

How to staff an ethics hotline: The New York County Lawyers' Association experience

The organized bar is replete with committees. And many, if not most of the larger and more established bar associations in the United States have one form or another of an ethics committee, the most prominent of which is the ABA Standing Committee on Ethics and Professional Responsibility, which develops the ABA Model Rules of Professional Conduct (Model Rules) and related Formal Ethics Opinions.

While a great deal has been written about bar association ethics committees,¹ there is a dearth of literature on one of their most interesting and important features: the free legal ethics telephone hotline.² In our state, ethics hotlines provide free, confidential information about New York's Rules of Professional Conduct (RPC) to lawyer callers. Often, these callers are solo or small-firm practitioners who do not have access to the in-house ethics lawyers who have become staples of large, national firms.

This is not a theoretical article about the virtues or pitfalls of bar association ethics hotlines. Rather, this article documents the experience of the Professional Ethics Committee of the New York County Lawyers' Association. By publishing and explaining the procedures of the NYCLA Ethics Committee, the authors hope to provide guidance to sister organizations in other jurisdictions that are looking to establish their own ethics hotlines or develop and expand existing programs.

We also seek to memorialize our experience as members of the NYCLA Ethics Committee so that it can be shared with current and future members of our own committee. We further hope to encourage discussion about the role and mechanics of bar association ethics hotlines and welcome feedback from sister bar associations concern-

ing their experiences. In the course of this dialogue, we anticipate that some contributions and comments will educate us and the other members of the NYCLA Ethics Committee.

Composition of the committee

NYCLA's Professional Ethics Committee is the oldest bar association ethics committee in the country and has been issuing written ethics opinions since 1912.³ The committee's fundamental purpose is to interpret the RPC.⁴ The committee does so in two primary ways: 1) written ethics opinions, which are published on Westlaw and the bar association's webpage; and 2) informal, private telephone calls to inquiring attorneys who call the committee's ethics hotline.⁵ The telephone hotline is offered to all New York lawyers, free of charge. Ethics hotlines for New York lawyers are also provided by the New York State Bar Association, New York City Bar, and Nassau County Bar Association.⁶

The NYCLA Ethics Committee is open to any NYCLA member who expresses an interest in joining. At the time of writing, there are approximately 35 members of the committee, including officers and staff of the association. There is no special vetting process; no interviews, resumes, or special expertise in legal ethics are required as a precondition to joining. The chair and co-chair are not routinely asked to vet new members; the association generally notifies the committee *after* a new member has joined the committee.

The membership of the committee includes professional legal ethicists, law professors, law firm ethics counsel, members of the Association of Professional Responsibility Lawyers (including two past presidents of APRL), and other lawyers with significant experience in

legal ethics. But the committee also includes lawyers, recent graduates, and law students with an interest in the subject, but little prior experience or knowledge. As a result of the differing levels of experience on the committee, the committee meetings serve an educational function, with senior and junior ethicists participating in a continuing dialogue about issues at our meetings.

Hotline mechanics

The hotline is staffed by volunteer members of the committee in half-month shifts. The volunteer lawyers field hotline calls from the comfort of their offices, or from whatever phone number they chose to share with the committee. The on-duty hotline staffer's phone number is posted in two places: the association's webpage (**NYCLA.org**) and the association's monthly newsletter, the *New York County Lawyer*. In addition, lawyers calling the bar are directed to the hotline volunteer on duty for that two-week period.

For many years, the hotline staffers had been asked to volunteer for a full month. Such a commitment was, in our experience, somewhat burdensome, and a half-month assignment was ultimately found to be much less onerous. A typical stretch of hotline duty will generally yield somewhere between 10 and 20 phone inquiries, some of which do not require answers, as they may fall outside of the committee's jurisdiction or guidelines, as explained below.

The hotline is supervised by the chair and vice-chair, both of whom have been committee members for several years. The committee's secretary keeps a schedule of hotline volunteers, which is periodically transmitted to the association. Any staffer with a complicated ethical question is encouraged to consult with other

committee members, including the chair. Law students and recent admittees do not staff the ethics hotline.

In the remainder of this article, we will discuss the jurisdiction and guidelines for hotline calls. We will also identify some of the resources available to the volunteer lawyers who staff the NYCLA ethics hotline.

Some important guidelines

If your bar association currently has or intends to set up an ethics hotline, it is critical to be clear from the outset regarding its purpose and scope. Here are some guiding principles for NYCLA's hotline.

NYCLA furnishes an ethics hotline for New York lawyers.

The NYCLA Ethics Hotline is a pro bono service furnished to fellow members of the New York bar. The committee does not answer questions posed by laypersons, paralegals, or clients. The NYCLA Ethics Hotline is not equipped to and does not answer questions from laypersons inquiring about the conduct of their own lawyers or other lawyers. The hotline is not prepared to answer calls from lawyers concerning the ethics rules in other states or jurisdictions. Occasionally, we do get inquiries from other jurisdictions asking for information about New York's procedures, which we either refer to the management of the bar association or answer as a professional courtesy.

The hotline gives advice concerning the caller's own conduct.

The NYCLA Ethics Committee does not answer questions about other attorneys' conduct, and does not answer hypothetical questions. (The committee may issue written ethics opinions concerning hypothetical conduct, but the hotline does not.) As Professor Roy Simon writes: "Ethics committees will answer questions only about the inquiring attorney's *own* conduct, not about some other attorney's conduct. Ethics committees are not grievance committees, and will not render opinions concerning whether some *other* lawyer has done something wrong (or

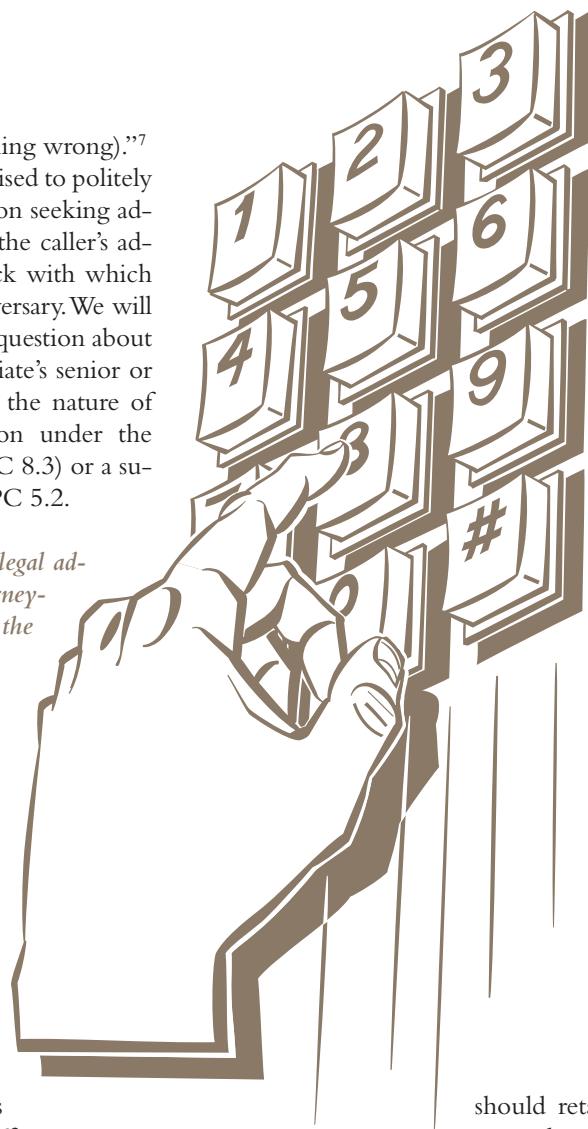
is planning to do something wrong)."⁷

A hotline staffer is advised to politely terminate any conversation seeking advice about the ethics of the caller's adversary. We are not a stick with which a lawyer may beat an adversary. We will not answer an associate's question about the conduct of the associate's senior or colleague, unless it is in the nature of a duty-to-report question under the whistle-blower rule (RPC 8.3) or a supervision issue under RPC 5.2.

The hotline does not give legal advice, and there is no attorney-client privilege between the staffer and caller.

The hotline provides only general guidance to help clarify pertinent ethics issues and identify applicable authorities to the caller. The staffer's assistance is limited to pointing out to the caller the relevant provisions of the Rules of Professional Conduct, applicable ethics opinions where available, or other sources of authority. While a staffer can occasionally do quick and limited research, the staffer does not generally perform extensive research. Neither will a hotline staffer ordinarily provide the caller with a written informal opinion letter. NYCLA's Ethics Committee simply does not have the resources, nor is it the committee's role, to review all the facts and documents pertinent to each individual caller's case and give tailored advice. Moreover, the hotline does not have the resources to interview witnesses, or listen to both sides of a caller's story.

The hotline will not become involved in issues for which counsel should be engaged to represent the caller (see further discussion below). Moreover, the staffer is not in a position to advise callers whether they should or should not retain their own counsel. That decision must be made by the caller without advice from the staffer, since even the suggestion that a caller



should retain counsel may be construed as providing legal advice. As stated, the staffer simply attempts to help focus the issue and give suggestions as to applicable authorities that the caller should consider.

The hotline will not deal with issues in litigation or before a disciplinary committee.

The hotline staffer does not render opinions on issues currently pending before a court or other adjudicatory body, nor is hotline advice intended to be cited to such authorities. As Professor Simon writes: "Ethics committees ordinarily will not answer questions that are already the subject of litigation or that could be answered by the judge presiding over pending litigation. Ethics committees do not want their opinions to be used as amicus briefs or as authority for one side's position in litigation without any input from the other side or from other parties or witnesses."⁸

The hotline staffer also does not give advice to lawyers who have received inquiries, subpoenas, or complaints from the departmental disciplinary or grievance committees.

The hotline will not deal with questions of law.

The NYCLA Ethics Committee's role is limited to applying and interpreting the New York Rules of Professional Conduct. The committee cannot and will not interpret questions of law, e.g., the CPLR, Federal Rule of Civil Procedure 11, New York State Court Rules Part 130, the Judiciary Law, whether a particular case was properly decided, etc. While sometimes an ethics committee's published ethics opinions will consider mixed questions of law incorporated by reference or intermingled with ethical issues under the RPC, this is something that is generally avoided when staffing the hotline.

Some questions are outside the committee's jurisdiction; here are a few examples of questions that are appropriate for the hotline:

- I am holding funds that belong to a client who has become unavailable and is not returning phone calls or responding to letters. What should I do with these funds?
- May I use a trade name or descriptive moniker in the address of a website of my law firm?
- May I share office space or associate in practice with my brother-in-law, the accountant?
- What should I do when my client is refusing to settle a case that I think should be settled?
- May my law firm hire an associate who is adverse counsel in a related case that has settled in principle but not in writing at this point?

The hotline will consider prospective conduct only.

The hotline is intended as guidance for the future conduct of the calling attorney and can only consider what the prospective conduct of the caller should be under the RPC. Thus, as Professor Simon explains, "a lawyer

may seek ethical guidance before doing something, but not after doing it."⁹ In addition, a request for ethics advice must be specific, not general. For example, open-ended questions such as, "How do I craft an ethically sound retainer agreement?" or "How do I ethically conduct a witness interview?" are beyond the scope of the hotline.

The call is confidential but not privileged.

The hotline call is confidential, and the caller is so advised. However, there is no attorney-client relationship with the caller, and calls to the hotline are not protected by the attorney-client privilege or the work product doctrine. It is the committee's position that a caller may disclose to the committee client confidential information under RPC

The hotline can only consider callers' prospective conduct, not conduct that has already occurred.

1.6(b)(4), and that such information is protected from disclosure to any outside agency or individual or the public since the committee qualifies as a bona fide legal services organization. Conversely, hotline staffers are not obligated to and do not report misconduct that they learn of in the course of their service as the hotline is exempt from the reporting requirements of RPC 8.3.¹⁰

Hotline staffers prepare a report.

Volunteer attorneys staffing the hotline routinely prepare a hotline report with short summaries of the nature of each call and the specific rules or ethics opinions to which the caller was referred. These reports maintain caller confidentiality by redacting the callers' identities and tele-

phone numbers.¹¹ Under committee procedure, the hotline staffer maintains a private, confidential notation of the caller's name and telephone number in case there is a change in the ethics rules or the caller requires further or contrary input. For example, the full committee may disagree with the staffer's analysis and ask the staffer to alert the caller to a previously overlooked authority or analysis. The caller's identity, however, is not shared with anyone else, whether inside or outside the committee.

Hotline resources

Here are some of the key resources hotline volunteers draw from when assisting callers.

Rules of Professional Conduct

New York's Rules of Professional Conduct are, of course, the fundamental source of authority for purposes of an ethics hotline for New York lawyers. While much of the former Code of Professional Responsibility has survived intact under the RPC, about a quarter of the RPC consists of new and different rules.

The RPC were adopted on April 1, 2009, and govern conduct occurring after that date. Because the hotline responds only to prospective and not past conduct, staffers generally will not need to refer to the former Code of Professional Responsibility in responding to caller inquiries. The RPC follow the formatting and numbering sequence of the ABA Model Rules. One important benefit of the change is that it is easier now for New York attorneys to avail themselves of ethics rules, advisory opinions, and legal opinions from across the country.

Among other places, the RPC can be found at the website of the New York State Unified Court System (www.courts.state.ny.us/rules/jointappellate/index.shtml) and at the website of the New York State Bar Association (www.nysba.org). The commentary of the New York State Bar Association, although not adopted by the Appellate Divisions, furnishes useful guidance, and can also be found at www.nysba.org. The rules and commentary

can be purchased from the New York State Bar Association in pamphlet form.

Ethics opinions

Formal ethics opinions of the NYCLA Professional Ethics Committee, the NYSBA Ethics Committee, and the New York City Bar Ethics Committee can be found on the respective websites of those three committees.¹² These opinions can also be found in Westlaw and, in the case of the state bar and city bar, Lexis as well. A word of caution is in order: Since some but not all of the rules were substantially changed on April 1, 2009, an opinion decided under the earlier rules may not be fully applicable to conduct governed by the new RPC.

Oxford University Press: The New York Rules of Professional Conduct

Members of the committee, including the authors, have assisted the New York County Lawyers' Association Ethics Institute in compiling *The New York Rules of Professional Conduct*, published by Oxford University Press in August 2010.¹³ The structure of the book is designed to be helpful for quick reference, and contains: the text of each rule, the New York State Bar Association commentary, a comparison with the predecessor code and the ABA Model Rules, the editors' practice commentary and helpful suggestions, the editors' analysis of the rule, and citations to relevant ethics opinions and other authorities relevant to the rule. This is a very helpful resource, as a hotline staffer may select any individual rule and quickly find the state bar commentary and relevant ethics opinions referring to that particular rule.

Simon's New York Code of Professional Responsibility Annotated

Professor Roy Simon of Hofstra University School of Law has perennially issued a paperback annotation to the New York Code of Professional Responsibility, *Simon's New York Code of Professional Responsibility Annotated*.¹⁴ Professor Simon's treatise is an extremely valuable resource in staffing any New York ethics hotline. If you're from a different state and your bar has or intends to establish an ethics hotline, we recommend

looking into whether a legal scholar has written something similar regarding the rules for your state.

Other members of the committee

Hotline staffers routinely make use of other members of the committee who are available to provide guidance and counsel to all colleagues, rookie or veteran. Not all hotline calls are amenable to quick and easy resolution, and it is completely appropriate to seek guidance or a sounding board from other committee members. It is very unusual to find unanimity among all members of the committee on all but the simplest question of law. Any member of the NYCLA Ethics Committee has access to the contact information of the other members on the committee webpage. The committee maintains a compilation of previous hotline reports that can also be consulted. The reports are available to committee members by specific request.

Other hotline considerations

How 'hot' is the hotline?

The word *hotline* is something of a misnomer. Hotline staffers are not expected to know every area of the law off the tops of their heads; thought, reflection, research, or discussions with colleagues may be required in order to properly respond to a caller's inquiry. Often a staffer will take down the caller's telephone number and name and promise to return the phone call within a reasonable period of time.

Depending upon the exigency of the situation and the complexity of the question, most callers expect and receive a response to their inquiry within two to three business days. Some questions are complex enough that it is worth waiting until the committee's next monthly meeting to discuss a proper response. Other calls may be more time sensitive.

The chair and vice chair are available to provide assistance to the volunteer staffers of the hotline. In addition, many veteran committee members who practice in the field of legal ethics give generously of their time and advice in assisting fellow members in carrying out their hotline service.

No forum shopping

The Ethics Committee's hotline is a pro bono service to assist members of the legal community. It is not available for "forum shopping" callers who are dissatisfied with the advice received from another ethics committee hotline. Hotline staffers do not affirmatively secure a representation from an inquiring caller that the caller has not made prior inquiries of another organization. If it becomes apparent, however, during the course of the telephone call that the caller has been shopping for an opinion and/or has received advice from a different ethics committee or hotline, then the volunteer staffer will politely end the conversation.

Difficult callers

In our experience in staffing the NYCLA Ethics Hotline, we have found that virtually all of the callers are genuinely appreciative of the pro bono guidance we provide. Occasionally, a caller will become argumentative or difficult, or will appear to be shopping among different members of the committee or among different committees. Under such conditions, the staffer will generally terminate the conversation and bring the difficulty to the attention of committee leadership.

No passing judgment

Callers are usually good lawyers who conscientiously seek advice in complying with the ethics rules and are genuinely appreciative of the pro bono service provided by the volunteer staffers. Volunteer staffers do not pass judgment on or criticize a caller.

Referrals for legal services

Some hotline callers may require or request legal representation. Such callers should be referred to a local legal referral service (for us, that's through the New York City Bar). Staffers are instructed to avoid accepting engagement from callers. This is a pro bono service, and callers are entitled to disinterested advice, given without hope of personal or professional gain. On occasion, a committee member who is not staffing the hotline may accept a referral from another committee member, provided

that there is no quid pro quo, no referral fee, and no personal-gain motive in making the referral.

Why volunteer?

Hotline staffers give generously of their time in volunteering to improve the quality of the legal profession. Most volunteer staffers will find, as we do, that the process of volunteering to help other lawyers is a genuinely transformative experience. In addition, staffers learn by researching and giving advice to other lawyers and, by doing so, become better and more ethical lawyers themselves. In short, volunteer staffers help themselves and others in the continual renewal of our noble profession and ultimately provide better service to clients.

—By Barry R. Temkin and Gordon Eng

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Conduct (Oxford University Press 2010).

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The views of the authors are their own and do not necessarily represent the views of NYCLA, the NYCLA Ethics Committee, Mound Cotton Wollan & Greengrass, Debevoise & Plimpton LLP, or their respective clients.

Endnotes

1. See, e.g., Bruce A. Green, "Bar Association Ethics Committees: Are They Broken?" (*Hofstra Law Review* 2002), http://www.hofstra.edu/PDF/law_green.pdf.

2. See, e.g., Barry Temkin and Wallace Larson, "Guidelines on NYCLA's Ethics Hotline," *New York County Lawyer*, September 2006 (available at http://works.bepress.com/cgi/viewcontent.cgi?article=1006&context=barry_temkin).

3. Edwin David Robertson, *Brethren and Sisters of the Bar, A Centennial History of the New York County Lawyers' Association* (NYCLA and Fordham U. Press 2008), 212.

4. 22 NYCRR §1200.00 *et seq.*, as amended April 1, 2009.

5. The committee also interprets the RPC in other, informal ways. For example,

committee members may express views on the ethics rules in discussions during committee meetings, in the minutes of those meetings, in continuing legal education lectures, and in publications authored by individual committee members.

6. Roy Simon, *Simon's New York Code of Professional Responsibility Annotated* (Thomson/West 2009) at xix.

7. Simon, *supra* at xix.

8. Simon, *supra* at xix.

9. Simon, *supra* at xix.

10. See RPC 8.3 (c).

11. Anonymous calls to the hotline are not permitted.

12. www.nycla.org, www.nysba.org, www.nycbar.org.

13. <http://www.oup.com/us/catalog/general/subject/Law/LegalProfessionandPracticeManage/?view=usa&ci=9780199740147>. The NYCLA Ethics Institute, founded by Lewis Tesser, offers programs that relate to the ethical issues confronted by attorneys in various practice areas (http://nycla.org/index.cfm?section=Ethics&page=NYCLA_Ethics_Institute). The authors are contributing editors to the *New York Rules of Professional Conduct*.

14. Roy Simon, *Simon's New York Code of Professional Responsibility Annotated* (Thomson/West 2009).