University of Ottawa Faculty of Law (Civil Law Section)

From the SelectedWorks of Hon. Gerald Lebovits

Fall 2010

N.Y. Rules of Prof. Conduct: Law & Prac. (2 Vols.)

Gerald Lebovits

Available at: https://works.bepress.com/gerald_lebovits/188/
New York County Lawyers' Association Ethics Institute

THE NEW YORK RULES OF PROFESSIONAL CONDUCT

VOLUME 1

LAW AND PRACTICE

FALL 2010

EDITED BY

New York County Lawyers' Association Ethics Institute
NEW YORK RULES OF PROFESSIONAL CONDUCT

PRACTICE AND PROCEDURE,
FALL 2010

Edited by
NYCLA’s ETHICS INSTITUTE

OXFORD UNIVERSITY PRESS
### Editors

<table>
<thead>
<tr>
<th>Role</th>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Editor-in-Chief</td>
<td>Lewis Tesser</td>
</tr>
<tr>
<td>Editorial Director</td>
<td>Bari Chase</td>
</tr>
<tr>
<td>Executive Editor</td>
<td>Wallace Larson Jr.</td>
</tr>
<tr>
<td>Contributing Editors</td>
<td>Hon. Gerald Lebovits</td>
</tr>
<tr>
<td></td>
<td>Edwin David Robertson</td>
</tr>
<tr>
<td>Coordinating Editors</td>
<td>Jennifer Arsego</td>
</tr>
<tr>
<td></td>
<td>Zachary Cronin</td>
</tr>
<tr>
<td>Editorial Consultant</td>
<td>Michael S. Ross</td>
</tr>
<tr>
<td>Editorial Advisors</td>
<td>Carol Buckler</td>
</tr>
<tr>
<td></td>
<td>James Kobak</td>
</tr>
<tr>
<td>Rules Editors</td>
<td>Andral Bratton</td>
</tr>
<tr>
<td></td>
<td>Janessa Bernstein</td>
</tr>
<tr>
<td></td>
<td>Gordon Eng</td>
</tr>
<tr>
<td></td>
<td>Robert Fettman</td>
</tr>
<tr>
<td></td>
<td>Bruce Green</td>
</tr>
<tr>
<td></td>
<td>Sarah Jo Hamilton</td>
</tr>
<tr>
<td></td>
<td>John R. Horan</td>
</tr>
<tr>
<td></td>
<td>Devika Kewalramani</td>
</tr>
<tr>
<td></td>
<td>Wallace Larson Jr.</td>
</tr>
<tr>
<td></td>
<td>Richard M. Maltz</td>
</tr>
<tr>
<td></td>
<td>Sarah Diana McShea</td>
</tr>
<tr>
<td></td>
<td>Ronald C. Minkoff</td>
</tr>
<tr>
<td></td>
<td>Martin Minkowitz</td>
</tr>
<tr>
<td></td>
<td>Deborah A. Scalise</td>
</tr>
<tr>
<td></td>
<td>Barry Temkin</td>
</tr>
<tr>
<td></td>
<td>Ellen Yaroshefsky</td>
</tr>
<tr>
<td></td>
<td>Carol L. Ziegler</td>
</tr>
</tbody>
</table>
RESEARCHERS

Nigeria Aljure, Frank Badalato, Joanne Barken, Matt Baum, Luna Bloom, Michael Brenner, Sean Burke, Jean Chou, Ryan Gainor, Daniel S. Kotler, Andrea Mauro, Danielle Miklos, Charisma L. Miller, Gergana Miteva, Atossa Movahedi, Carmela Romeo, Daniel M. Rosenblum, Jocelyn Ryan, Pinella Tajcher, Robert Trisotto, Adam Young
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>ix</td>
</tr>
<tr>
<td>Tribute to Mary C. Daly</td>
<td>xvii</td>
</tr>
<tr>
<td>Introduction: The Rules of Professional Conduct</td>
<td>xix</td>
</tr>
<tr>
<td>Some Historical Perspectives on New York’s Rules of Professional Conduct</td>
<td>xli</td>
</tr>
<tr>
<td>Rule 1.0 Terminology</td>
<td>1</td>
</tr>
<tr>
<td>Rule 1.1 Competence</td>
<td>19</td>
</tr>
<tr>
<td>Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer</td>
<td>27</td>
</tr>
<tr>
<td>Rule 1.3 Diligence</td>
<td>39</td>
</tr>
<tr>
<td>Rule 1.4 Communication</td>
<td>45</td>
</tr>
<tr>
<td>Rule 1.5 Fees and Divisions of Fees</td>
<td>55</td>
</tr>
<tr>
<td>Rule 1.6 Confidentiality of Information</td>
<td>79</td>
</tr>
<tr>
<td>Rule 1.7 Conflict of Interest: Current Clients.</td>
<td>139</td>
</tr>
<tr>
<td>Rule 1.8 Current Clients: Specific Conflicts of Interest Rules</td>
<td>165</td>
</tr>
<tr>
<td>Rule 1.9 Duties to Former Clients</td>
<td>219</td>
</tr>
<tr>
<td>Rule 1.10 Imputation of Conflicts of Interest</td>
<td>235</td>
</tr>
<tr>
<td>Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees</td>
<td>267</td>
</tr>
<tr>
<td>Rule 1.12 Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators, or Other Third-Party Neutrals</td>
<td>287</td>
</tr>
<tr>
<td>Rule 1.13 Organization as Client</td>
<td>297</td>
</tr>
<tr>
<td>Rule 1.14 Client with Diminished Capacity</td>
<td>319</td>
</tr>
</tbody>
</table>
Rule 1.15  Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records ................. 335
Rule 1.16  Declining or Terminating Representation .................. 367
Rule 1.17  Sale of Law Practice .............................................. 381
Rule 1.18  Duties to Prospective Clients ...................................... 389
Rule 2.1  Advisor .......................................................... 407
Rule 2.2  [Reserved] .......................................................... 415
Rule 2.3  Evaluation for Use by Third Persons ............................. 417
Rule 2.4  Lawyer Serving as Third-Party Neutral ....................... 431
Rule 3.1  Non-Meritorious Claims and Contentions .................... 439
Rule 3.2  Delay of Litigation .................................................. 447
Rule 3.3  Conduct Before a Tribunal ....................................... 451
Rule 3.4  Fairness to Opposing Party and Counsel  ...................... 475
Rule 3.5  Maintaining and Preserving the Impartiality of Tribunals and Jurors .................................................. 487
Rule 3.6  Trial Publicity ...................................................... 493
Rule 3.7  Lawyer as Witness .................................................. 499
Rule 3.8  Special Responsibilities of Prosecutors and Other Government Lawyers .................................................. 511
Rule 3.9  Advocate in Non-Adjudicative Matters ......................... 521
Rule 4.1  Truthfulness in Statements to Others .......................... 525
Rule 4.2  Communication with Person Represented by Counsel ........ 531
Rule 4.3  Communicating with Unrepresented Persons ................ 541
Rule 4.4  Respect for Rights of Third Persons ............................ 547
Rule 4.5  Communication after Incidents Involving Personal Injury or Wrongful Death .................................................. 553
Rule 5.1  Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers .................................................. 557
Rule 5.2  Responsibilities of a Subordinate Lawyer ....................... 567
Rule 5.3  Lawyer’s Responsibility for Conduct of Nonlawyers ........ 571
Rule 5.4  Professional Independence of a Lawyer ....................... 579
Rule 5.5 Unauthorized Practice of Law ......................... 589
Rule 5.6 Restrictions on Right to Practice ...................... 605
Rule 5.7 Responsibilities Regarding Nonlegal Services .......... 617
Rule 5.8 Contractual Relationship Between Lawyers and Nonlegal Professionals .......................... 631
Rule 6.1 Voluntary Pro Bono Service ................................ 643
Rule 6.2 [Reserved] ......................................................... 651
Rule 6.3 Membership in a Legal Services Organization .......... 653
Rule 6.4 Law Reform Activities Affecting Client Interests ........ 659
Rule 6.5 Participation in Limited Pro Bono Legal Service Programs .. 663
Rule 7.1 Advertising ....................................................... 673
Rule 7.2 Payment for Referrals ......................................... 691
Rule 7.3 Solicitation and Recommendation of Employment ........ 701
Rule 7.4 Identification of Practice and Specialty .................. 715
Rule 7.5 Professional Notices, Letterheads, and Signs ................ 719
Rule 8.1 Candor in the Bar Admission Process ....................... 729
Rule 8.2 Judicial Officers and Candidates .......................... 735
Rule 8.3 Reporting Professional Misconduct ....................... 743
Rule 8.4 Misconduct ....................................................... 753
Rule 8.5 Disciplinary Authority and Choice of Law ................. 767
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.”

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.

---

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.
Jennifer Arsego (Coordinating Editor) served as the Marketing and Program Associate, New York County Lawyers’ Association, CLE Institute, Ethics Institute, Member, NYCLA Pilot Mentoring Program Advisory Board.

Andral Bratton (Rules Editor) is a Principal Court Attorney for the Appellate Division, First Department. University of Virginia School of Law. Formerly Deputy Chief Counsel, Departmental Disciplinary Committee, First Department.

Janessa Bernstein (Rules Editor) is an associate in the Professional Practices department of Tesser, Ryan & Rochman, LLP., New York, N.Y., Articles Editor, Brooklyn Law Review.

Carol Buckler (Editorial Advisor) is the Associate Dean for Academic Affairs, New York Law School. Harvard Law School. Professor of Legal Ethics. Member, Professionalism Task Force, New York County Lawyers’ Association.

Bari Chase (Editorial Director) is the Director, New York County Lawyers’ Association CLE Institute, Ethics Institute, Member, NYCLA Pilot Mentoring Program Board of Advisors. Hofstra University School of Law.

Gordon Eng (Rules Editor) is an associate in the Litigation Department of Debevoise & Plimpton LLP. Fordham University School of Law magna cum laude. Order of the Coif. M.B.A. With honors, New York University. Vice Chair, Ethics committee, New York County Lawyers’ Association.

Robert Fettman (Rules Editor) is an associate at Stroock & Stroock & Lavan LLP. Fordham University School of Law. Chair, Insurance Committee, General Practice Section, New York State Bar Association. Member, Task Force on Ethics Reform, New York County Lawyers’ Association.

Bruce A. Green (Rules Editor) is the Louis Stein Professor at Fordham Law School. Columbia University Law School. Director, Louis Stein Center for Law and Ethics. Member, ABA Standing Committee on Ethics and Professional Responsibility. Reporter to the ABA Task Force on Attorney-Client Privilege. Co-chair, Committee on Ethics, Gideon and Professionalism, ABA Criminal Justice Section.

Sarah Jo Hamilton (Rules Editor) is a partner in Scalise & Hamilton, LLP, Scarsdale, New York, a firm which focuses its practice on the representation of professionals. St. John’s University Law School. Formerly Secretary to the Committee on Character and Fitness for the First Judicial Department. Formerly First Deputy Chief Counsel, First Judicial Department. Chair, Committee on Professional Discipline, New York State Bar Association; Co-Chair Professional Ethics Committee, Women’s Bar Association.


Devika Kewalramani (Rules Editor) is a partner and co-chair of Moses & Singer’s Legal Ethics and Law Firm Practice. City University of New York Law School. Member, Professional Discipline Committee of the Association of the Bar of the City of New York.
James Kobak (Editorial Advisor) is a partner in Hughes Hubbard & Reed President of NYCLA, Chair of its Professionalism Task Force.

Wally Larson Jr. (Executive Editor) is the Professional Responsibility Counsel to Cleary Gottlieb Steen & Hamilton LLP. Columbia University Law School. Former Co-Chair, Professional Ethics Committee, New York County Lawyers’ Association.

Hon. Gerald Lebovits (Contributing) is a Judge, Housing Court, Civil Court of the City of New York, New York County, Adjunct Professor of Law at St. John’s University School of Law. Ottawa (LL.L.), Tulane (M.C.L.), and New York University (L.L.M.) law schools.

Richard M. Maltz (Rules Editor) is counsel to Frankfurt, Kurnit, Klein & Selz, P.C.’s Legal Ethics and Professional Responsibility Group. Cardozo School of Law. Chair, New York State Trial Lawyer’s Ethics Committee. Formerly First Deputy Chief Counsel, Departmental Disciplinary Committee, First Department, Chair, Professional Responsibility Committee of the Association of the Bar of the City of New York. Lecturer on Professional Responsibility at Cardozo Law School.

Sarah Diane McShea (Rules Editor) is the principal lawyer in the Law Offices of Sarah Diane McShea, providing professional ethics advice and representation to lawyers. Boston University School of Law. Trustee, NYS Lawyer Assistance Trust. Formerly President of the Association of Professional Responsibility Lawyers, member, Editorial Board, ABA/BNA Lawyers’ Manual on Professional Conduct, member of NYSBA Committee on Standards of Attorney Conduct, Co-Chair, Professional Discipline Committee, adjunct professor of Professional Responsibility, Fordham, Columbia, St. John’s and Brooklyn Law Schools, Deputy Chief Counsel, Departmental Disciplinary Committee, 1st Judicial Department.

Ronald C. Minkoff (Rules Editor) is a member of Frankfurt Kurnit Klein & Selz, P.C., practicing in professional responsibility. Columbia Law School. Member, ABA Standing Committee on Professionalism, and Policy and Implementation Committee of the ABA Center for Professional Responsibility. Member, Committee on Standards of Attorney Conduct of the New York State Bar Association. Formerly, Chair, Committee on Professional Discipline, Association of the Bar of the City of New York, President, Association of Professional Responsibility Lawyers.

Martin Minkowitz (Rules Editor) is counsel to (formerly partner in) Stroock & Stroock & Lavan. Brooklyn Law School. Adjunct Professor, New York Law School. Chair, General Practice Section, New York State Bar Association. Formerly General Counsel and Deputy Superintendent, New York State Insurance Department, Chair, Professional Discipline Committee NYSBA and Past Chair, Ethics Committee, N.Y.C.L.A., Co-Chair, Professionalism Task Force, New York County Lawyers’ Association.

Michael Ross (Editorial Consultant) is principal of the Law Offices of Michael S. Ross, where he concentrates his practice in attorney ethics and criminal law. New York University School of Law. Former Assistant United States Attorney in the Criminal Division of the Southern District of New York. Former Assistant District Attorney in Kings County. Adjunct Professor at the Benjamin N. Cardozo School of Law. Member of the New York State Continuing Legal Education Board.

Deborah A. Scalise (Rules Editor) is a partner in Scalise & Hamilton, LLP, Scarsdale, New York, a firm which focuses its practice on the representation of professionals. Brooklyn Law School. Formerly Deputy Chief Counsel, Departmental Disciplinary Committee, 1st Judicial Department, Deputy Attorney General in Charge of Public Advocacy for the Westchester Region, Assistant District Attorney, Kings County Chair, Professional Ethics Committee, Women’s Bar Association. Member, Ethics Committee, American Bar Association.

Barry Temkin (Rules Editor) is counsel to Mound Cotton Wollan & Greengrass, where his practice includes legal ethics, securities and commodities law. University of Pennsylvania Law School. Adjunct professor of Legal Ethics at Fordham University School of Law. Chair, Professional Ethics Committee, New York County Lawyers’ Association. Formerly Assistant District Attorney, Kings County.

Lewis Tesser (Editor-in-Chief) is a partner in Tesser, Ryan & Rochman, LLP., focusing his practice on the representation of professionals. George Washington University Law School, with honors. Chair, Business Law Committee, General Practice Section, New York State Bar Association. CLE presenter, Association of the Bar of the City of New York, Director, Ethics Institute, New York County Lawyers’ Association. Member, NYCLA’s Pilot Mentoring Program Board of Advisors. Formerly, Assistant U. S. Attorney, Eastern District of New York.

Ellen Yaroshefsky (Rules Editor) is Clinical Professor of Law and the Director of the Jacob Burns Ethics Center at Cardozo Law School. Rutgers University Law School. Co-Chair, ABA Ethics, Gideon and Professionalism Committee, Criminal Justice Section. Chair, Ethics Committee, National Association of Criminal Defense Lawyers.

Carol L. Ziegler (Rules Editor) is Adjunct Professor, Professional Responsibility and Legal Ethics, Columbia Law School. New York University School of Law, cum laude. Reporter for the Committee on Standards of Attorney Conduct, New York State Bar Association. Formerly, Professor of Professional Responsibility and Legal Ethics, Brooklyn Law School. Formerly member, Ethics Commission, New York State Court System.

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,
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
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).

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
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.