

# Researching Ethics Issues In New York: Adventures In The Archipelago

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To paraphrase Yogi Berra, ninety percent of legal ethics is one half issue spotting. Many lawyers violate ethical or legal principles simply because they are not aware that there is a rule governing the situation confronting them. All the legal research in the world will not save a lawyer who saunters in blissful ignorance into an ethical minefield. For purposes of this discussion, however, we will assume that you have been able to detect a potential ethical problem before stepping - across the line into a violation, or that at a minimum your basic sense of propriety tells you that something may not be right -with what you plan to do (or what you are being asked or told to do).

## Look First At Code

The first and most obvious place to look for answers to your questions is the New York Code of Professional Responsibility. The Code has a three-tiered structure. The Disciplinary Rules, better known as DRs, are the core of the Code. They are minimum standards to which lawyers must adhere. Violation of a DR can lead to censure, suspension or disbarment.

The Ethical Considerations, or ECs, described as “aspirational” in the Preliminary Statement of the Code, in reality serve in large part as commentary on the black letter rules set forth in the DRs. The so-called “Canons” are little more than glorified topic headings. Most ethical questions will be answered within the friendly confines of the Code.

But where is the Code? Throughout my years of service on ethics “hot lines,” it has always amazed me how many lawyers simply did not know where to find the code of Professional Responsibility. Here are some hints. If you don’t have one of the pamphlets published by the New York State Bar Association, you can find the entire code at the end of the third volume of the McKinney’s Judiciary Law (beginning on page 350 in the current edition). The Disciplinary Rules (without the ECs) are codified in Part 1200 of Title 22 of the New York Code of Rules and Regulations (NYCRR). (Other compilations are available, such as Simon’s New York Code of Professional Responsibility Annotated, which contains the Code and many of the other sources cited in this article.)

## Ethics Opinions Are Best Guide

All too often, however, the bare language of the Code is insufficient to answer your questions. Because ethics issues in litigation are ordinarily limited to a narrow range of topics, helpful interpretations are rarely found in judicial decisions. Opinions of bar association ethics committees, generally consisting of volunteer lawyers, are often the best source of guidance as to the meaning and application of — and often the interplay between — the various rules. The easiest way to research ethics committee opinions is through the ABA/BNA Lawyers’ Manual on Professional Conduct, which contains digests of the opinions issued by all of the ethics committees in the country dating back to 1980. If your particular issue requires

recourse to ancient ethics opinions, the four volume Digest of Bar Association Ethics Opinions, published by the American Bar Foundation, will take you back almost to the turn of the century, when bar associations were young and ethics committees were being created.

Because many of the provisions of the New York Code are derived from or have parallels in the Model Rules of Professional Conduct, interpretations of that codification are usually helpful as well. (The ABA's Annotated Model Rules of Professional Conduct is a good single-volume reference for this purpose.)

### **Appellate Division Rules**

Scattered about in some improbable places are a wide variety of arcane rules governing the conduct of lawyers in particular circumstances. In most states, the highest court is responsible for admitting and disciplining lawyers. In New York, however, the four departments of the Appellate Division of the Supreme Court do that job. Consequently, each department has adopted its own set of rules governing the conduct of attorneys practicing within its borders.

All of these rules can be found in Title 22 of the NYCRR, mostly within Parts 602-10 (First Department), Parts 671-700 (Second Department), Parts 805-06 (Third Department) and Part 1022 (Fourth Department). These rules govern subjects as diverse as fees and retainer agreements in personal injury cases (including the rules governing filing of retainer statements and closing statements), random audits of attorney trust accounts, champerty and maintenance, the conduct of suspended and disbarred attorneys (who may one day approach you looking for work in your law office), the conduct of attorneys assigned by the court as counsel in criminal cases, aggregate settlement of more than one client's claims, and grievance committee procedures. To a great extent, these Appellate Division rules are a patchwork of provisions that are interrelated only to the extent that they govern the conduct of attorneys.

### **Other Rules In Other Places**

But wait, there's more. Title 22 of the NYCRR contains special rules for attorneys handling domestic relations cases, which can be found in Part 1400. The rules requiring lawyers to maintain "IOLA" accounts are located in Part 7200. Sanctions rules for state court proceedings are in newly revised Part 130. Rules requiring banks to report dishonored checks drawn on attorney trust accounts — a mechanism by which a large number of dishonest lawyers are caught dipping into escrow funds — are in Part 1300. Part 36 contains rules governing the appointment of guardians under Article 81 of the Mental Hygiene Law, guardians ad litem, and similar positions.

### **Judiciary Law Provision**

Article 15 of the New York Judiciary Law (460-99) likewise contains a wide range of provisions governing attorneys. Here can be found the only "source of law" for the well-known attorney's lien (~ 475), as well as the now infamous rule — almost certainly unconstitutional for over-breadth — barring all forms of solicitation of clients (479). Did you know that an attorney who "willfully delays his client's suit with a view to his own gain" is guilty of a misdemeanor and can be sued for treble damages by an aggrieved client? Section 487 of the Judiciary Law so provides. Do you have an office for the practice of law in New York City but live in Connecticut or New Jersey? If so, there's a statute just for you.

Section 470 of the Judiciary Law says that you may reside in an adjoining state and still lawfully practice in a New York office. Of course, if you're not admitted to practice in New York, there are statutes for you,

too. The Judiciary Law contains provisions governing the unauthorized practice of law in this state (~ 478, 484), which is also a misdemeanor. And while you're flipping pages in the Judiciary Law, don't miss section 90, which governs admission to and removal from practice by the Appellate Divisions. Believe it or not, these are only the obvious sources of the law governing New York lawyers. You will often have to review the Family Court Act, the Surrogate's Court Procedure Act, the Penal Law, the Court of Claims Act, the CPLR and even the County Law before you can be sure you are aware of the full extent of your professional responsibility.

### **Federal Courts Morass**

And anyone who ventures into the federal courts must also bear in mind that each district has adopted, in its local rules, provisions governing the conduct of lawyers. The Southern and Eastern Districts of New York, for example, have recently revamped their attorney conduct rules. They maintain their own Grievance Committees and conduct their own disciplinary hearings from time to time. If the Southern District's Grievance Committee strikes your name from the role of attorneys authorized to practice before it, provisions for reciprocal discipline will ordinarily lead to your disbarment by other courts. The federal court's rules cannot be ignored. Nor can the Rules of the Bankruptcy Courts which are often cited to measure a lawyer's conduct in bankruptcy cases.

At bottom, there is no substitute for familiarizing yourself with the various rules and authorities discussed above. Island hopping in the ethical archipelago is an imperfect method for finding answers to problems, but it is all we have right now. Hopefully, the foregoing discussion has provided you with peripheral vision that will keep you from bumping into the far-flung provisions of the law governing New York lawyers.