RULES THAT WORK "ON THE GROUND": JUDITH KAYE'S APPROACH TO THE LAW OF LAWYERING

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INTRODUCTION

"Pragmatic" best describes Chief Judge Judith Kaye's response to issues in the world of lawyer regulation, a world that includes (but is not limited to) the rules of professional conduct. By pragmatic I mean an orientation that looks at how lawyers actually behave and reasonably believe they may behave. Pragmatism strives for clear rules so lawyers know the lines they may not cross. When that is not possible, as often it is not, a pragmatic judge will offer examples and reasoning so lawyers can better predict what a court will say. Pragmatism does not reject legal theory, but it is not beholden to theory. If a rule will not work "on the ground," a theory is unlikely to save it. This Essay looks at three opinions Judge Kaye wrote for the New York Court of Appeals and which illustrate her pragmatic approach to the law and rules that govern the legal profession.

I
NIESIG V. TEAM I[1]

Rule 4.2 of the New York Rules of Professional Conduct, derived from Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct, forbids lawyers who represent a person in a matter to communicate about the matter with a person whom the

[1] 558 N.E.2d 1030 (N.Y. 1990).

lawyer knows is represented in the matter.[2] The policy behind this no-contact (or anticontact) rule is to prevent a lawyer from taking advantage of an opposing client when her lawyer is absent.[3] The rule is easy to apply when the opposing client is a biological person. But what if it is an organization, say a corporation with thousands of employees, a board of directors, and hundreds of officers (collectively "constituents")? Does the rule forbid contact with all of them or only some, and if some, which ones? Does it forbid contact with former constituents? The answers to these questions require courts to balance the organization's interests in the protection Rule 4.2 affords against the value of informal interviews. Consider the facts in *Niesig*, as described by Judge Kaye:

> [P]laintiff was injured when he fell from scaffolding at a building construction site. At the time of the accident he was employed by DeTrae Enterprises, Inc.; defendant J.M. Frederick was the general contractor, and defendant Team I the property owner. Plaintiff thereafter commenced a damages action against defendants, asserting two causes of action . . . and defendants brought a third-party action against DeTrae.
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> Plaintiff moved for permission to have his counsel conduct ex parte interviews of all DeTrae employees who were on the site at

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[2] When *Niesig* was decided, the governing rule was DR 7-104(A)(1), the predecessor to Rule 4.2. It provided:

> During the course of the representation of a client a lawyer shall not:
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> Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

N.Y. CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (N.Y.S. BAR ASS'N 1990). Today, Rule 4.2(a) in New York is substantially the same and provides:

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

N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 (2016) [hereinafter Rule 4.2]. Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct is substantially the same as New York Rule 4.2, except the Model Rule uses the word "person" instead of the word "party." Although New York uses the word "party" in Rule 4.2(a), it uses the word "person" in Rules 4.2(b) and (c). Whether "party" is synonymous with "person" or identifies a different group of represented clients is of no moment to the discussion in the text. For convenience, all references to Rule 4.2 will be to the New York rule.

[3] Comment 1 to Rule 4.2 provides:

> This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and un-counseled disclosure of information relating to the representation.

Id. cmt. 1.

> the time of the accident, arguing that these witnesses to the event were neither managerial nor controlling employees and could not therefore be considered "personal synonyms for DeTrae." DeTrae opposed the application, asserting that the disciplinary rule barred unapproved contact by plaintiff's lawyer with any of its employees.[4]

The lower court denied the motion to permit informal interviews with any DeTrae employee. Citing *Upjohn Co. v. United States*,[5] that court held that

> DeTrae's attorneys have an attorney-client relationship with every DeTrae employee connected with the subject of the litigation, and that the prohibition is necessitated by the practical difficulties of distinguishing between a corporation's control group and its other employees. The court further noted that the information sought from employee witnesses could instead be obtained through their depositions.[6]

This rule had the benefit of clarity. But should clarity, for all its virtues, outweigh the benefits of informal discovery? Judge Kaye described those benefits:

> [A] blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes. Foreclosing all direct, informal interviews of employees of the corporate party unnecessarily sacrifices the long-recognized potential value of such sessions. . . . Costly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for such off-the-record private efforts to learn and assemble, rather than perpetuate, information.[7]

In balancing the interests, Judge Kaye had to choose which corporate[8] constituents should be inside and which should be outside the no-contact rule's prohibition. The choice is significant. Informality can enable lawyers to uncover information that may be difficult or impossible to learn in a deposition, which will occur in the presence of the lawyer for the deponent's employer. On the other hand, Rule 4.2 is meant to protect clients against the overreaching or abusive behavior of an opposing lawyer. Judge Kaye acknowledged that organizational

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[4] *Niesig*, 558 N.E.2d at 1031.

[5] 449 U.S. 383 (1981).

[6] *Niesig*, 558 N.E.2d at 1032.

[7] *Id.* at 1034.

[8] While the issue here arises whenever a represented person or party is an organization, for convenience I will assume it is a corporation.

clients were also protected by the no-contact rule.[9] So what should the balance be? This is where Judge Kaye's pragmatism is on full display. In order fully to appreciate it, however, we must pause to see how courts and the ABA interpreted the rule before *Niesig*.

When the ABA adopted Rule 4.2 in 1983, it also adopted comments to aid in its interpretation. Comment 7 said that when the opposing party is an organization, the rule "prohibits communications by a lawyer for one party . . . with [among others] any other person . . . whose statement may constitute an admission on the part of the organization."[10] Whether a constituent's statement will be admissible against a corporation is a question in the law of evidence. In federal courts and states that follow the Federal Rules of Evidence, the constituents who can make vicarious admissions, as they are called, comprise a large group. It includes not only those actually authorized to make public statements, like press officers, but any current employee and agent whose statements are made within the scope of his employment or agency.[11] The ABA comment would all but foreclose informal discovery from the very employees and agents worth interviewing. It would impede a lawyer's ability to investigate the facts before filing a complaint, indeed to learn whether the facts could even support a complaint. In *Niesig*, the ABA comment would have prevented the plaintiff's lawyer from interviewing other DeTrae employees at the construction site who merely witnessed events leading to Niesig's injury.

How did it happen that a rule of evidence directed at vicarious admissions became a yardstick for measuring the scope of the no-contact rule when a represented person is an organization? The error can be traced to *Upjohn Co. v. United States*.[12] The issue in *Upjohn* did not concern the no-contact rule. The issue there was "the scope of the attorney-client privilege in the corporate context."[13] Construing federal law, the Supreme Court said that the privilege protected communications between a company's lawyers and its employees if they "concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain

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[9] *Niesig*, 558 N.E.2d at 1033 ("[C]orporate parties . . . are as much served by the rule's fundamental principles of fairness as individual parties.").

[10] *See* Univ. Patents, Inc. v. Kligman, 737 F. Supp. 325, 327 (E.D. Pa. 1990) (quoting comment 7 as originally adopted).

[11] *See* FED. R. EVID. 801(d)(2)(C)–(D).

[12] 449 U.S. 383 (1981).

[13] *Id.* at 387.

legal advice."[14] *Upjohn*'s holding was then broadened to identify the corporate constituents covered by Rule 4.2.[15] In other words, what worked for the privilege was held also to work for the no-contact rule. Judge Kaye quickly identified the illogic behind this leap. She wrote that *Upjohn*

> addresses an entirely different subject, with policy objectives that have little relation to the question whether a corporate employee should be considered a "party" for purposes of the disciplinary rule. First, the privilege applies only to *confidential communications* with counsel, it does not immunize the underlying factual information—which is in issue here—from disclosure to an adversary. Second, the attorney-client privilege serves the societal objective of encouraging open communication between client and counsel, a benefit not present in denying informal access to factual information. Thus, a corporate employee who may be a "client" for purposes of the attorney-client privilege is not necessarily a "party" for purposes of [Rule 4.2].[16]

After rejecting various tests for identifying the constituents with whom opposing[17] counsel could not communicate, Judge Kaye opted for this one:

> The test that best balances the competing interests, and incorporates the most desirable elements of the other approaches, is one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally.[18]

Niesig then influenced how courts outside New York thought about the scope of the no-contact rule for organizational clients.[19] *Niesig* also changed the Model Rules of Professional Conduct. When the ABA revised the Rules in 2002, comment 7 to Rule 4.2 was changed to eliminate the prohibition against communication with per-

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[14] *See id.* at 394.

[15] *See* Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll., 764 N.E.2d 825, 832 (Mass. 2002) (collecting cases that have so read the rule).

[16] *Niesig*, 558 N.E.2d at 1034 (internal citations omitted).

[17] Rule 4.2 prohibits lawyers from having contact with a represented party even if the party is not an opponent of the lawyer's client. For example, the represented party may be a codefendant who is in full accord with the lawyer's client.

[18] *Niesig*, 558 N.E.2d at 1035. She also held that the rule did not apply to communications with former clients. *Id.* at 1032.

[19] *See, e.g.*, Dent v. Kaufman, 406 S.E.2d 68, 71–72 (W.Va. 1991) (citing extensively to *Niesig*); State v. Ciba-Geigy Corp., 589 A.2d 180, 184–86 (N.J. Super. Ct. App. Div. 1991) (same).

sons "whose statement may constitute an admission on the part of the organization."[20] That change has in turn influenced other courts even when *Niesig* itself was not cited.[21] The Restatement of the Law Governing Lawyers also adopted the *Niesig* test, while modifying the language.[22]

Remarkable as this response is, it is more so because a peculiarity of New York law would have made it easy for courts elsewhere to dismiss *Niesig*. In New York, unless an employee is specifically authorized to make public statements, what she may say is *not* admissible against the corporation even if her statement is within the scope of her current employment.[23] In other words, unlike the federal rule and the rule in many states, the vicarious admission rule in New York is limited to those constituents authorized to make public statements in the name of the company. *Niesig* could have been distinguished on this ground. In fact, a Massachusetts judge, dissenting from his court's decision to follow *Niesig*, said just that.[24]

II
Tekni-Plex, Inc. v. Meyner & Landis[25]

Y.C. Tang had a great business. Tekni-Plex made and packaged products for drug companies and others. In 1994, when Tang was the sole owner, he decided to sell. The buyers created a shell company called Acquisition. The plan was for Tekni-Plex to merge into Acquisition, which would then change its name to Tekni-Plex. To avoid confusion, the court called the company when Tang owned it "old Tekni-Plex" and the postmerger company "new Tekni-Plex."

Meyner and Landis (M&L) had represented old Tekni-Plex for more than twenty years.[26] It also did work for Tang personally.[27] Two

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[20] *See* Univ. Patents, Inc. v. Kligman, 737 F. Supp. 325, 327 (E.D. Pa. 1990). A redline version of the ABA Model Rules, including comment 7 to Rule 4.2, shows the changes introduced in 2002. *See* Am. Bar Ass'n, Model Rules of Professional Conduct as Adopted by ABA House of Delegates (2000), http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_redline.html.

[21] *See, e.g.*, Col v. Me. Med. Ctr., No. 2:11–cv–249–JHR, 2012 WL 768243, at *2 (D. Me. Mar. 8, 2012).

[22] *See* Restatement (Third) of the Law Governing Lawyers § 100(2) (Am. Law Inst. 2000).

[23] *See* Loschiavo v. Port Auth. of N.Y., 448 N.E.2d 1351, 1352 (N.Y. 1983) (reiterating that only statements of persons who are authorized to speak for the organization are admissible against it).

[24] *See* Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll., 764 N.E.2d 825, 839 (Mass. 2002) (Cordy, J., concurring in part and dissenting in part).

[25] 674 N.E.2d 663 (N.Y. 1996). The description of the facts of *Tekni-Plex* is taken, with changes, from Stephen Gillers, Regulation of Lawyers: Problems of Law and Ethics 389 (10th ed. 2015).

[26] *Tekni-Plex*, 674 N.E.2d at 665.

of M&L's assignments from old Tekni-Plex are important here. First, in the 1980s, the firm helped the company get an environmental permit to operate a laminator machine at a plant in Somerville, New Jersey.[28] Second, M&L negotiated the merger agreement with Acquisition.[29] That agreement gave Acquisition all of the company's "tangible and intangible assets, rights, and liabilities."[30] After the deal closed, old Tekni-Plex was liquidated and its shares canceled.[31]

Tang personally warranted that the company was in full compliance with environmental laws.[32] After the merger, new Tekni-Plex claimed that the Somerville laminator was not in compliance with those laws.[33] It invoked arbitration against Tang.[34] M&L appeared for Tang.[35] New Tekni-Plex challenged the firm's right to represent Tang, claiming that M&L was *its* former lawyer and was now adverse to it on a matter substantially related to the work M&L formerly did for Tekni-Plex, which lawyer conflict rules do not permit.[36] New Tekni-Plex also demanded all of M&L's files from its representation of old Tekni-Plex on the Somerville laminator and the merger work.[37]

These issues raised questions about client confidentiality and conflicts of interest. The arbitrator declined to rule on the disqualification motion, believing that "he lacked authority" to do so.[38] So the arbitration was put on hold and new Tekni-Plex moved in court "for an order disqualifying M&L."[39] Judge Kaye's answers to two questions display her practical approach to problems that can appear intractably complicated. First, was M&L the former counsel to *new* Tekni-Plex in the work on the Somerville laminator? If not, the former client conflict rule[40] would not disqualify M&L. M&L argued that new Tekni-Plex was not a former client because it did not exist when M&L did the Somerville work, and that the client it did represent, old Tekni-Plex,

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *See id.*
[32] *Id.*
[33] *See id.*
[34] *Id.*
[35] *Id.* at 666.
[36] *Id.* at 667–68 (citing DR 5-108(A)(1)).
[37] *See id.* at 670.
[38] *Id.* at 666.
[39] *Id.*
[40] Today, the governing rule is Rule 1.9(a) of the New York Rules of Professional Conduct. At the time, the issue was governed by DR 5-108(A) of the Code of Professional Responsibility. *See Tekni-Plex*, 674 N.E.2d at 667. The two provisions are substantively the same.

no longer existed.[41] The second question before the court was whether Tang or new Tekni-Plex was entitled to the firm's files relating to its work for Tekni-Plex and Tang in the merger negotiations.[42] Judge Kaye ruled for new Tekni-Plex on the first question and against it on the second.[43] These answers may appear inconsistent. How can new Tekni-Plex be and not be M&L's former client? But they are not inconsistent if we look at the situation through Judge Kaye's pragmatic lens.

When a company is sold, what does the new owner buy? For new Tekni-Plex, the answer surely included the seller's going business, its real estate and equipment, and its name, intellectual property, reputation, and contracts. What about the loyalty and confidentiality duties of the seller's lawyers? Can a lawyer's professional obligations be sold? Intuitively, we might be inclined to say that these are personal and distinct from the business itself. Nothing in the merger agreement answered the question explicitly. But Judge Kaye interpreted the agreement's transfer of "all of the rights, privileges, liabilities and obligations of old Tekni-Plex" to Acquisition to include "any relevant pre-merger legal advice rendered to old Tekni-Plex that it might need to defend against these liabilities or pursue any of these rights."[44] A seller who wishes to continue to retain its law firm in the event of a dispute with the buyer has an easy remedy. Simply say so in the merger documents. But since Tekni-Plex did not, the court was not going to save it.

Lawyers are surprised when I discuss *Tekni-Plex* at continuing legal education courses. It's easy to see why. Look at it from the perspective of the M&L lawyers. They had been representing Tang and his business for decades. Personal relationships likely formed. In the arbitration, Acquisition was Tang's legal enemy. Yet a signature on a piece of paper gave that enemy the status of being a former client of the M&L lawyers, entitled to their files in the case against Tang. You can see how both Tang and the firm would be inclined to see such a shift in allegiance as a personal betrayal. But it is not a betrayal in law. It is an obligation.

As Judge Kaye viewed it, all that happened was that the company changed owners, but it was still the same company running the same business as when Tang owned it. She wrote:

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[41] *Id.* at 668.

[42] New Tekni-Plex demanded M&L's confidential information for all of its work for old Tekni-Plex, not only the work on the merger negotiations. *Id.* at 666.

[43] *Id.*

[44] *Id.* at 669.

> When ownership of a corporation changes hands, whether the attorney-client relationship transfers as well to the new owners turns on the *practical consequences* rather than the formalities of the particular transaction . . . . As a practical matter . . . old Tekni-Plex did not die. To the contrary, the business operations of old Tekni-Plex continued under the new managers.[45]

Judge Kaye's emphasis on the "practical consequences" also explains her ruling on the second question before the court: Who was entitled to the confidential information M&L acquired in the merger negotiations? This time, the former client was not new Tekni-Plex. Unlike the law firm's work on the Somerville laminator, Acquisition (and therefore new Tekni-Plex) was the adversary of old Tekni-Plex in the merger negotiations.[46] That made all the difference. Judge Kaye expressed concern about how a contrary ruling would affect the attorney-client relationship when companies are sold. She wrote:

> [T]o grant new Tekni-Plex control over the attorney-client privilege as to communications concerning the merger transaction would thwart, rather than promote, the purposes underlying the privilege. . . . Where the parties to a corporate acquisition agree that in any subsequent dispute arising out of the transaction the interests of the buyer will be pitted against the interests of the sold corporation, corporate actors should not have to worry that their privileged communications with counsel concerning the negotiations might be available to the buyer for use against the sold corporation in any ensuing litigation. Such concern would significantly chill attorney-client communication during the transaction.[47]

III

Graubard Mollen Dannett & Horowitz v. Moskovitz[48]

Throughout much of the last century, law firm partners rarely switched firms. As that began to change, the law needed to reconcile the interests of a partner who wanted quietly to plan a departure to a

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[45] *Id*. at 668–69 (emphasis added).

[46] *Id.* at 671.

[47] *Id.* at 671–72. The Delaware Court of Chancery, in an opinion by Chancellor Strine, disagreed with Judge Kaye on this point. Chancellor Strine wrote that under Delaware law even the confidential information in M&L's possession as a result of the merger belonged to new Tekni-Plex. *See* Great Hill Equity Partners IV, L.P. v. Sig Growth Equity Fund I, 80 A.3d 155, 159–60 (Del. Ch. 2013). That does not mean, however, that the New York court should have applied Delaware law. There is no indication that the parties argued the choice of law question or that Delaware law would have applied even if they had.

[48] 653 N.E.2d 1179 (N.Y. 1995).

competing firm with the interests of her current firm in knowing the plan early enough to avoid disruption.[49]

Partners have a fiduciary duty to the partnership.[50] Secretly planning to join a competing firm might be seen as a breach of that duty, especially if the plan includes encouraging firm clients and associates to come along. Yet some secrecy is needed. If a partner had to announce her desire to leave her firm as soon as it arose, she might find it unpleasant to remain should the plan then fizzle. The fiduciary duty to clients, meanwhile, might be seen to oblige a lawyer to tell her personal clients about departure plans even before she must tell her firm. But that earlier notice to clients can disadvantage the firm in the competition to keep those clients after the partner leaves. Judge Kaye recognized these conflicting interests. She wrote that it was "unquestionably difficult to draw hard lines defining lawyers' fiduciary duty to partners and their fiduciary duty to clients."[51]

Graubard came to the court on a summary judgment motion.[52] Since issues of fact remained, Judge Kaye could have remanded the case for trial without further discussion. But that would not have helped the bar. So she proceeded to "set out certain broad parameters" for reconciling the competing interests.

> At one end of the spectrum, where an attorney is dissatisfied with the existing association, taking steps to locate alternative space and affiliations would not violate a partner's fiduciary duties. That this may be a delicate venture, requiring confidentiality, is simple common sense and well illustrated by the eruption caused by defendants' announced resignation in the present case. As a matter of ethics, departing partners have been permitted to inform firm clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of its choice. *Ideally*, such approaches would take place only after notice to the firm of the partner's plans to leave.[53]

At the other end of the spectrum, secretly attempting to lure firm clients (even those the partner has brought into the firm and personally represented) to the new association, lying to clients about their rights with respect to the choice of counsel, lying to partners about

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[49] The trend led to the publication of a treatise on the law and ethics in partner departures. ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS (2d ed. 1998).

[50] *Graubard Mollen*, 653 N.E.2d at 1182.

[51] *Id.* at 1183.

[52] *Id.* at 1182.

[53] *Id.* at 1183 (emphasis added).

plans to leave, and abandoning the firm on short notice (taking clients and files) would not be consistent with a partner's fiduciary duties.[54]

I emphasize the word "ideally" in this excerpt because it tells us something valuable about Judge Kaye. On the one hand, she reaffirmed the right of departing partners to inform their own clients about an impending departure earlier than they tell their law firms. She was not prepared to deny that authority. But she also believed that it would sometimes be fairer if the firm were told first. With a gentle suggestion, she commended that course as ideal.

The excerpt tells us something else. Judge Kaye tied the right to give earlier notice to a lawyer's own clients to a duty concurrently "to remind the client of its freedom to retain counsel of its choice."[55] So while the earlier notice may give a lawyer a competitive advantage in a contest to keep the client, the reminder mitigates that advantage. It both ensures that the client understands its right not to follow her lawyer to her new firm and recognizes the interests of the old firm, which is not yet in a position to promote itself.

IV
Judith Kaye and the Two Pillars of Lawyer Regulation

Fiduciary duty and the adversary system are two dominant sources of the rules and laws regulating the legal profession. They differ. Fiduciary duty describes a body of law. The adversary system describes a methodology wrapped in a concept. Neither is self-defining. In *Niesig*, Judge Kaye had to decide the best way to reconcile the competing and legitimate interests of the adversaries. In *Tekni-Plex*, she had to interpret a contract between adversaries on a question the contract did not clearly address and which may not even have occurred to them. To do that, she had to look at the contract's generic language—in effect, boilerplate—and decide which interpretation worked best. In *Graubard*, Judge Kaye offered the bar direction on what fiduciary duty requires when a lawyer plans to change firms. In each of these cases, she chose solutions with an eye to overall fairness and how well the solution would work in the real world of law practice.

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[54] *Id.* at 1183–84 (emphasis added) (citations omitted). When the ABA's Committee on Professional and Judicial Ethics addressed the same issues in 1999, it cited *Graubard*. *See* ABA Formal Op. 99-414, at 6 (1999), http://iardc.fastcle.com/EdutechResources/resources/bytopicid/24414/ABA%2099-414.pdf.

[55] *Graubard Mollen*, 653 N.E.2d at 1183.