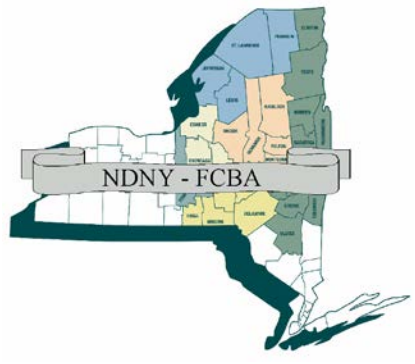

Northern District of New York Federal Court Bar Association

"Ethics and Civility 2018"

CLE PROGRAM TIMED AGENDA

Sky Armory, Syracuse, New York

Thursday, December 6, 2018

R.S.V.P. for CLE by November 23, 2018

Location: Sky Armory, 351 South Clinton Street, Syracuse, New York 13202
Registration: 12:30 p.m. – 1:00 p.m. (Light lunch provided)

Time:

1:00 p.m. – 1:45 p.m. "How Civility Works"
Professor Keith J. Bybee, Syracuse University College of Law and Maxwell School

1:45 p.m. – 2:30 p.m. "Update on the Law of Ethics"
Robert A. Barrer, Esq., Barclay Damon

2:35 p.m. – 3:50 p.m. "Candor Before a Tribunal"
John Gaal, Esq., Bond, Schoeneck & King moderator
Panel comprised of :
Honorable Thérèse Wiley Dancks, U.S. Magistrate Judge
Christopher J. Harrigan, Esq., Barclay Damon
Laura L. Spring, Esq., Compagni, Beckman, Appler & Knoll

3:50 p.m. – 4:25 p.m. “Ethics and Professionalism – A View from the Bench”
Suzanne Galbato, Esq., Bond, Schoeneck & King, moderator
Panel comprised of:
Honorable Frederick J. Scullin, Jr., Senior U.S. District Judge
Hon. Mae A. D’Agostino, U.S. District Judge
Honorable Brenda K. Sannes, U.S. District Judge
Hon. Andrew T. Baxter, U.S. Magistrate Judge

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York.

This program has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for **4.0** credits towards the **Ethics** requirement.*

This program is appropriate for newly admitted and experienced attorneys.

This is a single program. No partial credit will be awarded.

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The Requirement of Candor, and Other Limitations On Client Confidentiality, Under the New York Rules of Professional Conduct

NDNY Federal Court Bar Association
December 6, 2018

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Bond, Schoeneck & King, PLLC
One Lincoln Center
Syracuse, New York 13202-1355

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THE REQUIREMENT OF CANDOR, AND OTHER LIMITATIONS ON THE DUTY OF CONFIDENTIALITY, UNDER THE NEW YORK RULES OF PROFESSIONAL CONDUCT

I. Background

The Rules of Professional Conduct ("Rules") were implemented in New York in 2009. These Rules were the culmination of a comprehensive review of New York's Code of Professional Responsibility ("Code") which began in 2003. These Rules are significant both for some of the changes that were made to the prior Code as well as for some of the changes that were not made.

The first professional conduct rules for lawyers were adopted in Alabama in 1887. These rules provided the foundation for the American Bar Association's ("ABA") initial Canons of Ethics adopted in 1908. In 1969, the ABA issued the Model Code of Professional Responsibility ("Model Code"), providing more detailed guidance to lawyers. By the early 1970's, virtually every state had adopted the Model Code, albeit sometimes with variations, with New York's Code adoption effective January 1, 1970.

In 1983 the ABA moved away from the Model Code and adopted the Model Rules of Professional Conduct ("Model Rules"), reflecting both significant substantive and format changes. New York was poised to be one of the first states to adopt the new Model Rules when they were narrowly voted down by the New York State Bar Association's House of Delegates. As of 2008, 47 states and the District of Columbia had adopted the Model Rules, although sometimes with variations, with California, Maine, and New York as the only holdouts.

In 2002, as a result of "Ethics 2000," the ABA published significant modifications to the Model Rules. Again, while a number of states adopted many of those changes, New York did not.

While there had been modifications to New York's Code over the years, with the most significant coming in 1990, 1999, and with the addition of a comprehensive set of advertising guidelines in 2007, the basic format and many of the substantive provisions of the original Code remained in place, until 2009.

In 2003, the New York State Bar Association empanelled the Committee on Standards of Attorney Conduct (COSAC) to look at a substantial reworking of the Code, both from a substantive and a formatting perspective, to determine whether it could be brought more into line with the Model Rules and the rest of the country. The Committee completed its work in 2005 and throughout much of 2006 and 2007 COSAC presented its recommendations to the Bar Association's House of Delegates for review. Ultimately these proposals were endorsed by the House and submitted to the Appellate Divisions with the recommendation that they be adopted as the Courts' rules.

The former Code consisted of Disciplinary Rules (DRs) and Ethical Considerations (ECs). The DRs were mandatory standards of conduct which existed as court rules (found in 22 NYCRR Part 1200 and jointly adopted by the four Appellate Divisions), while the ECs were aspirational standards established by the Bar Association. The submission to the Appellate Divisions included both new Rules to replace the DRs, and supporting and explanatory Comments to take the place of the ECs. The Bar Association recommended that the Courts adopt both.

On December 17, 2008, the Courts announced adoption of new "Rules of Professional Conduct" based (mostly) upon the Bar Association's recommendations. While the Courts' version reflects the formatting changes proposed by the Bar Association and many of the substantive changes, it does not reflect all of the proposed changes. And unfortunately, the Courts did not explain (and still have not explained) why some changes were adopted and some were not, so lawyers are left to guess as to the Courts' thinking. For example, the Courts completely ignored the Bar Association's recommendation to include provisions dealing with multijurisdictional practice. (This was actually the second time in the past few years that the Courts refused to entertain such a recommendation from the Bar Association. The Courts just recently adopted MJP rules, see Part 523 of the Rules of the Court of Appeals.)

In addition, the Courts neither adopted nor even commented on the supplementary Comments proposed by the Bar Association, leaving them for the Bar Association to separately implement as "non-mandatory" guidance, in the same vein as the prior ECs.

The Rules have undergone some modifications since 2009 and the latest version can be found on the New York State Bar Association's website, www.nysba.org, under "Resources on Professional Standards for Lawyers."

The focus of this paper is on exploring the balance between a lawyer's obligation to maintain client confidentiality and the duty of candor owed to a tribunal and/or third parties under these the Rules of Professional Conduct. One of the hallmarks of New York's former Code was the primacy afforded to client confidentiality, calling for its preservation in almost all circumstances. That, however, is no longer the case in a number of contexts under the Rules.

II. The Scope of the Confidentiality Obligation

The Rules' basic confidentiality provision is found in Rule 1.6. Subsection (a) states that "[a] lawyer shall not knowingly *reveal* confidential information . . . or *use* such information to the *disadvantage* of a client or for the *advantage* of the lawyer or a third person." (emphasis added). This prohibition against revealing or using confidential information is subject to a number of exceptions, including when the client gives informed consent, as defined in Rule 1.0(j), or when 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. Rule 1.6(b) also gives the lawyer the *discretion* to 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.

A. "Confidential Information"

Previously, the Code's DR 4-101 defined two types of information ("confidences" and "secrets") which a lawyer was required to keep confidential. A "confidence" referred to information protected by the attorney-client privilege, while a "secret" referred to other information "gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Rule 1.6 abandons the dichotomy between "confidence" and "secret" and instead defines a single concept of "confidential information." Confidential information consists of information *gained during or relating to* the representation of a client, whatever its source, that is:

1. protected by the attorney-client privilege,

2. likely to be embarrassing or detrimental to the client if disclosed, or

3. information that the client has requested be kept confidential.

See also New York State Bar Association Formal Opinion 831 (2009). In substance, the core definition of "confidential information" mirrors that found in DR 4-101. Rule 1.6, however, then narrows this definition of confidential information by expressly excluding two categories of information: (1) "a lawyer's legal knowledge or legal research" and (2) "information that is generally known in the local community or in the trade, field or profession to which the information relates." As to the latter exclusion, the comments note that "information is not 'generally known' simply because it is in the public domain or available in a public file." Rule 1.6, Comment [4A]; *see* NYSBA Formal Opinion 991. No similar explicit exclusions existed under the former Code.

In addition, the scope of confidentiality obligation under New York's Rules is narrower than that under the Model Rules. Model Rule 1.6 prohibits revealing information "relating to the representation of the client," unless falling within an exception, without regard to whether that information is protected by the attorney-client privilege, its disclosure would be embarrassing or detrimental to that client, or the client has asked that it be kept confidential.

B. "Gained During or Relating to the Representation"

Disciplinary Rule 4-101 made information confidential if it was "gained in the professional relationship." Rule 1.6 replaces the phrase "gained *in* the professional relationship" with the phrase "gained *during or relating to* the representation of a client, whatever its source." This change adds clarity to the definition, including making it explicit that confidential information includes information obtained from the client as well as information obtained from other sources, such as witnesses or documents. Comment [4A] to Rule 1.6 defines "relates to" as "has any possible relevance to the representation or is received because of the representation." (An earlier version of Comment [4A] provided that "gained during or relating to the representation" does *not* include information gained before a representation begins or after it ends," but that portion of Comment [4A] has since been deleted.)

The New York State Bar Association's Committee on Professional Ethics, in Formal Opinions 866 (2011) and 998 (2014), indicated that the "during" requirement is not purely temporal but rather "implies some connection between the lawyer's activities on behalf of the client and the lawyer's acquisition of the information."

The basic confidentiality rule applicable to prospective clients and former clients differs somewhat from the foregoing rule which is applicable to current clients. With respect to prospective clients, Rule 1.18(b) provides, "[e]ven when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client." With respect to former clients, Rule 1.9(c) states that a lawyer who 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.

Thus, while the Rules protect the confidential information of current clients from disclosure, use to the disadvantage of the client *or* use to the advantage of the lawyer or a third person, a prospective or former client's confidential information is, at least literally, only protected from

disclosure and use that is disadvantageous to the former/prospective client. No explicit restriction is placed on the use of this information for the benefit of the lawyer or another person.

III. Permissive Disclosure to Prevent Reasonably Certain Death/Substantial Bodily Harm

In one of the more significant changes from the former Code, Rule 1.6 now *permits* a lawyer to reveal or use confidential information to prevent reasonably certain death or substantial bodily harm to anyone. According to Comment [6B], this new exception to the duty of confidentiality "recognizes the overriding value of life and physical integrity."

While this provision has been a part of the Model Rules for years, a comparable exception has never been a part of the New York Code. The closest equivalent was DR 4-101(C)(3), which permitted a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime."[1] Rule 1.6(b)(1) is much broader in that it permits a lawyer to disclose confidential information to prevent reasonably certain death or substantial bodily harm, even if the client is not involved and even if the conduct in question is not criminal.

But even this new basis for permissive disclosure is very limited. As explained in Comment [6B], harm is "reasonably certain" to occur only if (1) "it will be suffered imminently" or (2) if "there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat." The Comments provide a number of illustrations to demonstrate the scope of this provision. For example, if a client has accidentally discharged toxic waste into a town's water supply, the lawyer *may* reveal confidential information to protect against harm if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease *and* the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. Another example given is that the wrongful execution of a person is a life-threatening and imminent harm permitting disclosure *but only* once the person has been convicted and sentenced to death.

In contrast, if the harm the lawyer seeks to protect against is merely a "remote possibility" or carries a "small statistical likelihood that something is expected to cause some injuries to unspecified persons over a period of years," there is no present and substantial risk justifying disclosure. Furthermore, the fact that an event will cause property damage but is unlikely to cause substantial bodily harm does not provide a basis for disclosure. *Id.*

The ABA's Model Rules are broader still in that they permit disclosure to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from a client's commission of a crime or fraud, if the client has used the lawyer's services to further that crime or fraud. ABA Model Rule 1.6(b)(2). New York's Rule

[1] The New York Rules also explicitly continue this Code exception allowing a lawyer to reveal confidential information to the extent that the lawyer reasonably believes necessary "to prevent the client from committing a crime." Rule 1.6(b)(2).

1.6 does not similarly permit disclosure "merely" to protect property or financial interests (unless the "future crime" exception otherwise applies).

In the case of permissive disclosure to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a crime, Comment [6A] sets out a number of factors for the lawyer to consider in deciding whether to disclose or use confidential information:

1. the seriousness of the potential injury to others if the prospective harm or crime occurs;

2. the likelihood that it will occur and its imminence;

3. the apparent absence of any other feasible way to prevent the potential injury;

4. the extent to which the client may be using the lawyer's services in bringing about the harm or crime;

5. the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action; and

6. any other aggravating or extenuating circumstances.[2]

Comment [6A] further cautions that disclosure adverse to the client's interest should only be the minimum disclosure the lawyer reasonably believes is necessary to prevent the threatened harm or crime. Where disclosure would be permitted under Rule 1.6, the lawyer's initial duty, where practicable, is to remonstrate with the client. Only when the lawyer reasonably believes that that client nonetheless will carry out the threatened harm or crime may the lawyer disclose confidential information.

A. Related Impact – Representing an Organization

Former DR 5-109 set out an attorney's special obligations when representing an organizational client. One of those obligations was that when the lawyer knew that someone associated with the organization was engaged in action, intended to act, or refused to act in a matter related to that representation which involved a violation of a legal obligation to the organization or a violation of law and it was likely to result in substantial injury to the organization, the lawyer had to proceed as was "reasonably necessary in the best interests of organization." This explicitly included, in appropriate circumstances, reporting that action or inaction up the organizational chain of command, even to the Board of Directors if necessary. Under the Code, reporting outside the organization was not permitted unless the report fell within the "future crimes" exception of DR 4-101's confidentiality requirements.

[2] These same factors apply in the context of a lawyer withdrawing a representation based on materially inaccurate information or being used to further a crime or fraud, which is discussed in Part IV, *infra*.

Rule 1.13 follows DR 5-109. However, because Rule 1.6 (the analog to DR 4-101) permits the disclosure or use of confidential information to prevent reasonably certain death or substantial bodily harm (as well as to prevent the client from committing a future crime), the effect of this scheme is to now allow reporting outside the organization to prevent reasonably certain death or substantial bodily harm.

IV. Permissive Disclosure to Withdraw the Lawyer's Prior Representations Based on Materially Inaccurate Information or When Being Used to Further a Crime or Fraud

Rule 1.6(b)(3) contains another exception to the lawyer's duty to maintain confidentiality. It permits the lawyer to reveal or use confidential information to the extent that the lawyer reasonably believes necessary "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 (including opposing counsel), 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." The scope of Rule 1.6(b)(3) is not limited to representations made to a tribunal. Thus, for example, the Rule applies with equal force in a transactional setting.

Disciplinary Rule 4-101(C)(5), which was the predecessor to Rule 1.6(b)(3), provided that "[a] lawyer may reveal . . . [c]onfidences or secrets *to the extent implicit* in withdrawing a written or oral opinion or representation previously given by the lawyer and 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." While on its face, Rule 1.6(b)(3) may appear broader than its predecessor, in that it explicitly permits revealing or using confidential information "to withdraw" a representation (without explicitly limiting that disclosure to only that "implicit" in the withdrawal itself), Comment [6E] to Rule 1.6 states that "[p]aragraph (b)(3) permits the lawyer to give *only the limited notice that is implicit in withdrawing an opinion or representation*, which may have the collateral effect of inferentially revealing confidential information." Comment [6E] goes on to explain that the "lawyer's withdrawal of the tainted opinion or representation allows the lawyer to prevent further harm to third persons and to protect the lawyer's own interest when the client has abused the professional relationship, *but paragraph (b)(3) does not permit explicit disclosure of the client's past acts"* unless such disclosure is permitted to prevent the client from committing a crime. Based on these Comments, Rule 1.6(b)(3) apparently is no broader than the former DR 4-101(C)(5). That is, in most circumstances, only a bare-bones withdrawal of an opinion or representation will be permitted. For example, "I hereby withdraw my opinion letter relating to this matter dated November 20, 2009" is permitted even though by doing so, the lawyer is implicitly revealing that the opinion was "based on materially inaccurate information or is being used to further a crime or fraud." The lawyer may not, however, disclose that that is in fact the case, nor may the lawyer disclose the underlying facts or how the lawyer came to know that the opinion was based on materially inaccurate information or is being used to further a crime or fraud.

V. Permissive Disclosure to Prevent a Client From Committing a Future Crime

Rule 1.6(b)(2) contains another exception to the duty of confidentiality, which allows the lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to prevent the client from committing a crime." This provision is nearly identical to its counterpart in the former Code, DR 4-101(C)(3), which permitted the lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime." This exception is limited to instances in which the client's conduct, and not someone else's, will constitute an actual crime. In exercising her discretion under Rule 1.6(b)(2), a lawyer should consider those factors set out in Comment [6A] to Rule 1.6, as discussed in Part III of this paper.

While this Rule generally does not permit disclosure of past crimes, the Rules recognize that past conduct (*e.g.*, prior fraud) which has a continuing effect (*e.g.*, deceiving new victims), can constitute a continuing crime to which this disclosure rule applies. The Comments to Rule 1.6 state that a "lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts." Rule 1.6, Comment [6D].

VI. Required Disclosure in the Face of False Statements/Evidence by a Lawyer, the Lawyer's Client and/or the Lawyer's Witness to a Tribunal

Rule 3.3, regarding conduct before a tribunal, represents one of the most significant shifts between the former Code and the new Rules. Perhaps the most important part of Rule 3.3 concerns a lawyer's obligation if the lawyer learns that the lawyer's client, a witness called by that lawyer, or the lawyer himself has spoken or written a falsehood to a tribunal. Rule 3.3 states in pertinent part:

> (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; [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.

A. "Tribunal"

Rule 1.0(w) provides that a "tribunal denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." The definition goes on to provide that "[a] legislative 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." Furthermore, Comment [1] to Rule 3.3 indicates that the Rule "also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." This application of Rule 3.3 to discovery proceedings has been confirmed in several ethics opinions. *See* ABA Formal Opinion 93-376 (1993); New York County Bar Association Opinion 741 (2010); Association of the Bar of the City of New York, Formal Opinion 2013-2.

In NYSBA Formal Opinion 838 (2010), the Committee on Professional Ethics offered the following guidelines in analyzing whether a particular administrative proceeding is sufficiently adjudicatory to qualify as a tribunal:

> (a) are specific parties affected by the decision;
>
> (b) do the parties have the opportunity to present evidence, and cross examine other providers of evidence; and
>
> (c) will the ultimate determination be made by a person in a policy-making role or by an independent trier of fact, such as an administrative law judge.

In NYSBA Formal Opinion 1011 (2014), the Committee on Professional Ethics determined that the filing of employment based immigration visa petitions with the Department of Labor and related petitions with the Department of Homeland Security did not qualify as proceedings before a "tribunal." This determination was based on, among other things, the unilateral nature of these proceedings, and the absence of "legal argument," an adverse party, cross examination, and any "trier of fact." Similarly, in NYSBA Formal Opinion 1045 (2015), arising under a different context (the lawyer-witness provisions of Rule 3.7), the Committee concluded that an agency investigatory proceeding that could lead to either a decision not to pursue charges or a decision to pursue charges which would then result in an administrative hearing, was not itself a proceeding before a tribunal.

If a lawyer is not actually counsel appearing before the tribunal on behalf of a client, she has no obligation under Rule 3.3. NYSBA Formal Opinions 963 and 982.

B. "False" Statements/Evidence

Rule 3.3(a)(1) prohibits the lawyer from making a "false" statement to a tribunal or from failing to correct a "false" statement previously made by the lawyer.[3] Rule 3.3(a)(3) prohibits the offer or use of "false" evidence and requires the lawyer to take reasonable remedial measures if the lawyer, the lawyer's client or the lawyer's witness offers false material evidence. Much like its nearly identical counterpart in the ABA Model Rules, the term "false" is a critical but undefined term. Two very different meanings can be given to this term. The first is that evidence is "false" if it is objectively erroneous or untrue. The second is that evidence is "false" only if it is a deliberate falsehood known to be such by the person making the statement or offering the evidence. The Rule would apply quite differently under each variant of the term. If the former were the appropriate meaning, then the remedial measures of Rule 3.3 would be required even if the lawyer making the statement or the witness/client giving the testimony believed it to be true at the time it was made or offered. However, if the latter were appropriate, the Rule's coverage would be far less expansive and essentially limited to cases where a lawyer discovered a client or witness engaged in deliberate perjury or fabricated exhibits for the lawyer to offer in court.

There are substantial indicators that the broader meaning of the term was intended for both the Model Rules and the New York Rules. First, both the Model Rules and the New York Rules, elsewhere, separately reference "fraudulent" conduct (*see, e.g.*, Rule 3.3(b)) and define "fraud" or "fraudulent conduct" as something that has a "purpose to deceive" and has an element of "scienter deceit, intent to mislead." Rule 1.0(i). On the other hand, as defined by Black's Law Dictionary, "false" simply means "untrue." Thus, the plain meaning of these terms suggests a different, and broad, meaning for "false." Second, if only deliberate falsehoods could invoke the duty to disclose or rectify under Rule 3.3(a)(3), that Rule would be superfluous because such conduct is already covered in Rule 3.3(b). Rule 3.3(b) states that "[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." Thus, a client's or a witness's deliberate falsehood would constitute criminal or fraudulent conduct which is treated in Rule 3.3(b). *See* New York State Bar Association Formal Opinion 837 (2010) (noting that while Rule 3.3(b) applies in the case of fraud, Rule 3.3(a) "requires a lawyer to remedy false evidence even if it was innocently offered."); Association of the Bar of the City of New York, Formal Opinion 2013-2 ("it makes no difference if the falsity was intentional or inadvertent").

In addition, the broader interpretation makes the most sense in light of the lawyer's duty in Rule 3.3(a)(1) to correct his or her own previous false statement. If "false" were to mean only deliberately false statements, it would not make much sense to separately prohibit both the making of such a statement and then the failure to correct that same misstatement. However, if

[3] Rule 4.1 also prohibits a lawyer from knowingly making a false statement of fact or law to anyone. Misrepresentations, for this purpose, can occur by "partially true but misleading statements or omissions that are the equivalent of affirmative false statements." *See* NY Rule 4.1, Comment [1]; *In Re Filosa*, 976 F. Supp. 2d 460 (S.D.N.Y. 2013).

"false" means inaccurate or untrue, then the duty to correct is more understandable (and significant).

Another clue comes from the original Comment to ABA Model Rule 3.3, in which the drafters discussed the duty to take remedial steps in cases of perjured testimony *or* false evidence, suggesting that the drafters recognized perjury and false evidence as two separate categories of evidence and meant the Rule to apply equally to both. Geoffrey C. Hazard, W. William Hodes, *The Law of Lawyering*, 29-20 (Aspen Publishers 2009).

The Restatement of the Law Governing Lawyers also resolves this question in favor of the broader reading. Restatement § 120(1)(c), much like the Model Rules and the New York Rules, provides that "[a] lawyer may not . . . offer testimony or other evidence as to an issue of fact known by the lawyer to be false" and, if the lawyer has offered evidence of a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures, including disclosure. Comment d to §120 states:

> False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness had been instructed to say. . . . *[A]lthough a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false.* (emphasis added).

Thus, under the Restatement, "false" refers not only to deliberate falsehoods, but also to erroneous or untrue statements.

Case law and ethics opinions from other jurisdictions have interpreted similar language as encompassing the broader reading of the term "false" as well. *See, e.g.*, *Morton Bldg., Inc. v. Redeeming Word of Life Church*, 835 So.2d 685, 691 (La. App. 1st Cir. 2002) (citing *Washington v. Lee Tractor Co, Inc.*, 526 So.2d 447, 449 (La. App. 5th Cir.), *writ denied*, 532 So.2d 131 (La. 1998)) ("[F]ailure to correct false evidence, even if originally offered in good faith, violates Rule 3.3 of the Rules of Professional Conduct."); Washington State Bar Opinion 1173 (1988) (if the proceeding was still pending, the lawyer would have had to disclose his client's mistaken, but not fraudulent, failure to provide certain dates and medical treatments in answers to interrogatories). *See also* Mehta, *What Remedial Measures Can A Lawyer Take to Correct False Statements Under New York's Ethical Rules?* 12th Annual AILA New York Chapter Immigration Law Symposium Handbook (2009 ed.); Hazard and Hodes, *The Law of Lawyering*, 29-20.

Finally, the broader reading is probably more consistent with Rule 3.3's underlying objective. As illustrated in the Comments to the Rule, the purpose of imposing the duty of candor toward the tribunal is to keep the tribunal from going astray when the lawyer is in a position to prevent it. *See* Rule 3.3, Comments [2] and [5]. Thus, only the knowledge of the lawyer and the actual

incorrectness of the information should be relevant. If a lawyer knows her witness is mistaken, the lawyer should not allow the witness's mistake to lead the tribunal astray.

In sum, although the term "false" is not explicitly defined, it appears that the drafters of the New York Rules likely meant "false" to mean untrue, encompassing more than just deliberate falsehoods.

C. Materiality

While Rule 3.3(a)(1) and (3) prohibit a lawyer from making any false statement or offering/using any false evidence, those sections only require a lawyer to take affirmative corrective action in the event "material" false statements are made or false evidence is offered. Determining whether this materiality threshold is met is fact specific, "depending on the factors relevant to the ruling in the particular matter, and particularly whether the evidence is of a kind that could have changed the result." Association of the Bar of the City of New York, Formal Opinion 2013-2. *See also* NYSBA Formal Opinions 837 and 732.

D. Lawyer's Duty to Correct His Own False Statements/Evidence

Rule 3.3(a)(1) reads: "[a] lawyer shall not knowingly . . . 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." The first clause of this rule imposes essentially the same obligation as its predecessor, DR 7-102(A)(5), requiring that a lawyer not knowingly make a false statement of law or fact. Its application is narrower, however, in that Rule 3.3(a) is limited to statements "to a tribunal." Disciplinary Rule 7-102(A)(5) was not limited to a tribunal setting. While Rule 4.1 more generally prohibits false statements of material facts to a third person, Rule 4.1 does not contain the "correction" provision of Rule 3.3(a)(1).

The second clause of Rule 3.3(a)(1) explicitly imposes a new duty. It requires the lawyer to affirmatively *correct* a false statement of material fact[4] or law previously made to the tribunal by the lawyer. This mandatory duty to correct a false statement made by the lawyer to a tribunal is not an entirely new concept, but it has not previously been explicit or quite this broad.

As previously discussed, DR 4-101(C)(5) had *permitted* a lawyer to withdraw a representation made by the lawyer where that representation was based on materially inaccurate information or was being used to further a crime or fraud, and that representation was believed to still be relied upon by third parties. In New York State Bar Formal Opinions 781 (2004) and 797 (2006), the Committee on Professional Ethics concluded that where the lawyer's representation is the product of a client's fraud upon a tribunal, then the combined effect of DR 7-102(B)(1) (which otherwise required the disclosure of the client's fraud upon the tribunal *unless* it constituted a confidence or secret) and DR 4-101(C)(5) (which *permitted* the lawyer to reveal confidences or secrets of the client to the extent implicit in withdrawing a previously given written or oral

[4] While 3.3(a)(1) prohibits a lawyer from making any false statement of fact or law to a tribunal, it only imposes upon a lawyer an affirmative obligation to correct a "material" false statement.

opinion or representation, provided it was still being relied upon by others) was to *require* withdrawal of the lawyer's representation. However, the obligation was simply to withdraw the lawyer's representation. Disclosure of client confidences and secrets beyond that implicit in the act of withdrawal were not permitted. Under Rule 3.3(a)(1), if the lawyer made a statement of material fact which is false (inaccurate), the obligation is not simply to "withdraw" it but rather to *correct* it, which may require the explicit disclosure of confidential information. *See* Simon, *Roy Simon on the New Rules – Part VII Rule 2.1 through Rule 3.3(a)(1),* 4-5 (New York Professional Responsibility Report, September 2009).

In addition, this duty to correct under Rule 3.3(a)(1) applies even when no one is continuing to rely on the false statement.[5] *Compare* Rule 1.6(b)(3) (permitting a lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . 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."). (emphasis added).

Comment [3] to Rule 3.3 also recognizes that there "are circumstances where the failure to make a disclosure is the equivalent of an affirmative misrepresentation."

E. Lawyer's Duty In Light of False Evidence by the Lawyer's Client or Witness

Rule 3.3(a)(3) prohibits a lawyer from knowingly offering or using evidence that the lawyer knows to be false. In another of the more significant changes in the New York Rules, Rule 3.3(a)(3) goes on to require that if a 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 must take reasonable remedial measures, *including, if necessary, disclosure to the tribunal*. In other words, disclosure may be required to remedy false evidence by the lawyer's client or witness, as a last resort, even if the information to be disclosed is otherwise "protected" client confidential information.

As close as we came to this requirement under the former Code was DR 7-102(B)(1) which provided that if a lawyer received information clearly establishing that a client (but only a client), in the course of representation, had perpetrated fraud upon a person or tribunal, the lawyer was required to call upon the client to rectify it.[6] If the client refused or was unable to do so, then the lawyer might be required to withdraw from the representation pursuant to DR 2-110(B) if the lawyer could not continue without maintaining or advancing the earlier misrepresentation. Nassau County Bar Association Opinion 05-3 (2005). Disciplinary Rule 2-110(B) mandated withdrawal where the continued employment would result in violation of a disciplinary rule. A lawyer would have violated the disciplinary rules by maintaining or advancing the earlier misrepresentation because DR 1-102(A)(4) prohibited a lawyer from engaging in conduct that

[5] *See* the discussion on the duration of the obligation to disclose under Rule 3.3 at Part VIII, *infra*.

[6] Disciplinary Rule 7-102(B)(1) was only triggered by a client fraud, but it could be a fraud upon either a tribunal or a third party.

involved dishonesty, fraud, deceit, or misrepresentation and DR 7-102(A)(7) prohibited a lawyer from counseling or assisting a client in conduct that the lawyer knew to be illegal or fraudulent.

If the client refused or was unable to rectify the fraud, the lawyer was required under DR 7-102(B)(1) to reveal the fraud to the person or the tribunal, *except* to the extent that the information was protected as a client confidence or secret, in which case confidentiality was the order of the day. However, in most instances, this exception – disclosure unless the information was a client confidence or secret – swallowed the rule because this information was almost always protected as a confidence or secret.

For example, if a lawyer came to learn that a client had committed perjury (an obvious fraud upon the tribunal), that information was almost by definition a client confidence or secret which could not be disclosed. *See* New York State Bar Association Formal Opinions 674 (1995) and 523 (1980); New York County Bar Association Opinion 706 (1995); Association of the Bar of the City of New York Opinion 1994-8 (1994). In such a case, and assuming the client did not rectify the perjury, the lawyer's choices were to nonetheless continue the representation without disclosure to the tribunal – but only if continued representation could be accomplished without reliance on that perjured testimony – or, in most cases, to withdraw from the representation. *See* New York County Bar Association Opinion 712 (1996); *People v. Andrades*, 4 N.Y.3d 355 (2005). Disclosure under the former Code was not permitted; the duty of confidentiality trumped the duty of candor to the court.

DR 7-102(B)(2) provided that if a lawyer learned that someone *other than a client* (*e.g.*, the lawyer's non-client witness) had perpetrated a fraud on the tribunal (but not on a third party), the lawyer should reveal the fraud. DR 7-102(B)(2) contained no explicit exception for protecting client confidences and secrets in that circumstance. However, in NYSBA Formal Opinion 523 (1980), the Committee on Professional Ethics held that the explicit exception to the disclosure obligation for client confidential information found in DR 7-102(B)(1) applied by implication in circumstances covered by DR 7-102(B)(2).

Marking a dramatic shift in this area, Rule 3.3(a)(3) now provides that if either a lawyer's client or a witness called by the lawyer has offered material evidence to a tribunal and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, including if necessary disclosure to the tribunal. There is no caveat for confidential information. In other words, the Rule may require disclosing client/witness falsity, as a last resort, even if that knowledge is otherwise protected as client confidential information. So Rule 3.3(a)(3) differs from DR 7-102(B) in that (1) Rule 3.3(a)(3) applies equally to the lawyer's client and witnesses (but not to others); (2) is triggered by false material evidence and not necessarily fraud; (3) does not extend to false statements (or frauds) to third parties; and (4) can ultimately require disclosure of even client confidential information.

As detailed in Comment [10] to Rule 3.3, the first remedial measure – calling upon the client to correct the false testimony – is the same as it was under DR 7-102(B)(1) and in the case of intentionally false testimony is not likely to be successful in many cases. *See also* NYSBA Formal Opinion 837 (must bring issue of false evidence to client's attention before taking

unilateral action). If that course of action fails, the lawyer is required to take further remedial action. One possibility is to withdraw from the representation.[7] However, as Comment [10] explains, at times withdrawal is not permitted or will not undo the effect of the false evidence. On the latter point, at least one noted commentator has expressed the view that withdrawal in and of itself is not sufficient since the record is not corrected and the problem of the false evidence is simply transferred to another lawyer. Simon, *Roy Simon on the New Rules – Part VII Rule 3.3(a)(3) through Rule 3.3(d)*, 4-5 (New York Professional Responsibility Report, October 2009). *See also* New York County Bar Association Opinion 741; New York State Bar Association Form Opinion 837. Under the New York Rule, then, the lawyer must "make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6." Rule 3.3, Comment [10]; *see also* Rule 3.3(c) ("The duties stated in paragraph (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6"); NYSBA Formal Opinion 837 (disclosure only required if "necessary" and if not necessary, disclosure is not permitted). Depending on the circumstances, however, full disclosure might not be required and something less, in the form of a "noisy withdrawal" of the false evidence, might be sufficient. NYSBA Formal Opinion 837; *see also* NYSBA Formal Opinions 980, 982 and 998 (even when disclosure of confidential information is permitted, that disclosure should be no broader than reasonably necessary to achieve that permissible end).[8]

While disclosure may have grave consequences for the client, "the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement." Rule 3.3, Comment [11]. Thus, under the new Rule 3.3, the duty of candor toward the tribunal rises above the duty of confidentiality, in stark contrast to the Code.

Rule 3.3(a)(3) is broader than former DR 7-102(B)(1) and (2) not only because the exception for client confidences and secrets has been eliminated, but also because it is triggered by "false" material evidence and not just fraudulent conduct. Thus, for example, helpful but inaccurate testimony offered by the lawyer's witness must be remedied, even if that testimony was provided in good faith and was not fraudulent or perjured. Under DR 7-102(A)(4), a lawyer was precluded from using perjured or false evidence, but had no explicit duty to remedy the introduction of false evidence. Now that obligation exists.

On the other hand, Rule 3.3(a)(3) is limited to false statements by the lawyer's client or a witness called by the lawyer, and does not extend to false statements provided by the other side's witnesses. In other words, a lawyer is not required to disclose to the tribunal merely "false"

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[7] Of course, even in a withdrawal from representation, a lawyer has to be careful about what information is communicated to the Court. See NYSBA 1057 (2015).

[8] A lawyer confronted with this remedial obligation must also keep in mind CPLR § 4503(a)(1), the legislatively-enacted attorney-client privilege. The interplay between Rule 3.3 and CPLR § 4503 is not entirely clear. However, there is some commentary that suggests that the impact of CPLR § 4503 is to preclude the lawyer from testifying or otherwise presenting "evidence" to remedy false evidence under Rule 3.3 if not otherwise covered by an exception to the attorney-client privilege (*e.g.*, crime-fraud exception). Under this view, the privilege might not otherwise prevent a lawyer from providing remediation in a non-evidentiary way. *See* NYSBA Formal Opinions 837 and 980.

information provided by opposing counsel, the adverse party, or its witnesses. However, under Rule 3.3(a)(3) (as was the case under DR 7-102(A)(4)), the lawyer may not "use" this false evidence (regardless of its source), which means that the lawyer cannot maintain or advance the falsity, including referencing the false but favorable evidence or otherwise using it to advance her client's cause.

The obligations of Rule 3.3(a)(3) are triggered by the lawyer's "knowledge" that evidence is false. The definition section of the Rules make it clear that the terms "knowingly," "known" and "know" require "actual knowledge," although it is recognized that knowledge can be inferred from the circumstances. Rule 1.0(k). New York County Bar Association Opinion 741 looks to *In re Doe*, 847 F.2d 57 (2d Cir. 1988) for guidance on this issue, indicating that while mere suspicion or belief is not adequate, "proof beyond a moral certainty" is not required either. *See also* NYSBA Formal Opinion 1034 (mere suspicion not enough to trigger disclosure obligation, but may be grounds for withdrawal from representation).

If a lawyer knows that a client or witness intends to offer false testimony, the lawyer may not offer that testimony or evidence. If a lawyer does not know that his client's or witness' testimony is false, he *may* nonetheless *refuse* to offer it if he "reasonably believes" it will be false.[9] However, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact." Rule 3.3, Comment [8].

VII. Disclosure in the Face of Criminal or Fraudulent Conduct by Any Person

Rule 3.3(b) provides that if a lawyer represents a client before a tribunal and that lawyer knows that *anyone* intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, he must take reasonable remedial measures, including if necessary disclosure to the tribunal, even if this requires disclosure of information otherwise protected by Rule 1.6 as confidential information.

Rule 3.3(b) requires a lawyer to take reasonable remedial measures regarding the criminal or fraudulent conduct (including perjury) of *any* person. Unlike Rule 3.3(a)(3), it is not limited to conduct by the lawyer's client or witness, and extends to conduct of the other side. On the other hand, it is not triggered by "false evidence," but rather requires criminal or fraudulent conduct. Furthermore, as evidenced by the phrase "intends to engage, is engaging, or has engaged," Rule 3.3(b) covers past, present and future events. But like Rule 3.3(a)(3), once triggered, remedial action is required, including disclosure of confidential information if need be.

In this regard, the closest provision to Rule 3.3(b) in the former Code was DR 7-102(B)(2), which required the lawyer to reveal to the tribunal the fraud of a person, other than the client, committed upon the tribunal, subject to an implicit exception for client confidences and secrets. Rule 3.3(b) differs from DR 7-102(B)(2) in that it (1) applies to criminal or fraudulent conduct

[9] A lawyer may not refuse to offer his client's testimony in a criminal proceeding unless he knows it to be false. Even a reasonable belief that the client may lie in that setting does not override the client's constitutional right to be heard. *See* Rule 3.3(a)(3).

(not just fraud); (2) which relates to the proceeding (and not just fraud upon the tribunal); (3) which is occurring, has occurred or will occur in the future; (4) extends to client as well as non-client conduct; and (5) can ultimately require the disclosure of even client confidential information.

Rule 3.3(b) actually goes beyond issues of client/witness perjury and false evidence and extends to any criminal or fraudulent conduct by any person related to a proceeding. Thus, for example, it extends to intimidating witnesses, bribing a witness or juror, illegal communications with a court officer, destroying or concealing documents, and failing to disclose information to the tribunal when required to do so. *See* Rule 3.3, Comment [12]. The duty to take remedial action, including disclosure, applies in these circumstances as well.

VIII. Duration of the Obligation to Remediate

Both Model Rule 3.3 and the Bar Association's proposal to the Courts explicitly provided that the remediation (including disclosure) obligation "continue to the conclusion of the proceeding," defined by Comment [13] to mean "when a final judgment has been affirmed on appeal or the time for review has passed."[10] However, the final version of Rule 3.3 as adopted by the New York Courts contains no such temporal limitation. The Courts gave no indication as to whether this omission was intended to signal that the obligation to remediate continues forever. However, one possible limitation to the duration of a lawyer's remediation obligation may be found in the term "reasonable" as Rule 3.3 only requires the lawyer to take "reasonable remedial measures." Yet without further explanation, this ambiguous term offers little guidance.

The obligation to remedy false statements or criminal/fraudulent conduct related to a proceeding before a tribunal extends as long as the fraudulent conduct can be remedied, which may extend beyond the proceeding – but not forever. NYSBA Formal Opinions 831, 837 and 980; *see also* Association of the Bar of the City of New York Formal Opinion 2013-2 (obligation ends "only when it is no longer possible for the tribunal to which the evidence was presented to reopen the proceedings based on new evidence, and it is no longer possible for another tribunal to amend, modify or vacate the final judgment based on the new evidence").

IX. Required Disclosure in the Context of Ex Parte Proceedings

Rule 3.3(d), governing a lawyer's conduct during ex parte proceedings, adds an entirely new obligation; it had no equivalent at all in the old Code. Rule 3.3(d) fills a void by explaining how a lawyer is to behave when appearing before a tribunal in a legitimate ex parte proceeding. It provides:

> 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.

[10] New York State Bar Association Proposed Rules of Professional Conduct 160 (Feb. 1, 2008) (available at www.nysba.org/proposedrulesofconduct020108).

The policy behind the new provision is explained in Comment [14]. Typically in our adversary system an advocate has the limited responsibility of presenting one side of the matter to the tribunal since the opposing position will be presented by the adverse party. In an ex parte proceeding, however, there may be no presentation by the opposing side. Nevertheless, the object of an ex parte proceeding is to yield a substantially just result. Because the judge must accord the opposing party, if absent, "just consideration," the lawyer for the represented party "has the correlative duty to make disclosures of material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision." Rule 3.3, Comment [14].

Accordingly, a lawyer in an ex parte proceeding before a tribunal – whether before a court, an arbitrator, or a legislative or administrative agency acting in an adjudicative capacity – has the duty to present adverse facts favorable to the opposition. However, Rule 3.3(d) does not require the lawyer to provide a completely balanced view of the case. For example, a lawyer does not have to draw inferences favorable to the adversary or present adverse facts in the most persuasive manner to persuade the court. Furthermore, Rule 3.3(d) only requires the lawyer to disclose adverse facts, not adverse law. A lawyer must only advise the tribunal about unfavorable cases if they are "controlling" pursuant to Rule 3.3(a)(2).

More importantly, the language of this portion of the Rule itself may be subject to the interpretation that it requires the lawyer to disclose all material facts, regardless of whether they constitute client confidential information. The mandatory words used in Rule 3.3(d) – "a lawyer *shall* inform the tribunal of *all* material facts" –suggests that the disclosure obligation is unconditional. *See* Jill M. Dennis, *The Model Rules and the Search for the Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 Geo. J. Legal Ethics 157 (1994) (discussing ABA Model Rule 3.3(d)); *see also Restatement (Third) of the Law Governing Lawyers* §112, cmt. B(2000) ("To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law…"). However, this Rule may not require the disclosure of privileged information. *See* n.7, *supra; Restatement (Third) of the Law Governing Lawyers* §112, cmt b; *compare* Texas Disciplinary Rules of Professional Conduct Rule 3.03(a)(3) ("A lawyer shall not knowingly . . . in an ex parte proceeding, fail to disclose to the tribunal an *unprivileged* fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision.") (emphasis added). On the other hand, Rule 3.3 (c) expressly provides that the duty of candor found in 3.3(a) and 3.3(b) applies even if it requires disclosure of confidential information, but makes no mention of 3.3(d). Compare Florida Rule 4-3.3(d) (expressly extending the exception to client confidentiality to all provisions of Rule 4-3.3, including the ex parte communications provision). Final resolution of this issue will likely have to await the issuance of individual ethics opinions; however – given the straightforward requirement on the face of the Rule – lawyers should be cautious that the tradeoff for participation in an ex parte proceeding may be the sacrifice of client confidences.

X. Candor in Investigations

Issues of candor, in the sense of deceit and misrepresentation, often arise in the context of workplace investigations. Rule 8.4 provides:

> A lawyer or law firm shall not:
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> ***
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> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; [or]

From time to time, in assisting clients with investigations, it may be necessary to seek information through means other than overt interviews, and may even entail the use of outside private investigators. One common investigatory technique is pretexting – pretending to be someone you are not in order to secure that information. Pretexting may entail impersonating another, real individual, or it may involve pretending to be a fictional person. An example of the latter is the use of testers in employment or housing discrimination cases – someone creating and using an entirely false identity to assist in ferreting out discrimination. Both involve deceit and both implicate Rule 8.4 (c). Of course, pretexting can take a variety of forms in between.

Whether the pretexting is done directly by a lawyer or indirectly by a private investigator or staff member working under the lawyer's direction, the ethical issues generally are the same. While the Rules of Professional Conduct apply only to lawyers, Rule 8.4 (a) provides that a lawyer or law firm shall not "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." In addition, Rule 5.3 (b) provides:

> 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 :
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> (1) the lawyer orders or directs the specific conduct, or with knowledge of the specific conduct, ratifies it; or
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> (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
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> (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 the consequences of the conduct could have been avoided or mitigated.

Despite the unequivocal language of these ethics rules, the response of courts and disciplinary authorities to various forms of pretexting has been mixed, although pretexting in the extreme – impersonating another to obtain information about that other person – is likely to always be viewed as a violation.

There has been some recognition that pretexting in furtherance of some greater societal benefit, such as in the discrimination tester context, is permissible. Courts generally have recognized the value of testers in the fight against discrimination, providing some condonation for them. *See, e.g., Village of Bellwood v. Dewired*; 895 F.2d 1521 (7th Cir. 1990); *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971). So have some bar authorities. For example, in Arizona Opinion No. 99-11 (1999), the Committee on the Rules of Professional Conduct of the State Bar of Arizona condoned use of the limited deceit associated with testers to "protect society from discrimination based upon disability, race, age, national origin, and gender." *See also,* Isbell and Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 Georgetown Journal of Legal Ethics 791 (1995). A recent amendment to the rules of professional conduct in Oregon also explicitly permits such activity. *See* Oregon DR 1-102(D) ("[I]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these disciplinary rules. "Covert activity"...means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" maybe commenced by a lawyer or involve a lawyer as an advisor or supervisory only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.")

An "exception" to the general ethical prohibition against deceit also has been recognized by some authorities when the pretexting occurs in the context of law enforcement or other lawful governmental operations. *See, e.g.*, Utah Ethics Opinion 02-05 (2002) ("A governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct."); D.C. Bar Legal Ethics Comm., Op. 323 (2004) ("Lawyers employed by government agencies who act in a non - representational official capacity in a manner they reasonably believe to be authorized by law do not violation [the ethics rules] if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties."); *United States v. Parker*, 165 F. Supp. 2d 431 (W.D.N.Y. 2001) (same).

Some courts have gone further, permitting "incidental deceit" to promote more private interests. In *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999), a trademark owner sent private investigators posing as customers to a retail store operated by the defendant to determine whether infringement was occurring. The investigators posed as "typical customers" and engaged the defendant's sales people in conversation regarding items sold by the defendant. The conversations were "typical" of the interaction between a customer and salesperson and, apparently, were not intended to trick any salespeople into making any specific admissions. In response to a claim that the plaintiff's lawyer's involvement in this activity violated the proscription against lawyer deceit, the court observed:

> As for DR 1-102 (A)(4)'s prohibition against attorney "misrepresentations,"[11] hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation. The policy interests behind forbidding misrepresentations by attorneys are to protect parties from being tricked into making statements in the absence of their counsel and to protect clients from misrepresentations by their own attorneys. The presence of investigators posing as interior decorators did not cause the sales clerks to make any statements they otherwise would not have made. There is no evidence to indicate that the sales clerks were tricked or duped by the investigators' simple questions such as "is the quality the same?" or "so there is no place to get their furniture?"
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> * * * *
>
> These ethical rules should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover posing as a member of the general public engaging in ordinary business transactions with the target. To prevent this use of investigators might permit targets to freely engage in unfair business practices which are harmful to both trademark owners and consumers in general. Furthermore, excluding evidence obtained by such investigators would not promote the purpose of the rule, namely preservation of the attorney/client privilege.

82 F.Supp.2d at 122.

In *Apple Corps. Ltd. v. International Collectors Soc.*, 15 F. Supp. 2d 456 (D.N.J. 1998), a lawyer for Apple had instructed her secretary, private investigators, and others to contact the defendant posing as interested customers in an effort to buy certain items that the defendant was not

[11] Like former Disciplinary Rule 1-102(A)(4), current Rule 8.4(c) states that a lawyer or law firm shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

authorized to sell. In concluding that this conduct did not violate New Jersey's prohibition on deceit, the court held that "misrepresentations solely as to identify or purpose and solely for evidence gathering purposes," are not prohibited.[12] 15 F.Supp.2d at 475.

Relying explicitly on the decisions in *Gidatex* and *Apple*, the District Court for the Southern District of New York has concluded that

> the prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.

Cartier v. Symbolix, Inc., 386 F. Supp. 2d 354, 362 (S.D.N.Y. 2005).

Notwithstanding these views, there are still other authorities which have been far more literal in their application of the deceit rules, even when the lawyer's conduct was arguably serving some greater societal good. For example, *In re Malone*, 105 A.D. 2d 455 (3d. Dept. 1984), involved an attorney serving as the Inspector General of the New York State Department of Correctional Services. In the course of an investigation into prisoner abuse, Malone took a "private statement" from a corrections officer who had witnessed such abuse. The statement was taken under oath and recorded. This private statement was taken the day before a number of officers, including this individual, were scheduled for formal investigatory interviews. In conjunction with the private statement, Malone instructed the corrections officer to give a false statement that next day (denying any knowledge of abuse), to protect the individual and avert suspicion from him as the informer. The individual did as instructed. In sustaining discipline subsequently imposed on Malone for his role in this ruse of the false second statement, the Appellate Division explicitly rejected the notion that the "ends" (protection of the informer) can justify the "means" (deceit).

A similar result was reached in *Matter of Mark Pautler*, 47 P.3d 1175 (Colo. 2002). Pautler was a Deputy District Attorney. He arrived at a particularly gruesome crime scene in which three women had been murdered with a wood splitting maul. While there, he learned that three other individuals had called the Sheriff's office with information about the murderer. One of those three was someone the murderer had kidnapped and attempted to kill. Eventually, the Sheriff and Pautler made phone contact with the murderer (who by that time had already confessed to the murders and threatened to kill again), although they did not know his location. The murderer made it clear that he would not surrender without legal representation. After a failed attempt to

[12] While understanding the court's conclusion in the context of these particular facts, it seems unlikely that the court truly intended this sweeping language to apply in all contexts. For example, it seems clear that it would be inappropriate for a lawyer, or his agent, to misrepresent an association with an adverse party for the purpose of inducing a recalcitrant witness to share information, even when doing so involved "merely" a misrepresentation as to identity and purpose. *See, e.g.*, Kansas Bar Association Opinion 94-15 (1995) (inappropriate for lawyer to have staff member contact third party posing as a "friend" of an adverse party for purpose of securing information from that person.)

locate the murderer's requested lawyer, the Sheriff agreed with the murderer to locate a public defender. Instead, however, Pautler pretended to be a public defender and eventually secured the murderer's surrender to the Sheriff. The murderer was ultimately convicted and sentenced to death. Subsequently, misconduct charges were brought against Pautler for his deceitful conduct and his misrepresentations. Refusing to create an exception to Colorado's rules against attorney deception even in this context, the Supreme Court upheld Pautler's three month suspension (due to the mitigating circumstances involved, however, it stayed the suspension during a twelve month probation period). However, on September 28, 2017, the Colorado Supreme Court amended Rule 8.4 to include an exception allowing a lawyer to "advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities." *See* Colorado Rules of Prof. Cond., Rule 8.4(c).

Other courts also have been reluctant to create exceptions to the deceit rules. *See Sequa Corp. v. Lititech, Inc.*, 807 F.Supp. 653 (D. Colo. 1992) (recognizing, in context of surreptitious tape recordings, that attorney's interest in ferreting out misconduct does not justify deceptive practices); *In re the Complaint as to the Conduct of Daniel J. Gatti*, 8 P.3d 966 (Or. 2000) (lawyer posing as someone else as part of an investigation into suspected fraudulent conduct violated ethical rules); *In re Ositis*, 333 Ore. 366 (2002) (lawyer reprimanded for giving direction to private investigator falsely posing as journalist to interview opposing party in litigation); *In the Matter of the disciplinary proceedings against James C. Wood*, 190 Wisc.2d 502 (1995) (pretending to be someone else violates ethics rules).

Consistent with this more stringent view, the Eighth Circuit, on facts similar to those in *Gidatex* and *Apple*, has suggested that the use of investigators posing as customers and engaging salespersons in discussion violates these rules. *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F. 3d 693 (8th Cir. 2003).

On May 23, 2007, the New York County Bar Association issued Opinion 737 addressing this issue. While recognizing that it is generally unethical for non-governmental lawyers to knowingly utilize and/or supervise an investigator who will employ "dissemblance" in an investigation, it nonetheless recognized a limited exception to this proscription. Specifically, it concluded that non-governmental lawyers may ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where " (1) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taken place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means; (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the Code (including the "no contact" rules of DR 7-104)[13] or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of their parties. The investigator must be instructed, however, not to elicit information protected by the attorney-client privilege. In this context, the Committee distinguished dissemblance from dishonest, fraud, misrepresentation and deceit by the degree

[13] Now codified at Rule 4.2 of the Rules of Professional Conduct.

and purpose of dissemblance, defining dissemblance as "misstatements as to identify and purpose made solely for gathering evidence."

An added layer of concern in the pretexting context arises when the party contacted by the pretextor is a "represented" person. As discussed earlier, a lawyer is prohibited from communicating, or causing another to communicate, with a represented person whose interests may be adverse to those of her client. Thus not only is a lawyer prohibited from directly communicating with a represented adversary, but a lawyer breaches the Rules if a private investigator working for or under the supervision of that lawyer does so.

Application of this prohibition becomes even more complicated when the individual contacted by the pretextor is an employee of a represented corporation, raising the issue of whether that employee is deemed "represented" by virtue of the company's representation. Generally in New York, employees of a represented employer (1) whose acts or omissions in the matter under inquiry are binding on the corporation or are imputed to the corporation for liability purposes or (2) who are involved in implementing the advice of counsel, are deemed represented if the corporation is represented. *See Niesig v. Team I*, 76 N.Y. 2d 363 (1990). Other employees and, generally all former employees, fall outside this scope, are not considered represented by virtue of the corporate employer's representation, and are fair game for direct communications. *See Muriel Siebert & Co., Inc. v. Intuit, Inc.*, 8 N.Y.3d 506 (2007); *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990); ABA Formal Opinion 95-393.

Applying these rules in the pretexting context, a lawyer must be careful to not allow private investigators, posing as someone they are not, to have contact with anyone who might be considered a represented person. *See Allen v. International Truck and Engine*, 2006 U.S. Dist. LEXIS 63720 (S.D. In. 2006) (ethical rules violated when investigators, with knowledge and under at least some degree of supervision of lawyers, sent into plant posing as employees and engaged in discussions with other employees regarding possible workplace harassment where some of the employees contacted were represented claimants); *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147 (ethical breach when investigators, under lawyer's supervision, posing as customers engaged in discussions with employees of adverse party in effort to solicit damaging information); *Scranton Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 190 F.Supp.3d 419, 430-32 (M.D. Pa. 2016) (ethical violation when attorney listened and took notes on a phone call with an adversary, known to be represented by counsel, without disclosing his presence).[14]

However, as is the case in the use of deceit generally, not all courts are in agreement that all contact with a represented person is off limits. In *Gidatex*, the court not only found that the use of investigators to pose as customers was not a violation of the rules against deceit, it also found

[14] Simply because evidence is obtained in violation of ethical rules does not mean it is inadmissible. Both the Second Circuit and New York courts have recognized that the means by which evidence is obtained is not necessarily a barrier to admissibility. *See United States v. Hammad*, 858 F. 2d 834 (2d Cir. 1988); *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999); *Stagg v. New York City Health & Hosp. Corp.*, 162 A.D. 2d 595 (2d Dept. 1990).

that the investigators' conversations with employees of a represented adverse party (who were deemed to be represented themselves) was not a violation of the no contact rules. In that case, although the court concluded that the investigator's communications with the other party's salespeople literally ran counter to former DR 7-104 (a)(1)[15], it nonetheless observed that it

> did not violate the rules because [these] actions simply do not represent the type of conduct prohibited by the rules. The use of private investigators, posing as consumers and speaking to nominal parties who are not involved in any aspect of the litigation, does not constitute an end-run around the attorney/client privilege. Gidatex's investigators did not interview the sales clerks or trick them into making statements they otherwise would not have made. Rather, the investigators merely recorded the normal business routine in the [other side's] showroom and warehouse.

82 F.Supp.2d at 126. And in *Apple*, the court similarly noted:

> RPC 4.2 [prohibiting contact with represented persons] cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation. To apply the rule to the investigation which took place here would serve merely to immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule. *See, e.g., Weider*, 912 F. Supp. 502. Accordingly, Ms. Weber's and Plaintiffs' investigators' communications with Defendants' sales representatives did not violate RPC 4.2.

15 F.Supp.2d at 474-75.

It is difficult to generalize too much from these few authorities. Nonetheless, it would appear that conduct which employs some minor deceit or covert activity designed to obtain information that the opposing party seems otherwise willing to make generally available – such as that obtained by posing as a customer and asking nothing more than what a normal customer would ask – might pass muster. However, once an investigator begins to probe below the surface – pushing and pulling as investigators are quick to do -- to acquire more information than would normally be provided to "just anyone," or if the investigator pretends to be a specific person in an effort to acquire private information about that person, the line likely has been crossed.

Social networking sites present almost limitless opportunities as investigatory tools, and almost as many ethical traps for the unwary. If a lawyer is able to access an individual's information on social networking sites (e.g, Facebook, Twitter, etc.) because that information is publicly

[15] Now Rule 4.2(a).

available, then there is no ethical prohibition to doing so. The New York State Bar Association Committee on Professional Ethics, in Formal Opinion 843, has issued an opinion reaching this conclusion. As the Committee concluded, where the lawyer may gain access without engaging in deception, that access is permitted. The Committee found that acquiring information in this manner is no different than acquiring information through some publicly accessible online or print media, or through a subscription research service such as Nexis of Factiva. See also Oregon Formal Ethics Opinion 2005-16. In this context, it should not matter whether the individual is "represented" or not.

However, a lawyer may will run afoul of New York's Rules of Professional Conduct if she tries to access sites that are not open to the public. On many social networking sites access is limited to those granted access rights by the page creator. In some cases, access is limited to those who "friend" the creator. While NYSBA Formal Opinion 843 declined to address that situation, because it was not the case presented to it for an opinion, it did note a recent opinion issued by the Philadelphia Bar Association. In Opinion 2009-02, the Philadelphia Bar was confronted with a situation in which a lawyer inquired about using a third party to access the social networking site of an unrepresented adverse witness in a pending lawsuit for the purpose of obtaining information that might be useful for impeachment purposes at trial. Access could only be gained by the third party "friending" the adverse witness. The inquiring lawyer was proposing that the third party would friend the witness, using only truthful information but concealing the connection between the third party and the lawyer. The Philadelphia Bar Association concluded that such conduct would violate the Pennsylvania Rules of Professional Conduct. Specifically, the Philadelphia Opinion concluded that the third party's failure to reveal the connection with the lawyer would constitute deception in violation of the Rules and since the third party was acting under the supervision of the lawyer, the lawyer would be responsible for that deception.

While NYSBA Formal Opinion 843 declined to formally opine on the "friending" situation presented in the Philadelphia Opinion, it seems likely that the NYSBA Committee on Professional Ethics would reach a similar conclusion, given its comments. Other bar associations have reached this same conclusion. See New Hampshire Ethics Advisory Opinion 2012-13/05; San Diego Legal Ethics Opinion 2011-2; Massachusetts Advisory Ethics Opinion 2014-5. However, at least two opinions provide that so long as the information that is provided is truthful, even though it may not indicate the lawyer's connection to the matter, friending is permissible. Association of the Bar of the City of New York, Opinion 2010-2; Oregon Formal Ethics Opinion 2013-189.

Also, if the party to be friended is represented, Rule 4.2 is also likely implicated. That Rule prohibits communication by a lawyer (or another at the direction of a lawyer) with any represented party without the consent of that party's counsel.

XI. Conclusion

The adoption of the Rules of Professional Conduct marked a new chapter in professional responsibility in New York. On the one hand, these Rules bring New York practice into greater conformity with the rest of the country. In other respects, however, these Rules retain a special

"New York flavor," which continues to mean lawyers practicing in New York cannot not simply assume that our rules are like those which govern everyone else (or govern even them when their practice takes them to other jurisdictions).

Unfortunately, the Courts' adoption of these Rules – most identical to those proposed by the Bar Association, but some not, and without any explanation as to why – leaves New York lawyers in the dark about the meaning of a number of these provisions, even years later.

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Robert is the firm's chief ethics officer and risk management partner and is responsible for all ethics, conflicts, loss prevention, and continuing legal education activities at the firm. In this senior leadership position, Robert counsels firm attorneys and provides analysis and advice on ethical questions involving conflicts of interest, privileges, and legal issues implicating the Rules of Professional Conduct. He also supervises the firm's CLE programs and lectures on a wide variety of ethics and practice management topics. In addition, Robert is responsible for designing and implementing programs and policies to improve the provision of high quality legal services for firm clients.

Robert has over 33 years of trial and appellate experience in the state and federal courts. He also serves as a mediator for court-directed and private mediation clients. Over the course of his career, Robert represented large and small corporations, governmental and agency clients as well as individuals in a wide variety of matters.

In recognition of his trial experience, Robert was elected as a member of the American Board of Trial Advocates. As part of his commitment to serve the legal profession and his high ethical standards, Robert served by appointment of the Chief Judge of the Appellate Division as a member, and then, chair, of the Fifth District Grievance Committee, the body charged with adjudicating misconduct complaints against attorneys. In 2010, Robert received the Pro Bono Service Award from the NDNY Federal Court Bar Association for his extensive and successful service as a mediator in the District Court's Alternate Dispute Resolution program.

Robert is a frequent lecturer to clients and attorneys on legal ethics, professional responsibility, and federal practice issues. He is a two-time winner of the Burton Award for excellence in legal writing, presented at the Library of Congress, in recognition of his articles "Careless Keystrokes & Bad Decisions: New York Law on Inadvertent Disclosure" and "Unintended Consequences: Avoiding and Addressing the Inadvertent Disclosure of Documents."

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EDUCATION

1995: PhD in Political Science, University of California, San Diego

1987: AB in Politics, Princeton University

1985 – 86: Visiting Student in Philosophy, Politics, and Economics (PPE),
Hertford College, Oxford University

PROFESSIONAL EXPERIENCE

Endowed Chairs and Professorships:

2009 – Present: Paul E. and the Hon. Joanne F. Alper '72 Judiciary Studies Professor
College of Law
Syracuse University

2002 – 08: Michael O. Sawyer Chair of Constitutional Law and Politics
Maxwell School of Citizenship and Public Affairs
Syracuse University

Administrative Appointments:

2017 – Present: Vice Dean
College of Law
Syracuse University

Academic Ranks:

2011 – Present: Professor of Political Science
Maxwell School of Citizenship and Public Affairs
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2010 – Present: Professor of Law
College of Law
Syracuse University

2007 – 10: Associate Professor of Law
College of Law
Syracuse University

2003 – 07: Associate Professor of Law (by courtesy appointment)
College of Law
Syracuse University

2002 – 11: Associate Professor of Political Science
Maxwell School of Citizenship and Public Affairs
Syracuse University

1999 – 2002: Associate Professor
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Government Department
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1995 – 99: Assistant Professor
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1994 – 95: Instructor
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Directorships:

2006 – Present: Founding Director
Institute for the Study of the Judiciary, Politics, and the Media (IJPM)
College of Law,
Maxwell School of Citizenship and Public Affairs, and
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Syracuse University

2003 – 08: Founding Director
Sawyer Law and Politics Program (SLAPP)
Maxwell School of Citizenship and Public Affairs
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Research Positions:

2002 – Present: Senior Research Associate
Campbell Public Affairs Institute
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RESEARCH AND TEACHING INTERESTS

Public law, legal theory, political philosophy, judicial process, LGBTQ politics, the politics of race and ethnicity, American politics, codes of public conduct, and the media. My current research examines civility, free speech, and fake news.

PUBLICATIONS

Books:

How Civility Works. Stanford: Stanford University Press, 2016.
Reviews and Author Interviews: New York Times, PBS The Open Mind, WRVO, WNYC, WCNY, WNPR, Teen Vogue, Christian Science Monitor, Comment, Public Books, Svenska Dagbladet (in Swedish), Hufvudstadsbladet (in Swedish)

All Judges Are Political – Except When They Are Not: Acceptable Hypocrisies and the Rule of Law. Stanford: Stanford University Press, 2010.

Bench Press: The Collision of Courts, Politics, and the Media. Edited volume. Stanford: Stanford University Press, 2007.

Mistaken Identity: The Supreme Court and the Politics of Minority Representation, Princeton: Princeton University Press, 1998. Second printing, 2002.

Articles, Book Chapters, and Critical Essays:

"The Rise of Trump and the Death of Civility," forthcoming in *Law, Culture, and the Humanities*.

"Potter Stewart Meets the Press" in *Judging Free Speech: First Amendment Jurisprudence of U.S. Supreme Court Justices*, Helen J. Knowles and Steven B. Lichtman, eds. (New York: Palgrave MacMillan, 2015): 147-68.

"Courts and Judges: The Legitimacy Imperative and the Importance of Appearances," (co-authored with Angela Narasimhan) in *The Wiley Handbook of Law and Society*, Austin Sarat and Patricia Ewick, eds. (Malden, MA: Wiley & Sons, 2015): 118-33.

"Muckraking: The Case of the United States Supreme Court," *Oñati Socio-Legal Series* [online], 4 (2014), 597-612. Available from: Social Science Research Network.

"The Supreme Court: An Autobiography," *Studies in Law, Politics, and Society* 61(2013): 179-201. Co-authored with Angela Narasimhan.

"Open Secret: Why the Supreme Court has Nothing to Fear from the Internet," 88 *Chicago-Kent Law Review* 309 (2013).

"The Limits of Debate or What We Talk About When We Talk About Gender Imbalance on the Bench," 2012 *Michigan State Law Review* 1481 (2012).

"Paying Attention to What Judges Say: New Directions in the Study of Judicial Decisionmaking," *Annual Review of Law and Social Science* 8(2012): 69-84.

"Judging in Place: Architecture, Design, and the Operation of Courts," *Law & Social Inquiry* 37(2012):1014-28.

"The Rule of Law is Dead! Long Live the Rule of Law!," in *What's Law Got To Do With It? What Judges Do, Why They Do It, and What's at Stake*, Charles Gardner Geyh, ed. (Stanford: Stanford University Press, 2011): 306-27.

"Will the Real Elena Kagan Please Stand up? Conflicting Public Images in the Supreme Court Confirmation Process," 1 *Wake Forest Journal of Law and Policy* 137 (2011).

"Efficient, Fair, and Incomprehensible: How the State 'Sells' its Judiciary," *Law & Policy* 33(2011): 1-26. Co-authored with Heather Pincock.

"Legalizing Public Reason: The American Dream, Same-Sex Marriage, and the Management of Radical Disputes," *Studies in Law, Politics, and Society* 49(2009): 125-56. Co-authored with Cyril Ghosh.

"The Polite Thing To Do," in *The Future of Gay Rights in America*, H.N. Hirsch, ed. (New York: Routledge, 2005): 297-302.

"Legal Realism, Common Courtesy, and Hypocrisy," *Law, Culture, and the Humanities* 1(2005): 75-102.

"The Liberal Arts, Legal Scholarship, and the Democratic Critique of Judicial Power," in *Legal Scholarship in the Liberal Arts*, Austin Sarat, ed. (Ithaca: Cornell University Press, 2004): 41-68.

"The Jurisprudence of Uncertainty," *Law & Society Review* 35 (2001): 501-14.

"The Political Significance of Legal Ambiguity: The Case of Affirmative Action," *Law & Society Review* 34 (2000): 263-90.

"Democratic Theory and Race-Conscious Redistricting: The Supreme Court Constructs the American Voter," in *The Supreme Court in American Politics: New Institutionalist Approaches*, Howard Gillman and Cornell W. Clayton, eds. (Lawrence: University of Kansas Press, 1999): 219-34.

"Splitting the Difference: The Representation of Ideas and Identities in Modern Democracy," *Law & Social Inquiry* 22 (1997): 389-403.

"Essentially Contested Membership: Racial Minorities and the Politics of Inclusion," *Legal Studies Forum* 21 (1997): 469-83.

Edited Symposia:

"Law in the Age of Media Logic," *Oñati Socio-Legal Series* [online], 4 (2014), 593-835. Symposium abstract and individual article links available from: Social Science Research Network.

"The Importance of Judicial Appearances: A Symposium on Law, Politics, and the Media," *Syracuse Law Review* (2009): 361-469.

"Creators vs. Consumers: The Rhetoric, Reality and Reformation of Intellectual Property Law and Policy," *Syracuse Law Review* (2008): 427-546.

Symposium on "Queer (Theory) Eye for the Straight (Legal) Guy," by Susan Burgess, *Political Research Quarterly* (September 2006): 401-18.

"Citizenship At Home and Abroad: A Symposium," *International Studies Review* 7 (2005): 503-524.

Reviews, Commentaries, and Other Publications:

"So You Read That Scandalous Report About Donald Trump and Russia — Now What?," *Teen Vogue*, January 11, 2017. Available at Teen Vogue

"How Should We Understand Trump's 'Uncivil' Behaviour?," *Open Democracy*, September 27, 2016. Available at Open Democracy.

"Why Manners Matter," August 23, 2016. Available at Stanford Press.

Judging Judges: Values and the Rule of Law, Jason E. Whitehead, *Law and Politics Book Review* 22 (August 2016): 78-81.

"What Will the Justices Decide? And How Will They Look Doing It?," September 28, 2015. Available at SU News.

Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy, James L. Gibson, *Law and Politics Book Review* 26 (October 2012): 477-81.

"U.S. Public Perception of the Judiciary: Mixed Law and Politics," *Jurist*, April 10, 2011. Available at Jurist.

The Hart-Fuller Debate in the Twenty-First Century, by Peter Cane (ed.), *Law and Politics Book Review* 21 (April 2011): 214-18.

"Politics or Impartiality in the Courtroom?," *Washington Post*, January 3, 2011. Available at Political Bookworm, Washington Post.

"Judicial Ethics: Appearances Still Matter," *Jurist*, October 18, 2010. Available at Jurist.

"Kagan Delay Hypocrisy," *Washington Post*, July14, 2010. Available at Political Bookworm, Washington Post.

"Kagan's Confirmation: Conflicting Imagery," *Jurist*, June 28, 2010. Available at Jurist.

The Lost Promise of Civil Rights, Risa L. Goluboff, *Law and Politics Book Review* 17 (August 2007): 659-62.

"The Media's Role In Selecting Impartial Justices," Public Eye CBSNews.com, October 27, 2006. Available at CBS News.

The Gift of Science: Leibniz and the Modern Legal Tradition, Roger Berkowitz, *Law and Politics Book Review* 16 (August 2006): 608-11.

"All Judges Are Political Actors – Except When They Aren't," *Knight Ridder/Tribune*, December 14, 2005. Co-authored with Jeffrey Stonecash. Available at Maxwell Poll.

"How Would You Know a Virtuous Citizen If You Saw One?," in *Constructing Civic Virtue: A Symposium on the State of American Citizenship*, Syracuse, NY: Campbell Public Affairs Institute, The Maxwell School of Syracuse University, 2003. Re-printed in *International Journal of Public Administration* 30 (2007): 683-86.

The Political Use of Racial Narratives: School Desegregation in Mobile, Alabama, 1954-97, Richard A. Pride, *Law and Politics Book Review* 14 (June 2004): 393-95.

Race and Redistricting: The Shaw-Cromartie Cases, Tinsley E. Yarbrough, *Law and Politics Book Review* 13 (January 2003).

Freedom and Time: A Theory of Constitutional Self-Government, Jed Rubenfeld, *Journal of Politics* 64 (February 2002): 270-2.

American Legal Thought from Premodernism to Postmodernism, Stephen M. Feldman, *Law and Politics Book Review* 10 (April 2000): 287-90.

Race and Redistricting in the 1990s, Bernard Grofman (ed.), *Law and Politics Book Review* 6 (June 1999): 236-38.

To Secure These Rights: The Declaration of Independence and Constitutional Interpretation, Scott Douglas Gerber, *Political Science Quarterly* 111 (Summer 1996): 375-6.

The Rooster's Egg: On the Persistence of Prejudice, Patricia J. Williams, *Law and Politics Book Review* 4 (April 1996): 68-70.

Works-in-progress:

"Speech and a Free Press: Fake News, Facebook, and Twitter"

The Case for Fake News [Book Project]

EDITORIAL POSITIONS

Associate Editor. 2011 – Present. *Journal of Law and Courts*, peer-reviewed journal sponsored by the American Political Science Association's Law and Courts Section. Published by University of Chicago Press.

Editor. 2009 – Present. *Law, Politics, and the Media*, a subject matter journal published by the Social Science Research Network.

Series Editor. 2007 – Present. *Stanford Studies in Law and Politics*, an interdisciplinary book series published by Stanford University Press.

Editorial Board Member. 2013 – 2016. *Law and Social Inquiry*, quarterly peer-reviewed journal of law and social science published by the American Bar Foundation and Wiley-Blackwell.

Associate Editor. 2004 – 07. *Law, Culture and the Humanities*, an interdisciplinary, peer-reviewed journal published by Sage.

Assistant Editor. 1989 – 90. *Political Theory*, an international, peer-reviewed journal published by Sage.

GRANTS

Collaboration for Unprecedented Success and Excellence (CUSE) Grant Program: $5,000
Funds to support study of "fake news" and the political dimensions news consumption. Term of support: 2018 – 20.

Social Science Research Council: $50,000
Co-PI for "The Shari'a, Laws of War, and Post-Conflict Justice Project" led by William Banks, Institute for National Security and Counterterrorism, Syracuse University. Term of support: 2011 – 13.

John Ben Snow Foundation: $25,000
Funds to support the creation and development of a "Law, Politics, and the Media Graduate Certificate Program" at Syracuse University College of Law. Term of support: 2007 – 10.

Carnegie Corporation: $27,500
Secured through Carnegie Legal Reporting Program, S.I. Newhouse School of Public Communications. Funds to support the creation and development of a "Law, Politics, and the Media Graduate Certificate Program" at Syracuse University College of Law. Term of support: 2007 – 10.

PAPERS PRESENTED

"The Rise of Trump and the Death of Civility," Law and Politics Under Stress Works-in-Progress Conference, April 12-13, 2018, University of Oregon Law School.

"The Public Face of the Supreme Court," Southeastern Association of Law Schools (SEALS) Annual Meeting, Palm Beach, 2013.

"Muckraking the Courts," Law and the Age of Media Logic, Oñati International Institute for the Sociology of Law, Oñati, Spain, 2013.

"Open Secret: Why the Supreme Court has Nothing to Fear from the Internet," The Supreme Court and the Public, Chicago-Kent Law School, Chicago, 2012.

"Structural Study of Judicial Decisionmaking," Southeastern Association of Law Schools (SEALS) Annual Meeting, Amelia Island, 2012.

"The Limits of Debate or What We Talk About When We Talk About Gender Imbalance on the Bench," Gender and the Pipeline to Legal Power, Michigan State Law School, Detroit, 2012.

"The Supreme Court: An Autobiography," Association for the Study of Law, Culture, and the Humanities Annual Conference, Providence, 2010; New England Political Science Association Meeting, Newport, 2010; Law and Society Association Annual Meeting, Chicago, 2010.

"Efficient, Fair, and Incomprehensible: How the State 'Sells' its Judiciary to Disputing Parties," Association for the Study of Law, Culture, and the Humanities Annual Conference, Boston, 2009.

"Managing Radical Disputes: Public Reason, The American Dream, and the Case of Same-Sex Marriage," New England Political Science Association Meeting, Providence, 2008; Law and Society Association Annual Meeting, Montreal, Quebec, Canada, 2008; American Political Science Association Annual Meeting, Boston, 2008.

"Gay Rights, Good Manners, and the Courts," Law and Society Association Annual Meeting, Baltimore, 2006.

"All Judges are Political Actors — Except When They Are Not," New England Political Science Association Annual Meeting, Portsmouth, 2006.

"Gay Rights, Common Courtesy, and the Courts," Western Political Science Association Annual Meeting, Oakland, 2005.

"How Would You Know a Virtuous Citizen if You Saw One?" Constructing Civic Virtue Conference, Campbell Public Affairs Institute, Maxwell School, Syracuse University, November 1, 2002.

"The Liberal Arts, Legal Scholarship, and the Democratic Critique of Judicial Power," Legal Scholarship in the Liberal Arts Conference, Amherst, 2002.

"Abortion and the Political Significance of Judicial Compromise," Western Political Science Association Annual Meeting, Las Vegas, 2001.

"The Politics of Law as the Politics of Interests: An Examination of Affirmative Action," Western Political Science Association Annual Meeting, San Jose, 2000.

"The Supreme Court, Affirmative Action, and the Political Significance of Legal Ambiguity," American Political Science Association Annual Meeting, Atlanta, 1999.

"One People, One Race? The Constitution, Color Blindness, and the Problem of Political Judgment," American Political Science Association Annual Meeting, San Francisco, 1996.

"Making Democracy Deliberative: Minority Representation, The Supreme Court, and Post-Pluralist Theory," American Political Science Association Annual Meeting, Chicago, 1995.

"Essentially Contested Memberships: Racial Minorities and the Politics of Inclusion," Law and Society Association Annual Meeting, Toronto, Canada, 1995.

"Judicial Recognition of Political Identity: The Case of Minority Representation," Western Political Science Association Annual Meeting, Albuquerque, 1994.

INVITED LECTURES

Academic:

Boston College, 2017.

University of Pittsburgh School of Law, 2017.

Middlebury College, Department of Political Science, 2016.

Indiana University Maurer School of Law – Bloomington, 2016.

Campbell Public Affairs Institute Research Colloquium, 2012 and 2016.

Judicial Decisionmaking Seminar, Syracuse University, College of Law, 2012.

University of South Carolina, University Constitution Day Lecture, 2011.

Leaders for Democracy Fellows (LDF) at the Maxwell School, 2011.

MIT, Department of Anthropology, 2010.

Civic Education and Leadership Fellows Program (CELF) at the Maxwell School, 2010.

Middlebury College, Department of Political Science, 2010.

Boston Area Public Law Colloquium, organized by the Clough Center for the Study of Constitutional Democracy at Boston College, 2010.

Indiana University Maurer School of Law – Bloomington, 2009.

Campbell Public Affairs Institute Research Colloquium, 2009.

Syracuse University, College of Law, 2003 and 2007.

Middlebury College, Department of Political Science, 2001.

Dartmouth College, Department of Geography, 2001.

UCSB, Law & Society Program, 2001.

Syracuse University, Department of Political Science, 2001.

UCSD, Department of Political Science, 2000.

Harvard Program on Constitutional Government, 1999.

Plenary Speaker, 13th Annual Law and Semiotics Round Table, 1999.

UMASS Amherst, Department of Political Science, 1997.

Yale Political Theory Workshop, 1997.

Community, Alumni, and Educational:

Capstone Lectures, The Lawrenceville School, 2015, 2016, 2018.

College of Law Alumni Lecture, Lubin House, New York City, 2017.

Central New York Council for the Social Studies Annual Conference, 2012, 2013, 2014, 2015, 2016, and 2017.

Informed and Shared Conversations, Manlius Senior Center, 2010, 2016, and 2017.

Fayetteville Free Library, 2016.

Conversation from the Bench, Dineen Hall Dedication, Syracuse University College of Law, 2014.

Political Science Dissertation Writing Workshop, 2012, 2013, and 2014.

Future Professoriate Program, Syracuse University, 2012 and 2014.

Law Dialogs, Washington, D.C., 2013

Social Justice and Law, National Pro Bono Week, Syracuse University College of Law, 2011.

American Constitution Society, Syracuse University College of Law, 2011.

Oberlin College, Political Science Honors Program, 2011.

Law! Live @ Lubin House Lecture Series, New York City, 2008 and 2010.

Le Moyne College, Intelligent Conversations Series, 2008.

Elderhostel, 2006.

The Teaching Company, 2006.

Bet Havarim, 2004.

Keynote Speaker, Harvard Model Congress Europe (Paris, France), 1999.

CONFERENCES, LECTURES, AND SYMPOSIA ORGANIZED

Series Organizer, "Law, Politics and the Media Lectures," Syracuse University, 2008 – Present.

Program Co-Organizer, Peter and Sharon Murphy Kissel Fund for the Study of Civil Liberties, Maxwell School of Citizenship and Public Affairs, Syracuse University, 2012 – Present

Series Co-Organizer, Tanner Lectures on Citizenship, Maxwell School of Citizenship and Public Affairs, Syracuse University, 2011 – Present.

Series Organizer, IJPM Faculty Fellows Lectures, Syracuse University, 2010 – Present.

Event Co-Sponsor, American Politics Mini-Conference, Maxwell School of Citizenship and Public Affairs, Syracuse University, 2018.

Event Co-Organizer, Supreme Court Term Preview (featuring Amy Howe, SCOTUSblog), Syracuse University College of Law, 2017.

Lecture Co-Organizer, Countering Terrorism (and Russia) in the Age of Trump, with Eric Schmitt of *The New York Times*, Maxwell School, 2017.

Series Organizer, 1L Convocation Lecture Series, Syracuse University College of Law, 2011 – 2014.

Lecture Organizer, "Breaking In: The Rise of Sonia Sotomayor and the Politics of Justice," Joan Biskupic, Legal Affairs Editor, Reuters, Syracuse University, 2014.

Workshop Co-Organizer, "Law in the Age of Media Logic," Oñati International Institute for the Sociology of Law, Oñati, Spain, June 27-28, 2013.

Conference Co-organizer, Northeast Law and Society Meeting, Amherst, 2008 – 2013.

Lecture Organizer, "New York's Constitution: Sometimes It's Just a Suggestion," Susan Arbetter, State Capitol Correspondent and News & Public Affairs Director, WCNY, Syracuse University, 2013.

Colloquium Organizer, "Inside Game: The Effects of Editorial Bias in Legal Scholarship," Albert Yoon, University of Toronto, Syracuse University, 2012.

Lecture Organizer, "Henry Ford's War on Jews and the Legal Battle Against Hate Speech," Victoria Saker Woeste, American Bar Foundation, Syracuse University, 2012.

Symposium Organizer, "Is the Best Defense a Good Offense? The Ethics and Politics of Allowing Judges to Advocate Controversial Views," Syracuse University, 2011.

Lecture Co-organizer, "The Dynamism and Activism of the Roberts Court" and "9/11 Plus Ten: Entering the Age of Permanent War," Lyle Denniston, SCOTUSblog, Syracuse University College of Law, 2011.

Lecture Co-organizer, "Independent Media: Speaking Up for Democracy," Amy Goodman, Co-Host of Democracy Now!, Syracuse University, 2011.

Symposium Co-organizer, "The Toughest Call: The Lake Pleasant Murder Case," Syracuse University College of Law, 2010.

Lecture Organizer, "Supreme Decisions: The Roberts Court in 2010 and Beyond," Amy Howe, Editor of SCOTUSblog, Syracuse University College of Law, 2010.

Lecture Organizer, "The Undulating Role of Federal Judges in Sentencing," Honorable Sidney H. Stein, United States District Court Judge, Southern District of New York, Syracuse University College of Law, 2010.

Conference Co-organizer, Federal Judicial Center Seminar for Federal Judges, "Law and Media," Syracuse University College of Law, 2009.

Symposium Organizer, "Jurist in Residence: Chief Justice Ruth McGregor, Arizona Supreme Court," Syracuse University College of Law, 2009.

Lecture Organizer, "The Aspirational Constitution," Michael Dorf, Robert S. Stevens Professor of Law, Cornell University, Syracuse University College of Law, 2009.

Lecture Organizer, "Critical Mass is Critical: Building Authority in a Changing World," Gregg Gordon, President and CEO, Social Science Research Network (SSRN), Syracuse University College of Law, 2009.

Lecture Organizer, "Reinforcing Federal Law: The Designer Courthouses In Massachusetts and their Meaning for the First Circuit," John Brigham, Professor of Political Science, UMass Amherst, Syracuse University College of Law, 2009.

Event Co-organizer, Film screening of "Blanchard Road: A Murder in the Finger Lakes," Syracuse University College of Law, 2009.

Lecture Organizer, "Bloggers, Pundits, and Journalists: Assessing the Coverage of the 2008 Presidential Election," College of Law, Syracuse University, 2008.

Symposium Co-organizer, "Bush's Law: A Conversation with Pulitzer-Winning Author, Eric Lichtblau," S.I. Newhouse School of Public Communications, Syracuse University, 2008.

Conference Co-Organizer, "Creators vs. Consumers: The Rhetoric, Reality and Reformation of Intellectual Property Law and Policy," The Maxwell School, Syracuse University, 2007.

Symposium Organizer, "Supreme Makeover: Inventing a New Model of Judicial Openness on the High Court?," College of Law, Syracuse University, 2007.

Symposium Organizer, "Are Federal Judges Political? Views from the Academy, the Bench, and the Media," College of Law, Syracuse University, 2007.

Symposium Organizer, "Jail for Journalists: Freedom of the Press, Confidential Sources, and the Demands of Criminal Justice," The Maxwell School, Syracuse University, 2007.

Series Organizer, Secret Life of the Law Lectures, Syracuse University, 2004 – 07.

Series Organizer, Sawyer Law and Politics Faculty Fellows Colloquia, Syracuse University, 2005 – 07.

Symposium Organizer, "The Last Umpires? The News Media, the ABA and Other Independent Voices in the Federal Judicial Confirmation Process," S.I. Newhouse School of Public Communications, Syracuse University, 2006.

Symposium Organizer, "Lacrosse Justice: Gender, Race, and Fairness in the Duke Lacrosse Legal Saga," The Maxwell School, Syracuse University, 2006.

Conference Co-organizer, 9th Annual Meeting of Association for the Study of Law, Culture, and the Humanities Conference, Syracuse, 2006.

Series Organizer, George H. Babikian Guest Lectures, Syracuse University, 2005 – 06.

Conference Co-organizer, "Bench Press: The Collision of Media, Politics, Public Pressure, and an Independent Judiciary," JW Marriott Hotel, Washington, D.C., 2005.

Conference Organizer, "Legalizing Homosexuality: To What Extent are the Courts Likely to Recognize Gay Rights?," The Maxwell School, Syracuse University, 2004.

CONFERENCE AND SYMPOSIA PARTICIPATION

Moderator, Supreme Court Term Preview, Syracuse University, 2017.

Discussant, "Authors Meet Readers: *Raised Right: Fatherhood in Modern American Conservatism* by Jeffrey R. Dudas," American Political Science Association Annual Meeting, San Francisco, 2017.

Organizer and Moderator, "Democratizing Legal Information: The Promise and Pitfalls of Freely Circulating Law on the Internet," Association of American Law Schools Annual Meeting, San Francisco, 2017.

Panelist, "Race and Our Communities: Race, Justice, Violence and Police in 21st Century America," Syracuse University, 2016.

Panelist, "Authors' Perspectives," 62nd Annual National Conference of Law Reviews, Syracuse, 2016.

Presenter, "The U.S. Supreme Court and the Press: Tensions and Trends," Association of American Law Schools Annual Meeting, New York, 2014.

Presenter, "Law as Interpretation," Association of American Law Schools Annual Meeting, New York, 2014.

Chair and Discussant, "Framing Judicial Nominations," Oñati International Institute for the Sociology of Law, Oñati, Spain, 2013.

Chair and Discussant, "The Courts and Civil Rights," New York State Political Science Association Annual Meeting, Syracuse, 2013.

Moderator, "Sensoria Animalis? Tracing the Sensory Capacities of Non-Human Animals in the Law" and "Revisiting Law and Society Classics," Northeast Law and Society Meeting, Amherst, 2013.

Moderator, "Interpretation and Uncertainty," Association of American Law Schools Annual Meeting, New Orleans, 2013.

Discussant, "Authors Meet Readers: *Representing Justice* by Judith Resnik and Dennis Curtis, and *Legal Architecture: Justice, Due Process, and the Place of Law* by Linda Mulcahy," Law and Society Association Annual Meeting, San Francisco, 2011.

Moderator, "Legal Consciousness," Northeast Law and Society Meeting, Amherst, 2010.

Chair and Presenter, "Conference Theme Panel: Revisiting Sarat and Silbey's 'The Pull of the Policy Audience'," Law and Society Association Annual Meeting, Chicago, 2010.

Chair, "Jobs and Publishing: A Discussion about Professional Development in Law, Culture and the Humanities," Association for the Study of Law, Culture, and the Humanities Annual Conference, Providence, 2010.

Presenter, "Law and Interpretation: Interdisciplinary Legal Scholarship," Association of American Law Schools Annual Meeting, New Orleans, 2010.

Moderator, "Empirical Legal Studies," Northeast Law and Society Meeting, Amherst, 2008.

Chair and Discussant, "Author Meets Readers: *The Founding Fathers, Pop Culture, and Constitutional Law* by Susan Burgess," Law and Society Association Annual Meeting, Montreal, Quebec, Canada, 2008.

Discussant, "The Justification of Minority Language Rights," Campbell Public Affairs Institute Citizenship and Human Values Lecture Series, Syracuse 2008.

Chair and Discussant, "Masculinity and the Constitution," Association for the Study of Law, Culture, and the Humanities Annual Conference, Berkeley, 2008.

Discussant, "Constructing Constitutional Doctrine," American Political Science Association Annual Meeting, Chicago, 2007.

Presenter, "What Place (if any) Does Law and Society Scholarship Have in Public Life?," Northeast Law and Society Conference, Amherst, 2007.

Chair and Discussant, "Legal Realism Re-Examined," Association for the Study of Law, Culture, and the Humanities Annual Conference, Syracuse, 2006.

Chair, "Regulation," Association for the Study of Law, Culture, and the Humanities Annual Conference, Syracuse, 2006.

Chair and Discussant, "Law and Popular Culture," American Political Science Association Annual Meeting, Washington, D.C., 2005.

Chair and Discussant, "The Rule of Law and the State of Terrorism," Association for the Study of Law, Culture, and the Humanities Annual Conference, Austin, 2005.

Participant, "Roundtable on Current Research," Regional LGBT Studies Conference: Local, National, and Global Perspectives, Syracuse University, 2004.

Chair, "Litigation, Mobilization and Social Change," New England Political Science Association Annual Meeting, Providence, 2003.

Discussant, "Courts and the Federal Balance of Power," Conference on Evolving Federalisms: The Intergovernmental Balance of Power in America and Europe, The Maxwell School, Syracuse University, 2003.

Chair and Discussant, "Slavery and Territories," Western Political Science Association Annual Meeting, Denver, 2003.

Chair and Discussant, "Rights and Race: Readings in History, Law, and Literature," Association for the Study of Law, Culture, and the Humanities Annual Conference, New York City, 2003.

Chair and Discussant, "Judging and Writing," Association for the Study of Law, Culture, and the Humanities Annual Conference, New York City, 2003.

Panel Participant, "How to Teach Writing," College of Arts & Sciences Honors Program, Syracuse University, 2003.

Chair and Discussant, "What is Binding in the Constitution and Constitutional Interpretation?," Association for the Study of Law, Culture, and the Humanities Annual Conference, Philadelphia, 2002.

Chair and Discussant, "Privacy, Individuality, and Obligations to Others," Association for the Study of Law, Culture, and the Humanities Annual Conference, Austin, 2001.

Chair and Discussant, "Paradigms of Race," Law and Society Association Annual Meeting, Chicago, 1999.

Chair and Discussant, "Neutral Discourses," Law and Society Association Annual Meeting, St. Louis, 1997.

Discussant, "Judicial Interpretations of Civil and Political Rights," American Political Science Association Annual Meeting, San Francisco, 1996.

Participant, "Roundtable on Social Facts, Constitutional Theory, and the Rights of Subordinated Groups," American Political Science Association Annual Meeting, Chicago, 1995.

Discussant, "Occupied Territory II: Sovereignty and Sexuality," Law and Society Association Annual Meeting, Toronto, Canada, 1995.

Discussant, "Occupied Territory I: Law, Sovereignty, and Justice," New England Political Science Association, Portland, Maine, 1995.

HONORS, FELLOWSHIPS, AND AWARDS

Selected as Syracuse University's ACC Distinguished Lecturer for 2016-18.

Selected to deliver Keynote Address, Onondaga County Bar Association Law Day, Syracuse, 2018.

Finalist, *How Civility Works* (Nonfiction Category), YMCA Downtown Writer's Center CNY Book Awards, 2017.

"Is Civility Dead? Author Meets Readers Discussion of *How Civility Works*," Syracuse University College of Law, 2016.

Selected to deliver Walter R. Smith Visiting Scholar Lecture, Corning Community College, 2014.

Symposium on *All Judges Are Political – Except When They Are Not: Acceptable Hypocrisies and the Rule of Law*, published in *Law & Social Inquiry* 38(2013):190-221.

Selected to deliver Hands Lecture, sponsored by the Second Circuit Judicial Council Committee on History, Commemorative Events, and Civic Education, Second Circuit Court of Appeals, 2013.

Selected to deliver Aldrich Lecture in Law, Justice, and Society, Albion College, 2012.

"Law, Courtesy, and Hypocrisy: Author Meets Readers Discussion of *All Judges Are Political – Except When They Are Not*," Syracuse University College of Law, 2010; New England Political Science Association Annual Meeting, Hartford, 2011; Law and Society Association Annual Meeting, San Francisco, 2011.

Outstanding Teaching Award presented by Pi Sigma Alpha, the National Political Science Honor Society, and the American Political Science Association, 2007.

Syracuse University Excellence in Graduate Education Faculty Recognition Award, 2007.

Visiting Scholar, Political Science Department, University of California, San Diego, Spring 2000.

"Author Meets Critics: Keith J. Bybee's *Mistaken Identity: The Supreme Court and the Politics of Minority Representation*," New England Political Science Association Annual Meeting, Providence, 1999.

Best Dissertation Award, given by the American Political Science Association Organized Section on Race, Ethnicity, and Politics for all dissertations completed during 1993 – 95.

University of California, San Diego Excellence in Teaching Award, 1993.

National Science Foundation Minority Graduate Fellowship, 1989 – 92.

PROFESSIONAL ACTIVITIES

Chair, Section on Mass Communication Law, American Association of Law Schools, 2016 – 17; Chair-Elect, 2015 – 16; Secretary, 2014 – 15; Member of Executive Board, 2014 – Present.

Chair, Syracuse University College of Law Appointments and Leaves Committee, 2016 – Present; Member, 2008 – 14.

Co-Organizer, Law and Society Association Collaborative Research Network: Law and Media, 2013 – Present.

Member, SU Student Success Faculty Advisory Board, 2017 – Present.

Field Coordinator, Law and Courts, Political Science Department, 2017 – 18.

Department Representative, Ralph Bunche Summer Institute Poster Session, American Political Science Association Annual Meeting, 2017.

Member, Syracuse University College of Law Ad Hoc International and Special Programs Committee, 2016 – 17.

Member, Fayetteville Free Library Board, 2016 – Present.

Member, Board of the Central New York Council for the Social Studies (CNYCSS), 2014 – Present.

Member, Board of Advisors, Tully Center for Free Speech, S.I. Newhouse School of Public Communications, Syracuse University, 2010 – Present.

Faculty Advisor, American Constitution Society, Syracuse University College of Law, 2004 – Present.

Faculty Advisor, Syracuse Law and Civic Engagement (SLACE), Syracuse University College of Law, 2013 – Present.

Chair, Section on Law and Interpretation, American Association of Law Schools, 2012 – 13. Chair-Elect, 2011 – 12; Secretary, 2010 – 11; Member of Executive Board, 2013 – 16.

Member, Syracuse University Provost and Vice Chancellor Search Committee, 2015 – 16.

Member, Syracuse University College of Law Executive Promotion and Tenure Committee, 2011 – 16.

Member, Graduate Admissions and Funding Committee, Political Science Department, 2012 – 16.

Lower Division Advisor, College of Arts & Sciences, 2010 – 11; 2014 – 16.

Chair, Syracuse University College of Law Curriculum Committee, 2013 – 14; Member, 2014 – 16.

Member, Law and Society Association Herbert Jacob Book Prize Committee, 2014 – 15.

Chair, American Politics Search Committee, Political Science Department, 2014 – 15.

Member, Syracuse University Senate Committee on Appointments and Promotions, 2013 – 14.

Series Sponsor, "Interchanges" Government, Media, and Law Luncheons, Syracuse University, 2006 – 2014.

Member, Syracuse University Senate, 2008 – 09; 2012 – 14.

Advisor, Mackenzie Hughes Moot Court Problem Writing Team, Syracuse University College of Law, 2013 – 14.

Member, Syracuse University College of Law Advisory Committee on Educational Opportunities, 2013 – 14.

Member, Board of Advisors, Center for Indigenous Law, Governance and Citizenship, Syracuse University College of Law, 2004 – 14.

Member, Campbell Public Affairs Institute (CPAI) Advisory Committee, 2005 – 08; 2012 – 13.

Placement Director, Political Science Department, 2005 – 12.

Member, Syracuse University College of Law Colloquium Committee, 2010 – 12.

Member, Law and Society Association Harry J. Kalven Jr. Prize Committee, 2011 – 12.

Member, College of Law Faculty Task Force on Strategic Academic Programs, 2011 – 12.

Member, Political Science Department Research Committee, 2011 – 12.

President, Association for the Study of Law, Culture, and the Humanities, 2007 – 10.

Member, American Political Science Association Ralph J. Bunche Award Committee, 2009 – 10 for the best political science work on ethnic and cultural pluralism published in 2009.

Member, College of Law Self-Study Committee, 2009 – 10.

Member, Law Professor Evaluation Team organized by the American Bar Association Standing Committee on the Federal Judiciary for the evaluation of U.S. Supreme Court Nominees Harriet Miers (October 2005) and Sonia Sotomayor (June 2009).

Member, Syracuse University Committee for Diversity, 2008 – 09.

Member, Syracuse University College of Law Curriculum Committee, 2007 – 08.

Chair of Panel Organization, Constitutional Law and Jurisprudence Section, 2007 American Political Science Association Annual Meeting.

Panel Organizer and Participant, "Judging the Judges," Syracuse University Capital Campaign Kick-Off, 2007.

"Books to Watch For" Columnist, *Law and Courts: The Newsletter of the Law and Courts Organized Section of the APSA*, 2004 – 07.

Member, Syracuse University Faculty Council, 2006 – 07.

Member, Special Ad Hoc Promotions & Tenure Committee, College of Arts & Sciences, Syracuse University, Fall 2006.

Chair, Promotions & Tenure Committee, College of Arts & Sciences, Syracuse University, 2003 – 04. Committee member, 2002 – 03.

Minority Recruiter for Political Science PhD Program, Ralph Bunche Summer Institute, Duke University, June 2005, and McNair Scholars Program, Syracuse University, July 2005.

Founding member, Boston-Amherst Legal Studies Group (BALS), 1995 – 2002.

Member, Law and Cultural Studies Reading Group, 1998 – 2002.

Member, Law & Society Association Graduate Workshop Committee, 2001 – 03.

Section Head, Public Law, New England Political Science Association Annual Conference, Providence, 2003.

Member, APSA McGraw Hill Award Committee, 2002 – 03 and 2004 – 05, for best journal article on law and courts written by a political scientist and published during the calendar years 2002 and 2004.

Member, APSA Harcourt College Publishers Award Committee, 2000 – 01, for book or journal article, ten years or older, that has made a lasting contribution to the field of law and courts.

Member:

American Political Science Association
Law and Society Association
Association for the Study of Law, Culture and the Humanities

Peer reviewer for:

Journals:

American Journal of Political Science
American Politics Research
Journal of Law & Courts
Law, Culture, and the Humanities
Law & Social Inquiry
Law & Society Review
Studies in Law, Politics, and Society
Perspectives on Politics
Political Theory

Presses:

Ashgate Publishing
Baylor University Press

Cambridge University Press
Oxford University Press
Princeton University Press
Routledge
Stanford University Press
University of Chicago Press
University of Pennsylvania Press

Foundations:

Mellon Project on Student-Faculty Research
Social Sciences and Humanities Research Council of Canada
National Science Foundation, Law and Social Sciences Program (Ad Hoc reviewer and Member of Senior Advisory Panel).

COURSES TAUGHT

Law, Politics, and the Media

Constitutional Law (two-semester sequence at the College of Law)

Elements of Law

Constitutional Interpretation

Civil Liberties

Judicial Politics

Political Science Research Workshop

Political Argument and Reasoning

PhD Research and Writing Seminar

The Political Significance of Legal Ambiguity

Constitutional Democracy in America

The Supreme Court and the Politics of Minority Representation

The Law and Politics of Affirmative Action

American Political Thought from *Pluribus* to *Unum*

Political Theory and Legal Reasoning

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Profile

John is a labor and employment law attorney who has more than 30 years of experience exclusively representing employers in the full range of labor and employment law services.

He has defended businesses in a broad spectrum of employment litigation matters, including age, gender (including sexual harassment), race, religion, disability and other types of discrimination claims; wage hour claims under the Fair Labor Standards Act (FLSA) and state wage hour laws; breach of contract claims; and tort claims, in both state and federal courts and before state and federal agencies (EEOC and NYSDHR).

In addition, a substantial portion of John's practice includes traditional labor law services for management, including union avoidance counseling, collective bargaining (in units from a few dozen employees to a few thousand employees), counseling in connection with strikes and lockouts, representation of employers before the NLRB in representation and unfair labor practice proceedings and the handling of labor arbitrations.

While representing employers across all industry sectors, John has particular experience in construction, health care and higher education. In the construction industry, he has been involved in the negotiation and defense of Project Labor Agreements on a wide variety of construction projects and programs, ranging from a few million dollars to $15 billion dollars. Among the PLA projects/programs John has been involved with over the years are the Tappan Zee Bridge (including landmark litigation before the New York Court of Appeals), various projects for the City of New York and the New York City School Construction Authority, Boston's Central Artery/Third Harbor Tunnel Project, Syracuse's Joint School Construction Board and New York City's Javits Center, to name just a few.

In health care, John represents a number of acute care hospitals throughout Central New York in connection not only with day to day labor and employment issues in a unionized setting, but also in connection with various affiliation efforts between both represented facilities and between represented and nonrepresented facilities. In higher education, John has been involved in providing a full range of labor and employment law services to more than 10 higher education institutions. These services have included among other things, advising institutions on adjunct faculty organizing issues; faculty hiring, discipline (including termination) and tenure issues; collective bargaining (involving both staff and faculty); labor arbitrations; and

Education

- Notre Dame Law School (J.D., *magna cum laude,* 1977)
- University of Notre Dame (B.A., *with honors,* 1974)

Bar/Court Admissions

- New York
- U.S. Supreme Court
- U.S. Court of Appeals for the District of Columbia Circuit
- U.S. District Court for the Northern District of New York

Practices

- Higher Education
- Labor and Employment
- Cybersecurity and Data Privacy

discrimination litigation.

John is a frequent speaker and author on topics of interest to the labor and employment law bar. He has presented at meetings of the New York State Bar Association, the American Bar Association, the National Association of College and University Attorneys (NACUA), the College and University Personnel Association HR (CUPA), Georgetown Employment Law Litigation Institute, St. John's University Law School Employment Law Litigation Institute, and the National Transportation Research Board (National Academy of the Sciences). His articles have appeared in the Journal of College and University Law, Syracuse University Law Review, Notre Dame Law Review and the Labor Law Journal. He also previously taught as an adjunct in the Syracuse University School of Management and the Syracuse University School of Law.

Prior to joining the firm, John clerked for the Hon. John A. Danaher, U. S. Court of Appeals for District of Columbia Circuit.

Honors & Affiliations

- Listed in:
  - *The Best Lawyers in America*® 2019, Education Law; Employment Law - Management; Labor Law - Management; Litigation - Labor and Employment (listed for 15 years)
    - *Best Lawyers' 2019 Syracuse Education Lawyer of the Year*
    - *Best Lawyers' 2017 Syracuse Education Lawyer of the Year*
    - *Best Lawyers' 2011 Syracuse Education Lawyer of the Year*
  - *Martindale-Hubbell*®, AV Preeminent Rated
    - *Top-Rated Lawyer in Labor and Employment Law*
  - *New York Super Lawyers 2018*®, Employment and Labor (listed for more than 10 years)
    - *2015 Top 50 Upstate New York Super Lawyers*
    - *2014 Top 50 Upstate New York Super Lawyers*
    - *2013 Top 50 Upstate New York Super Lawyers*
  - *Who's Who In America*
  - *Who's Who In American Law*
- American Bar Association, Labor and Employment Law Section
- New York State Bar Association, Past Chair, Labor and Employment Law Section; Executive Committee; Past Co-Chair Committee on Ethics; Past Member; House of Delegates
- Onondaga County Bar Association
- Fellow, American Bar Foundation
- Fellow, College of Labor and Employment Law Lawyers
- Editorial Board, Journal of College and University Law
- NACUA (National Association of College and University Attorneys)
- Seventh Circuit and Note Editor, *Notre Dame Law Review*

Representative Presentations

- Labor Relations and Collective Bargaining - Northwestern University: football and beyond, National Association of College and University Attorneys Annual Conference, June 24, 2014
- Bond, Schoeneck & King's In-House Counsel CLE Series: Ethics Issues for In-House Counsel, December 11, 2013
- Bond, Schoeneck & King Webinar: 2013 Study of Labor Activity Within Region 3 of the National Labor Relations Board, November 14, 2013
- New York State Bar Association, Labor and Employment Law Section, Frequent Speaker at the Labor and Employment Law Section's Annual and Fall Meetings
- Past Speaker, Annual CUPA-HR Eastern Region Annual Conferences
- Past Speaker, Annual NACUA (National Association of College and University Attorneys) Conferences

Representative Publications

- Gaal and DiLorenzo, "Ten Degrees of Separation: How to Avoid Crossing the Line on Witness Preparation," *NYSBA Journal,* February 2018
- Gaal and Jones, "Disability Discrimination in Higher Education," 28 *Journal of College and University Law* 435
- Gaal, Glazier, Evans, "Gender Based Pay Disparities in Intercollegiate Coaching: The Legal Issues," 28 *Journal of College and University Law* 519
- "The Disclosure of Financial Information: Competitiveness and the Current Requirements of the Duty to Bargain in Good Faith," 38 *Labor Law Journal* 526
- "The NLRB's Misuse of Witnesses' Statements in Election Objection Proceedings," 33 *Labor Law Journal* 17
- "Pre-Hire Agreements and Their Current Legal Status," 32 *Syracuse Law Review* 581
- Ferguson and Gaal, "Codetermination: A Fact or a Future in America," 10 *Employee Relations Law Journal* 176
- Gaal and DiLorenzo, "The Legality and Requirements of HEW's Proposed 'Policy Interpretation' of Title IX and Intercollegiate Athletics," 6 *Journal of College and University Law* 161

Other Activities

- Board Member, Crouse Health Foundation
- Board Member, AccessCNY
- Past Board Member, Legal Services of Central New York
- Prior service as Adjunct Professor, Syracuse University College of Law and Syracuse University School of Management

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(315) 218-8100 fax

Profile

Suzanne is a litigation attorney who handles litigation throughout New York state courts and in federal courts across the country, including multidistrict and class action litigation.

She counsels and represents a wide variety of clients, including individuals, manufacturers, media companies, pharmaceutical companies, insurance companies, financial institutions, municipalities, not-for-profit organizations, small business owners, school districts and universities.

Suzanne's practice also includes representing clients in administrative hearings and resolving disputes through mediation. She has extensive experience arguing appeals in both state and federal court. Suzanne represents a variety of public and private companies as well as non-profit organizations in complex civil litigation. She handles commercial disputes, breach of contract, product liability, employment discrimination, unfair competition, trade secret and antitrust matters. Her practice also includes complex environmental litigation, encompassing defense of personal injury and property damage claims in multi-plaintiff cases arising from the contamination of soil and groundwater. Suzanne has experience defending personal injury claims based on exposure to hazardous substances in consumer products. She also represents clients in False Claims Act litigation and white collar criminal matters.

Prior to joining the firm, Suzanne clerked for the Honorable Rosemary S. Pooler, of the U.S. Court of Appeals for the Second Circuit.

Representative Matters

- Defending insurance company against *qui tam* relator's allegations that it and 35 other insurers and self-insured entities violated the False claims Act by fraudulently failing to reimburse the Centers for Medicare and Medicaid Services in violation of the Medicare Secondary Payer Act
- Defending financial institution in fraudulent conveyance multidistrict litigation concerning LBO of publicly traded company
- Defending media company in gender, age, race and disability discrimination/retaliation cases
- Defended financial institution in putative class action in federal district court concerning bank overdraft fees

Education

- Syracuse University College of Law (J.D., *summa cum laude,* 1998)
- Harvard University (A.B., *magna cum laude,* 1995)

Bar/Court Admissions

- New York
- U.S. Court of Appeals for the Second Circuit
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the Northern District of New York
- U.S. District Court for the Western District of New York
- U.S. District Court for the Southern District of New York

Practices

- School Districts
- Toxic Tort and Environmental Litigation
- Litigation
- Intellectual Property and Technology
- Environmental and Energy

- Defended financial institution in class action challenging merger; obtained summary judgment dismissing complaint and allowing merger to proceed
- Defended designer / manufacturer of mercury retort oven in action alleging damages from mercury vapor contamination and obtained summary judgment dismissing all claims following extensive discovery
- Defended tool manufacturer in action alleging personal injury and obtained order dismissing case
- Assisted with defense of agricultural marketing and service organization, including motions and ongoing discovery in putative class actions in Northern District of California and Southern District of Illinois alleging antitrust violations against dairy cooperatives
- Defended pharmaceutical company in multidistrict litigation involving alleged personal injury due to alleged drug defect; worked with multiple national firms coordinating various aspects of litigation; responsible for discovery in all actions filed in New York state and federal court courts in Upstate New York
- Worked on team defending manufacturer in multi-plaintiff cases in New York State Supreme Court in cases alleging personal injury, medical monitoring and property damage due to soil/water contamination (PCBs, TCE, DCE, VC)
- Defended a manufacturer in multi-plaintiff action in federal court alleging personal injury, medical monitoring and property damage due to vapor intrusion; and participated in mediated settlement of all claims
- Defended nonprofit health care provider in False Claims Act litigation alleging Medicaid fraud and retaliation against relator
- Defend school districts in IDEA hearings and advise districts on compliance with IDEA and Section 504 regulations
- Obtained summary judgment affirmed by Second Circuit for school district in First Amendment claims by student concerning threatening instant message
- Obtained summary judgment declaring right of property owner to sell property and invalidating right of first refusal based on violation of rule against perpetuities

Honors & Affiliations

- Listed in:
  - *New York Super Lawyers 2010*®, Environmental Litigation; Antitrust Litigation; Personal Injury Defense: General
- Appointed to New York State Bar Association Committee on Women in the Law; Programming Co-Chair
- Northern District Federal Court Bar Association
- Onondaga County Bar Association
- Onondaga County Bar Foundation, Board Member
- Central New York Women's Bar Association, Board Member
- *Central New York Business Journal*, 2016 Successful Business Women Awards
- Graduate, 2009 Leadership Greater Syracuse
- Mediator, ADR Mandatory Mediation Program, Northern District of New York

Representative Presentations

- Expert Witnesses in the New York State and Federal Courts, New York State - Federal Judicial Council and Advisory Group Second Circuit Continuing Legal Education Program, October 19, 2018
- Panel Member, NDNY-FCBA CLE, The Disciplined Deposition: Tips for Taking a Deposition in a Federal Court Proceeding, March 31, 2016
- Panel Member, NDNY-FCBA CLE, False Claims Act and Qui Tam Seminar, April 22, 2015
- The False Claims Act – What You Need to Know, Bond In-House Counsel CLE Series, November 18, 2014
- False Claims Act and *Qui Tam* Enforcement: All Points of View, Northern District of New York Federal Court Bar Association CLE, July 15, 2014
- Drafting 101: Complaints and Removal Papers, Northern District of New York Federal Court Bar Association CLE, March 18, 2013
- Federal Courts Jurisdiction and Venue Act, Northern District of New York Federal Court Bar Association CLE, August 13, 2012

Other Activities

- Chair, Board of Directors, Hiscock Legal Aid Society
- Board Member, Syracuse University Law Alumni Association
- Former Board Member, Child Care Solutions, 2007-2012

Christopher J. Harrigan

Barclay Damon

Chris counsels and represents employers of all types in labor and employment-related matters, including employment litigation in federal and state courts and before the EEOC and the New York State Division of Human Rights. From Fortune 500 companies to small family-owned businesses, Chris has extensive experience counseling clients and litigating claims regarding workplace discrimination and the enforcement of non-competition agreements. In addition, Chris advises clients on a variety of business issues, including collective bargaining negotiations, labor arbitrations, union organizing campaigns, executive employment agreements, wage and hour law investigations, employee theft, severance agreements, the development of employment policies, and the preparation of restrictive covenants/non-competition agreements.

Chris also provides a broad range of counseling and training to executives, supervisors, managers, and employees on topics including positive employer-employee relations, anti-harassment compliance, wage and hour issues, investigations of workplace misconduct, documentation and performance reviews, and avoiding workplace violence. In addition, Chris represents institutions of higher education, charter schools, and public school districts in employment law issues and education law matters, including student disciplinary issues.

Besides his labor and employment practice, Chris is heavily involved with the leadership of the firm in his role as marketing partner, overseeing the marketing and business development efforts of the firm's Marketing Committee and marketing department. A Syracuse native, Chris is highly visible and very active in the local community, serving on a number of civic and charitable boards and volunteering his time with various youth sports organizations.

Laura L. Spring, J.D.

Partner

Cohen Compagni Beckman Appler & Knoll, PLLC (CCBLaw)

Laura, a Member and equity owner of CCBLaw, concentrates her practice in the areas of labor and employment law, human rights disputes, health law, intellectual property rights and commercial litigation. Laura is versed in all aspects of employment law, representing clients in federal and state administrative agencies as well as federal and state courts, arbitrations and mediations. She has over 20 years of litigation experience. Laura represents a myriad of small and medium sized businesses to ensure compliance with the various discrimination laws, wage and hour issues, corporate compliance, and human resources management. Laura negotiates employment contracts, separation agreements, severance agreements, non-competition agreements, shareholder and partnership agreements for individuals, executives, physicians, employers, and employees and has handled and been involved in numerous complex commercial litigation. Laura also represents licensed professionals before the Office of Professional Misconduct, the Office of Professional Discipline and other administrative agencies.

Laura has volunteered for various local charities. Most recently, Laura served as President of the Auxiliary of St. Joseph’s Health and is currently a member of the St. Joseph's Health Foundation Board. Laura serves as a Director of the Onondaga County Bar Association. Laura also serves as a mediator for the NDNY Federal Mediation Program. She has served as the President of the Fayetteville Free Library Board of Directors, as a Director of the Women’s Fund of Central New York and as Secretary of the Board.

Hon. Andrew T. Baxter
U.S. Magistrate Judge

Andrew T. Baxter is a United States Magistrate Judge for the Northern District of New York in Syracuse. At the time of his appointment in January 2010, he was the Interim United States Attorney for the Northern District of New York. Judge Baxter earned an A.B. in Economics from Princeton University in 1978 and a J.D. from Harvard Law School in 1981.

Andrew T. Baxter served as a federal prosecutor in the U.S. Attorney's Office in Syracuse from 1988, at various times holding the positions of Senior Litigation Counsel, Chief of the Criminal Division, and First Assistant U.S. Attorney. Judge Baxter was an Assistant U.S. Attorney in the District of New Jersey from 1984 through 1988, after engaging in the private practice of law in Philadelphia for three years.

Hon. Mae A. D'Agostino
U.S. District Judge

Mae Avila D'Agostino is a United States District Judge for the Northern District of New York. At the time of her appointment in 2011, she was a trial attorney with the law firm of D'Agostino, Krackeler, Maguire & Cardona, PC. Judge D'Agostino is a 1977 magna cum laude graduate of Siena College in Loudonville, New York. At Siena College Judge D'Agostino was a member of the women's basketball team. After graduating from College, she attended Syracuse University College of Law, receiving her Juris Doctor degree in May of 1980. At Syracuse University College of Law, she was awarded the International Academy of Trial Lawyers award for distinguished achievement in the art and science of advocacy.

After graduating from Law School, Judge D'Agostino began her career as a trial attorney. She has tried numerous civil cases including medical malpractice, products liability, negligence, and civil assault.

Judge D'Agostino is a past chair of the Trial Lawyers Section of the New York State Bar Association and is a member of the International Academy of Trial Lawyers and the American College of Trial Lawyers.

Judge D'Agostino has participated in numerous Continuing Legal Education programs. She is an Adjunct Professor at Albany Law School where she teaches Medical Malpractice. She is a past member of the Siena College Board of Trustees, and Albany Law School Board of Trustees. She is a member of the New York State Bar Association and Albany County Bar Association.

Hon. Therese Wiley Dancks
U.S. Magistrate Judge

Thérèse Wiley Dancks is a United States Magistrate Judge for the Northern District of New York. At the time of her appointment in February of 2012, she was a founding partner in the law firm of Gale & Dancks, LLC, where her practice centered on civil litigation and trial work. She was associated with the law firm of Mackenzie Hughes, LLP from 1991 to 1997. Judge Dancks graduated magna cum laude from LeMoyne College in 1985 and earned her J.D. degree cum laude from Syracuse University College of Law in 1991.

Judge Dancks is a past president of the Central New York Women's Bar Association and established the organization's award winning Domestic Violence Legal Assistance Clinic during her term. She is a past director of the Onondaga County Bar Association and has been a board member of several charitable and community organizations. She served as Chairwoman of the Board of Directors of the Hiscock Legal Aid Society and the Secretary of the Board of Directors of St. Elizabeth College of Nursing. She has co-authored articles for the Syracuse Law Review and she frequently lectures for educational institutions, professional organizations and bar association.

Hon. Brenda K. Sannes
U.S. District Judge

Brenda K. Sannes is a United States District Judge for the Northern District of New York. At the time of her appointment in 2014 she was the Appellate Chief in the United States Attorney's Office in that district.

Judge Sannes earned her B.A. degree magna cum laude, with distinction in the English Department, from Carleton College in 1980. She earned her J.D. degree magna cum laude from the University of Wisconsin Law School in 1983 where she was an articles editor for the law review and was elected to the Order of the Coif.

From 1983 to 1984, Judge Sannes clerked for the Honorable Jerome Farris on the Ninth Circuit Court of Appeals. From 1984 to 1988, she was litigation associate in a law firm in Los Angeles. In 1988, she became an Assistant United States Attorney in Los Angeles. During her time in that office she served as a Deputy Chief in the Narcotics Section and later as the Anti-Terrorism Advisory Council Coordinator. She moved to Central New York in 1994 and was an Assistant United States Attorney in the Northern District of New York from 1995 until her judicial appointment in 2014. She served as the Appellate Chief from 2005 until her appointment to the bench.

Hon. Frederick J. Scullin Jr. *Senior U.S. District Judge*

Senior Judge Scullin received his commission appointing him a United States District Judge for the Northern District of New York on February 10, 1992 and took the oath of office on March 13, 1992. On April 6, 2000, he became Chief Judge of the Northern District of New York. He became Senior Judge on March 13, 2006.

Judge Scullin, a native Syracusean, attended and graduated from Niagara University in 1961 and Syracuse University, College of Law in 1964.

In November of 1964, Judge Scullin entered active duty with the United States Army, received training as a paratrooper and ranger, and thereafter served as an infantry commander with the 173rd Airborne Brigade in the Republic of Vietnam. He received numerous awards and decorations, and after release from active duty, continued to serve in the United States Army Reserve retiring in 1991 with the rank of Colonel.

Following military service, Judge Scullin entered the private practice of law with the firm of Germain and Germain, Syracuse, New York. Thereafter, he served as an Assistant District Attorney for Onondaga County. In 1971, he was appointed by the New York State Attorney General as one of the original prosecutors of the then newly-formed Statewide Organized Crime Task Force and in that capacity, served as the Assistant in Charge of the Albany Regional Office. In 1978, he was appointed by the Governor of the State of Florida as Chief Prosecutor of the Governor's Council for the prosecution of organized crime. He returned to the private practice of law in 1980 and in 1982 was appointed the United States Attorney for the Northern District of New York, a position he held until his appointment to the federal bench. In that capacity, Judge Scullin supervised numerous investigations and prosecutions in drug trafficking, organized crime, and -- most notably-- public corruption.

Senior Judge Scullin is a former member of the Second Circuit Judicial Council and was the Circuit representative on the Judicial Conference of the United States, which is the policy-making body for federal courts throughout the nation. In addition to his regular duties as a District Court Judge, Judge Scullin was a member of the Foreign Intelligence Surveillance Court, having been appointed by Chief Justice Rehnquist to a seven-year term which ended in May 2011. The Foreign Intelligence Surveillance Court meets in Washington, DC and is in session throughout the year.

Senior Judge Scullin is a member of the Federal Court Bar Association (NDNY), Federal Bar Council, State of Florida Bar Association, the Onondaga County Bar Association (having served on the Board of Directors from 1988 to 1990), honorary member of the Board of Advisors, Syracuse University College of Law, the Law College Association of Syracuse University and is a past member and chairman of the City of Syracuse, County of Onondaga Drug & Alcohol Abuse Commission, member of the Board of Directors, Elmcrest Children's Center, Christ the King Retreat House, and the Franciscan Collaborative Ministries Advisory Council.