

Your Court Street Lawyer's Quick Reference Guide

Attorney's Liens and Legal Fee Enforcement

What to do if your client stops paying you

By Richard A. Klass, Esq.



Richard A. Klass, Esq.

Litigation for the Legal Profession:

Legal Malpractice defense of attorneys

Legal Malpractice actions against attorneys

Attorney fee collection

Consultation on and litigation of attorney's
retaining and charging liens

Expert Witness analysis and testimony on reasonable
attorney's fees and awards

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Published by the Law Firm of Richard A. Klass, Esq.
16 Court Street, Brooklyn, New York 11241
Phone: (718) COURT • ST or (718) 643-6063
Email: RichKlass@CourtStreetLaw.com
www.CourtStreetLaw.com

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"Your Court Street Lawyer" is a Lawyer's Lawyer!

Richard A. Klass, Esq., has been assisting his professional colleagues for over 22 years. He started out as a "collection lawyer," handling commercial and consumer debt collection. By helping other lawyers collect their due debts from recalcitrant clients, Richard Klass learned by doing and honed his skills in the area of attorney fee collection. He is able to help you collect your outstanding fees.

1. Unlike their lay peers, professionals seldom sue first and analyze later. It is important to competently and thoroughly evaluate the claim. Planning for collection requires dealing with aspects of the claim with the same diligence and skill the attorney-client used to originally earn those legal fees.
2. It is not just a matter of knowing the difference between retaining liens and charging liens. It's a matter of having the know-how and experience to apply those remedies in the most appropriate, expeditious and cost-effective manner.
3. The factors courts consider in determining whether the legal fees charged were reasonable can become complicated. Skilled counsel can help focus the court on the factors that support the maximum legal fee award.
4. Being a Lawyer's Lawyer requires an attorney to have good facility with the areas of professional responsibility (discipline and ethics) and professional liability (legal malpractice). Richard Klass is able to provide competent, effective and diligent counsel to his attorney-clients.

Richard A. Klass, Esq., maintains a law firm engaged in civil litigation in Brooklyn, New York. He may be reached by e-mail at richklass@courtstreetlaw.com or by phone at (718) COURT•ST with any questions.

Prior results do not guarantee a similar outcome.

Attorney Advertising

About Richard A. Klass, Esq.

Richard A. Klass is an attorney in private practice in downtown Brooklyn. He practices primarily in the areas of commercial litigation, debt collection/enforcement of judgments, legal malpractice and real estate litigation. His law firm also represents clients in bankruptcy, civil appeals and federal court litigation.

Mr. Klass serves as a Trustee of the Brooklyn Bar Association, Chair of the General Practice Section of the New York State Bar Association, Co-Chairman of the Continuing Legal Education Committee of the Brooklyn Bar Association, Co-Editor of the New York State Bar Association's General Practice Section *One on One* Publication, and an Arbitrator, Small Claims Part of the Civil Court of the City of New York, County of Kings. Mr. Klass also currently serves as a Fee Arbitrator in the Part 137 Attorney-Client Fee Dispute Program. He has also served as a representative to the Statewide Special Counsel for the Commercial Division of the New York State Unified Court System.



In 1989, Mr. Klass received his Bachelor of Arts at Hofstra University and in 1992, his Juris Doctorate at New York Law School. He was the Recipient of the American Jurisprudence Award in Conflict of Laws. Mr. Klass is admitted to the following jurisdictions: State of New York (1992); State of New Jersey (1993); U.S. District Court for the Eastern District of New York (1992); U.S. District Court for the Southern District of New York (1992); U.S. District Court for the District of New Jersey (1993); U.S. Court of Appeals for the Second Circuit (1999); and the U.S. Supreme Court (1997).

Richard Klass has been a formative voice within New York law circles both for the high standards of his work as well as his extensive writings, lectures and appearances in the media. He reaches audiences of both lawyers and non-lawyers, through publications which include his quarterly newsletter, *Law Currents*, his blogs *Law Currents* and *The Legal Malpractice Blog, New York*, and his book *Successfully Defending Your Credit Card Lawsuit: What to do if you are sued for a credit card debt*.

The newsletter and blog *Law Currents*, with a combined readership of tens of thousands, is particularly popular. Written in plain English in a style that appeals to anyone who likes a good story, this two-page illustrated quarterly features case studies that both entertain and inform.

Areas of Practice

- Abandoned Property
- Appellate
- Attorney Fee Collections
- Bankruptcy Practice
- Business Formation and Commercial
- Commercial Litigation
- Debt Collection and Litigation
- Legal Malpractice
- Personal Injury
- Real Estate Transactions
- Real Estate Litigation
- Wills and Estates

Quick Reference Guide to Attorney's Liens and Legal Fee Enforcement

By Richard A. Klass, Esq.

This Quick Reference Guide is intended to provide attorneys with information relating to the attachment and enforcement of retaining liens and charging liens; methods of enforcement of these attorney's liens; steps to be taken to pursue legal action for the recovery of legal fees; and risk management and ethical issues relating to the enforcement of attorney's liens and actions.

A. Attorney's Liens: There are two types of attorney's liens.

1. Retaining lien (or 'possessory' or 'general' lien):

The retaining lien is a right granted to an attorney to hold on to the property of a client until the legal fees due have been paid. It can be compared to a car mechanic who does work on a customer's car and may hold on to the car until the bill for repairs has been paid. Even though today, most of a case file may be filed online and, thus, the client's file is not needed as much as in the past, this lien is still very effective when dealing with either large quantities of documents, original papers/evidence or property other than papers that cannot be easily obtained or replicated.

- A retaining lien attaches to all property, papers and money coming into the hands of the attorney. *Butler, Fitzgerald & Potter v. Gelmin*, 235 AD2d 218 [1 Dept. 1997].
- As opposed to a charging lien, it is not assignable. *People v. Keefe*, 50 NY2d 149 [1980].
- Generally, an attorney may not be required to surrender the property belonging to the client until an expedited hearing has been held to ascertain the amount of his fee. *Andreiev v. Keller*, 168 AD2d 528 [2 Dept. 1990].
- Absent evidence of discharge for cause, the attorney cannot be compelled to give up a client's file unless he receives adequate security for payment. 7 NY Jur., Attorneys §243; *Goldman v Rafel Estates*, 269 AD 647 [1 Dept. 1945].

- Lien does not extend to property beyond the client's interest in it. *Jackson v. American Cigar Box Co.*, 141 AD 195 [1 Dept. 1910].
- Alimony/maintenance/child support is not subject to a retaining lien. *Schelter v. Schelter*, 206 AD2d 865 [4 Dept. 1994].
- The retaining lien exists both for charges due in the particular case in which the lienable item came into the attorney's hands and for any general balance due for services unconnected with that matter. *Matter of Weldon v. De Martini*, 35 Misc.2d 710 [Sup. Queens 1962].
- Unlike an artisan's or mechanic's lien, an attorney's retaining lien may not be enforced through foreclosure; it is merely a passive right to hold on to the property until the fees are paid or adequate security is given. In re *Wilson*, 12 F. 235 [SDNY 1882]; In re *Makames*, 238 AD 534 [4 Dept. 1933].
- Under certain circumstances, a court may order the attorney to turn over the file to the client without payment or security, such as criminal capital punishment or matrimonial case, indigence (attorney may contest this claim of poverty and get an expedited hearing), or other exigent circumstances. *Matter of Hauptman*, 243 AD 613 [2 Dept. 1935].
- Lien can be waived where attorney voluntarily releases property. *Kaplan v. Reuss*, 113 AD2d 184 [2 Dept. 1985].

2. Charging lien or 'statutory' lien:

The charging lien is an equitable one, originating from common law and later codified under Judiciary Law Section 475. It grants to the attorney a property right in the client's case from inception through judgment.

§ 475. Attorney's lien in action, special or other proceeding. From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute, the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

- It creates a vested property interest in the attorney. *LMWT Realty Corp. v Davis Agency Inc.*, 85 NY2d 462 [1995].
- Lien attaches to the client's cause of action, verdict, judgment or award for his client. *People v. O'Keeffe*, 50 NY2d 149 [1980].
- Lien is given only to counsel who appears for a party – granted to the "attorney of record." *Itar-Tass Russian News Agency v Russian Kurier, Inc.*, 140 F3d 442 [2 Cir. 1998].
- Law firm associates or "of counsel" attorneys have no statutory lien. *Jaghab & Jaghab v Marshall*, 256 AD2d 342 [2 Dept. 1998].
- There must be proceeds from the litigation upon which the lien can affix. *Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34 [2002].
- Attorney for a defendant who asserts a counterclaim can have a lien.
- Charging lien is granted in actions, special proceedings or other proceedings in a court or governmental department (except Dept. of Labor).

Lien may apply to a wide range of courts, including federal, bankruptcy, Surrogate's (in decedents' estates) and state courts.

- The lien comes into existence, without notice or filing, upon commencement of the action or proceeding. *LMWT Realty Corp. v Davis Agency Inc.*, 85 NY2d 462, 467-68 [1995].
- Lien may apply to services performed by attorneys in proceedings in and out of New York.
- Charging lien is to be measured by the reasonable value of attorney's services.
- In contingency cases where termination by the client without cause during the pendency of the case occurs, the court can set the lien at either a fixed dollar amount based upon quantum meruit or as a contingent percentage to be determined at the conclusion of the case (attorney has the option for either one). *Wiggins v. Kopko*, 105 AD3d 1132 [3 Dept. 2013].
- Judiciary Law §475-a permits a pre-action 'notice of lien' to be served upon other parties (written notice signed by client and attorney, served by personal service or registered mail).
- Unlike a retaining lien, a charging lien applies only to services rendered in the particular case and not to general balances due the attorney. *Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34 [2002].
- Lien attaches to the client's cause of action, which continues even if that attorney is no longer counsel of record upon the action's conclusion. *Klein v. Eubank*, 87 NY2d 459 [1996].
- Lien cannot be affected by any settlement between the parties; a defendant who pays settlement proceeds directly to the plaintiff with notice of the lien pays at his own peril. *Fischer-Hansen v Brooklyn Hgts. R. Co.*, 173 NY 492 [1903].
- Charging lien is superior to a creditor's execution, judgment or other liens subsequent in time. In order to supersede an attorney's charging lien, a party's claim must be a prior one against the specific fund upon which the attorney's lien has attached.

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- Lien takes priority over federal tax lien (except for claim against USA); hospital lien; right of setoff of adverse party.
- Lien may be lost if attorney abandons the case, withdraws from representation without cause or by reason of misconduct (such as disbarment, suspension, or infidelity). More is required than a client's general dissatisfaction with an attorney's performance. *DeLuccia v. Village of Monroe*, 180 AD2d 897 [3 Dept. 1992].

B. The procedure to determine and enforce an attorney's lien is either through summary proceeding or a motion in the underlying action.

- The remedies available to an attorney, including the retaining lien, charging lien and action for fees, are cumulative and not exclusive. An attorney may bring a summary proceeding to determine and enforce the lien and bring a plenary action. *Wankel v Spodek*, 1 AD3d 260 [1 Dept. 2003].
- If parties colluded to settle a case without paying attorney's lien or otherwise disregard the lien, the attorney may bring a proceeding against the plaintiff and defendant to enforce the lien.
- A hearing will be held to determine the amount of the outgoing attorney's lien, to be determined upon the basis of the value of the services rendered up to the time of his discharge. *Goldenstein v Goldenstein*, 28 AD2d 962 [1 Dept. 1967].
- When an attorney was hired on a contingency basis, the proper practice is to compel the discharged attorney to elect, at the time the substitution is made, either to have his compensation then fixed at a specified amount or to have his fee fixed at a percentage basis at the conclusion of the case. *Podbielski v Conrad*, 286 AD 1040 [2 Dept. 1955].
- An attorney who is discharged for cause is not entitled to a lien. *Callan & Byrnes, LLP v Ruth E. Bernstein Law Firm*, 48 AD3d 459 [2 Dept 2008].

C. There may be other circumstances in which an attorney may have a lien.

Aside from the rights to a retaining lien and a charging lien, the attorney may have an independent right to a lien for attorney's fees against another party. In general, New York follows the "American" rule that legal fees are not awarded when a party succeeds in the litigation. However, legal fees may be awarded to the prevailing party under a statute, court rule or contract. Various statutes have prevailing attorney's fees and fee-shifting rules, such as Domestic Relations Law §237, Debtor and Creditor Law §276-a, Worker's Compensation Law §225; and Fair Debt Collection Practices Act (15 USC 1692k). Enforcement of the attorney's lien against other parties may be had in such circumstance.

D. Collection actions:

Once the attorney has come to the decision to further pursue collection of the debt through means of a plenary action, it is important to follow pre- and post-commencement steps in order to ensure a successful recovery.

1. Pre-litigation activities:

- Deciding whether to pursue the debt against former client—rule of thumb is to sue only on cases in which the attorney achieved a favorable result for the client.
- Referral to a collection agency—dunning campaign, including letters and telephone calls.
- Implications of the Fair Debt Collection Practices Act (FDCPA) on collection activities—also, compliance with state collection restrictions.
- Assessing the collectability of the debt from the client—is the client "judgment proof" and not worth pursuing?
- Review of attorney's file to determine whether all documents are in the file; contemporaneous time records were made and are preserved; retainer agreement on file; ripe for collection.
- Ensuring conditions precedent, including service of the appropriate notice of right to fee arbitration under Part 137 (as applicable) or any notices to cure defaults have been served.

2. Court action:

- There are considerations concerning the venue of the action, including whether the debt is a 'consumer debt' in which the action must be brought in either the county where the transaction took place or where the debtor resides.
- Confirm detailed bills were issued at regular intervals, preferably every 30-60 days. *Edelstein v. Greisman*, 67 AD3d 796 [2 Dept. 2009].
- Anticipating defenses/counterclaims of the debtor/former client.
- A charging lien entered in the underlying action against the client may bar him from thereafter asserting a claim for legal malpractice. *Lusk v Weinstein*, 85 AD3d 445 [1 Dept. 2011].
- Consideration of the three-year statute of limitations for legal malpractice cases. *CPLR 214(6)* ("an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort" must be commenced within three years).
- Allegation of license to practice law.

3. Causes of action:

- Breach of contract—based upon retainer agreement/engagement letter.
- Retainer agreement/engagement letter required under Rules of Court §1215. Exceptions to the Rule include where the fee to be charged is expected to be less than \$3,000; domestic relations matters (where Part 1400 applies); and where the attorney's services of the same general kind as previously rendered to and paid for by the client.
- Quantum meruit/unjust enrichment claims. Attorney must prove that the terms of the retainer agreement were fair, fully understood and agreed to by client. *Gary Friedman PC v. O'Neill*, 115 AD3d 792 [2 Dept. 2014].
- Account stated. Retaining bills without objection or even with partial payment by the client ratifies them. *Mintz & Gold LLP v. Hart*, 48 AD3d 526 [2 Dept. 2008].

E: Ethical/professional concerns:

Separate from the normal considerations of any person when deciding whether to pursue legal remedies to collect an unpaid bill, attorneys have other, special considerations, including:

1. Billing concerns.
2. Grievance arising out of liens/actions.
3. Legal malpractice actions or counterclaims.
4. Disclosure of client's confidential information.
5. Withdrawal from the case or terminating representation of the client at the right (or wrong) time.
6. Breakdown of the attorney/client relationship.
7. Careful with the escrow account! Setting aside only the disputed portion and not withholding from the client the undisputed portion.
8. Reporting on insurance applications—could affect premium amount.
9. Reasonableness of legal fee.
10. Rule of Professional Conduct 1.5(a) states that the cardinal principle that governs all lawyer fee agreements is: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."
11. The factors to be considered in determining the reasonableness of a fee include: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. Rule 1.5.
12. Diversion of the attorney's resources from future, productive work (putting good money after bad).
13. Some attorneys do not want to have a reputation for suing their clients.

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F: Risk management:

There are measures that attorneys can take and systems that can be put in place to reduce exposure to potential legal malpractice claims and to ensure payment of legal fees, including:

1. Client selection—do you get the sense of trouble when the client walks in the door?!
2. Written engagement letters/retainer agreements should be provided to client, as may be required under Part 1215 (and, if relevant, filing retainer statements with the Office of Court Administration, Supreme Court or other office, including Fiduciary Clerk for court appointments).
3. Checking for conflicts of interest.
4. Calendar management—preferably two methods of managing the calendar, including one for statute of limitations and deadlines.
5. Billing systems—appropriate time entries and review of time expended for quality control; detailed entries to eliminate “block billing.”
6. Review of fee actions for potential counterclaims.
7. File closing and disengagement letters.
8. Withdraw from a case when appropriate. There are three primary reasons allowing an attorney to withdraw from a case: (a) failure of the client to remain in contact with counsel; (b) deterioration of the attorney-client relationship; and (c) nonpayment of legal fees. *Tartaglione v. Tiffany*, 280 AD2d 543 [2 Dept. 2001].
9. Document retention policies.
10. Rules of Professional Conduct annual review.
11. Maintaining Professional Liability Insurance.
12. Returning calls and e-mails and keeping the client updated on the matter!

Statutory and case law analysis of the “reasonable attorney’s fee”

When analyzing whether a legal fee is “reasonable” or “excessive,” an analysis of the legal fee based upon the law must be conducted.

A. Applicable New York Rules

On April 1, 2009, New York adopted the Rules of Professional Conduct, found in the New York Code of Rules and Regulations (“NYCRR”), at 22 NYCRR §1200, *et seq.* The pertinent rules to be applied towards determining the reasonableness of a legal fee are:

i) Rule 1.1 Competence:

- (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- (c) A lawyer shall not intentionally:
 - (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
 - (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

ii) Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer:

- (a) Subject to the provisions herein, a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to settle a matter.

iii) Rule 1.3 Diligence:

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.

iv) Rule 1.4 Communication:

- (a) A lawyer shall:
 - (1) promptly inform the client of:
 - (i) any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(j), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with a client’s reasonable requests for information; and
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

v) Rule 1.5 Fees and Division of Fees:

Pursuant to Rule 1.5, a lawyer may not charge or collect an excessive fee for legal services rendered.

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Rule 1.5 defines a fee as “excessive” when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee may include:

1. The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
2. The likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation and ability of the lawyer or lawyers performing the services.
8. Whether the fee is fixed or contingent.

Accordingly, a court must determine whether the attorney's fees billed by an attorney to his client are “reasonable” within the general framework of the above rules, or are “excessive” and subject to reduction.

B. Method of calculating Attorney's Fees under relevant case law

In the oft-cited opinion by New York Court of Appeals Chief Judge Breitel, in *In re Estate of Julius Freeman*, 34 N.Y.2d 1 [1974], he addressed the case law surrounding the determination of reasonable attorney's fees:

Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved.

i. Lodestar method

In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 [1983], the United States Supreme Court held that the proper method of determining the amount of reasonable attorney's fees to be awarded in an action is by use of the “lodestar” method, in which the court calculates the time spent on the matter multiplied by a reasonable hourly rate. As part of the decision, the Supreme Court adopted an approach known as “billing judgment,” in which reasonableness should be judged on a case-by-case basis, taking into account that the attorney would not include time which was excessive, redundant or unnecessary.

The United States Supreme Court held, in *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 [1984], that the “lodestar” should be based upon “prevailing market rates,” which are based upon the rates charged in the pertinent legal community for comparable attorneys of comparable skill and standing. For purposes of calculating an attorney's fees award, reasonable hourly rates should be based upon customary fee charges for similar services by lawyers in the community with like experience and of comparable reputation to those by whom the prevailing party was represented. See, e.g. *McIntyre v. Manhattan Ford-Lincoln-Mercury*, 176 Misc.2d 325 [Sup. NY 1997].

As indicated in *Hensley*, supra, the application for fees under the “lodestar” method should generally be documented by contemporaneously created time records that specify, for each professional, the date, hours expended, and nature of work done.

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ii. Increase or reduction of the initial lodestar estimate

While a court should certainly begin with the “lodestar” approach (*McIntyre*, supra), a court should also consider whether the number of hours purportedly devoted to prosecution of the causes of action is in line with what reasonably competent attorneys would expend in similar cases in which they are billing their clients directly (*Rahmey v. Blum*, 95 A.D.2d 294 [2 Dept. 1983]), and whether the hourly rates charged are in line with the rates charged by comparably experienced attorneys within the relevant geographical area. In addition, for purposes of calculating an attorney’s fees award, the initial lodestar estimate, which is predicated upon an objective assessment of reasonableness, may be reduced (or increased) by a court based upon several factors, including: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

iii. Judicial discretion to be applied

Even after applying the above (the calculation of the amount due by application of the “lodestar” method), there may be sufficient basis to either enhance or reduce the fee; In *Elliott v. Board of Education of Rochester City School District*, 295 F.Supp.2d 282 [WDNY 2003], the court held that courts have discretion to reduce an attorney’s fee by simply deducting a reasonable percentage of the number of hours claimed, if appropriate, citing to *New York State Association for Retarded Children v. Carey*, 711 F.2d 1136 [2 Cir. 1983].

“An award of attorney’s fees pursuant to a contractual agreement may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered... An award of reasonable attorney’s fees is within the sound discretion of the court...” *SO/Bluestar LLC v. Canarsie Hotel Corp.*, 33 AD3d 986 [2 Dept. 2006].

In the context of the above-cited ethics rules and case law, a proper analysis of a claim for attorney's fees can be conducted.

C. Factors which may demonstrate that a legal fee is ‘excessive’

Some of the factors which may prove “excessiveness” of the legal fee include:

1. **Block billing:** This is appears it that many of the entries are “block-billed entries” or bundled entries where various, discrete tasks are lumped together so as to make it difficult, if not impossible, to allocate time to each individual task in order to gauge the reasonableness of time expended on each activity. See, *Penberg v. Healthbridge Management*, 2011 WL 1100103 [EDNY 2011]; *In re Poseidon Pools of America, Inc.*, 180 BR 718 [Bankr. EDNY 1995] (“It is not the court’s job to decipher time entries and guess how much time each activity took. It is the responsibility of the applicant to make separate time entries for each activity.”) Based upon the persistent use of block billing through the bills, a reduction of the overall legal fee may be imposed. See, *New York State Association for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 [2 Cir. 1983] (substantial and repeated use of block billing support across-the-board percentage reductions “as a practical means of trimming the fat from a fee application.”)
2. **Travel time:** Sometimes, there is no breakdown between travel time to and from the courthouse and the court appearance itself. Various case law has held that travel time should appropriately be compensated at half (50%) of the attorney’s normal billing rate. See, *Rozell v. Ross-Holst*, 576 F.Supp.2d 537 [SDNY 2008]; *Barfield v. NY Health and Hospitals Corp.*, 537 F3d 132 [2 Cir. 2008]; *RMP Capital Corp. v. Victory Jet, LLC*, 40 Misc.3d 1243(A) [Sup. Suffolk 2013].
3. **Billing without sufficient explanation:** Throughout a bill, there may be time entries for items of work such as “work on ...” and “review ...” These entries do not permit a meaningful review of the exact work done and whether the same was necessary to the matter. Courts have found that such entries do not meet

the specificity required for a fee award. See, *Noghrey v. Town of Brookhaven*, 17 Misc.3d 1102(A) [Sup. Suffolk 2007].

4. **Wasteful or unnecessary time spent:** Where there is a finding that time spent was wasteful or unnecessary, courts have imposed across-the-board percentage reductions in fees. See, *Gierlinger v. Gleason*, 160 F.3d 858 [2 Cir. 1998]; *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149 [2 Cir. 1998]. Also, time billed that reflects either inefficiency or “padding” of the bill should be disallowed. See, *Matter of Rahmey v. Blum*, 95 AD2d 294 [2 Dept. 1983].
5. **Duplication of work:** A reduction of a legal fee is proper when two or more attorneys have duplicated each other’s work, since some of the work may have been duplicative and unnecessary. See, *Wilder v. Bernstein*, 725 F.Supp. 1324 [SDNY 1989], *affirmed in part and remanded* 965 F.2d 1196 [2 Cir.], *cert. denied* 506 US 954 [1992]; Cf. *Williamsburg Fair Housing Comm v. Ross-Rodney Housing Corp.*, 599 F.Supp. 509 [SDNY 1984] (the use of more than one attorney may be reasonable in complex litigation where each attorney made a distinct contribution by his presence or participation).
6. **Lack of detailed time entries:** Where time records lack sufficient specificity to assess the reasonableness of the amount charged in relation to the work performed, a court is justified in reducing the hours claimed for those entries. See, *Mautner v. Hirsch*, 831 F.Supp. 1058 [SDNY 1993], *affirmed in part, reversed in part* 32 F.3d 37 [2 Cir. 1994].

D. Consideration of other factors:

Aside from the determination as to the excessiveness of the legal fee, there are other factors to be considered by a court, including whether:

1. the attorney met the objectives of the client;
2. reasonable means or strategies were taken;
3. the client was provided with written retainer agreement (note: failure to provide a retainer agreement has been not held not to bar an action on an account stated. See, *Thelen LLP v. Omni Contracting Co., Inc.*, 79 AD3d 605 [1 Dept. 2010];
4. bills were sent to the client at regularly intervals of at least every 30-60 days. See, *Julian v. Machson*, 245 AD2d 122 [1 Dept. 1997]; *but see, Flanagan v. Flanagan*, 267 AD2d 80 [1 Dept. 1999]; and
5. there was compliance with rules concerning the filing of retainer statements. See, 22 NYCRR §603.7(a)(3); *Rabinowitz v. Cousins*, 219 AD2d 487 [1 Dept. 1995].

Excerpts from Important Cases on Attorney's Liens

The following cases are some of the most well-known and oft-cited cases in the areas of attorney's liens and attorney fee collection.

Albunio v City of New York, 23 NY3d 65, 68 [2014]

Banque Indosuez v Sopwith Holdings Corp., 98 NY2d 34 [2002]

Butler, Fitzgerald & Potter v Sequa Corp., 250 F3d 171 [2d Cir 2001]

Callan & Byrnes, LLP v Ruth E. Bernstein Law Firm, 48 AD3d 459 [2d Dept 2008]

Desmond v Socha, 38 AD2d 22 [3d Dept 1971] *aff'd*, 31 NY2d 687 [1972]

First Nat. Bank & Trust Co. of Ellenville v Hyman Novick Realty Corp., 72 AD2d 858 [3d Dept 1979]

Fischer-Hansen v Brooklyn Hgts. R. Co., 173 NY 492 [1903]

Frear v Lewis, 201 AD 660 [2d Dept 1922]

Fuentes v Brookhaven Mem. Hosp., 43 AD3d 992 [2d Dept 2007]

Goldenstein v Goldenstein, 28 AD2d 962 [1st Dept 1967]

Goldman v Rafel Estates, 269 AD 647 [1st Dept 1945]

Goldstein, Goldman, Kessler & Underberg v 4000 E. Riv. Rd. Assoc., 64 AD2d 484 [4th Dept 1978] *aff'd sub nom. Goldstein Goldman Kessler & Underberg v 4000 E. Rive R Assoc.*, 48 NY2d 890 [1979]

Haser v Haser, 271 AD2d 253 [1st Dept 2000]

Hauptmann v Fawcett, 243 AD 613 [2d Dept 1935] *aff'd as mod sub nom. Petition of Hauptmann*, 243 AD 616 [2d Dept 1935]

In re Heinsheimer, 214 NY 361 [1915]

Itar-Tass Russian News Agency v Russian Kurier, Inc., 140 F3d 442 [2d Cir 1998]

Jaghab & Jaghab v Marshall, 256 AD2d 342 [2d Dept 1998]

J.K.C. v T.W.C., 39 Misc 3d 899 [Sup Ct 2013]

LMWT Realty Corp. v Davis Agency Inc., 85 NY2d 462 [1995]

Lusk v Weinstein, 85 AD3d 445 [1st Dept 2011]

Neimark v Martin, 7 AD2d 934 [2d Dept 1959]

People v Keeffe, 50 NY2d 149 [1980]

Peri v New York Cent. & H.R.R. Co., 152 NY 521 [1897]

Podbielski v Conrad, 286 AD 1040 [2d Dept 1955]

Rotker v Rotker, 195 Misc 2d 768 [Sup Ct 2003]

Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn L.L.P., 91 NY2d 30, 37-38 [1997]

Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York, 302 AD2d 183 [1st Dept 2002]

In re Shirley Duke Assoc., 611 F2d 15 [2d Cir 1979]

Theroux v Theroux, 145 AD2d 625, 627-28 [2d Dept 1988]

Tunick v Shaw, 45 AD3d 145 [1st Dept 2007]

Wankel v Spodek, 1 AD3d 260 [1st Dept 2003]

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This appeal concerns the appropriate treatment of statutory counsel fees awarded under the New York City Human Rights Law where the contingency fee agreement does not explicitly mention statutory fees. We hold that, absent a contract term expressly providing for a different distribution, an attorney is entitled to the greater of either the contingency fee or the statutory award.

Albunio v City of New York, 23 NY3d 65, 68 [2014]

It is well settled that, under section 475, an attorney's charging lien comes into existence, without notice or filing, upon commencement of the cause of action or proceeding (see *LMWT*, 85 NY2d at 467; *Beecher*, 227 NY at 471). But since its enactment, the statutory provision has limited such lien rights to outcomes where "proceeds" have been obtained "in [a] client's favor" (Judiciary Law § 475; see also *LMWT*, 85 NY2d at 470; *Robinson v Rogers*, 237 NY 467, 473 [1924]; *Goldstein, Goldman, Kessler & Underberg v 4000 E. Riv. Rd. Assoc.*, 64 AD2d 484, 488 [4th Dept 1978], *aff'd on op below* 48 NY2d 890 [1979]). In other words, the litigation or settlement must result in more than the mere entry of a judgment on behalf of a client: there must be proceeds from the litigation upon which the lien can affix. We therefore hold that where competing claims arise out of the same transaction or instrument, an attorney's charging lien under section 475 will be recoverable against the client's net recovery, if any, after offsetting the parties' judgments. Here, the Sopwith defendants won no net recovery because the Bank's \$3.5 million judgment against them exceeded their \$2.4 million judgment against the Bank. There are simply no funds remaining from the Sopwith judgment from which Katz, Barron may collect its lien.

Banque Indosuez v Sopwith Holdings Corp., 98 NY2d 34, 43-44 [2002]

New York's statutory charging lien, see N.Y. Judiciary Law § 475 (McKinney 1983), is a device to protect counsel against "the knavery of his client," whereby through his effort, the attorney acquires an interest in the client's cause of action. *In re City of New York*, 5 N.Y.2d 300, 307, 184 N.Y.S.2d 585, 157 N.E.2d 587 (1959). The lien is predicated on the idea that the attorney has by his skill and effort obtained the judgment, and hence "should have a lien thereon for his compensation, in analogy to the lien which a mechanic has upon any article which he manufactures." *Williams v. Ingersoll*, 89 N.Y. 508, 517 (1882).

Butler, Fitzgerald & Potter v Sequa Corp., 250 F3d 171, 177 [2d Cir 2001]

New York precedent, which governs attorney's charging liens issued by federal courts in New York, see *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 448-49 (2d Cir.1998), defines a charging lien as giving an "equitable ownership interest in the client's cause of action," rather than providing for a mere "priority of payment" in favor of the attorney, *LMWT Realty Corp. v. Davis Agency Inc.*, 85 N.Y.2d 462, 467-68, 626 N.Y.S.2d 39, 649 N.E.2d 1183 (1995). Under this reasoning a client who enlists the services of counsel on a standard one-third contingency fee arrangement equitably assigns a proportionate share of the cause of action to counsel. The client is left with only the remaining balance of any eventual judgment after the attorney receives his agreed upon share. *In re City of New York*, 5 N.Y.2d at 307-08, 184 N.Y.S.2d 585, 157 N.E.2d 587.

Butler, Fitzgerald & Potter v Sequa Corp., 250 F3d 171, 178 [2d Cir 2001]

Following the settlement of a personal injury action entitled *Vazquez v Rosa*, which had been commenced in the Supreme Court, Kings County, under index No. 12089/01 (hereinafter the underlying action), a fee dispute arose between the petitioner, former counsel to the plaintiffs in the underlying action, and the respondents, current counsel to those plaintiffs. The dispute included conflicting claims as to whether the petitioner had been discharged for cause. The Supreme Court properly held a hearing to resolve the issue (see *Byrne v Leblond*, 25 AD3d 640, 642 [2006]). Following the hearing, the Supreme Court determined that the petitioner had been discharged for cause, and was not entitled to any part of the attorney's fee.

Callan & Byrnes, LLP v Ruth E. Bernstein Law Firm, 48 AD3d 459, 460 [2d Dept 2008]

An attorney may have a general or retaining lien on books or papers in his possession or a special or charging lien upon a cause of action and the proceeds of it. He has no other lien. Charging liens are provided for by statute. (Judiciary Law, § 475.) The statute allows the attorney to exercise control over property which he does not possess and secure payment of his fee in the particular litigation by satisfying it from the fund created by his efforts. (*Matter of Heinsheimer*, 214 N. Y. 361.) It is justified because the attorney created the fund or proceeds out of which he is paid. Before there can be a charging lien, however, there must be something awarded by the

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judgment, to which the lien can attach. (*Kovarsky v. Brooklyn Union Gas Co.*, 170 Misc. 855, affd. 261 App. Div. 822; *Irish Free State v. Guaranty Safe Deposit Co.*, 148 Misc. 256, affd. 242 App. Div. 612; *Matter of Herlihy*, 274 App. Div. 342, 346-347.) Where the attorneys' services do not create any proceeds but consist solely of defending a title or interest already held by the client, there is no lien on the realty. (*Ekelman v. Marano*, 251 N. Y. 173; *Morey v. Schuster*, 159 App. Div. 602, affd. 217 N. Y. 639, rearg. den. 217 N. Y. 700.)

Desmond v Socha, 38 AD2d 22, 23-24 [3d Dept 1971] affd., 31 NY2d 687 [1972]

A statutory attorney's lien pursuant to section 475 of the Judiciary Law is a lien only for the value of services rendered in the particular action which produced the recovery sought to be charged (*Matter of Regan v Marco M. Frisone, Inc.*, 54 AD2d 1125). Consequently, we are of the view that this matter must be remanded for a hearing to determine the source of the funds in the hands of the receiver (see *Matter of Peters [Bachman]*, 296 NY 974). It is to be noted that the statutory lien does not cover all the services rendered by respondent in regard to the Laurels Hotel, but only those services which produced the funds in the hands of the receiver (*Matter of Regan v Marco M. Frisone, Inc.*, *supra*, pp 1125-1126). Respondent is also possessed of a common-law retaining lien which is a lien for the entire balance of account on all papers, securities or moneys belonging to a client and in the possession of the attorney (*Robinson v Rogers*, 237 NY 467, 470). A retaining lien is dependent upon the attorney's physical possession of the client's property (*Eiduson Fuel & Hardware Co. v Drew*, 59 AD2d 1025), and cannot be enforced through a court order directing that the lien be satisfied out of property not in the possession or control of the attorney (*Matter of Cooper [McCauley]*, 291 NY 255, 260).

First Nat. Bank & Trust Co. of Ellenville v Hyman Novick Realty Corp., 72 AD2d 858 [3d Dept 1979]

So a lien upon a claim or a cause of action follows the fund created by a settlement of the claim, which thereupon ceases to exist. It attaches to the amount agreed upon in settlement the instant that the agreement is made, and if the defendant pays over to the client without providing for the lien of the attorney, he violates the rights of the latter and must stand the consequences.

Fischer-Hansen v Brooklyn Hgts. R. Co., 173 NY 492, 502 [1903]

Our courts have invariably refused to sanction dishonest efforts by clients to settle or discontinue litigations for the purpose of defrauding attorneys of their costs or compensation, and have frequently not only denied permission to discontinue based on such settlements, but have permitted the attorney upon a showing of proper facts to continue the litigation for the collection of costs and compensation. This the courts have permitted not on the principle of a lien, because prior to statute the attorney had no lien before judgment; nor upon the theory that his services had produced for the client the money paid in settlement because occasionally, as here, it could not be shown that any money had been paid or promised. The courts in the exercise of inherent power over pending litigations and the parties thereto invented this method of circumventing attempts to cheat or defraud the attorneys who were their officers and under their control (*Coughlin v. N. Y. C. & H. R. R. R. Co.*, 71 N. Y. 443), and the right to refuse the discontinuance and to permit the attorney to continue the litigation was established at least as early as the time of Lord MANSFIELD and has continued unimpaired to our own day. (*Coughlin v. N. Y. C. & H. R. R. R. Co.*, 71 N. Y. 443, 447, 448; *National Exhibition Co. v. Crane*, 167 id. 508; *Pilkington v. Brooklyn Heights R. R. Co.*, 49 App. Div. 22; *Rochfort v. Metropolitan Street R. Co.*, 50 id. 261; *Matter of Evans*, 58 id. 502, 505; *Randall v. Van Wagenen*, 115 N. Y. 527, 532; *Astrand v. Brooklyn Heights R. R. Co.*, 24 Misc. Rep. 92; affd., 34 App. Div. 624; *Hart v. Mayor, etc.*, 69 Hun, 237; affd., 139 N. Y. 610.)

Frear v Lewis, 201 AD 660, 667-68 [2d Dept 1922]

The appellant has a statutory lien pursuant to Judiciary Law § 475 against the settlement obtained in the underlying action since it was an "attorney of record" (see *Russell v Zaccaria*, 8 AD3d 255 [2004]). It is undisputed that the appellant filed the summons and complaint and thereafter prosecuted the action to the point of trial (see *Rodriguez v City of New York*, 66 NY2d 825, 827 [1985]; *Wahba v S.I. Parmar*, 1 AD3d 507, 508 [2003]). "Although portions of the retainer agreement were left blank, those portions are not the subject of dispute" (*Miszko v Gress*, 4 AD3d 575, 579 [2004]), and thus the missing information does not bar recovery of a fee. Although the subject retainer agreement failed to identify the attorney being retained, the plaintiff does not dispute that she retained Maltese or that the appellant handled the case through the filing of the note of issue and pretrial preparations. Moreover, the appellant did file a retainer statement, albeit late, with the OCA which was sufficient under the circumstances

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to preserve its right to recover a share of the fee (*see Garrett v New York City Health & Hosps. Corp.*, 25 AD3d 424 [2006]).

Fuentes v Brookhaven Mem. Hosp., 43 AD3d 992, 994 [2d Dept 2007]

Order entered June 6, 1967 modified on the law and the facts, without costs and disbursements, to the extent of striking therefrom the last two decretal paragraphs; and the matter is remanded to Special Term to fix, following a hearing at Special Term or before a Special Referee, the amount of the outgoing attorneys' lien, to be determined upon the basis of the value of the services rendered up to the time of his discharge, this amount to be a first lien upon any attorney's fees payable by plaintiff to defendant's attorneys and which may be allowed by the court, or payable on any settlement, and to be a first lien upon the proceeds of any settlement or recovery upon defendant's counterclaims. The court below erroneously required a release of the outgoing attorneys' file without adequate provision to secure the payment of such fee as it may be determined they were entitled to or alternative protection of their statutory lien pursuant to the provisions of section 475 of the Judiciary Law.

Goldenstein v Goldenstein, 28 AD2d 962 [1st Dept 1967]

The papers which appellant was directed to relinquish consisted of pleadings and other papers in the action which ordinarily have no intrinsic value. Refusal to permit the new attorneys to use or inspect such papers might serve merely to impede the new attorneys in the defense of the pending suit. Nonetheless, the retaining lien which appellant possessed is a valuable right given by law to secure him for the payment of the reasonable value of the services which he had rendered as attorney in the action and for all other services rendered for the client. (*Matter of Weitling*, 266 N. Y. 184, 186; *Matter of Heinsheimer*, 214 N. Y. 361, 364, 365; *Application of Kellogg, Emery & Inness-Brown*, 33 N. Y. S. 2d 949, 953, *affd. sub nom. Matter of Inness Brown*, 264 App. Div. 852.) The lien is valuable in proportion as denial of access to the papers causes inconvenience to the client. (*In re San Juan Gold, Inc.*, 96 F. 2d 60.) A displaced attorney is thus afforded the same advantage as any other workman who is entitled to retain the things upon which he has worked, until he is paid for his work. (*The Flush*, 277 F. 25, 29.)

Goldman v Rafel Estates, 269 AD 647, 647-49 [1st Dept 1945]

No affirmative step other than the plenary suit could have been taken by appellant to enforce payment for his services. The retaining lien which appellant possessed here is merely the passive right to hold the papers until his fees are all paid. It confers no further rights upon appellant and cannot be actively enforced. (*Matter of Sebring*, 238 App. Div. 281, 286; *Matter of Makames*, 238 App. Div. 534, 536; 7 C. J. S., Attorney and Client, § 233.)

Goldman v Rafel Estates, 269 AD 647, 649 [1st Dept 1945]

The general or retaining lien is dependent upon possession (*Robinson v. Rogers*, 237 N. Y. 467, 470) and once the papers are surrendered the lien is lost. However, it is now settled that the courts have the power to compel delivery of papers before payment of fees upon giving of security. (*Leviten v. Sandbank*, *supra*, 357; *Robinson v. Rogers*, *supra*, 473; *Fitzsimmons v. Long Island Lighting Co.*, 251 App. Div. 395, 399.)

Goldman v Rafel Estates, 269 AD 647, 650 [1st Dept 1945]

It is elemental knowledge that taxes are a charge upon real property and that the amount of the tax debt is determined by multiplying the assessed value by the tax rate. If the taxpayer believes the tax debt produced by that arithmetic is excessive because his assessment is unequal or illegal, he may challenge its validity in certiorari proceedings and the order of the court, whether entered after trial or by way of settlement, constitutes an adjudication with respect to the validity and amount of the assessment. The litigation is defensive and unless a refund of past taxes paid is obtained the proceeding does not create any proceeds. It avoids payment of a future invalid charge in precisely the same fashion that a declaration of the invalidity of a mortgage (*Matter of Snitow v Jackson*, *supra*), or reconnection charge (*Kovarsky v Brooklyn Union Gas Co.*, *supra*) voids an illegal debt, or the defense of a title preserves or enhances existing values (*Ekelman v Marano*, 251 NY 173; *Morey v Schuster*, 159 App Div 602, *affd* 217 NY 639, *rearg den* 217 NY 700; and see *Matter of Desmond v Socha*, *supra*). If a lien is to be declared upon a client's assets in this case, we see no impediment to asserting one against the client after the successful defense of any action in which an adverse judgment might affect a defendant's general assets.

Goldstein, Goldman, Kessler & Underberg v 4000 E. Riv. Rd. Assoc., 64 AD2d 484, 488-89 [4th Dept 1978]

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affd sub nom. *Goldstein Goldman Kessler & Underberg v 4000 E. Rive R Assoc.*, 48 NY2d 890 [1979]

Under New York law, a plaintiff's attorney may enforce her statutory charging lien against the defendant's own assets, if he still possesses the settlement proceeds or knowingly paid them to the plaintiff so as to deprive the attorney of her compensation (*Kaplan v Reuss*, 113 AD2d 184, 186-187, *affd* 68 NY2d 693; *Fischer-Hansen v Brooklyn Hgts. R. R. Co.*, 173 NY 492, 502). The lien which attaches in the attorney's favor cannot be impaired by a collusive settlement (*Matter of Epstein & Furman*, 189 AD2d 738).

Haser v Haser, 271 AD2d 253, 255 [1st Dept 2000]

It appears on this appeal that the respondent has certain papers in his possession which he received or accumulated while in the employ of the appellant, and that he has a retaining lien upon these papers for the amount of his fees and charges, which has been fixed by the court. The respondent, however, is an officer of this court and under the circumstances here disclosed, to wit, that the appellant is now on trial upon an indictment for murder in the first degree in the State of New Jersey, the court is of the opinion that if the respondent has papers which would be of value to the defendant in his defense, the latter should not be deprived of the use thereof. Consequently, the court orders the respondent to appear before the presiding justice of this court, at his chambers in Borough Hall, Brooklyn, on Friday, January 18, 1935, at ten o'clock in the forenoon, and produce the papers in his possession, at which time the present attorney for the appellant may be present or represented, with a view of determining whether any of the papers now in the possession of the respondent may be competent or material in the preparation and presentation of the appellant's defense. Thereafter such order as may be proper in the premises will be made.

Hauptmann v Fawcett, 243 AD 613, 613-14 [2d Dept 1935] *affd as mod sub nom. Petition of Hauptmann*, 243 AD 616 [2d Dept 1935]

At common law, the liens available to an attorney were of two kinds. There was a retaining lien on all papers, securities, or moneys belonging to his client which came into his possession in the course of his professional employment. *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489; *Ward v. Craig*, 87 N. Y. 550, 560; *Goodrich*

v. McDonald, 112 N. Y. 157, 163, 19 N. E. 649, 651. This was a general lien for the entire balance of account. It was dependent, however, upon possession. There was also a charging lien, which bound a judgment recovered through the attorney's efforts. This lien was not dependent on possession. The very reason for its existence was to save the attorney's rights where he had been unable to get possession. 'It was a device invented by the courts for the protection of attorneys against the knavery of their clients, by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained.' *Goodrich v. McDonald*, *supra*. A clandestine or collusive payment, after notice, actual or constructive, of the lien, did not discharge the debtor. *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443, 448, 27 Am. Rep. 75.

In re Heinsheimer, 214 NY 361, 364-65 [1915]

The charging lien of an attorney has been likened to the lien of an artisan or mechanic.

In re Heinsheimer, 214 NY 361, 366 [1915]

New York Judiciary Law § 475 ("Section 475") governs attorneys' charging liens in federal courts sitting in New York. *See Markakis v. S.S. Mparmpa Christos*, 267 F.2d 926, 927 (2d Cir.1959) (Section 475 "creates an equitable right and remedy cognizable in the federal courts"); *Brooks v. Mandel-Witte Co.*, 54 F.2d 992, 994 (2d Cir.1932), *cert. denied Mandel-Witte Co. v. Brooks*, 286 U.S. 559, 52 S.Ct. 641, 76 L.Ed. 1292 (1932) ("federal courts sitting in a state have enforced statutes of that state creating attorney's liens whether the suit for services in which the lien was claimed was originally brought in a state court or in a federal court").

Moreover, the Second Circuit has "long recognized that the lien created by section 475 ... is enforceable in federal courts in accordance with its interpretation by New York courts." *In re Chesley v. Union Carbide Corp.*, 927 F.2d 60, 67 (2d Cir.1991); *see also In re McCrory Stores Corp.*, 19 F.Supp. 691, 693 (S.D.N.Y.1937) ("The lien being a matter of substantive law created by a statute of New York, the bounds placed on it by authoritative decisions of the New York courts are bounds on it here.")

Itar-Tass Russian News Agency v Russian Kurier, Inc., 140 F3d 442, 448-49 [2d Cir 1998]

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Judicial remedies “for the protection of attorneys against the knavery of their clients” took root at common law. *Goodrich v. McDonald*, 112 N.Y. 157, 163, 19 N.E. 649 (1889). Lord Kenyon observed that it had been “settled long ago, that a party should not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained.” *Read v. Dupper*, 101 Eng. Rep. 595, 596 (1795). The theory underlying the attorney’s lien is “in analogy to the lien which a mechanic has upon any article which he manufactures.” *Williams v. Ingersoll*, 89 N.Y. 508, 517 (1882).

Itar-Tass Russian News Agency v Russian Kurier, Inc., 140 F3d 442, 449 [2d Cir 1998]

Despite the liberal interpretation afforded Section 475, the New York cases make clear that the charging lien provided for by Section 475 is for the benefit of an “attorney of record” only. *Weinstein v. Seidmann*, 173 A.D. 219, 220, 159 N.Y.S. 371 (1st Dept.1916). *See also Cataldo v. Budget Rent A Car Corp.*, 226 A.D.2d 574, 574, 641 N.Y.S.2d 122 (2d Dept.1996) (“[t]he Court of Appeals has clearly stated that the emphasized language grants a lien to the ‘attorney of record’”) (citations omitted); *In re Sebring*, 238 A.D. 281, 285, 264 N.Y.S. 379 (4th Dept.1933) (Section 475 gives a lien to “the attorney who appears for a party. It is not broad enough to include counsel; it is confined to the attorney of record”); *Gary v. Cohen*, 34 Misc.2d 971, 973, 231 N.Y.S.2d 394 (N.Y.Sup.Ct.1962) (“[a]n attorney’s statutory or charging lien is confined to the attorney of record in the cause; trial counsel is not thus protected”).

Itar-Tass Russian News Agency v Russian Kurier, Inc., 140 F3d 442, 450 [2d Cir 1998]

A brief review of the elements of a charging lien under section 475 of the Judiciary Law supports this broad reading of the statute’s reach and the legislature’s use of the words “in whatever hands they may come.” A charging lien automatically comes into existence, without notice or filing, upon commencement of the action, and is measured by the reasonable value of the attorney’s services in the action, unless fixed by agreement. (*N.K. v M.K.*, 19 Misc 3d 1124[A], 2008 NY Slip Op 50837[U], [Sup Ct, Kings County 2008]; *Resnick v Resnick*, 24 AD3d 238, 239 [1st Dept 2005]; *see also Theroux v Theroux*, 145 AD2d 625 [2d Dept 1988].) The charging lien creates an “equitable ownership interest” in the

client’s cause of action. (*Chadbourne & Parke, LLP v AB Recur Finans*, 18 AD3d 222, 223 [1st Dept 2005], cited in *Dominguez v Zinnar*, 2012 NY Slip Op 30138[U] [Sup Ct, NY County 2012].) The Court of Appeals has concluded that because a cause of action is a species of property, the attorney can acquire a vested property interest—an “equitable ownership interest”—which cannot subsequently be disturbed by the client or anyone claiming through or against the client. (*LMWT Realty Corp. v Davis Agency*, 85 NY2d 462, 467 [1995]; *Matter of Lubin*, 213 NYS2d 143, 147 [Sup Ct, Kings County 1961] [the “lien of an attorney attaches from the time of the commencement of the action and not the time of the presentment of a notice of claim to an alleged debtor”]; *Resnick v Resnick*, 24 AD3d 238 [1st Dept 2005].)

“Manifestly, then, an attorney’s charging lien is something more than a mere claim against either property or proceeds; an attorney’s charging lien is a vested property right created by law and not a priority of payment.” (*LMWT Realty Corp. v Davis Agency* at 467-468 [internal quotation marks omitted].) There are three prerequisites to the creation of a charging lien, as a result of the attorney’s efforts: (1) the client must assert a claim, (2) which results in proceeds, (3) payable to or for the benefit of the client. (*Batista v KLS-Kachroo Legal Servs., P.C.*, 2012 NY Slip Op 32016[U], [Sup Ct, NY County 2012]; *City of Troy v Capital Dist. Sports*, 305 AD2d 715, 716 [3d Dept 2003] [the attorney’s charging lien “attaches only when proceeds in an identifiable fund are created by the attorney’s efforts in that action or proceeding”]; *Tunick v Shaw*, 6 Misc 3d 1014[A], 2004 NY Slip Op 51787[U], *7 [Sup Ct, NY County 2004]; *Moody v Sorokina*, 50 AD3d 1522 [4th Dept 2008]; *Theroux v Theroux*, 145 AD2d 625 [2d Dept 1988].) In a matrimonial action, a charging lien is available only to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interests already held by the client. (*Noble v Noble*, 2011 NY Slip Op 30835[U] [Sup Ct, Albany County 2011]; *Resnick v Resnick*, 24 AD3d 238 [2005].) Importantly, the Court of Appeals has repeatedly recognized the sweeping reach of a charging lien under section 475. In *Matter of Cohen v Grainger, Tesoriero & Bell* (81 NY2d 655, 658 [1993]), the Court intoned that the lien, as drafted by the legislature, reflected the intention to protect attorney claims for fees: “the lien is imposed on the cause of the action and . . . the proceeds, wherever found, are subject to it.” A century of Court of Appeals holdings affirm this wide dimension of the charging lien, even in its earlier statutory iteration:

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“the general rule is that a lien upon property attaches to whatever the property is converted into and is not destroyed by changing the nature of the subject. . . . It follows its subject and cannot be shaken off by a change of form or substance. It clings to any property or money into which the subject can be traced” (*Fischer-Hansen v Brooklyn Hgts. R.R. Co.*, 173 NY 492, 501 [1903], cited by *Tunick v Shaw*, 45 AD3d 145, 148-149 [1st Dept 2007]).

While *Fischer-Hansen v Brooklyn Hgts. R.R. Co.* interpreted the earlier version of the Code of Civil Procedure, it noted that the phrase “proceeds thereof in whosoever hands they may come” was added by the legislature in 1879. (*Id.* at 497.) The Court concluded that the statute was remedial in character, and hence should be construed liberally in aid of the object sought by the legislature, which was to furnish security to attorneys by giving them a lien upon the subject of the action. (*Fischer-Hansen v Brooklyn Hgts. R.R. Co.* at 499.)

J.K.C. v T.W.C., 39 Misc 3d 899, 907-09 [Sup Ct 2013]

A charging lien does not attach to an award of maintenance. (*Rosen v Rosen*, 97 AD2d 837 [2d Dept 1983].) Child support is also immune from a charging lien. (*Haser v Haser*, 271 AD2d 253 [1st Dept 2000].) There is no suggestion in the Domestic Relations Law that an attorney has a charging lien on the marital interests in tax-sheltered retirement accounts. Section 237 of the Domestic Relations Law permits attorneys to maintain an action for fees against either spouse, but makes no mention of any charging liens or their use against IRAs. The absence of statutory guidance in the Domestic Relations Law, which governs fees chargeable in matrimonial actions, is some evidence that the legislature did not intend the charging lien to interfere with court-ordered transfers of retirement accounts.

J.K.C. v T.W.C., 39 Misc 3d 899, 912 [Sup Ct 2013]

Since the petitioner law firm neither appeared as attorney of record in an action or proceeding (Judiciary Law § 475) nor filed a proper notice of lien pursuant to Judiciary Law § 475-a, it was not entitled to a charging lien under the Judiciary Law (*see, Cataldo v Budget Rent A Car Corp.*, 226 AD2d 574; *Ebert v New York City Health & Hosps. Corp.*, 210 AD2d 292, 293; *Matter of Taylor, Jacoby & Campo*, 208 AD2d 400; *Matter of*

Robinson, 100 AD2d 724; *cf., Klein v Eubank*, 87 NY2d 459; *Rodriguez v City of New York*, 66 NY2d 825, 827).

Jaghab & Jaghab v Marshall, 256 AD2d 342 [2d Dept 1998]

Under the common law, the attorney was only entitled to a lien upon the judgment, but the scope of the charging lien was extended by statute to give the attorney a lien upon the client's cause of action as well. The lien comes into existence, without notice or filing, upon commencement of the action or proceeding (*see, Matter of Heinsheimer*, 214 NY 361, 367; *Fischer-Hansen v Brooklyn Hgts. R. R. Co.*, 173 NY 492; Judiciary Law § 475). In *Matter of City of New York (United States--Coblentz)* (5 NY2d 300, 307-308, *cert denied sub nom. United States v Coblentz*, 363 US 841), we stated that because a cause of action is a species of property, an attorney acquires a “vested property interest” in the cause of action at the signing of the retainer agreement and thus a “title to ‘property and rights to property’ “. Accordingly, the charging lien does not merely give an attorney an enforceable right against the property of another, it gives the attorney an equitable ownership interest in the client's cause of action. The client's property right in his own cause of action is only what remains after transfer to the attorney of the agreed-upon share upon the signing of the retainer agreement (*Matter of City of New York, supra*). Similarly, in *People v Keeffe* (50 NY2d 149, 156), we noted that with the signing of a retainer agreement that expressly assigns a portion of the proceeds of a cause of action to the attorney, the attorney “acquires ... a vested property interest which cannot subsequently be disturbed by the client or anyone claiming through or against the client.” Manifestly, then, an attorney's charging lien is something more than a mere claim against either property or proceeds; an attorney's charging lien “is a vested property right created by law and not a priority of payment” (*Matter of City of New York*, 5 NY2d 300, 306, *supra*).

LMWT Realty Corp. v Davis Agency Inc., 85 NY2d 462, 467-68 [1995]

The court properly found that a charging lien entered in the underlying action against plaintiff barred her from thereafter asserting a claim for legal malpractice (*see* Judiciary Law § 475; *Wallach v Unger & Stutman, LLP*, 48 AD3d 360 [2008]). While it is unclear to what award the charging lien attached, the charging lien order was

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never vacated or appealed. Instead, plaintiff entered into a stipulation with Parker to resolve the parties' fee dispute without prejudice to any other claims either party might assert against the other in other actions, e.g., Parker's *res judicata* defense here.

Plaintiff's causes of action for breach of contract and breach of fiduciary duty were properly dismissed as duplicative of the legal malpractice claim (*see e.g. Garten v Shearman & Sterling LLP*, 52 AD3d 207, 207-208 [2008]), since they arose out of the same facts as the legal malpractice action and did not involve any additional damages, separate and distinct from those generated by the alleged malpractice (*see Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435 [2011]).

Plaintiff's claim under Judiciary Law § 487 was also properly dismissed on *res judicata* grounds since it was predicated on the same conduct as that alleged in the legal malpractice claim (*see Zito v Fischbein Badillo Wagner Harding*, 80 AD3d 520, 521 [2011]).

Lusk v Weinstein, 85 AD3d 445, 445-46 [1st Dept 2011]

The attorney's lien attaches to the client's cause of action, and any recovery thereon, albeit the recovery is effected in an action other than the action in which the services were rendered (*Matter of Lourie*, 254 App. Div. 555; *Morgan v. Drewry, S. A. R. L.*, 285 App. Div. 1). This is especially so where the recovery is in an action which is a logical sequence of a prior action in connection with which the services were rendered (*Matter of Falk*, 128 Misc. 856).

Neimark v Martin, 7 AD2d 934, 935 [2d Dept 1959]

With but two exceptions the rendition of services by an attorney gives rise to nothing more than a contract claim, express or implied, by the attorney against his client. The two exceptions are the attorney's retaining and charging liens. The first entitles the attorney to retain all papers, securities or money belonging to the client which come into his possession in the course of his professional employment until the amount of his fee is fixed by agreement or by litigation and is paid (*Matter of Cooper [McCauley]*, 291 NY 255; *Matter of Heinsheimer*, 214 NY 361; *Matter of Desmond v Socha*, 38 AD2d 22, affd 31 NY2d 687; see 3 NY Jur 545, Attorney & Client, §§ 128-130). While it is possessory it has no bearing on this case because D'Isernia never had possession of the proceeds of the action and in any event never asserted such a lien. The second entitled the

attorney at common law to a lien upon the judgment only, but has been expanded by statute to give a lien upon the client's cause of action from the commencement of the action (or if a proper notice is served, prior to such commencement), which attaches to the judgment and the proceeds of the judgment and cannot be affected by settlement between the parties (Judiciary Law, §§ 475, 475-a; *Matter of City of New York [USA-Coblentz]*, 5 NY2d 300, 307, cert den 363 US 841; *Fischer-Hansen v Brooklyn Hgts. R. R. Co.*, 173 NY 492; *Goodrich v McDonald*, 112 NY 157; see 3 NY Jur 556, Attorney & Client, § 135).

People v Keeffe, 50 NY2d 149, 155-56 [1980]

When by the retainer agreement the client expressly assigns a portion of the cause of action proceeds to his attorney the attorney acquires at the time the agreement is signed a vested property interest which cannot subsequently be disturbed by the client or anyone claiming through or against the client (*Matter of City of New York [USA-Coblentz]*, *supra*, at pp 307-308). Absent express language of assignment, however, the attorney has no ownership or immediate right to possession (cf. *Matter of Herlihy*, 274 App Div 342) and must obtain enforcement of his lien by appropriate order of the court in which the action is pending (*Hovey v Elliott*, 118 NY 124; Judiciary Law, § 475 ["The court upon the petition of the client or attorney may determine and enforce the lien"]). Such an enforcement order may direct that the lien be satisfied out of money or property to which the lien attaches even though it is not in the possession or control of the attorney (*Matter of Cooper [McCauley]*, *supra*, at p 260; *Goodrich v McDonald*, *supra*, at pp 163-166).

People v Keeffe, 50 NY2d 149, 156 [1980]

An attorney's charging lien may be lost if he voluntarily withdraws or is discharged for misconduct, among other ways (*Matter of Dunn*, 205 NY 398, 401; *Fischer-Hansen v Brooklyn Hgts. R. R. Co.*, *supra*, at p 502; 3 NY Jur 587, 588, Attorney & Client, §§ 157, 158). Generally, however, if an attorney is discharged without cause he will be allowed a charging lien upon the proceeds of the lawsuit, the amount to be determined on a *quantum meruit* basis at the conclusion of the case (*Matter of Shaad*, 59 AD2d 1061; *Reubenbaum v B. & H. Express*, 6 AD2d 47), and his fees will be made a charge included within the fees to which the incoming

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attorney will be entitled (*Reubenbaum v B. & H. Express, supra*, at p 50).

People v Keeffe, 50 NY2d 149, 156-57 [1980]

The lien operates as security, and if the settlement entered into by the parties is in disregard of it and to the prejudice of plaintiff's attorney, by reason of the insolvency of his client, or for other sufficient cause, the court will interfere and protect its officer by vacating the satisfaction of judgment and permitting execution to issue for the enforcement of the judgment to the extent of the lien, or by following the proceeds in the hands of third parties, who received them before or after judgment impressed with the lien. (*Poole v. Belcha*, 131 N. Y. 200; *Bailey v. Murphy*, 136 N. Y. 50; *Lee v. V. O. Company*, 126 N. Y. at page 587.)

Peri v New York Cent. & H.R.R. Co., 152 NY 521, 527-28 [1897]

A client may discharge an attorney at any time, even without cause. In such event, the discharged attorney is entitled to be paid a fixed sum on a *quantum meruit* basis, despite the fact that his original retainer may have been on a contingent basis. (*Matter of Krooks*, 257 N. Y. 329.) The lien of the discharged attorney may not be fixed on a percentage basis over objection. (*Martucci v. Brooklyn Children's Aid Soc.*, 284 N. Y. 408; *Matter of Tillman*, 259 N. Y. 133; *Rich v. Railway Express Agency*, 248 App. Div. 594; *Matter of Korn* [Cutler], 255 App. Div. 870.) Where the plaintiff is only a nominal appellant, and the dispute is between the discharged attorney and the new attorney, the discharged attorney may waive his right to have the amount of his lien fixed on a lump sum basis and may elect to have his lien fixed on a contingent percentage basis. (*Friedman v. Gordon*, 260 App. Div. 1023, *affd.* 285 N. Y. 630; *Taylor v. Hentschel Bros.*, 273 App. Div. 972.) In such case, the proper practice is to compel the discharged attorney to elect, at the time the order for substitution is made, either to have his compensation then fixed at a specified amount or to have his fee fixed at a percentage basis at the conclusion of the case. (*Carroll v. Sertner*, 280 App. Div. 859; *Buckley v. Surface Transp. Corp.*, 277 App. Div. 224.)

Podbielski v Conrad, 286 AD 1040, 1041 [2d Dept 1955]

Analysis of the competing claims of the plaintiff and her former attorneys must begin with the basic principle that the plaintiff, like every client, had the right to discharge her former attorneys at any time with or without cause (*see, Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 457 [1989]; *Teichner v W&J Holsteins*, 64 NY2d 977, 979 [1985]). An attorney who has been discharged without cause, and who has satisfied the conditions precedent to earning a fee (*see, Bishop v Bishop*, 295 AD2d 382 [2d Dept 2002]), is entitled to recover the amount of his or her compensation (*see, Cohen v Cohen*, 183 AD2d 802, 803 [2d Dept 1992]) in three ways: by the assertion of a retaining lien, by the assertion of a charging lien or by commencing a plenary action (*see, Teichner v W&J Holsteins*, 64 NY2d at 979, *supra*; *Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218 [1st Dept 1997]).

Rotker v Rotker, 195 Misc 2d 768, 769 [Sup Ct 2003]

A retaining lien, which attaches automatically upon the commencement of the representation, is a security interest in any documents or other items of the client that are in the possession of the attorney and is extinguished when the possession terminates other than by court order (*see, Matter of Cooper*, 291 NY 255 [1943]; *Matter of Heinsheimer*, 214 NY 361 [1915]; *Kaplan v Reuss*, 113 AD2d 184, 186 [2d Dept 1985], *affd.* 68 NY2d 693 [1986]; *Rosen v Rosen*, 97 AD2d 837 [2d Dept 1983]). A charging lien is a security interest in the favorable result of the litigation (*see, Lebandy v Carnegie Trust Co.*, 222 NY 525 [1917]; *Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218 [1997], *supra*; *Kaplan v Reuss*, 113 AD2d at 186, *supra*). It attaches automatically upon the interposition of the claim, whether in a complaint or a responsive pleading (*see, Judiciary Law* § 475; *see also, Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34 [2002]; *LMWT Realty Corp. v Davis Agency*, 85 NY2d 462, 467 [1995]). Where either lien is asserted, the attorney is entitled to a prompt hearing to fix the amount of the lien (*see, Katsaros v Katsaros*, 152 AD2d 539 [2d Dept 1989]; *Rosen v Rosen*, 97 AD2d 837 [1983], *supra*; *see also, Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218 [1997], *supra*).

Rotker v Rotker, 195 Misc 2d 768, 770 [Sup Ct 2003]

The one exception to the attorney's entitlement to protect his or her fee by the assertion of a lien is the situation presented where the attorney is discharged for cause, i.e., as a result of attorney misconduct or the

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unjustifiable abandonment of the representation, in which case neither a retaining lien nor a charging lien may be asserted (*see, Klein v Eubank*, 87 NY2d 459, 464 [1996]; *Teichner v W&J Holsteins*, 64 NY2d at 979, *supra*; *see also, Campagnola v Mulholland Minion & Roe*, 76 NY2d 38, 44 [1990]; *Matter of Montgomery*, 272 NY 323, 326 [1936]; *Holmes v Evans*, 129 NY 140 [1891]; *Shalom Toy v Each & Every One of Members of N.Y. Prop. Ins. Underwriting Assn.*, 239 AD2d 196, 198 [1st Dept 1997]). Whether an attorney was discharged with or without cause must be determined by a timely hearing (*see, Teichner v W&J Holsteins*, 64 NY2d at 979, *supra*; *Matter of Clark [Vitiello]*, 261 AD2d 824 [4th Dept 1999]; *Marschke v Cross*, 82 AD2d 944 [3d Dept 1981]). If the discharge was for cause, the attorney may not recover his or her compensation (*see, Teichner v W&J Holsteins*, 64 NY2d at 979, *supra*). If it is determined that the discharge was without cause, and occurred before the completion of the attorney's services, the amount of compensation must be determined on a quantum meruit basis (*see, Teichner v W&J Holsteins*, 64 NY2d at 979, *supra*).

Rotker v Rotker, 195 Misc 2d 768, 770 [Sup Ct 2003]

In addition to the right to a speedy determination of his or her entitlement to a fee, the outgoing attorney who asserts a retaining lien is entitled to retain the client's file, and, in the absence of exigent circumstances, may not be compelled to deliver the file to the client or substitute counsel until an expedited hearing has been held to determine the amount of the fee owed (*see, Eighteen Assoc. v Nanjim Leasing Corp.*, 297 AD2d 358 [2d Dept 2002]; *Markard v Markard*, 206 AD2d 512 [2d Dept 1994]; *Fields v Casse*, 182 AD2d 738 [2d Dept 1992]; *Andreiev v Keller*, 168 AD2d 528 [2d Dept 1990]) and the attorney is paid the reasonable value of his or her services or adequate security is provided therefor (*see, Hom v Hom*, 210 AD2d 296, 298 [2d Dept 1994]; *Cohen v Cohen*, 183 AD2d 802 [1992], *supra*; *Matter of Science Dev. Corp. [Schonberger]*, 159 AD2d 343, 344 [1st Dept 1990]; *Corby v Citibank*, 143 AD2d 587, 588 [1st Dept 1988]; *Pileggi v Pileggi*, 127 AD2d 751 [2d Dept 1987]; *Steves v Serlin*, 125 AD2d 780, 781 [3d Dept 1986]; *Artim v Artim*, 109 AD2d 811, 812 [2d Dept 1985]; *Rosen v Rosen*, 97 AD2d at 837, *supra*; *Manfred & Sons v Mortillaro*, 69 AD2d 1019 [4th Dept 1979]). The burden is on the client who seeks the immediate release of the file to establish by affidavit the existence of exigent circumstances (*see, Pileggi v Pileggi*, 127 AD2d at 751, *supra*). Where outgoing

counsel sufficiently challenges the claim of exigent circumstances, a hearing must be held regarding the claim (*see, Cohen v Cohen*, 183 AD2d at 803-804, *supra*; *Pileggi v Pileggi*, 127 AD2d at 751, *supra*). Ultimately, whether the fee "shall be presently payable or secured by a lien on the cause of action rests in the sound discretion of the trial court" (*Hom v Hom*, 210 AD2d at 298, *supra*).

Rotker v Rotker, 195 Misc 2d 768, 771 [Sup Ct 2003]

Proskauer, however, should not be required to disclose documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law (*see, e.g., Restatement [Third] of Law Governing Lawyers*, op cit., § 58, comment c). Additionally, nonaccess would be permissible as to firm documents intended for internal law office review and use. "The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved" (id.). This might include, for example, documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation. Such documents presumably are unlikely to be of any significant usefulness to the client or to a successor attorney. Upon remittal, which will be required in the instant case, disputes concerning access to these and other categories of internal law firm papers will be resolved in the first instance by Supreme Court through a hearing which might necessitate in camera review. Moreover, Proskauer can apply to that court for protective remedies in the event of oppression or harassment in connection with demands for file inspection, delivery of original documents or reproduction.

We also conclude that, as a general proposition, unless a law firm has already been paid for assemblage and delivery of documents to the client, performing that function is properly chargeable to the client under customary fee schedules of the firm, or pursuant to the terms of any governing retainer agreement.

Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn L.L.P., 91 NY2d 30, 37-38 [1997]

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The “retaining lien” gives an attorney the right to keep, with certain exceptions, all of the papers, documents and other personal property of the client which have come into the lawyer’s possession in his or her professional capacity as long as those items are related to the subject representation (*Matter of Lerner v Seigel*, 22 AD2d 816). This type of lien is founded upon physical possession, and an attorney may forfeit its retaining lien by voluntarily giving away any of the items to which it may have attached (Annotation, *Attorney’s Retaining Lien: What Items of Client’s Property or Funds Are Not Subject to Lien*, 70 ALR 4th 827; *First Natl. Bank & Trust Co. v Hyman Novick Realty Corp.*, 72 AD2d 858, 859 [retaining lien cannot be satisfied by property not in the possession or control of the attorney]). Further, an attorney’s retaining lien generally lasts “until [the attorney’s] disbursements have been fully paid and, as a general rule, his fee has been determined” (*Cosgrove v Tops Mkts., Inc.*, 39 Fed Appx 661, 664).

Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York, 302 AD2d 183, 186-87 [1st Dept 2002]

“The [charging] lien is predicated on the idea that the attorney has by his skill and effort obtained the judgment, and hence ‘should have a lien thereon for his compensation, in analogy to the lien which a mechanic has upon any article which he manufactures.’ *Williams v. Ingersoll*, 89 N.Y. 508, 517 (1882)” (*Butler, Fitzgerald & Potter v Sequa Corp.*, 250 F3d 171, 177; *see also LMWT Realty Corp. v Davis Agency*, 85 NY2d 462, 467-468). Further, enforcement of a charging lien is founded upon the equitable notion that the proceeds of a settlement are ultimately “under the control of the court, and the parties within its jurisdiction, [and the court] will see that no injustice is done to its own officers” (*Rooney v Second Ave R.R. Co.*, 18 NY 368, 369; *see also Fischer-Hansen v Brooklyn Hgts. R.R. Co.*, 173 NY 492, 502; *Petition of Rosenman & Colin*, 850 F2d 57, 60). However, an attorney’s recovery under Judiciary Law § 475 is contingent upon his client reaching a favorable outcome, because the charging lien is a specific attachment to the funds which constitute the client’s recovery (*Butler v Sequa*, *supra* at 177). Moreover,

“the plaintiff must show that he comes within the statute by establishing the facts alleged in his complaint, and the action is open to any defense tending to show that no lien ever existed, or that if it once existed it was discharged with the consent of the plaintiff, or was

waived or forfeited by his misconduct or neglect” (*Fischer-Hansen*, *supra* at 502).

Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York, 302 AD2d 183, 187-88 [1st Dept 2002]

The Court of Appeals addressed the breadth of the Judiciary Law § 475 charging lien and its application in *Sargent v McLeod* (209 NY 360), a case where an attorney died prior to the settlement of the litigation. The attorney had been hired pursuant to a contingency fee arrangement, and had performed some work, but did not complete the litigation before his death. Rather than hiring another attorney, the client himself settled the underlying action. The Court of Appeals held that the estate of the attorney was entitled to the reasonable value of the services he had provided his former client from the defendant in the underlying case, pursuant to Judiciary Law § 475. The Court wrote that, “[t]he defendant having knowledge of the lien may not say that it disregarded it and parted with the entire fund. It was bound to retain and the law conclusively assumes it has retained sufficient [funds] to pay the sum which the plaintiff was entitled to receive” (*Sargent*, *supra* at 365). Thus, according to the *Sargent* Court, a defendant, having knowledge of an attorney’s lien, is required to retain sufficient funds to pay the lien, even where the defendant has a good faith belief that some event, in *Sargent* the attorney’s death, extinguished the charging lien (*id.*).

Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York, 302 AD2d 183, 188 [1st Dept 2002]

A third remedy is a plenary action in quantum meruit for the reasonable value of the services rendered (*Butler v Sequa*, *supra* at 179; *Smith v Boscov’s Dept. Store*, 192 AD2d 949; *Bruk v Albin*, 270 AD2d 441, 442; *Cushion v Nemes*, 266 AD2d 126, *lv denied* 94 NY2d 760). This cause of action accrues immediately upon an attorney’s discharge, and, unlike the “retaining lien” or the “charging lien,” it can be exercised by the attorney against all of the former client’s assets (*Butler v Gelmin*, *supra* at 219). In determining the value of the attorney’s services provided to the client prior to discharge, a number of variables are considered.

Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York, 302 AD2d 183, 188-89 [1st Dept 2002]

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A court is not empowered by section 475 of the New York Judiciary Law to enforce a charging lien upon any and all property owned by the attorney's client. See *Morey v. Schuster*, 159 A.D. 602, 609, 145 N.Y.S. 258 (1913), Aff'd, 217 N.Y. 639, 112 N.E. 1066 (1916); In re *Robinson*, 125 A.D. 424, 425, 109 N.Y.S. 827, Aff'd, 192 N.Y. 574, 85 N.E. 1115 (1908); In re *Rowland*, 55 A.D. 66, 67, 66 N.Y.S. 1121 (1900), Aff'd, 166 N.Y. 641, 60 N.E. 1120 (1901). The rationale of section 475 is that an attorney should have a lien for his litigation efforts that bring a fund into existence, In re *Heinsheimer*, 214 N.Y. 361, 365, 108 N.E. 636 (1915); In re *Sebring*, 238 A.D. 281, 286, 264 N.Y.S. 379 (1933); it is upon the fund thus created, either by judgment or settlement, that the lien is imposed. *Desmond v. Socha*, 38 A.D.2d 22, 24, 327 N.Y.S.2d 178 (1971), Aff'd, 31 N.Y.2d 687, 337 N.Y.S.2d 261, 289 N.E.2d 181 (1972). In the event of settlement, the attorney's lien attaches to the fund representing the cause of action extinguished by the settlement. *Fischer-Hansen v. Brooklyn Heights R. R.*, 173 N.Y. 492, 499-502, 66 N.E. 395 (1903); *Oishei v. Pennsylvania R. R.*, 117 A.D. 110, 112-13, 102 N.Y.S. 368 (1907), Aff'd, 191 N.Y. 544, 85 N.E. 1113 (1908)

In re Shirley Duke Assoc., 611 F.2d 15, 18 [2d Cir 1979]

An attorney representing a creditor in a bankruptcy proceeding has a judicially enforceable section 475 lien upon the fund allocated to the payment of his client's claim. See In re *Pathe News, Inc.*, 276 F.Supp. 670, 672 (S.D.N.Y.1967). However, the attorney's lien is upon that fund only, nothing else. In re *McCrary Stores Corp.*, supra, 19 F.Supp. at 694; See *Ekelman v. Marano*, 251 N.Y. 173, 176, 167 N.E. 211 (1929); *Robinson v. Rogers*, 237 N.Y. 467, 473-74, 143 N.E. 647 (1924); *Regan v. Marco M. Frisone, Inc.*, 54 A.D.2d 1125, 1126, 388 N.Y.S.2d 798 (1976). In the instant case, appellants seek more; they ask the bankruptcy court to enforce a lien upon the proceeds of the loan obtained by Gordon and Sarubin, a fund that was in no way the fruits of appellants' labor. In short, appellants ask the bankruptcy court to enforce a lien that does not exist.

In re Shirley Duke Assoc., 611 F.2d 15, 18 [2d Cir 1979]

A charging lien, codified in Judiciary Law § 475, is based upon the equitable doctrine that an attorney should be paid out of the proceeds of the judgment procured by him and the lien exists independent of possession of the file (see, *Matter of Desmond v Socha*, 38 AD2d 22, 24, aff'd 31 NY2d 687; *White v White*, supra). A charging lien does not

attach to an award of alimony and maintenance (see, *Rosen v Rosen*, supra; *Turner v Woolworth*, 221 NY 425). Moreover, where the attorney's services do not create any proceeds, but consist solely of defending a title or interest already held by the client, there is no lien on that title or interest (see, *Matter of Desmond v Socha*, supra., at 24). Here, the equitable distribution settlement merely permitted the plaintiff to retain her one-half interest in the condominium that she held as a tenant by the entirety. Although the nature of the property was converted from realty into dollars, her interest remained the same. Thus, no equitable distribution fund to which a charging lien can attach was created by the efforts of the discharged attorney (see, *Matter of Desmond v Socha*, supra; *Matter of Golden v Whittemore*, 125 AD2d 942). While Judiciary Law § 475 does not preclude the enforcement of such a lien on an award of counsel fees to either the client or to subsequent counsel in the matrimonial action, here, there would be no such award as evidenced by the absence of such a provision in the proposed judgment of divorce. Accordingly, the court properly declined to impose a charging lien on any proceeds to be received by the plaintiff upon resolution of the action.

Theroux v Theroux, 145 AD2d 625, 627-28 [2d Dept 1988]

Larry Shaw never denied receipt of Tunick's bills and never protested the amounts, and therefore Tunick set forth an account stated in the amount of \$557,505.77 (see *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [2004]) and is entitled to a charging lien in that amount plus contractual interest. Where there is an account stated, it is unnecessary to separately establish the reasonableness of the fees (see *Cohen Tauber Spievak & Wagner, LLP v Alnwick*, 33 AD3d 562 [2006], lv dismissed 8 NY3d 840 [2007]).

Tunick v Shaw, 45 AD3d 145, 149 [1st Dept 2007]

A charging lien grants an attorney an interest in any judgment or settlement in favor of the client in the action in which the attorney previously represented the client. In contrast, a retaining lien permits the attorney to retain all of the client's papers and files until all outstanding fees are paid (*Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218, 219 [1997]). The award of a charging lien does not preclude an attorney from asserting a retaining lien as these remedies "are not exclusive but cumulative" (*id.* at 219).

Wankel v Spodek, 1 AD3d 260, 261 [1st Dept 2003]

Sample Retainer Agreement

December 1, 2014

John Doe, Client
123 Main Street
Brooklyn NY 11201

Re: Doe v. Roe

Dear Mr. Doe,

You have requested me to represent you regarding the above matter. I shall be guided by the following understandings and agreements:

1. In connection with the services to be performed, it is difficult and impossible at this time to specify the exact nature, extent and difficulty of the contemplated services and attorney's time involved. In addition to temporary or pretrial hearings, there may be the necessity of a trial on the merits. I shall exert effort at all times to represent your interests and rights and, if possible, to seek an amicable resolution of your claims.
2. In connection with the services rendered, or to be rendered, it is understood and agreed that said services shall be compensated, at a minimum of ten-minute increments, at the rate of: **(a) \$400.00 per hour for Richard A. Klass; (b) \$300.00 per hour for associate; and (c) \$100.00 per hour for paralegal.**
3. Hourly fees may be charged for the following services: all legal research; drafting of pleadings and correspondence; attending meetings and conferences; conducting telephone conversations with opposing counsel, parties or the court; preparing for, and appearing at, depositions or in court; and other tasks necessary to handle your case.
4. In consideration of the services performed, or to be performed, you are to pay to me at this time the sum of **\$10,000.00** as an initial retainer, which shall be credited as a payment on account of services rendered, or to be rendered in your case. **This initial retainer amount shall also serve as this office's minimum fee for the legal services to be rendered by this office.**

5. In addition to the above legal fees, you are responsible to pay for all necessary and reasonable costs and expenses incurred, or paid out in the performance of, my services. These costs and expenses may include by specification: filing fees, expert witness fees, subpoena costs, deposition costs, fees of process servers, toll charges, local travel expenses, duplication expenses and any other necessary expenses. If I advance any costs or expenses on your behalf for your case, you shall forthwith reimburse me upon my furnishing to you information as to the amount, unless said amount can be charged against any available retainer amount remaining in your account.

6. Billings and accountings for my services and costs will be submitted monthly (or at other regular intervals). Statements shall be payable upon receipt unless otherwise agreed upon.

7. This retainer agreement, and the services to be rendered hereunder, do not include the following services, if applicable: (a) post-judgment enforcement; (b) appeals of Orders/Judgments; or (c) representation in any other court or case, other than as specified above. You are also specifically advised herein that you are under an obligation, where applicable, to ascertain whether you have any type of insurance policy which may partly or entirely cover the subject case, and that you should review any relevant insurance policies as quickly as possible; this firm will not undertake the responsibility to ascertain the nature and extent of any insurance coverage in this matter.

8. In the event of a dispute, you have the right to receive notice of your right to arbitrate any fee dispute in accordance with Part 137 of the Rules of the Chief Administrator.

In representing you in this matter I cannot and do not warrant or predict results or final developments. Be assured that it is my desire to afford you conscientious, faithful and diligent service, seeking at all times to achieve solutions that are just and reasonable for you. It is extremely important that you keep in mind that a matter which is initially perceived as being uncomplicated or uncontested can become hotly and fiercely contested, and require much more time and expense than initially anticipated.

If the foregoing meets with your approval, kindly signify your consent and approval by signing your name in the space provided below, and return the original of this letter agreement to me along with your retainer check.

Very truly yours,

Richard A. Klass, Esq.

Agreed to:

Attachment A

ELECTRONICALLY STORED INFORMATION:

Please be advised that electronically stored information may be an important and irreplaceable source of discovery and/or evidence in the defense or prosecution of the pending matter. Generally, a lawsuit requires preservation of all information from one's computer systems, removable electronic media and other locations relating to the particular subject matter. This includes, but is not limited to, e-mail and other electronic communication, word processing documents, spreadsheets, databases, calendars, telephone logs, contact manager information, Internet usage files and network access information.

You should preserve the following platforms in your possession or control of a third party (such as an employee or outside vendor under contract): databases, networks, computer systems including legacy systems (hardware and software), servers, archives, backup or disaster recovery systems, tapes, discs, drives, cartridges and other storage media, laptops, personal computers, internet data, personal digital assistants, handheld wireless devices, mobile telephones, paging devices and audio systems (including voicemail).

Failure to do so could result in extreme penalties against you.

PRESERVATION OBLIGATIONS:

The laws and rules prohibiting destruction of evidence apply to electronically stored information in the same manner as they apply to other evidence. Due to its format, electronic information is easily deleted, modified or corrupted. Accordingly, you must take every reasonable step to preserve this information until the final resolution of this matter.

This includes, but is not limited to, an obligation to:

- Discontinue all data destruction and backup tape recycling policies;
- Preserve and not dispose of relevant hardware unless an exact replica of the file (a mirror image) is made;
- Preserve and not destroy passwords, decryption procedures (and accompany software), network access codes, ID names, manuals, tutorials, written instructions and decompression or reconstruction software;
- Maintain all other pertinent information and tools necessary to access, view and/or reconstruct all requested or potentially relevant electronic data.

Attachment B

NOTICE REGARDING SOCIAL MEDIA WEBSITES:

I am writing to give you some advice regarding your use of social media as you progress through the legal matter you have placed in our hands. As I am sure you are aware, social networking in the form of Facebook, LinkedIn, Twitter, MySpace, blogs and the like has become an almost ever-present part of our lives. Often, we post a thought, feeling or photo without a second thought. In the context of a legal issue though, these actions can come back to cause you headache and hurt your case. **I must advise you to use extreme caution when making any sort of post, update or upload to any social networking outlet.**

It is becoming a common practice for defense attorneys to request copies of any and all posts plaintiffs have made online. While we can object to these requests based on their relevancy, the courts have nonetheless been agreeing with defendant's requests and allowing them access. In order to protect yourself, I offer you the following suggestions and strongly recommend you follow them:

- Do not mention anything about your case online.
- If you absolutely must post something about your case online, do not enter anything detrimental to your case; for instance, don't post anything about how good you feel—or how you are pain free; or if you are injured, don't post photos of you on a rock-climbing adventure or winning a triathlon. (While these seem like extreme examples, you would be surprised at the ways clients severely damage their cases by not thinking before posting online.)
- You ***can't*** delete it! Once you post something to a social networking site, it is there forever. If you go into your account and delete anything, it still exists, as the social networking site's administrator keeps archives of all the material ever on their site. The information or photos still exist, and defendants can ask for—and usually get—them.
- Review your “privacy settings” to make sure they are set at the tightest restraint possible. You can change them back once your case is over—but while your matter is pending, it is in your best interest that your “friends” not be aware of your every move.

Please keep in mind that these warnings are not to make your life more difficult, but rather they are for your protection, as well as to help make your case as solid as possible. Being cautious and making smart choices will help your case in the long run.

Please feel free to call our office if you have any questions at all or need additional information. Also, ***I ask that you contact us immediately if you feel you have any sort of social networking post that might be detrimental to your case*** so we may assess how to deal with it, and what action to take.

Very truly yours,

Richard A. Klass, Esq.

Statement of Client's Rights

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and nonlawyer personnel in your lawyer's office.
2. You are entitled to have your attorney handle your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to discharge your attorney and terminate the attorney-client relationship at any time. (Court approval may be required in some matters, and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge.)
3. You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.
4. You are entitled to be charged reasonable fees and expenses and to have your lawyer explain before or within a reasonable time after commencement of the representation how the fees and expenses will be computed and the manner and frequency of billing. You are entitled to request and receive a written itemized bill from your attorney at reasonable intervals. You may refuse to enter into any arrangement for fees and expenses that you find unsatisfactory. In the event of a fee dispute, you may have the right to seek arbitration; your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.
5. You are entitled to have your questions and concerns addressed promptly and to receive a prompt reply to your letters, telephone calls, e-mails, faxes and other communications.
6. You are entitled to be kept reasonably informed as to the status of your matter and are entitled to have your attorney promptly comply with your reasonable requests for information, including your requests for copies of papers relevant to the matter. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter and make informed decisions regarding the representation.
7. You are entitled to have your legitimate objectives respected by your attorney. In particular, the decision of whether to settle your matter is yours and not your lawyer's. (Court approval of a settlement is required in some matters.)
8. You have the right to privacy in your communications with your lawyer and to have your confidential information preserved by your lawyer to the extent required by law.
9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the New York Rules of Professional Conduct.
10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability.

Attorney-Client Relationship



THE LEGAL PROFESSION

Client / Attorney Relationship

The rules that lawyers are bound to follow when representing their clients, and information to help clients if they are having difficulties with their lawyer.

[Client's Rights](#)

[Client's Responsibilities](#)

[Letters of Engagement Rules](#)

[Attorney Grievance Committee](#)

[Attorney-Client Fee Dispute Resolution Program](#)

[Attorney Rules of Professional Conduct \(Part 1200\)](#)

(as amended, May 1, 2013)

Lawyers' Fund for Client Protection:

[Site](#) and [Video](#) (Windows Media Player)



Web page updated: June 6, 2013

Letters of Engagement Rules

NYCOURTS.GOV

THE LEGAL PROFESSION

Letters of Engagement Rules

Joint Order Of The Appellate Divisions

The Appellate Divisions of the Supreme Court, pursuant to the authority invested in them, do hereby add, effective March 4, 2002, Part 1215 to Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York, entitled "Written Letter of Engagement," as follows:

Part 1215 Written Letter of Engagement

§1215.1 Requirements

- a. Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term "client" shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.
- b. The letter of engagement shall address the following matters:
 1. Explanation of the scope of the legal services to be provided;
 2. Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.
- c. Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

§1215.2 Exceptions

This section shall not apply to:

1. representation of a client where the fee to be charged is expected to be less than \$3000,
2. representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client, or
3. representation in domestic relations matters subject to Part 1400 of the Joint Rules of the Appellate Division (22 NYCRR), or
4. representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

As amended April 3, 2002

Attorney-Client Fee Dispute Resolution Program, Overview



Attorney-Client Fee Dispute Resolution Program

Overview

22 NYCRR § 137

[Fee Dispute Brochure](#) 

This website is designed to educate the public about the FDRP. This site contains information to assist clients and attorneys in making decisions about the program.

The New York State Court System has established a Statewide Fee Dispute Resolution Program (FDRP) to resolve attorney-client disputes over legal fees through arbitration (and in some cases mediation).

In general, a lawyer may not sue a client in court over a fee dispute unless he or she first provided the client with notice of the right to utilize the FDRP. Once the client has received this notice, he or she has 30 days to decide whether to use the FDRP. If the client doesn't choose to participate in the FDRP within 30 days, the lawyer is free to pursue the matter in court.

Fee dispute resolution services are provided by local programs throughout New York. To find out which local program has jurisdiction over your fee dispute first identify the county in which the majority of the legal services in the case were performed. This is usually (but not always) the county where the lawyer's office is located. Then click on the [local program's page](#) and download the local program's rules and forms there.

Please note that the FDRP's jurisdiction is limited to resolving attorney-client disputes over legal fees.

The FDRP cannot address claims of lawyer misconduct. In New York, the conduct of attorneys is governed by the Appellate Divisions of State Supreme Court and the Disciplinary and Grievance Committees appointed by the respective Appellate Division.

[Get more information on the Grievance Committees.](#)

The FDRP cannot address claims of lawyer malpractice. If you are a client and you believe that your attorney committed malpractice in your case, you should not utilize the FDRP because it is possible that an arbitration decision against you with regard to the fee dispute could adversely affect your ability to pursue malpractice in court at a later date.

Web page updated: September 17, 2014

The New York State Attorney-Client Fee Dispute Resolution Program (FDRP)

**THE NEW YORK STATE ATTORNEY-CLIENT FEE
DISPUTE RESOLUTION PROGRAM (FDRP)**



Published as a public service by the Board of Governors
New York State Attorney-Client Fee Dispute Resolution Program
C/O UCS Office of ADR & CI Programs

25 BEAVER STREET, 8TH FLOOR • NEW YORK, NY 10004 • (877) FEES 137

VISIT US AT WWW.NYCOURTS.GOV/FEEDISPUTE FOR FEE ARBITRATION FORMS OR ADDITIONAL INFORMATION.

INTRODUCTION

The New York State court system has established a Statewide Fee Dispute Resolution Program (FDRP) to resolve attorney-client disputes over legal fees through arbitration (and in some cases mediation). The FDRP is established by Part 137 of the Rules of the Chief Administrator of the Courts, which is reprinted in this booklet.

This booklet has been designed to educate you about the FDRP and to help you make informed choices about whether the FDRP is right for you. Use this booklet if:

- You are trying to decide whether to use the FDRP process to resolve a fee dispute with your attorney, either because your attorney has given you notice of your right to use the FDRP or because you have learned about the FDRP on your own, or
- You are trying to decide whether you and your

attorney should agree ahead of time in writing that any fee disputes that may arise between you will be resolved through the FDRP instead of the courts. (If this situation applies to you, it is very important that you read page 3 and the local program brochure located inside of this booklet.)

Please note that the FDRP's jurisdiction is limited to resolving attorney-client disputes over legal fees.

- The FDRP cannot address claims of lawyer misconduct.¹
- The FDRP cannot address claims of lawyer malpractice. If you believe that your attorney committed malpractice in your case, you should not utilize the FDRP because it is possible that an arbitration decision against you with regard to the fee dispute could adversely affect your ability to pursue malpractice in court at a later date.

WHAT IS FEE ARBITRATION AND THE FDRP?

Lawyers in New York State are generally required to provide their clients with retainer agreements or letters of engagement which discuss the fees and expenses to be charged. At the initial conference with your lawyer, you should request a retainer agreement or letter of engagement and ask any questions you may have regarding the fee to be charged.

Despite the letter of engagement and discussions about fees, sometimes disputes arise. In general, your lawyer may not sue you in court over a fee dispute unless he or she first provided you with notice of your right to utilize the FDRP. Once you have received this notice you have 30 days to decide whether to use the FDRP. If you don't choose to participate in the FDRP within 30 days, your lawyer is free to pursue the matter in court.

¹ In New York State, there are special attorney disciplinary or grievance committees charged with investigating complaints of professional misconduct. They operate under the authority of the Appellate Divisions of the Supreme Court: First Judicial Department, Manhattan (212) 401-0800; Second Judicial Department, Brooklyn (718) 923-6300; Hauppauge (631) 231-3775; White Plains (914) 949-4540; Third Judicial Department, Albany (518) 474-8816; Fourth Judicial Department, Syracuse (315) 471-1835; Rochester (585) 530-3180; Buffalo (716) 845-3630.

Your Court Street Lawyer's Quick Reference Guide Attorney's Liens and Legal Fee Enforcement

WHAT IS FEE ARBITRATION AND THE FDRP? (CONT.)

The FDRP is made up of a network of State-approved and monitored local programs that resolve attorney-client fee disputes outside of court through arbitration. Arbitration is a hearing conducted by one or more neutral persons who have special training and experience. One arbitrator or a panel of three arbitrators (at least one of whom must be a nonlawyer) listen to the arguments on both sides and decide the outcome of the dispute. Fee arbitration is fair, inexpensive and usually faster than going to court.

In addition to arbitration, some local programs may offer mediation. This is a process by which both sides meet with the assistance of a trained mediator to clarify issues and explore options for a mutually acceptable resolution. Mediation provides the opportunity for you and your attorney to discuss your concerns and reach a satisfactory result without going to court. Unlike an arbitrator, the mediator does not issue a decision. Participation in mediation is voluntary for your attorney and you, and it does not waive your right to arbitration. If you are interested in resolving your dispute through mediation, you may indicate this on the Request for Arbitration form. However, not every local program offers mediation.

If you are interested in using the FDRP process to resolve your dispute, or just want to learn more about the FDRP, please visit the FDRP web site at WWW.NYCOURTS.GOV/FEEDISPUTE.

WHEN DOES THE FDRP APPLY?

- Your attorney practices in New York and your case involved a civil matter (personal injury and criminal cases are not covered)
- The amount in dispute is between \$1,000 and \$50,000 (fee disputes can involve fees that you have already paid your attorney and for which you seek a refund, or fees that your attorney claims are owed by you)
- The legal representation began on or after January 1, 2002
- Your attorney has rendered services to you within two years prior to the filing of the request for fee arbitration

ALTERNATIVES TO FEE ARBITRATION

Fee arbitration provides clients and attorneys with an out-of-court option for resolving fee disputes, but that doesn't mean it's necessary or a good idea in your case. If you have a problem with your lawyer's bill, you should say so. Sometimes much unpleasantness can be prevented if you and your lawyer simply talk things over. Ask your lawyer to explain why the bill is higher than you expected. You may find out that your case was more complicated than you expected and took more time than you realized. Or your lawyer may agree that it is appropriate

to adjust the bill. If discussion does not solve the problem, you can take the dispute to arbitration under the FDRP or choose to resolve it in court.

WHO ADMINISTERS THE PROGRAM AND HOW MUCH DOES IT COST?

The FDRP's Board of Governors has approved a number of local programs which administer the FDRP on a region by region basis. These local programs are run by bar associations or by the court system's regional Administrative Judges. All local programs have been carefully reviewed to ensure that they will resolve fee disputes in a fair, impartial and efficient manner. To find out which local program has jurisdiction over your fee dispute you need to identify the county in which the majority of the legal services in your case were performed. This is usually (but not always) the county where your lawyer's office is located. If you have a question about which local program will handle your dispute, please visit the FDRP's web site, WWW.NYCOURTS.GOV/FEEDISPUTE for an updated list of local programs.

The cost of utilizing the FDRP varies from program to program. You can find out about local program fees by checking the local programs section of the FDRP web site. Local programs charge about the same or less than it costs to file a case in court.

HOW DOES THE FEE ARBITRATION PROCESS START?

There are three ways in which you can enter the FDRP. In all three situations, the filing of a Request for Fee Arbitration form, available at WWW.NYCOURTS.GOV/FEEDISPUTE, officially starts the process.

A. YOUR LAWYER HAS MAILED YOU A NOTICE OF CLIENT'S RIGHT TO ARBITRATE.

A dispute over fees exists between you and your lawyer and he or she has provided you with a form entitled "Notice of Client's Right to Arbitrate" (UCS 137-1). If you are reading this booklet, chances are that you have received this form. You now have 30 days to decide whether to utilize the FDRP by filing a form entitled "Client Request for Fee Arbitration" (UCS 137-4a) with the appropriate local program. (See page 4). Once you file the Client Request for Fee Arbitration your attorney will be required to participate in the FDRP unless your dispute is one that the FDRP is not designed to handle. (See page 4 to find out how the rest of the process works.)

If you do not file the Request for Fee Arbitration within 30 days, you lose your right to utilize the FDRP and your lawyer will be free to take legal action.

(CONTINUED ON BACK COVER)

Your Court Street Lawyer's Quick Reference Guide

Attorney's Liens and Legal Fee Enforcement

HOW DOES THE FEE ARBITRATION PROCESS START?

(CONTINUED FROM INSIDE)

B. YOU HAVE NOT RECEIVED THE NOTICE OF CLIENT'S RIGHT TO ARBITRATE.

You have not received the Notice of Client's Right to Arbitrate from your lawyer but decided to look into the FDRP on your own. You may have obtained this booklet directly from the FDRP web site, by contacting a local program directly or by asking your attorney to provide you with information about the FDRP. If you believe you have a fee dispute you should read this booklet carefully. If you then want to use the FDRP, complete the Client Request for Arbitration form (UCS 137-4a) and file it with the appropriate local program. Once you file this form, your attorney will be required to participate in the FDRP unless your dispute is one the FDRP is not designed to handle. (See page 4 to find out how the rest of the process works.)

C. YOU AND YOUR LAWYER HAVE AGREED AHEAD OF TIME TO USE THE FDRP.

You and your attorney previously agreed in writing to resolve fee disputes through the FDRP rather than in court. You probably agreed to this option when your attorney first began representing you and after you had the opportunity to read about the FDRP and how it works. If you believe that you have a fee dispute, you may simply file the Client Request for Arbitration form (UCS 137 - 4a) with the local program, together with a copy of the agreement to arbitrate. Filing the request form with the local program will start the process and your attorney will be required to participate. (See page 4 to find out how the rest of the process works.)

Alternatively, your attorney can start the process by filing a Request for Arbitration with the appropriate local program. If your attorney starts the process, you will be required to participate under the terms of your agreement.

See page 4 for more information on how you and your attorney can agree to use the FDRP ahead of time.

I FILED A REQUEST FOR FEE ARBITRATION. WHAT HAPPENS NOW?

The process officially starts once you file the Client Request for Arbitration form with the local program (and pay the administrative fee, if there is one). Upon receiving your Request for Arbitration, the local program administrator will forward it to the attorney, who then has 15 days to complete an Attorney Response form (UCS 137-5a) and return it to the local program, with a copy to you.

Unless the fee dispute is rejected by the local program for jurisdictional reasons, you will then be given 15 days advance notice of the time and place of the arbitration hearing and the identity of the arbitrator(s).

Prior to the arbitration hearing someone from the local program may contact you in an effort to settle the dispute. In addition, some local programs may offer mediation services and you may be asked whether you wish to participate in mediation. Mediation is voluntary for both sides. If one side does not wish to mediate, or the attempt at mediation proves unsuccessful, the next step in the process is the arbitration hearing.

WHAT IS THE PROCEDURE AT THE ARBITRATION HEARING?

Both parties have the right to present evidence and call witnesses. The burden of proof is on the attorney to prove the reasonableness of the disputed fee by a preponderance of the evidence. The attorney must present documentation of the work performed and the billing history. If witnesses are called, both parties have the right to question the witnesses at the hearing. Arbitration is less formal than court, so you do not necessarily need a lawyer to help you prepare for and/or represent you at the hearing. However, you may, of course, appear with an attorney at your own expense.

THE ARBITRATION AWARD

Your arbitration hearing will result in a decision (arbitration award) issued by the arbitrator(s) within 30 days of the hearing. The arbitration award will be final and binding on both you and your attorney, unless either of you seeks a trial de novo within 30 days.

REJECTION OF THE AWARD (TRIAL DE NOVO)

A trial de novo means that either you or your attorney can reject the arbitration award by filing a court action within 30 days after the award has been mailed. The arbitration award is not used as evidence in the court case. Since a trial de novo obviously will add significantly to the time and expense of resolving your fee dispute, you and your attorney may wish to waive this right ahead of time in writing. However, keep in mind that if you do so and agree to final and binding arbitration, the arbitrators' decision can be appealed only on very limited grounds.

SHOULD I AGREE AHEAD OF TIME WITH MY ATTORNEY TO RESOLVE FEE DISPUTES THROUGH THE FDRP RATHER THAN THE COURTS?

It's up to you. Your attorney cannot force you to enter into such an agreement. The FDRP offers a quick, inexpensive and informal means of resolving fee disputes. Litigation in the courts can take longer and cost more. Unlike litigation in the courts, arbitration is confidential and closed to the public. The speed, informality and less confrontational nature of arbitration allows the parties to quickly get on with their lives.

On the other hand, you may prefer the formality of a lawsuit, and to have your dispute resolved by a judge or jury rather than by arbitrators. In a lawsuit, you have the right to conduct depositions and engage in pretrial fact finding, which are generally not permitted in arbitration, and to appeal a judgment that you think is contrary to law.

So think it over carefully. If you want to preserve your right to go to court to resolve disputes over fees, then you may wish to avoid binding and final arbitration and should not waive your right to a trial de novo. On the other hand, if you are interested in achieving closure quickly and inexpensively and want to avoid litigation in the courts, then you may wish to choose final and binding arbitration by waiving your right to a trial de novo.

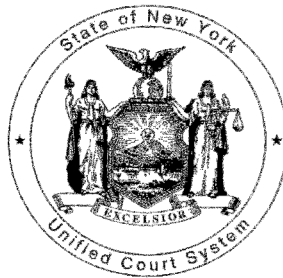
To enter into a valid agreement ahead of time, the agreement must be in writing and specify that you read the written materials describing the rules and procedures of the FDRP and the appropriate local program. In addition, if you are agreeing to final and binding arbitration, the written agreement must specify that you understand that you are waiving your right to a trial de novo.

New York State Unified Court System Part 1200 Rules of Professional Conduct

NEW YORK STATE UNIFIED COURT SYSTEM

PART 1200

RULES OF PROFESSIONAL CONDUCT



Dated: May 1, 2013

These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at www.dos.ny.gov/info/nycrr.html (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

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PART 1200 - RULES OF PROFESSIONAL CONDUCT

RULE 1.0.

Terminology

(a) **“Advertisement”** means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

(b) **“Belief” or “believes”** denotes that the person involved actually believes the fact in question to be true. A person’s belief may be inferred from circumstances.

(c) **“Computer-accessed communication”** means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop- under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

(d) **“Confidential information”** is defined in Rule 1.6.

(e) **“Confirmed in writing”** denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person’s oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) **“Differing interests”** include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(g) **“Domestic relations matter”** denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(h) **“Firm” or “law firm”** includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

(i) **“Fraud” or “fraudulent”** denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

(j) **“Informed consent”** denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

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(k) **“Knowingly,” “known,” “know,” or “knows”** denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(l) **“Matter”** includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

(m) **“Partner”** denotes a member of a partnership, a shareholder in a law firm organized as a professional legal corporation or a member of an association authorized to practice law.

(n) **“Person”** includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(o) **“Professional legal corporation”** means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(p) **“Qualified legal assistance organization”** means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(q) **“Reasonable” or “reasonably,”** when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, “reasonable lawyer” denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

(r) **“Reasonable belief” or “reasonably believes,”** when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(s) **“Reasonably should know,”** when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(t) **“Screened” or “screening”** denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.

(u) **“Sexual relations”** denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(v) **“State”** includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(w) **“Tribunal”** denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party’s interests in a particular matter.

(x) **“Writing” or “written”** denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and email. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 1.1.

Competence

- (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
- (c) lawyer shall not intentionally:
- (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
 - (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

RULE 1.2.

Scope of Representation and Allocation of Authority Between Client and Lawyer

- (a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.
- (e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.
- (f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.
- (g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

RULE 1.3.

Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not neglect a legal matter entrusted to the lawyer.
- (c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

RULE 1.4.

Communication

- (a) A lawyer shall:
 - (1) promptly inform the client of:
 - (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;
 - (ii) any information required by court rule or other law to be communicated to a client; and
 - (iii) material developments in the matter including settlement or plea offers.
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with a client's reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.5.

Fees and Division of Fees

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

- (1) a contingent fee for representing a defendant in a criminal matter;
- (2) a fee prohibited by law or rule of court;

- (3) fee based on fraudulent billing;
- (4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or
- (5) any fee in a domestic relations matter if:
 - (i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;
 - (ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or
 - (iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

- (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
- (3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

RULE 1.6.

Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

- (1) the client gives informed consent, as defined in Rule 1.0(j);
- (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
- (3) the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime;
- (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
- (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s firm or the law firm;
- (5) (i) to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct; or
(ii) to establish or collect a fee; or
- (6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer’s employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

RULE 1.7.

Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

- (1) the representation will involve the lawyer in representing differing interests;
or
- (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

RULE 1.8.

Current Clients: Specific Conflict of Interest Rules

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

- (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not:

- (1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or
- (2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:

- (1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or
- (2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- (2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and
- (3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and
- (3) the client's confidential information is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in

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a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or
- (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

(j) (1) A lawyer shall not:

- (i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;
 - (ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm; or
 - (iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.
- (2) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.

(k) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

RULE 1.9.

Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
- (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

RULE 1.10.

Imputation of Conflicts of Interest

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

- (1) the firm agrees to represent a new client;
- (2) the firm agrees to represent an existing client in a new matter;

- (3) the firm hires or associates with another lawyer; or
- (4) an additional party is named or appears in a pending matter.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

(h) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

RULE 1.11.

Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:

- (1) shall comply with Rule 1.9(c); and
- (2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the firm acts promptly and reasonably to:
 - (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
 - (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
 - (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(e) As used in this Rule, the term “matter” as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions.

(f) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

RULE 1.12.

Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals

(a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

- (1) an arbitrator, mediator or other third-party neutral; or
- (2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the firm acts promptly and reasonably to:
 - (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
 - (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
 - (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and
 - (iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and
- (2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

RULE 1.13.

Organization As Client

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

RULE 1.14.

Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have

the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

- (1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.
- (2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

- (3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.
- (4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

- (1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;
- (2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
- (3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and
- (4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

- (1) A lawyer shall maintain for seven years after the events that they record:
 - (i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;
 - (ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;
 - (iii) copies of all retainer and compensation agreements with clients;
 - (iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

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- (v) copies of all bills rendered to clients;
 - (vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;
 - (vii) copies of all retainer and closing statements filed with the Office of Court Administration; and
 - (viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.
- (2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.
- (3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

- (1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.
- (2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer

of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

- (3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

RULE 1.16.

Declining or Terminating Representation

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

- (1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or
- (2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

- (1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;
 - (3) the lawyer is discharged; or
 - (4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.
- (c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (4) the client insists upon taking action with which the lawyer has a fundamental disagreement;
 - (5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;
 - (6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
 - (7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;
 - (8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;
 - (9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
 - (10) the client knowingly and freely assents to termination of the employment;
 - (11) withdrawal is permitted under Rule 1.13(c) or other law;
 - (12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or
 - (13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

RULE 1.17.

Sale of Law Practice

(a) A lawyer retiring from a private practice of law; a law firm, one or more members of which are retiring from the private practice of law with the firm; or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of these Rules. Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.

(b) Confidential information.

- (1) With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as confidential information under Rule 1.6.
- (2) Notwithstanding Rule 1.6, the seller may provide the prospective buyer with information as to individual clients:
 - (i) concerning the identity of the client, except as provided in paragraph (b)(6);
 - (ii) concerning the status and general nature of the matter;
 - (iii) available in public court files; and
 - (iv) concerning the financial terms of the client-lawyer relationship and the payment status of the client's account.
- (3) Prior to making any disclosure of confidential information that may be permitted under paragraph (b)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to paragraph (b)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information,

or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless the seller shall have obtained the consent of the client in accordance with Rule 1.6(a)(1).

- (4) Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.
- (5) Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.
- (6) If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.

(c) Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:

- (1) the client's right to retain other counsel or to take possession of the file;
- (2) the fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;
- (3) the fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;
- (4) proposed fee increases, if any, permitted under paragraph (e); and
- (5) the identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in New York State, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.

(d) When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

(e) The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

RULE 1.18.

Duties to Prospective Clients

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client."

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

- (1) both the affected client and the prospective client have given informed consent, confirmed in writing; or
 - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
 - (ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;
 - (iii) the disqualified lawyer is apportioned no part of the fee therefrom; and
 - (iv) written notice is promptly given to the prospective client; and
 - (3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.
- (e) A person who:
- (1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

- (2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client with the meaning of paragraph (a).
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RULE 2.1.

Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

RULE 2.2.

[Reserved]

RULE 2.3.

Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Unless disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is protected by Rule 1.6.

RULE 2.4.

Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

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RULE 3.1.

Non-Meritorious Claims and Contentions

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

- (1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;
- (2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or
- (3) the lawyer knowingly asserts material factual statements that are false.

RULE 3.2.

Delay of Litigation

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

RULE 3.3.

Conduct Before a Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the

tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

- (1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;
- (2) engage in undignified or discourteous conduct;
- (3) intentionally or habitually violate any established rule of procedure or of evidence; or
- (4) engage in conduct intended to disrupt the tribunal.

RULE 3.4.

Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a)
 - (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;
 - (2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;
 - (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;
 - (4) knowingly use perjured testimony or false evidence;
 - (5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or
 - (6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

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(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

- (1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or
- (2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

- (1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;
- (2) assert personal knowledge of facts in issue except when testifying as a witness;
- (3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or
- (4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;
or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

RULE 3.5.

Maintaining and Preserving the Impartiality of Tribunals and Jurors

(a) A lawyer shall not:

- (1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

- (2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:
 - (i) in the course of official proceedings in the matter;
 - (ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;
 - (iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or
 - (iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts;
- (3) seek to or cause another person to influence a juror or prospective juror by means prohibited by law;
- (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order;
- (5) communicate with a juror or prospective juror after discharge of the jury if:
 - (i) the communication is prohibited by law or court order;
 - (ii) the juror has made known to the lawyer a desire not to communicate;
 - (iii) the communication involves misrepresentation, coercion, duress or harassment; or
 - (iv) the communication is an attempt to influence the juror's actions in future jury service; or
- (6) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

RULE 3.6.

Trial Publicity

(a) A lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:

- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness;
- (2) in a criminal matter that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that could result in incarceration;
- (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
- (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:

- (1) the claim, offense or defense and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;

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- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal matter:
 - (i) the identity, age, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the identity of investigating and arresting officers or agencies and the length of the investigation; and
 - (iv) the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

RULE 3.7.

Lawyer As Witness

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

- (1) the testimony relates solely to an uncontested issue;
- (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
- (3) disqualification of the lawyer would work substantial hardship on the client;
- (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
- (5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

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- (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
- (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

RULE 3.8.

Special Responsibilities of Prosecutors and Other Government Lawyers

(a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

(c) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

- (1) disclose that evidence to an appropriate court or prosecutor's office; or
- (2) if the conviction was obtained by that prosecutor's office,
 - (A) notify the appropriate court and the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;
 - (B) disclose that evidence to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, and a court authorizes delay for good cause shown; and
 - (C) undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.

(d) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted, in a prosecution by the prosecutor's office, of an offense that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.

(e) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (c) and (d), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

RULE 3.9.

Advocate In Non-Adjudicative Matters

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

RULE 4.1.

Truthfulness In Statements To Others

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

RULE 4.2.

Communication With Person Represented By Counsel

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

(c) A lawyer who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

RULE 4.3.

Communicating With Unrepresented Persons

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

RULE 4.4.

Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

RULE 4.5.

Communication After Incidents Involving Personal Injury or Wrongful Death

(a) In the event of a specific incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(b) An unsolicited communication by a lawyer or law firm, seeking to represent an injured individual or the legal representative thereof under the circumstance described in paragraph (a) shall comply with Rule 7.3(e).

RULE 5.1.

Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers

- (a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.
- (b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.
- (2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.
- (c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.
- (d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:
- (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or
- (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and
- (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or
- (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 5.2.

Responsibilities of a Subordinate Lawyer

- (a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

RULE 5.3.

Lawyer's Responsibility for Conduct of Nonlawyers

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

- (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or
- (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and
 - (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or
 - (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 5.4.

Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer; and

- (3) a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6.

(d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

RULE 5.5.

Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.

(b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

RULE 5.6.

Restrictions On Right To Practice

(a) A lawyer shall not participate in offering or making:

- (1) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (2) an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

RULE 5.7.

Responsibilities Regarding Nonlegal Services

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

- (1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.
- (2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.
- (3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.
- (4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and (c) with respect to the confidential information of a client receiving legal services.

(c) For purposes of this Rule, “nonlegal services” shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

RULE 5.8.

Contractual Relationship Between Lawyers and Nonlegal Professionals

(a) The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed “independent professional judgment and undivided loyalty uncompromised by conflicts of interest.” Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State.

Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a), provided that:

- (1) the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules;
 - (2) the lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm, nor, as provided in Rule 7.2(a)(1), shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and
 - (3) the fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the “Statement of Client’s Rights In Cooperative Business Arrangements” pursuant to section 1205.4 of the Joint Appellate Divisions Rules.
- (b) For purposes of paragraph (a):
- (1) each profession on the list maintained pursuant to a Joint Rule of the Appellate Divisions shall have been designated sua sponte, or approved by the Appellate Divisions upon application of a member of a nonlegal profession or nonlegal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:
 - (i) have been awarded a bachelor’s degree or its equivalent from an accredited college or university, or have attained an

equivalent combination of educational credit from such a college or university and work experience;

(ii) are licensed to practice the profession by an agency of the State of New York or the United States Government; and

(iii) are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession;

(2) the term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

(c) This Rule shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

RULE 6.1.

Voluntary Pro Bono Service

Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.

(a) Every lawyer should aspire to:

- (1)* provide at least 50 hours of pro bono legal services each year to poor persons; and
- (2)* contribute financially to organizations that provide legal services to poor persons. Lawyers in private practice or employed by a for-profit entity should aspire to contribute annually in an amount at least equivalent to (i) the amount typically billed by the lawyer (or the firm with which the lawyer is associated) for one hour of time; or (ii) if the lawyer's work is performed on a contingency basis, the amount typically billed by lawyers in the community for one hour of time; or (iii) the amount typically paid by the organization employing the lawyer for one hour of the lawyer's time; or (iv) if the lawyer is underemployed, an amount not to exceed one-tenth of one percent of the lawyer's income.

(b) Pro bono legal services that meet this goal are:

- (1)* professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel;
- (2)* activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and
- (3)* professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

(c) Appropriate organizations for financial contributions are:

- (1)* organizations primarily engaged in the provision of legal services to the poor; and
- (2)* organizations substantially engaged in the provision of legal services to the poor, provided that the donated funds are to be used for the provision of such legal services.

(d) This Rule is not intended to be enforced through the disciplinary process, and the failure to fulfill the aspirational goals contained herein should be without legal consequence.

RULE 6.2.

[Reserved]

RULE 6.3.

Membership in a Legal Services Organization

A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rules 1.7 through 1.13; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

RULE 6.4.

Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the organization, but need not identify the client. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7.

RULE 6.5.

Participation in Limited Pro Bono Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

- (1) shall comply with Rules 1.7, 1.8 and 1.9, concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest; and

(2) shall comply with Rule 1.10 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9.

(b) Except as provided in paragraph (a)(2), Rule 1.7 and Rule 1.9 are inapplicable to a representation governed by this Rule.

(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.

(e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation.

RULE 7.1.

Advertising

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

- (1) contains statements or claims that are false, deceptive or misleading; or
- (2) violates a Rule.

(b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

- (1) legal and nonlegal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;
- (2) names of clients regularly represented, provided that the client has given prior written consent;
- (3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and
- (4) legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.

(c) An advertisement shall not:

- (1) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;
- (2) include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;
- (3) use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same; or

(4) be made to resemble legal documents.

(d) An advertisement that complies with subdivision (e) of this section may contain the following:

- (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;
- (2) statements that compare the lawyer's services with the services of other lawyers;
- (3) testimonials or endorsements of clients, and of former clients; or
- (4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in subdivision(d) of this section provided:

- (1) its dissemination does not violate subdivision(a)of this section;
- (2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated;
- (3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome"; and
- (4) in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing.

(f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize meta tags or other hidden computer codes that, if displayed, would violate these Rules.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements shall appear on the home page.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(k) All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

(l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

(p) All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law §488(3).

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(r) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

RULE 7.2.

Payment for Referrals

(a) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

- (1) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with

such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and

- (2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).

(b) A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

- (1) a legal aid office or public defender office:
 - (i) operated or sponsored by a duly accredited law school;
 - (ii) operated or sponsored by a bona fide, non-profit community organization;
 - (iii) operated or sponsored by a governmental agency; or
 - (iv) operated, sponsored, or approved by a bar association;
- (2) a military legal assistance office;
- (3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or
- (4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:
 - (i) Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;
 - (ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;
 - (iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

- (iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;
- (v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations; and
- (vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

RULE 7.3.

Solicitation and Recommendation of Professional Employment

- (a) A lawyer shall not engage in solicitation:
 - (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or
 - (2) by any form of communication if:
 - (i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;
 - (ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;
 - (iii) the solicitation involves coercion, duress or harassment;
 - (iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or
 - (v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not

affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this Rule, “solicitation” means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:

- (1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:
 - (i) a copy of the solicitation;
 - (ii) a transcript of the audio portion of any radio or television solicitation; and
 - (iii) if the solicitation is in a language other than English, an accurate English-language translation.
- (2) Such solicitation shall contain no reference to the fact of filing.
- (3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.
- (4) Solicitations filed pursuant to this subdivision shall be open to public inspection.
- (5) The provisions of this paragraph shall not apply to:
 - (i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;
 - (ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at a prospective client affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or
 - (iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).

(d) A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(f) Any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

RULE 7.4.

Identification of Practice and Specialty

(a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:

- (1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "The [name of the private certifying organization] is not affiliated with any governmental authority."
- (2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "Certification granted by the [identify state or territory] is not recognized by any governmental authority within the State of New York."

RULE 7.5.

Professional Notices, Letterheads and Signs

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:

- (1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates;
- (2) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;
- (3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or
- (4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis include in

its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

- (1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;
- (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;
- (3) the domain name does not imply an ability to obtain results in a matter; and
- (4) the domain name does not otherwise violate these Rules.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.

RULE 8.1.

Candor in the Bar Admission Process

(a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

- (1) has made or failed to correct a false statement of material fact; or
- (2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

RULE 8.2.

Judicial Officers and Candidates

(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.

RULE 8.3.

Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

- (1) information otherwise protected by Rule 1.6; or
- (2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

RULE 8.4.

Misconduct

A lawyer or law firm shall not:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability:
 - (1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or
 - (2) to achieve results using means that violate these Rules or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

RULE 8.5.

Disciplinary Authority and Choice of Law

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

- (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
 - (2) For any other conduct:
 - (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
 - (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.
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Richard A. Klass, Esq.

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Richard A. Klass is an attorney in private practice in downtown Brooklyn. He practices primarily in the areas of commercial litigation, debt collection/enforcement of judgments, legal malpractice and real estate litigation. His law firm also represents clients in bankruptcy, civil appeals and federal court litigation.

Richard Klass has been a formative voice within New York law circles both for the high standards of his work as well as his extensive writings, lectures and appearances in the media. He reaches audiences of both lawyers and non-lawyers, through publications which include his quarterly newsletter, *Law Currents*, his blogs *Law Currents* and *The Legal Malpractice Blog, New York*, and his book *Successfully Defending Your Credit Card Lawsuit: What to do if you are sued for a credit card debt*.

The newsletter and blog *Law Currents*, with a combined readership of tens of thousands, is particularly popular. Written in plain English in a style that appeals to anyone who likes a good story, this two-page illustrated quarterly features case studies that both entertain and inform.

Richard may be reached by e-mail at richklass@courtstreetlaw.com or by phone at (718) COURT•ST with any questions.

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