I would first recommend going to one of three treatises. I don't mean to suggest that there aren't other good learned volumes to consider – in fact Dean Daly's two-part article identified a number of them – these are just the first three that I have learned to go to when I have a generic ethics issue to research.

Professor Roy Simon's *Simon's New York Code of Professional Responsibility Annotated* (Thompson-West 2007) (*Simon's*) is viewed by many as the definitive authority on New York ethics issues. The text is organized around the DRs, with pages of annotations to case law, ethics opinions, and secondary sources. Professor Simon also adds his own commentary to certain portions of the text. If you don't happen to know which DR applies to the question you have, a detailed word index will point you to whichever section(s) of the Code may be relevant. This treatise is updated yearly, so if it has one shortcoming, it is that very recent authority will not appear until Professor Simon's next edition. On the other hand, the treatise does have a section that reprints the full text of ethics materials issued immediately prior to the date of publication.

If you need to research ethics issues in other jurisdictions – or, in more than one jurisdiction – or if the Simon treatise is off the library shelf, my own experience has shown that the ABA/BNA Lawyers’ Manual on Professional Conduct is an excellent choice. The manual is a multi-volume loose-leaf service, which is now also available on Westlaw in the database entitled ABA-BNA-MOCNL and on LEXIS under “Secondary Legal” and the database for “BNA.” Among other things, the manual collects ethics cases and materials from around the country, broken up by subject matter. If, for example, New York has not yet reached a particular issue, going to the manual is a great way to see what other U.S. jurisdictions have said. If you’re ever faced with a 50-state survey assignment, comparing how different courts have treated a specific ethics issue, run, don’t walk, to the manual. It will save you countless hours, because its editors have done the collecting for you. Another excellent feature of the manual is that it is frequently updated – presenting recent opinions from bar associations, court decisions, and even news updates on conferences and legislative developments. Think of it as the equivalent of “advance sheets” for ethics information.

A third treatise you should consider studying is the Restatement (Third) of the Law governing Lawyers. Prepared by the American Law Institute in the traditional Restatement format, this treatise has illustrations, examples, and annotations to case law and ethics committee opinions from around the country. Perhaps the best evidence of the restatement’s usefulness, however, lies in the fact that it is commonly cited by appellate courts analyzing ethics issues. Suffice to say, if the appellate courts are citing to this treatise, shouldn’t you?

Bar Association Ethics Committee Opinions Are Useful Too

I have made reference to ethics committee opinions several times in this article. Many major bar associations have ethics committees, some of which issue formal opinions to help guide practitioners and courts as to what the law of ethics is. If court decisions haven’t reached an ethics issue, there is a reasonable likelihood that one or more bar association committees have opined on it. Some of the more well known and prolific ethics committees within New York State are the New York State Bar Association (www.nysba.org then click “Publications” and “ethics opinions”); the New York City Bar Association (http://www.nycbar.org/Publications/reports/reports_ethics.php [last visited June 8, 2008]); the New York County Lawyer’s Association (http://www.nycla.org/index.cfm?section=news_AnD_Publications&page=ethics_opinions [last visited June 8, 2008]); and the Nassau County Bar Association (http://www.nassaubar.org/ethic_opinions.cfm [last visited June 8, 2008]). The American Bar Association’s Ethics Committee, although not limited to New York State issues, is well known and well respected (www.abanet.org then click “Lawyer Resources; EthicSearch; Lawyer Ethics and Professionalism; ABA ethics opinions”). [Editor’s note: the ethics opinions cited above can also be accessed on the NYPRR home page, www.NYPRR.com. Just click on the appropriate logo and go directly to the opinions of the Association whose logo you’ve clicked on.]

Ethics opinions come with significant positives and negatives of which the prudent researcher should be aware. The opinions constitute a combination of ethical and practical advice intended to guide practitioners as to the boundaries of permissible conduct. A practitioner who analyzes his dilemma by following the teachings of a well-reasoned opinion from a respected bar association, will typically be better off in a disciplinary action than a practitioner who did not do so.

These opinions are prepared after analysis of an issue by volunteer ethicists, frequently including lawyers, judges, and professors who have devoted themselves to studying legal ethics. These committee

members have reviewed the issue(s) thoroughly, and they normally set forth their conclusions in a relatively simple format. From the standpoint of further research, ethics opinions can be a “gold mine.” The opinions may provide citations to other relevant resources, including rules, case law, and even other bar association ethics opinions on the same issue.

On the other hand, these opinions do not have the force of law and are not binding – not on courts, not on other ethics committees, and not even on the lawyers who read and write them. Very often, bar association ethics committees disagree with each other on the proper analysis of an issue. One recent example concerned the duty of a lawyer who receives an inadvertent disclosure of privileged information (compare NYCBar op. 2003-04 with NYCLA op. 730 with ABA Opn. 05-437). There is no hierarchy among these opinions, either. A national ethics opinion, like the ABA, does not trump a local one. Nor would a state-wide opinion carry more weight than one from a city bar committee. Even if two committees have the same view of an issue, and a third committee differs, that does not mean that either is “right” or “wrong.” Committees also have been known to revisit their own opinions. This makes it a good idea for a researcher to check that subsequent committee opinions from the same bar association have not overruled or modified a prior conclusion. See, e.g., NYCBar Op. 2003-02 (modifying earlier opinions 95-10 and 80-95 concerning undisclosed taping of conversations).

General Legal Ethics Websites

Internet websites covering legal ethics have long been a presence, and a useful resource for those researching ethics. Two websites that stand out are the American Legal Ethics Library at Cornell Law School (<http://www.law.cornell.edu/ethics> [last visited June 9, 2008 and also accessible on NYPRR’s home page]) and the ABA’s Center for Professional responsibility (www.abanet.org/cpr/ [last visited June 9, 2008]). The former is a partial collection of rules, commentary and opinions from many states. its New York section contains a cross-linked version of the Code, commentary comparing each provision to its counterpart(s) in the Model Rules, and a handful of other related resources. The latter website, which requires an ABA membership to make full use of some of its resources, provides a running collection of ethics news stories, the ABA’s ethics opinion database, and a detailed list of ethics resources throughout the country. Another website, devoted exclusively to the issue of conflicts of interest, is <http://www.freivogelonconflicts.com/> (last visited June 10, 2008). The website bills itself as a “guide to conflicts of interest for lawyers,” and subdivides itself into many different categories that are relevant to common day-to-day conflicts questions. It also provides a comprehensive collection of cases that fall directly under each conflicts category.

Legal Ethics Blogs

Given the widespread use of internet blogs on other issues, it should not be surprising that ethics issues are treated in the “blogosphere” as well. Typically, the more useful blogs will focus on a specific area, rather than attempt to keep up with ethics generally. With the important caveat that blogs come and go quickly, I offer three that, as of this writing, contain useful information for an ethics researcher. First, the Legal Ethics Forum is a blog run by a group of ethics professors from around the country, reporting information from mainstream news sources, conferences, and the like. It also contains a list of links to other blogs, websites, and resources. <http://legalethicsfo-rum.typepad.com/blog/> (last visited June 8, 2008).

As one might expect, www.legalethics.com (last visited June 8, 2008) is a relevant site to visit, but rather than covering a wide range of topics, it is in fact a blog with a more limited focus – ethics issues arising from the use of technology. If you would like to see how issues of inadvertent disclosure through misuse of e-mail or metadata are playing out around the country, this is a useful resource. A third blog worthy of mention is www.electronicdiscovery-blog.com (last visited June 8, 2008), which is a site collecting and presenting case law and other resources from around the United States focused on electronic discovery issues. Given the explosive growth of e-discovery in the past few years, it is likely that blogs such as this one could become an invaluable time-saver in locating the most recent, or most important, decisions in this nettlesome area of litigation.

Judicial Ethics Research and Resources

If you need to find an answer to a judicial ethics question, new resources now exist for this class of questions as well. New York State's Advisory Committee on Judicial Ethics has recently launched a full website, complete with a library of commonly referenced materials, links to the websites of other relevant judicial ethics websites, and, most importantly, a full-searchable database of the Committee's thousands of prior opinions. This website can be found at <http://www.nycourts.gov/ip/acje/index.shtml> (last visited June 7, 2008), and the searchable database by selecting "search ethics opinions" from that page. If, for example, a reader of NYPRR wishes to look more closely at an issue raised in the Committee opinion running in this month's issue, typing "08-71" into the searchable database will bring up the opinion and any other subsequent opinions citing to it.

The New York State Commission on Judicial Conduct also has its own website, with a searchable database of its public disciplinary determinations. Those decisions, which can be found at http://www.scjc.state.ny.us/Determinations/all_decisions.htm (last visited June 10, 2008), establish the outer bounds of behavior for which judges can be disciplined. By contrast, the Advisory Committee on Judicial Ethics Opinions set forth safe harbors for permissible behavior by judges.

Don't Overlook Search Engines

Finally, sometimes the most basic and commonly used internet research tools may prove to be quite useful in relation to their cost. Typing a search into your favorite search engine, whether www.yahoo.com, www.google.com, or something else, can lead to commentary, articles on law firm websites, or other materials that would not otherwise be uncovered through any other search method. Just bear in mind, that these search results may not all be equally reliable, nor may they cover the topic you need to research in sufficient depth to be helpful.

Conclusion

I have tried to give you a sense of where you can look, and what you should look for, in researching New York ethics issues. Ethics practitioners and regular readers of NYPRR already know that as of this writing, the Appellate Divisions are considering a proposal from the New York State Bar Association. This proposal would shift the format of New York's ethical guidelines from the format of a Model Code jurisdiction (it is the last such jurisdiction) to the format of a model rules jurisdiction. It would also update the substance of the Code to reflect both modern practice and the conclusions of courts and ethics committees that have interpreted the Code over the years. Be assured that if such a significant change occurs, many of the resources I have cited above will be first among the sources you should consult for interpretative assistance.

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