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**Connecticut Legal Ethics & Malpractice, 3d Ed.**

— Mark A. Dubois & James F. Sullivan, Connecticut Law Tribune, a division of ALM Media Properties, LLC, New York, NY, 2016. 397 pages.

“No attorney practices without making mistakes.”<sup>1</sup> The background and experience of Mark Dubois and James Sullivan, authors of *Connecticut Legal Ethics & Malpractice*, suggest that this statement must be the product of their personal observations – of the mistakes of others. Mark Dubois served eight years as Connecticut’s first Chief Disciplinary Counsel, a role where he investigated and prosecuted claims of attorney misconduct. James Sullivan, a member of the Connecticut Bar Association’s Standing Committee on Professional Ethics, is a veteran legal malpractice defense attorney. Both authors provide representation to attorneys facing disciplinary actions. From their respective vantage points, they have witnessed the full spectrum of claims against lawyers, from the intentional theft of clients’ funds to poor client communications, lack of diligence or the neglect of a client’s matter. Known for their intellectual engagement with the law, both authors became regular presenters at bar association ethics seminars warning lawyers how to avoid common mistakes. In doing this work, however, they found that Connecticut lacked a convenient yet reliable guide for attorneys to improve their practices and avoid the risks of ethical error and malpractice.<sup>2</sup> They addressed this deficiency in 2012 with the publication of first edition of this book. Now, four years later, the book’s third edition is available and is the subject of this review.

Lawyers must adhere to the Rules of Professional Conduct and their work should comport with the applicable

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<sup>1</sup> MARK A. DUBOIS & JAMES F. SULLIVAN, *CONNECTICUT LEGAL ETHICS & MALPRACTICE* 393 (3d ed. 2016).

<sup>2</sup> To be sure, others have written on this topic. See, e.g., GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* (3d Ed. 2001 & Supp. 2003). In addition, the Connecticut Bar Journal has published an annual Professional Responsibility Review since 2009. It analyzes the prior year’s case law, rule changes, grievance rulings and ethics opinions. The present work, however, is uniquely a Connecticut-specific compendium.

standard of care. The nature of these obligations has remained static over the decades, but the nature of the practice of law has not. The modern lawyer handles a greater volume of work and frequently deals with legal issues more complex than in years past. New cases, new legislation or amendments to statutes and regulations demand that lawyers constantly update and adapt to the changing legal environment. Time and reflection now seem a luxury because speed is considered essential. Lawyers read newly released court decisions on their computer screens, sometimes within minutes of the decision being released. Real time communications, once limited to the office phone, now include cell phones, emails, texts and other technologies, all of which extend the typical lawyer's hours beyond the normal work week. These devices also leave a permanent record of the lawyer's communications and advice. This increase in work hours and practice complexity correspondingly increases a lawyer's exposure to errors. To remain "current" on legal topics, lawyers use blogs and research software. The jargon of our profession employs terms like "multi-jurisdictional practice," "sophisticated clients," "unbundled legal services," "outsourcing" and "metadata." Recent changes to the Rules of Professional Conduct reflect the fact that computers and other technologies have altered not only lawyer-client relationships but also law office management. One such change amended the notion of a lawyer's "competence" as requiring that he or she be "kept abreast" of changes in the law, including changes in technology.<sup>3</sup> Therefore, the modern lawyer must navigate both practical and ethical considerations in creating a website, adding or changing content, using social media accounts or determining how to dispose of an old copy machine.<sup>4</sup> The authors warn that "[l]ost laptops and thumb drives with unencrypted client information ... have led to liability."<sup>5</sup> Simply put, *Connecticut Legal Ethics and Malpractice* goes well beyond a recital of the rules. Rather, it is designed to optimize the ethical and efficient practice of

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<sup>3</sup> Rule 1.1, commentary.

<sup>4</sup> Hint: fully erase the machine's memory, lest thousands of pages of confidential documents be exposed.

<sup>5</sup> M. DUBOIS & J. SULLIVAN, *supra* note 1, at 51.

law in the modern day.

This book intentionally joins together two wholly different legal subjects, ethics and malpractice. This joinder recognizes that whenever an attorney faces a claim of error, it could result in a disciplinary prosecution addressing purely ethical considerations, a lawsuit triggering malpractice issues, or both. The authors' experience suggests these claims frequently arrive in tandem and, even when they do not, the arrival of one demands the analysis of exposure to the other. "As a practical matter, there will always be areas of overlap in ethics, breach of fiduciary duty, malpractice and habeas corpus matters."<sup>6</sup> This interplay of ethics and malpractice is discussed in the Scope section of the Preamble to the Rules, which says that a "violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached."<sup>7</sup> On the other hand, "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."<sup>8</sup> The authors understand that ethical violations and malpractice issues must be viewed together.

This book's intended audience is Connecticut lawyers. It highlights the common problems related to the practice and suggests techniques for avoiding adverse outcomes. Reading this book not only enhances one's understanding of the Rules and their nuances, it also provides the reader with recommended best practices. Indeed, the last chapter is simply titled "Prevention" and is a quick guide to screening clients, checking conflicts and using writings in both forming and terminating the attorney-client relationship. This book may prompt some readers to change their practice or management techniques and it will reaffirm for others the efficacy of their existing methods. With optimal practice techniques, practitioners will avoid the time, cost and risk of defending a grievance complaint, a malpractice action, or both.

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<sup>6</sup> *Id.*, 15-16.

<sup>7</sup> Practice Book, Preamble, 3 (2017).

<sup>8</sup> *Id.*

The reviewed book is the third edition. It contains about forty new pages, primarily reflecting developments in the law since the original publication. With two topics, it is divided into two parts. Part One is entitled “Legal Ethics” and Part Two is entitled “Legal Malpractice.” Part One is the work of Attorney Dubois and contains six chapters dedicated to the law of lawyering and a detailed review of the Rules of Professional Conduct. A seventh chapter is dedicated entirely to Connecticut’s lawyer disciplinary process. Part Two is the work of Attorney Sullivan. The first six chapters cover the legal theories supporting claims asserted against lawyers, their defenses, and the procedural and evidentiary issues common to most claims. A separate chapter of this Part is dedicated to attorney fee disputes, whether between attorneys and clients or between lawyers.

Part One seeks to coalesce the numerous, various sources of legal ethics law into a single place. The beginning of the law of ethics may be the Rules of Professional Conduct and the attached commentary, but it certainly does not end there. Section 2 of the Practice Book includes a host of rules outlining lawyer duties and the attorney disciplinary process. Our statutes also affect the practice of law.<sup>9</sup> Cases decided by the Supreme, Appellate and Superior Courts have interpreted, augmented and colored those rules and statutes. Disciplinary decisions issued by the Statewide Grievance Committee, opinions issued by the grievance committee’s advertising committee, as well as opinions issued by both the American Bar Association’s and the Connecticut Bar Association’s respective Committees on Professional Ethics, further illuminate the rules. The present book was an enormous undertaking: Part One is over 250 pages with nearly 1,500 footnotes. As a result, it provides the reader a clear understanding of black letter ethics law and a working understanding of the more nuanced issues. Part One concludes by detailing the procedures of the grievance process and the burden of proof in such matters.

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<sup>9</sup> See, e.g., CONN. GEN. STAT. § 52-251c (limiting contingent fees in personal injury matters).

The Rules of Professional Conduct cover a wide range of lawyer conduct and involve numerous relationships arising under varied circumstances. Consequently, the risk of a rules violation is correspondingly broad. Chapter One covers the topics associated with the attorney-client relationship. The length of this chapter mirrors the length of the corresponding Rules on these topics<sup>10</sup> and violations of these Rules are the ones most likely to result in grievance complaints, malpractice claims or both. In this chapter, the authors describe the essential elements necessary to create the attorney-client relationship and how such relationships can be inadvertently created based on nothing more than a casual conversation and a client's "reasonable expectations." Section by section, fact-specific points of ethics law are addressed: why lawyers owe duties to potential clients despite never having been paid a fee; the differences between a lawyer's ethical duty of confidentiality under Rule 1.6 and the evidentiary issue raised by the attorney-client privilege; the specific duties attached to clients operating with disabilities or to corporate clients; and duties owed by lawyers when seeking to undertake a direct business relationship with a client. Whenever relevant, the authors highlight where Connecticut's Rules, such as our state's requirement for written fee agreements, deviate from the Model Rules. The chapter concludes with analysis of the complicated issues related to conflicts of interest (both concurrent and former clients), when waivers of such conflicts are permitted or required, firm screening responsibilities and the use of "Chinese Walls" to separate a specific attorneys from a client or file.

The book's discussion of the Rules on competency, diligence and communication is understandably brief. Violations of these rules are typically flagrant and indefensible. Interestingly, the authors claim a profile has emerged for lawyers facing the more serious ethical breaches, namely, a "middle-aged male in a solo or small firm practice,"<sup>11</sup> usually

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<sup>10</sup> The Rules and commentary contained in Practice Book §§1.8 through 1.18 include more language than all of the other Rules and commentary combined.

<sup>11</sup> DUBOIS & SULLIVAN, *supra* note 1, at 25.

dealing with one or more other issues such as mental health problems, substance abuse or gambling issues, divorce or other family complications or physical ailments, including the effects of aging. Lawyers aware of a colleague exhibiting such issues are urged to try to provide assistance if possible. Where knowledge of another lawyer's ethical breaches raise questions regarding that lawyer's "honesty, trustworthiness or fitness as a lawyer," the book explains that reporting responsibilities under Rule 8.3 are triggered.

The practice of law is a "self-regulated" profession. Lawyers are required to make annual payments to the client's security fund, a pool of money designed to ensure clients never directly suffer the financial consequences of lawyer defalcation. Decades ago a spate of such thefts prompted changes to Rule 1.15, regarding safekeeping of property, and new Practice Book provisions requiring automatic disbarments in cases of theft, as well as authorizing "random audits" of lawyer's client's fund accounts to uncover possible offenders and to deter such conduct. Beyond the concerns about theft, the book's treatment of Rule 1.15 provides guidance to lawyers handling competing "claims" made against a client's funds, an area of particular importance to the personal injury bar.

The remaining chapters in Part One cover lawyer relationships and duties outside of the attorney-client relationship. These include the duty of candor to tribunals, obligations of fairness to opposing parties and counsel and to unrepresented parties, obligations respecting the rights of third parties, the profession and judges, as well as the required reporting of certain lawyer misconduct. The authors remind lawyers that they are responsible for the actions of their associates and staff and that when such subordinates violate rules, supervising lawyers are liable. Also addressed are the specific rules governing lawyers acting as prosecutors, guardians ad litem, conservators, authorized house counsel, and *pro hac vice*. The final chapter of Part One, "Bar Discipline," details Connecticut's disciplinary process. "[T]he grievance process is not a civil action between the client and the lawyer. At its heart, it is an institutional

inquiry into the fitness of the lawyer, and such an inquiry may go far afield from the original charges.”<sup>12</sup> Explaining that each year over 1,000 grievance complaints are lodged against lawyers, the book warns of the numerous traps for the unwary inherent within the system. The grievance process has an unfamiliar feel to most lawyers in that discovery is not permitted, and sometimes the process morphs the charges against a lawyer into new ones bearing little or no resemblance to the ones initially filed. Further, the Statewide Grievance Committee operates under its own special rules of procedure. Serious matters are “presented” by disciplinary counsel to a judge of the Superior Court for findings and potential discipline while “lesser” forms of discipline are typically handled by the Committee itself. The book recounts a troublesome case where the Committee actually dismissed a complaint against the lawyer but did so “with criticism.”<sup>13</sup> This outcome, a creation of the Committee, was without either statutory or rule support. However, since the case was dismissed it was not subject to appeal. The authors stress that any lawyer subjected to a grievance is best advised to engage counsel with experience practicing before grievance panels.

While many subjects covered in Part Two on Legal Malpractice were addressed in the book’s first part, context can make all the difference. Some errors result in either no discipline or a minor admonishment from a grievance committee, yet these same errors could provide the basis for a significant malpractice verdict. Therefore, while the book may be targeted to a general audience of practitioners, Part Two is a must read for any lawyers prosecuting and/or defending legal malpractice or related claims. It contains a comprehensive and easily understandable review of Connecticut’s substantive and procedural law on lawyer claims.

Shorter than its counterpart, Part Two is just over 100 pages in length. Its first chapter, “Theories of Liability,” is

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<sup>12</sup> *Id.* at 256.

<sup>13</sup> *Id.* at 272.

the book's eighth. It reviews the common law and statutory claims most often asserted against lawyers: negligence, breach of contract, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, unjust enrichment, third-party beneficiary claims, fraud claims, misrepresentation, unfair trade practices, and negligent and intentional infliction of emotions distress. The book notes that attorneys are "creative in asserting causes of action on behalf of their clients," but warns plaintiff's lawyers that "piling on (multiple causes of action) ... does not make for a stronger overall claim."<sup>14</sup> This chapter details each of the individual legal theories, the elements required, any need for expert testimony, the burdens of proof and those evidentiary issues common to them. Chapter Nine is the mirror to Chapter Eight as it covers the same material from a defense perspective. The chapter outlines special defenses such as the statute of limitations or a failure to mitigate damages. It explains when a defendant may deflect liability by asserting a third-party claim against successor counsel. A thorough education is provided regarding when a statute of limitations might be tolled by the theories of continuous course of conduct or continuous representation, thereby potentially exposing a lawyer to a claim long after the occurrence of the original alleged error. Fraudulent concealment claims can also extend a limitations defense, while the ripeness doctrine might subject a claim to dismissal as being "premature" if the underlying action is still pending. Chapter Ten covers very specific, miscellaneous attorney exposures, such as vexatious litigation, abuse of process and Fair Debt Collection Practices violations. Chapter Eleven discusses the case law related to fee disputes both as to clients and between attorneys.

The book's penultimate chapter, "Damages," notes the "dearth of case law" dealing with damages in legal malpractice actions, and the confusion over what damages are available in such matters.<sup>15</sup> When a malpractice claim is the result of the client's loss of an underlying legal action, damages are "the value of that underlying action,"<sup>16</sup> sometimes

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<sup>14</sup> *Id.* at 330.

<sup>15</sup> *Id.* at 385.

<sup>16</sup> *Id.* at 386.

referred to as “the case within the case.” In such matters, the plaintiff’s liability burden involves proof that the loss of the underlying action was the result of the defendant lawyer’s neglect. The damages, however, rest on proof of the “value” of the lost cause of action, hence, “the case within the case.” In that damages component of the trial, all of the defenses available in the original, lost action may be asserted in an attempt to prove the lost action was of no or limited value. In cases where the alleged legal error results in a loss of business profits or the incurring of attorney’s fees, separate damages issues arise. The book describes instances where interest or punitive damages may be available. It is clear, however, that this area of law is still undeveloped, and it is suspected the length of this chapter will increase in future editions.

Abraham Lincoln wrote a century and a half ago, “(t)here is a vague popular belief that lawyers are necessarily dishonest.” This impression still exists today and Connecticut has certainly had dishonest lawyers. Fortunately, their number has been small. *Connecticut Legal Ethics & Malpractice* was written for honest lawyers in the hope that while “(n)o attorney practices without making mistakes,” the goal of reducing the number and scope of those mistakes is within reach.

—JOHN R. LOGAN\*

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