

# Nassau Lawyer



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## The Cloak Room at Domus

*New Restaurant and Catering Service Rejuvenates Dining Experience*

By Valerie Zurblis



25 Sails Hospitality Co-Owners Chef Richard Venticinque (standing), Mark Goodyear (l) and Ivan Sayles (r).  
Photo by Hector Herrera

The word is quickly spreading. There's a new caterer at the Nassau County Bar Association, the Cloak Room, and the food is amazing.

NCBA has brought in 25 Sails Hospitality, an established restaurant and catering company, to take the Bar Association's dining experience up to the next level. Co-owner Ivan Sayles said their mission is to provide a first-class dining and catering experience while maintaining the high standards expected by NCBA members.

"This is the Nassau County Bar Association, the home to legal and judicial professionals and a leader in the community. Members should have the food services they deserve," Sayles said. "We want the members to be proud to bring their colleagues and guests to their Bar Association."

NCBA President Martha Krisel explained that the change benefits the entire membership. "We party a lot at Domus. We have several annual food-oriented events and our committees always

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NCBA COMMITTEE MEETING CALENDAR  
Page 22

### SAVE THE DATES

#### WE CARE

**Children's Festival**  
Wednesday, February 22, 2017  
At Domus  
See pg 16

#### NASSAU ACADEMY OF LAW

**Bridge the Gap**  
Saturday & Sunday, March 4-5, 2017  
At Domus  
Details coming soon

#### WE CARE

**Jekyll & Hyde The Musical**  
Engeman Theater at Northport  
Sunday, March 19, 2017  
Details pg 16

#### NASSAU ACADEMY OF LAW

Hon. Elaine Jackson Stack  
**MOOT COURT COMPETITION**  
March 21 & 22, 2017 at Domus  
Details to follow

#### WE CARE

**Dressed to a Tea**  
Thursday, March 30, 2017  
At Domus  
Details coming soon

#### 118TH ANNUAL

**NCBA DINNER DANCE**  
Saturday, May 13, 2017  
See pg 6

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### OF NOTE

#### NCBA Member Benefit - I.D. Card Photo

Obtain your photo for Secure Pass Court  
ID cards at NCBA Tech Center  
**Only For New Applicants**

Cost \$10 • February 7, 8 & 9, 2017

9 a.m. - 4 p.m.

**PLEASE NOTE:** Existing Secure Pass holders do not need new photos and can now renew online at the OCA website [www.nycourts.gov/attorneys/registration/securepass.shtml](http://www.nycourts.gov/attorneys/registration/securepass.shtml)

#### UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, January 12, 2017 12:45 p.m.  
at Domus

Thursday, February 9, 2017 12:45 p.m.  
at Domus

### ON ETHICS

## What Are Ethics?

By Kevin Kearon

What are ethics? Socrates contemplated them and described them as the norms by which acceptable and unacceptable behavior are measured. Plato studied and learned from Socrates and concluded ethics were acquired by the assemblage and adoption of the great virtues and fidelity to their commands. Aristotle was a student of both and wrote the epics Nicomachean Ethics, exploring proper conduct of the individual, and Politics, about how to function properly in the midst of and for the benefit of the community. These three early Greek thinkers studied and appreciated the subject. So should we.

Black's Law Dictionary defines ethics as: directives based on one's ethics and morality; as how one lives with others; as the foremost concepts and principles of proper human conduct; as socially, the collective of human values, treating each human equally, acknowledging human and natural rights, obeying the law of the land, showing health and safety concerns, caring for the natural environment.

Is there a difference between ethics and morality? Are ethics universal? Are they a naturally intuitive attribute of hu-

#### WELCOME TO THE INAUGURAL EDITION OF ON ETHICS, A NEW MONTHLY COLUMN.

Each issue, *On Ethics* will report on consequential developments in the field of ethics in the practice of law, as well as on the business of the Ethics Committee of the Nassau County Bar Association.

man nature or are they counterintuitive, learned, or cultural in nature? Are codes of ethics hard to understand or to practice or adopt consistently and without exception? Seemingly every profession has a unique ethical code. Doctors follow rules different from lawyers. They should not, for example, perform unnecessary procedures and should obtain consent before removing a limb or an organ. Journalists should use reliable sources, conduct thorough investigations and seek to hear from all sides before printing scandalous allegations. Architects and engineers should not seek to save expense by using inferior building materials likely to result in a structural collapse.

So what, then, are legal ethics? Black's Law Dictionary defines legal ethics as the term that is given to the code that is set

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### Judicial Election Results

#### Supreme Court

Hon. Edmund M. Dane  
Hon. Joseph H. Lorintz

#### Family Court

Hon. Stacy D. Bennett  
Hon. Ayesha K. Brantley  
Hon. Ellen R. Greenberg  
Hon. Conrad D. Singer

#### District Court

Hon. Eileen J. Goggin  
Hon. Helen Voutsinas

Supreme Court, Family Court  
and District Court Judicial Induction  
Ceremony

Friday, January 20, 2017 at 2:00 p.m.

Participating in the  
Induction Ceremony:

Hon. Dane  
Hon. Lorintz  
Hon. Brantley  
Hon. Goggin

Central Jury

Courtroom

100 Supreme

Court Drive

Mineola

For Induction Ceremony Information  
contact Dan Bagnuola  
516-493-3262



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## ETHICS ...

Continued From Page 1

up by legal professionals that details their moral and professional duties to clients. This is one proper characterization of the New York Rules of Professional Conduct, which replaced the New York Code of Professional Responsibility's Disciplinary Rules and Ethical Considerations about a decade ago.

Lawyers have a more difficult set of obligations than most non-lawyers, which many lawyers fully appreciate. The breadth and complexity of challenges, ethically and otherwise, across the spectrum of legal issues imaginable is staggering. The Ethics Committee helps our fellow attorneys face those challenges. The Nassau County Bar Association has dozens of committees. Most of them serve limited constituencies or practice areas. The Ethics Committee serves all of the members, and all of the other committees.

## The Ethics Committee

Many people confuse the Ethics Committee with the Grievance Committee. Simply put, the Ethics Committee aims, among other things, to help our members avoid business before the Grievance Committee. We attempt to do so in two distinct ways. The first is the regular and ongoing education of our members about the Rules of Professional Conduct. (Domus has many excellent ethics CLEs available for rent). The second is the prompt and considered response to inquiries from members about the proper course of conduct when an unusual or difficult decision needs to be made, frequently against time exigencies.

All inquiries to the Ethics Committee are taken seriously, and responded to as quickly as possible depending upon their time sensitivity. The members of the Committee will frequently consult with one another and review applicable provisions of the Code of Professional Conduct before seeking to provide guidance. We are discreet and enjoy problem-solving.

We have dealt with a number of issues involving life-and-death consequences. Usually such inquiries relate to the nature and scope of the attorney client privilege and the disposition of information obtained through privileged communications.

Over the last year, we have responded to dozens of inquiries reflecting the variety of ethical conundrums that lawyers can face. From time to time and where appropriate, this column will examine such inquiries.

For instance, the Rules permit, but

do not compel, an attorney to disclose confidences in order to prevent the commission of criminal activity. This is a significant enlargement of the previous rule which permitted disclosure of such communications only to prevent the commission of a violent crime likely to result in serious injury or death. We have had a number of such inquiries.

The obligation to report attorney misconduct is widely misunderstood and frequently causes ethical dilemmas for lawyers who may have some level of information about possible misconduct but are unsure about the quantum of evidence necessary to trigger a reporting obligation.

We have addressed and frequently conducted CLEs on issues involving web sites and marketing, old clients, new clients, conflicts of interest, candor with a tribunal, retainer agreements, fee disputes, moving to be relieved as counsel, inadvertent disclosures, prosecutorial misconduct and many others.

We are not always able to give black-and-white direction. We do not give legal advice as much as we help the inquiring attorney understand his or her obligations under the rules. Frequently the analysis of an ethical question is in the nature of a balancing test, weighing the obligations of seemingly conflicting sections of the code against one another. If nothing else, we are adept at directing the inquiring attorney to the applicable provisions and are available to discuss their application.

## Inquiries Are Welcome

This column welcomes and encourages the entire NCBA membership to come to understand, appreciate and benefit from the resources of the Ethics Committee. We are a friendly and remarkably non-judgmental group of lawyers who appreciate the difficulty of the daily practice of law. We meet monthly and encourage telephone, email or any other form of inquiry. Our formal written opinions are on the NCBA website.

Each month, this column will be dedicated to making us better lawyers and better familiar and altogether compliant with the New York Professional Rules of Conduct. Without revealing confidences, it will report about the work of the Ethics Committee, both educationally and in responding to inquiries. It will frequently examine aspects and provisions of the Rules in an effort to make them more familiar and less mysterious. It will identify easily available resources from which to study the issues practitioners confront, from the New York Rules of Professional Conduct, various other codes of professional ethics and conduct, ethics opinions

of the Nassau County, New York State, and American Bar Associations, and ethics treatises, such as Roy Simon's seminal New York work on the subject, as well as credible blogs on legal ethics.

## Issue:

Lawyer represents a client criminally charged with a series of violent threats to kill and with actual crimes of violence against another. Client is at liberty on bail and has a psychiatric history of mental instability and suicidal ideations. Client confides in lawyer she is going to kill herself, and makes a series of ambiguous statements causing the lawyer, given the totality of circumstances, to be concerned client may pose an imminent threat of harm to the complainant in addition to herself. What do the New York Rules of Professional Conduct say about the obligations or discretion, if any, the lawyer may have to address the concerns these circumstances raise?

## Discussion:

Rule 1.6 provides in part:

*Confidentiality of Information*

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

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

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

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

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

Importantly, this rule authorizes

but does not require disclosure. While neither suicide nor any particular crime is specifically identified in the rule, suicide would certainly qualify as certain death or substantial bodily harm.

The fact that the client may intend only self-harm as opposed to harm to others does not negate the disclosure authority. Rule 1.14 specifically authorizes disclosure of privileged information in the case of a client suffering from diminished capacity when necessary to take protective action to safeguard the client's interests. Surely a client contemplating suicide is suffering from diminished capacity and the preservation of her life an interest worth safeguarding.

Rule 1.6(b)(2) gives discretion to the lawyer to disclose what otherwise would be privileged to prevent the commission of a crime. Whereas a disclosure to prevent suicide is less likely to cause the client harm, the discretion to disclose regarding an intent to cause harm to or commit a crime against another is often an unwelcome burden, particularly when such statements are ambiguous or quickly retracted or claimed to have been only a joke.

The lawyer may disclose such a confidence which requires the exercise of discretion. The comment to Rule 1.6, acknowledging that any such disclosures may very well inure to the detriment of the client, counsels that before disclosing, the lawyer should take into account the totality of circumstances, including: the seriousness of the prospective harm, the imminence and likelihood of its occurrence, the availability of alternatives to disclosure to seek its avoidance. Additionally the comment indicates that any disclosure be no greater than necessary to prevent the threatened harm or crime.

In addition to enlightening our readers on ethical issues, this column and the Ethics Committee will seek to celebrate this profession and its hard-working practitioners most of whom strive valiantly every day to provide honest and competent legal services to their clients. If we can make their professional lives a bit less stressful by providing guidance and assistance, then we will have served our purpose and our profession.

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## ADA ...

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& Mental Hygiene, the Second Circuit remanded the case back to the district court to consider whether it would have been reasonable for the employer to have allowed the plaintiff to work from home.<sup>19</sup> Likewise, in *DeRosa v. Nat'l Envelope Corp.*, the court suggested that the employer had already provided a reasonable accommodation by allowing the employee to work from home.<sup>20</sup>

Despite the Second Circuit's approach, district courts have nonetheless often found requests to work from home to be unreasonable.<sup>21</sup> For example, in *Lalla v. Consol. Edison Co. of*

*New York*, the court noted that case law suggested that working at home "is an extraordinary accommodation, and is warranted in only exceptional cases".<sup>22</sup> Similarly, the court in *Smith-Henze v. Edwin Gould Servs. for Children & Families*<sup>23</sup> noted that courts have generally held that it is not reasonable to require an employer to accommodate a request to work outside the workplace.

As one can see from a review of the above, it is imperative that business owners and their employment law attorneys review each request for a leave of absence or to telecommute as a request for a reasonable accommodation for a disability on a case-by-case basis.

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- 42 USC §12112(a).
- 42 USC §12111(8).
- 42 USC §12111(5)(A).
- 42 USC §12111(9).
- 42 USC §12111(10).
- Borkowsky v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 140 (2d Cir. 1995).
- 29 CFR §1630.2(n)(1).
- Hunt-Watt v. Nassau Health Care Corp.*, 43 F.Supp.3d 119 (E.D.N.Y. 2014).
- 29 CFR §1630.2(n)(2)(1), (n)(3).
- Thompson v. Workmen's Circle Multicare Ctr.*, 2016 U.S. Dist. LEXIS 24121 (S.D.N.Y. 2016); *Misek-Falkoff v. IBM Corp.*, 854 F. Supp. 215, 227 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 811 (2d Cir. 1995).
- Misek-Falkoff*, 854 F. Supp. at 227; *Kotlowski v. Eastman Kodak Co.*, 922 F.Supp. 790 (W.D.N.Y. 1996).
- Petrone v. Hampton Bays Union Free School Dist.*, 568 Fed. App'x 5 (2d Cir. 2014).
- Parker v. Columbia Pictures Indus.* 204 F.3d 326, 338 (2d Cir. 1999).

14. *Petrone*, 568 Fed. App'x at 5; see also *Graves v. Finch Pruyn & Co.*, 353 Fed. App'x 558 (2d Cir. 2009).

15. See, e.g., *Thompson*, 2016 U.S. Dist. LEXIS 24121; see also *Nandori v. City of Bridgeport*, 2014 U.S. Dist. LEXIS 5581(D. Ct. 2014).

16. *Nandori*, 2014 U.S. Dist. LEXIS 5581.

17. Globalworkplaceanalytics.com (updated January, 2016).

18. *Nixon-Tinkelman v. N.Y.C. Dept. of Health & Mental Hygiene*, 434 F. App'x 17, 20 (2d Cir. 2011); *DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 104 (2d Cir. 2010).

19. *Nixon-Tinkelman*, 434 F. App'x at 20.

20. *DeRosa*, 595 F.3d at 104.

21. *Smith-Henze v. Edwin Gould Servs. for Children & Families*, 2008 U.S. Dist. LEXIS 94081 (S.D.N.Y. 2008); *Lalla v. Consol. Edison Co. of New York*, 2001 U.S. Dist. LEXIS 5312, (S.D.N.Y. Apr. 30, 2001), *aff'd* 91 F. App'x 701 (2d Cir. 2002).

22. *Lalla*, 2001 U.S. Dist. LEXIS 5312, \*14.

23. *Smith-Henze*, 2008 U.S. Dist. LEXIS 94081.