Columbia Law School

From the SelectedWorks of Hon. Gerald Lebovits

Fall 2010

N.Y. Rules of Prof. Conduct: 2 Vols.

Gerald Lebovits

Available at: https://works.bepress.com/gerald_lebovits/188/

ISBN 978-0-19-976575-1
90000
9 780199 765751

FALL 2010

THE NEW YORK RULES OF PROFESSIONAL CONDUCT

VOLUME 1

New York County Lawyers' Association Ethics Institute

OXFORD

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LAW AND PRACTICE

FALL 2010

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EDITED BY

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ISBN 978-0-19-976576-8
90000
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NYCLA's ETHICS INSTITUTE

OXFORD
UNIVERSITY PRESS

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Oxford University Press, Inc., publishes works that further Oxford University's objective of excellence in research, scholarship, and education.

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Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

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Cataloging-in-Publication information is available from the Library of Congress.

ISBN 978-0-19-974014-7

Printed in the United States of America on acid-free paper.

Note to Readers:

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Preface

There is a plaque in the foyer of the New York County Lawyers' Association at 14 Vesey Street, New York, New York. A quote on the plaque begins: "Those who link arms in the organized bar enjoy to the full that spirit of professional companionship which is one of the joys of our calling."[1]

In July of 2009, a unique cadre of lawyers answered the call to volunteer their time and considerable wisdom to publish this treatise. The Rules of Professional Conduct had become effective on April 1, 2009. The treatise, *The New York Code of Professional Responsibility: Opinions, Commentary and Case Law,* as the name implies, had covered the former Code of Professional Responsibility. Its editor, our esteemed colleague Professor Mary Daly of St. John's Law School, had passed away. Additionally, the publishing responsibilities of Oceana Press had evolved to Oxford University Press. There was an urgent need to communicate to all New York lawyers the details and commentary about the new Rules and how the rules would be applicable to their practices. The new publisher enlisted the Ethics Institute of the New York County Lawyers' Association for assistance. This treatise ensued.

The writers and editors of this treatise are among the most noted professional responsibility lawyers in New York. With others, they served on committees and task forces to assist the Appellate Divisions to implement the New York Rules of Professional Conduct. They teach ethics at our law schools and at continuing legal education seminars. They volunteer their time to hear and referee disciplinary complaints on behalf of the courts. Some are private practitioners who advise other firms and lawyers regarding ethical responsibilities; some are in-house ethics counsel. They serve on bar association "hot lines" to provide immediate assistance to attorneys seeking a consult on their professional responsibilities. Some are or have been counsel to the disciplinary committees and the courts; others defend attorneys charged with disciplinary violations. They serve on committees that study and report on ethical issues; they publish bar association ethics opinions and articles that are relied upon by bench and bar. Proudly, all are members of the Advisory Board of the Ethics Institute of the New York County Lawyers' Association.

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1 Whitney North Seymour, speaking as President-Elect of the American Bar Association at the Annual Dinner of the New York County Lawyers' Association, December 3, 1959.

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We are grateful for the assistance provided by the staff of NYCLA's CLE Institute, especially Jennifer Arsego who coordinated the entire project, keeping everyone on track and all the manuscript organized. It was a daunting task and we could not have completed the book without her extraordinary effort. Special mention should also be given to Judy Shepard for assisting with the design and marketing of the book, Zachary Cronin for his editorial assistance and Marilyn Flood, NYCLA Counsel and Executive Director, NYCLA Foundation for referring the project to the Ethics Institute. The book never would have been completed without the encouragement of Sophia Gianacoplos,

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NYCLA's Executive Director, who was a true champion of the project from the beginning.

In addition to the writers, editors, and NYCLA staff, others, too numerous to identify, devoted time, energy, and resources to help. We would especially like to thank Mariana Hogan, Dean for Professional Development and Professor of Law at New York Law School and Hillary Mantis, Career Consultant, New York Law School for assisting us in securing research assistance for the project. The researchers, whose names appear on the title page and on the individual chapters, contributed countless hours of research, writing, cite checking, and assistance to the Rules Editors, and we are eternally grateful for their efforts.

We would like to thank the staff at Oxford University Press for giving NYCLA's Ethics Institute the opportunity to become the editors of this treatise. In particular, we recognize Irusia Kocka for her dedication to ensuring that the legacy of Mary Daly lives on and to Peter Berkery for securing for the Ethics Institutes the resources needed to complete the book.

Above all, we want to thank Wally Larson and Judge Lebovits for their collegiality and guidance provided throughout the project and James Kobak for his support and leadership in helping to make this treatise a reality.

Lew Tesser would especially like to acknowledge the herculean efforts of Bari Chase, in the life and spirit of this endeavor. If the writers, editors, and NYCLA staff are the vessels through which this treatise has been produced, then Bari Chase is its heart.

Bari Chase would like to recognize the extraordinary dedication of Lew Tesser, not only to this project, but also to improving the professionalism of New York lawyers. It was an honor to work along side Lew on this book and I treasure his friendship and camaraderie.

THE LAYOUT OF THE BOOK

Volume 1: Analysis of the New Rule

To facilitate research, we have adopted an easy-to-navigate organizational structure for each Rule.

- The Text of the Rule
- NYSBA Commentary
- Cross-references
- Practice Pointers
- Analysis
- Analysis of Ethics Opinions (organized by topic)
- Analysis of Cases (organized by topic)
- Bibliography

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Volume 2: Resources and Finding Aids

Volume 2 contains primary source materials, articles, Ethics Opinions, finding aids and other resources designed to assist lawyers in using this treatise and in their practice of law.

- Report of NYCLA's Task Force on Professionalism
- NYSBA Commentary
- Articles
- Forms
- Ethics Opinions
- General Bibliography and Research Aids
- Index
- Tables

CAVEATS

The discussion and analysis of each Rule of Professional Responsibility expresses the personal views of the author. The research and analysis does not in any way reflect the position of NYCLA, nor of the firm, government entity, university, or any other institution that the Rule Editor may be affiliated with.

Some of the references in this book are to older materials that predate the new Rules effective April 1, 2009. While historical sources are always germane, readers must exercise caution in determining whether that material still has applicability to their matter, especially in view of the Rule changes.

While the New York Rules of Professional Conduct were promulgated by the courts, the Comments to the Rules were only issued by the House of Delegates of the New York State Bar Association (similarly, while the predecessor Disciplinary Rules were promulgated by the courts, the Ethical Considerations were issued by the Association). In our view, although the Comments have less weight than the rules themselves, the Comments have and should be accorded greater weight than advisory opinions issued by the ethics committees of the various New York bar associations. One argument for such persuasive authority is the rigor of the process by which the Association's Committee on Standards of Attorney Conduct invited and received comment from the public, bar and bar associations (other bar associations, such as out of New York City and New York County, are represented in the Association's House of Delegates).

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Whitney North Seymour's remarks, memorialized on the plaque in the lobby of NYCLA's Home of Law, continue: "Here the traditions are nourished; here our sense of responsibility to the public and to the maintenance of the good name of the profession gets its greatest support." The men and women who have come together in a spirit of collegiality and service to write this treatise represent the true ideals of professional

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responsibility. The commitment, professionalism, zeal, and time that they devoted to this treatise are beyond the limits of what anyone could reasonably expect from volunteers. We are profoundly grateful for their efforts. They embody and sustain the good name of our profession. We offer their work to you, the lawyers of New York and others interested in the ethical obligations of New York lawyers, in the sincere hope that your work will be enhanced and your professional lives enriched.[2]

Lew Tesser, Editor-in-Chief,

Bari Chase, Editorial Director

2 To our readers: we welcome your comments and participation as we prepare new editions of this treatise. Please let us hear from you. You can e-mail your suggestions to cleinstitute@nycla.org.

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