SELECTED MATERIALS:

ETHICAL CONSIDERATIONS IN AUTOMOBILE CASES

to establish, or to continue in effect" for consistency and to eliminate unnecessary words. The words "standard prescribed under this chapter" are substituted for "Federal standard" for clarity. The words "However, the United States . . . may prescribe" are substituted for "Nothing in this section shall be construed to prevent the Federal . . . from establishing" for consistency. The words "of a State" are substituted for "thereof" for clarity. The word "standard" is substituted for "safety requirement" for consistency. The words "performance requirement" are substituted for "standard of performance" to avoid using "standard" in 2 different ways.

Subsection (b)(2) is substituted for 15:1392(d) (2d sentence) for consistency and to eliminate unnecessary words.

In subsection (c), the words "be deemed to" and "of the United States" are omitted as surplus.

In subsection (d), the words "United States" are substituted for "Federal" in 15:1420 for consistency. The words "Consumer" in 15:1420, "not in lieu of" in 15:1410a(e) and 1420, and "not in substitution for" in 15:1394(a)(6) are omitted as surplus. The word "other" is added for clarity.

AMENDMENTS

1995—Subsec. (a). Pub. L. 104–88 substituted "subchapter I of chapter 135" for "subchapter II of chapter 105" in two places.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 701 of this title.

§ 30104. Authorization of appropriations

There is authorized to be appropriated to the Secretary $98,313,500 for the National Highway Traffic Safety Administration to carry out this part in each fiscal year beginning in fiscal year 1999 and ending in fiscal year 2001.

(Pub. L. 103–272, § 1(e), July 5, 1994, 108 Stat. 944; Pub. L. 105–178, title VII, § 7102(a), June 9, 1998, 112 Stat. 465; Pub. L. 106–39, § 1(a), July 28, 1999, 113 Stat. 206.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
30104	15:1392 (note).	Dec. 18, 1991, Pub. L. 102–240, § 2501(a), 105 Stat. 2081.

In this section, before clause (1), the words "to the Secretary of Transportation for the National Highway Traffic Safety Administration" are substituted for "For the National Highway Traffic Safety Administration" for clarity and consistency in the revised title and with other titles of the United States Code. The reference to fiscal year 1992 is omitted as obsolete.

AMENDMENTS

1999—Pub. L. 106–39 substituted "$98,313,500" for "$81,200,000".

1998—Pub. L. 105–178 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows: "The following amounts may be appropriated to the Secretary of Transportation for the National Highway Traffic Safety Administration to carry out this chapter:

"(1) $71,333,436 for the fiscal year ending September 30, 1993.

"(2) $74,044,106 for the fiscal year ending September 30, 1994.

"(3) $76,857,782 for the fiscal year ending September 30, 1995."

§ 30105. Restriction on lobbying activities

(a) IN GENERAL.—No funds appropriated to the Secretary for the National Highway Traffic Safety Administration shall be available for any activity specifically designed to urge a State or local legislator to favor or oppose the adoption of any specific legislative proposal pending before any State or local legislative body.

(b) APPEARANCE AS WITNESS NOT BARRED.—Subsection (a) does not prohibit officers or employees of the United States from testifying before any State or local legislative body in response to the invitation of any member of that legislative body or a State executive office.

(Added and amended Pub. L. 105–178, title VII, § 7104(a), (c), June 9, 1998, 112 Stat. 466; Pub. L. 105–206, title IX, § 9012(a), July 22, 1998, 112 Stat. 864.)

AMENDMENTS

1998—Subsec. (a). Pub. L. 105–178, § 7104(c), as added by Pub. L. 105–206, inserted "for the National Highway Traffic Safety Administration" after "Secretary".

EFFECTIVE DATE OF 1998 AMENDMENT

Title IX of Pub. L. 105–206 effective simultaneously with enactment of Pub. L. 105–178 and to be treated as included in Pub. L. 105–178 at time of enactment, and provisions of Pub. L. 105–178, as in effect on day before July 22, 1998, that are amended by title IX of Pub. L. 105–206 to be treated as not enacted, see section 9016 of Pub. L. 105–206, set out as a note under section 101 of Title 23, Highways.

§ 30106. Rented or leased motor vehicle safety and responsibility

(a) IN GENERAL.—An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—

(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and

(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

(b) FINANCIAL RESPONSIBILITY LAWS.—Nothing in this section supersedes the law of any State or political subdivision thereof—

(1) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or

(2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.

(c) APPLICABILITY AND EFFECTIVE DATE.—Notwithstanding any other provision of law, this section shall apply with respect to any action commenced on or after the date of enactment of this section without regard to whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before such date of enactment.

(d) DEFINITIONS.—In this section, the following definitions apply:

(1) AFFILIATE.—The term "affiliate" means a person other than the owner that directly or indirectly controls, is controlled by, or is under common control with the owner. In the preceding sentence, the term "control" means the power to direct the management and policies of a person whether through ownership of voting securities or otherwise.

(2) OWNER.—The term "owner" means a person who is—

(A) a record or beneficial owner, holder of title, lessor, or lessee of a motor vehicle;

(B) entitled to the use and possession of a motor vehicle subject to a security interest in another person; or

(C) a lessor, lessee, or a bailee of a motor vehicle, in the trade or business of renting or leasing motor vehicles, having the use or possession thereof, under a lease, bailment, or otherwise.

(3) PERSON.—The term "person" means any individual, corporation, company, limited liability company, trust, association, firm, partnership, society, joint stock company, or any other entity.

(Added Pub. L. 109–59, title X, § 10208(a), Aug. 10, 2005, 119 Stat. 1935.)

REFERENCES IN TEXT

The date of enactment of this section, referred to in subsec. (c), is the date of enactment of Pub. L. 109–59, which was approved Aug. 10, 2005.

SUBCHAPTER II—STANDARDS AND COMPLIANCE

§ 30111. Standards

(a) GENERAL REQUIREMENTS.—The Secretary of Transportation shall prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms.

(b) CONSIDERATIONS AND CONSULTATION.—When prescribing a motor vehicle safety standard under this chapter, the Secretary shall—

(1) consider relevant available motor vehicle safety information;

(2) consult with the agency established under the Act of August 20, 1958 (Public Law 85–684, 72 Stat. 635), and other appropriate State or interstate authorities (including legislative committees);

(3) consider whether a proposed standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which the standard will carry out section 30101 of this title.

(c) COOPERATION.—The Secretary may advise, assist, and cooperate with departments, agencies, and instrumentalities of the United States Government, States, and other public and private agencies in developing motor vehicle safety standards.

(d) EFFECTIVE DATES OF STANDARDS.—The Secretary shall specify the effective date of a motor vehicle safety standard prescribed under this chapter in the order prescribing the standard. A standard may not become effective before the 180th day after the standard is prescribed or later than one year after it is prescribed. However, the Secretary may prescribe a different effective date after finding, for good cause shown, that a different effective date is in the public interest and publishing the reasons for the finding.

(e) 5-YEAR PLAN FOR TESTING STANDARDS.—The Secretary shall establish and periodically review and update on a continuing basis a 5-year plan for testing motor vehicle safety standards prescribed under this chapter that the Secretary considers capable of being tested. In developing the plan and establishing testing priorities, the Secretary shall consider factors the Secretary considers appropriate, consistent with section 30101 of this title and the Secretary's other duties and powers under this chapter. The Secretary may change at any time those priorities to address matters the Secretary considers of greater priority. The initial plan may be the 5-year plan for compliance testing in effect on December 18, 1991.

(Pub. L. 103–272, § 1(e), July 5, 1994, 108 Stat. 944.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
30111(a)	15:1392(a), (b), (e) (1st sentence).	Sept. 9, 1966, Pub. L. 89–563, §§ 102(13), 103(a)–(c), (e), (f), 107 (related to standards), 80 Stat. 719, 721.
30111(b)	15:1391(13). 15:1392(f).	
30111(c)	15:1396 (related to standards).	
30111(d)	15:1392(c), (e) (last sentence).	
30111(e)	15:1392(j).	Sept. 9, 1966, Pub. L. 89–563, 80 Stat. 718, § 103(j); added Dec. 18, 1991, Pub. L. 102–240, § 2505, 105 Stat. 2084.

In subsection (a), the words "shall prescribe" are substituted for "shall establish by order" in 15:1392(a) and "may by order" in 15:1392(e) (1st sentence) for consistency. The words "amend or revoke" in 15:1392(e) (1st sentence) and 1397(b)(1) (last sentence) are omitted because they are included in "prescribe". The words "appropriate Federal" in 15:1392(a) and "Federal" in 15:1392(e) (1st sentence) are omitted as surplus. The words "established under this section" are omitted because of the restatement. The text of 15:1392(b) is omitted as surplus because 5:chs. 5, subch. II, and 7 apply unless otherwise stated.

In subsection (b)(1), the words "including the results of research, development, testing and evaluation activities conducted pursuant to this chapter" are omitted as surplus.

In subsection (b)(2), the words "agency established under the Act of August 20, 1958 (Public Law 85–684, 72 Stat. 635)" are substituted for 15:1391(13) and "the Vehicle Equipment Safety Commission" in 15:1392(f) because of the restatement. The citation in parenthesis is included only for information purposes.

In subsection (b)(4), the words "contribute to" are omitted as surplus.

In subsection (c), the words "departments, agencies, and instrumentalities of the United States Government, States, and other public and private agencies" are substituted for "other Federal departments and agencies, and State and other interested public and private agencies" for consistency. The words "planning and" are omitted as surplus.

In subsection (d), the words "The Secretary" are added for clarity. The words "effective date" are sub-

2010 NY Slip Op 51108(U)

MIKHAIL VINOKUR, Plaintiff,

v.

ASHA RAGHUNANDAN, MICHAEL RADHUNANDAN, ANNE MARIE LEMOINE, PV HOLDING CORP. AND MARIO REGINA, Defendants.

21901/08.

Supreme Court, Kings County.

Decided June 25, 2010.

Defendants PV Holding Corp. and Mario Regina were represented by David S. Aronowitz, Esq. of Shapiro, Beilly, Rosenberg & Aronowitz, LLP.

No other party submitted papers on the motion.

JACK M. BATTAGLIA, J.

This action arises from a multi-vehicle collision on the Belt Parkway on September 6, 2007. In his Complaint, plaintiff Mikhail Vinokur alleges, among other things, that defendant PV Holding Corp. ("PV Holding"), the owner of one of the involved vehicles, negligently entrusted its vehicle to defendant Mario Regina (*see* Complaint, ¶¶ 31-36); and that defendant Mario Regina negligently operated the vehicle in the course of his employment for PV Holding (*see* Complaint, ¶¶ 14-15).

The law firm Shapiro, Beilly, Rosenberg & Aronowitz LLP ("the Law Firm") represents movant PV Holding, as well as defendant Mario Regina. The Law Firm, on behalf of PV Holding, seeks summary judgment dismissal of the Complaint and all cross-claims and counterclaims as against PV Holding, based upon the Graves Amendment (*see* 49 USC § 30106). On May 3, 2010, which was the original return date of the motion, this Court recognized *sua sponte* that the law firm has a potential conflict of interest in its representation of both defendants PV Holding and Mario Regina. As such, the Court ordered the Law Firm to submit a further brief regarding the potential conflict.

Where it has been determined that counsel has a concurrent conflict of interest, it has been held that the lawyer should be disqualified from representing both clients. (*See* Alcantara v Mendez, 303 AD2d 337, 338 [2d Dept 2003]; Sidor v Zuhoski, 261 AD2d 529, 530 [2d Dept 1999] ["An attorney who undertakes the joint representation of two parties in a lawsuit should not continue as counsel for either one after an actual conflict of interest has arisen because continued representation for either or both parties would result in a violation of the ethical rules requiring an attorney to preserve a client's confidences or the rule requiring an attorney to represent a client zealously" (citations, internal quotation marks, and brackets omitted)].) A motion to disqualify is addressed to the sound discretion of the court, and "any doubts are to be resolved in favor of disqualification." (*Matter of* Stober v Gaba & Stober, P.C., 259 AD2d 554, 555 [2d Dept 1999].) The Court may raise the issue of disqualification *sua sponte,* and should do so under certain circumstances. (*See* People v Swanson, 43 AD3d 1331, 1332 [4th Dept 2007] [violation of witness-advocate rule]; *see also* Boyd v Trent, 287 AD2d 475, 475-76 [2d Dept 2002] [conflict of interest].)

A Federal statute, known as the Graves Amendment and codified at 49 USC § 30106, "bars vicarious liability actions against professional lessors and renters of vehicles", as would otherwise be permitted by Vehicle and Traffic Law § 388. (*See* Graham v Dunkley, 50 AD3d 55, 58 [2d Dept 2008].) The Graves Amendment provides, in pertinent part, that "[a]n owner of a motor vehicle that rents or leases the vehicle to a person . . . shall not be liable under the law of any State . . ., by reason of being the owner of the vehicle . . ., for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if . . . the owner . . . is

engaged in the trade or business of renting or leasing motor vehicles; and . . . there is *no negligence* or criminal wrongdoing *on the part of the owner*." (42 USC § 30106[a][emphasis added].)

In its Supplemental Affirmation, the Law Firm contends, among other things, that it does not have a conflict of interest since any liability as against PV Holding (the leasing company) would only have been vicarious through Vehicle and Traffic Law § 388, which is barred by the Graves Amendment. In this regard, the Law Firm contends that the other causes of action alleged against PV Holding, *i.e.,* negligent entrustment and *respondeat superior,* were not addressed in Plaintiff's Bill of Particulars, and do not have any merit. (*See e.g. Drake v Karahuta,* (2010 WL 376388, *3 [WDNY 2010] ["Plaintiff's failure to allege any basis for independent negligence against [the leasing company] (other than vicarious liability under NY Vehicle and Traffic Law § 388) negates any possibility of independent liability by [the leasing company]. Therefore, defense counsel does not have a conflict of interest in asserting a Graves Amendment defense.")

The Rules of Professional Conduct, which were promulgated as joint rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and which supersede the former Part 1200 (Disciplinary Rules of the Code of Professional Responsibility), govern the resolution of the issue of the Law Firm's potential conflict of interest. Rule 1.7 (a) of the Rules of Professional Conduct provides that, "Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests." (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [a].) Paragraph (b) sets forth necessary conditions that allow an attorney to represent parties with differing interests.

The first question, then, is whether, under the circumstances of this case, a reasonable lawyer would conclude that the Law Firm's representation of both the driver Mario Regina and the leasing company PV Holding will involve the Law Firm in "representing differing interests". In its Supplemental Affirmation, the Law Firm suggests that this determination should be made as of the time when the issue of the potential conflict of interest is raised, *i.e.,* as of now. In this regard, the Law Firm points out that the issue was raised by the Court *sua sponte* after disclosure was complete, and only after the Law Firm brought a motion for summary judgment.

Nonetheless, the language of Rule 1.7(a) requires that the determination be made as of the time it becomes apparent to a reasonable lawyer that the dual representation "will involve the lawyer in representing differing interests." For reasons that will follow, in this case a reasonable lawyer should have been aware of the conflict of interest upon receipt of Plaintiff's Complaint. (*See e.g. Graca v* ***Krasnik,*** **20 Misc 3d 1127**[A], 2008 NY Slip Op 51640[U], *3 [Sup Ct, Kings County, Saitta, J.]["The conflict exists at the point the attorney recognizes that one of their two clients may have a Graves Amendment defense.")

In *Graca v* ***Krasnik*** (**20 Misc 3d 1127**[A], 2008 NY Slip Op 51640[U]), the court raised *sua sponte* the issue of a potential conflict where, as here, a law firm represented both the driver of a leased vehicle and the leasing company, and the law firm was moving for summary judgment on behalf of the leasing company based upon the Graves Amendment. It was held, among other things, that there is an "inherent conflict of interest in representing the named defendants where, if the case against one defendant (owner/lessor) is dismissed pursuant to the Graves Amendment, the other defendant (driver) is left bearing full liability for the claims alleged in Plaintiff's complaint." (*Id.* at *3.) The court reasoned that "Defendants' attorneys cannot zealously represent both Defendants where they seek dismissal of the claims against one of the defendants they represent while the other has no independent advocate to oppose the motion which would result in their shouldering full liability." (*Id.*) The court pointed out that "the mere assertion of a Graves Amendment defense does not mean there are no questions of fact as to whether the Amendment applies"; and that the Graves Amendment "is only a defense to vicarious liability, so a defendant must also demonstrate that there was no negligence on their [*sic*] part." (*See id.*). The court further held that "the issue giving rise to the conflict of interest, the dismissal of the claim against one defendant shifting liability to the other, rises to a level that full disclosure and consent would not cure."

In *Meigel v Schulman* (24 **Misc 3d** 1242[A], 2009 NY Slip Op 51853[U] [Sup Ct, Kings County, Saitta, J.]), the same court again recognized the "inherent conflict of interest"; and further held that even where there is a provision in the

lease requiring the driver to indemnify the leasing company for any losses arising from the use of the vehicle, there is still an inherent conflict of interest where "there is a possibility that the leasing company may have been negligent." (*See id.* at *2.) In *Meigel,* the court disqualified the law firm from representing the driver even though the law firm submitted an affidavit from the driver admitting that there was no mechanical defect in the vehicle.

In *Drake v Karahuta,* (2010 WL 376388), a federal magistrate held, under similar circumstances, that a law firm representing both the driver and leasing company does not have a conflict of interest in asserting a Graves Amendment defense where "discovery is complete, and plaintiff has neither alleged nor sought to prove any basis other than vicarious liability for its claim against [the leasing company]." (*See id.* at *2.)

Although neither *Graca, Meigel,* nor *Drake* analyzed the issue of the potential conflict of interest under the new Rules of Professional Conduct, they are still persuasive on the question of potential conflict of interest under the facts presented here. Indeed, it has been noted that the Rules of Professional Conduct "include[s] approximately three-quarters of the former [Code of Professional Responsibility], with the remaining one quarter coming from the ABA's Model Rules", and that the new rules do not necessarily eviscerate the holdings in cases decided based upon the Code of Professional Responsibility. (*See Delorenz v Moss,* 24 **Misc 3d** 1218 [A], 2009 NY Slip Op 51519[U], *2 [Sup Ct, Nassau County, Palmieri, J.]

Graca and *Meigel* stand for the proposition that a law firm representing both the leasing company and the driver has an inherent conflict of interest where the law firm seeks to move for dismissal of the complaint only as against the leasing company since the driver would be left bearing full liability. *Drake* stands for the proposition that a law firm, representing both the leasing company and the driver, that raises the Graves Amendment defense to dismiss the action against the leasing company has a conflict of interest only where there are allegations asserted against the leasing company other than vicarious liability under Vehicle and Traffic Law § 388, presumably because the Graves Amendment bars the imposition of liability against the leasing company solely "by reason of being the owner of the vehicle" (*see* 49 USC § 30106[a].)

This Court agrees with *Graca* and *Meigel* that a law firm has an inherent conflict of interest in representing both the leasing company and the driver, regardless of whether the only claim against the leasing company is vicarious liability based upon Vehicle and Traffic Law § 388. As noted in *Graca,* the fact that a party asserts a Graves Amendment defense does not mean that the driver would have no basis to oppose that party's summary judgment motion. (*See Graca v* ***Krasnik,*** **20 Misc 3d 1127**[A], 2008 NY Slip Op 51640[U], at *3.) In this regard, a party asserting the Graves Amendment as a basis for summary judgment dismissal of a Vehicle and Traffic Law § 388 cause of action must establish *prima facie* that it was engaged in the business of leasing vehicles, a fact which a driver having independent counsel may challenge. (*See id.* at *3.)

In addition, even though a plaintiff may in some circumstances not assert any other basis of liability against a leasing company other than vicarious liability pursuant to Vehicle and Traffic Law § 388, a driver of the leased vehicle may assert, if appropriate, cross-claims against the leasing company for, among other things, having provided the driver with a vehicle with a mechanical defect. (*See generally Estate of Byrne v Collins,* 25 **Misc 3d** 1232[A], 2009 NY Slip Op 52395[U], *4 [Sup Ct, Kings County, Rivera, J.]; *Luma v Elrac, Inc.,* 19 **Misc 3d** 1138[A], 2008 NY Slip Op 51062 [U][Sup Ct, Kings County, Battaglia, J.], *2 ["Vicarious liability (under the Graves Amendment) is not abrogated where the injury or damage results from the negligence of the owner's employee in the operation or maintenance of the vehicle, nor where it seems the owner was negligent in entrusting the vehicle to the operator."].)

In any event, even if this Court were to adopt the holding of the *Drake* decision, the reasoning of *Drake* leads to the conclusion that the Law Firm has a conflict of interest. Plaintiff's Complaint alleges a cause of action for negligent entrustment as against PV Holding, as well as cause of action alleging that PV Holding is vicariously liable for the driver Mario Regina's negligence based upon *respondeat superior.* If the driver has possession of the vehicle under circumstances that allow for liability based upon *respondent superior,* the "harm to persons or property" would not "result[] or arise[] out of the use, operation, or possession of the vehicle during the period of [a] rental or lease." (*See* 42 USC § 30106[a].) Since the Complaint alleges causes of action against PV Holding other than vicarious liability

under Vehicle and Traffic Law § 388, the Law Firm would still have a conflict of interest under *Drake* because of Plaintiff's causes of action for negligence that have not been abrogated by the Graves Amendment.

Even though this Court has concluded that the Law Firm has a concurrent conflict of interest since "a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests"(*see* Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [a]), the Law Firm may still represent both clients if conditions set forth in Rule 1.7(b) of the Rules of Professional Conduct are met. Rule 1.7(b) provides that, "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing." (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [b].)

In its Supplemental Affirmation, the Law Firm fails to even address the criteria set forth Rule 1.7(b). In any event, it is clear that the conditions specified in Rule 1.7(b) have not been met because the Law Firm failed to, among other things, attach any writing demonstrating that Mario Regina gave his "informed consent, confirmed in writing." Even if the Law Firm were to have submitted such a writing, it may not be possible, under circumstances here, to show that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client", or that the "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation." (*See e.g. Graca v* ***Krasnik,*** **20 Misc 3d 1127**[A], 2008 NY Slip Op 51640[U], at *4 ["Here, the issue giving rise to the conflict of interest, the dismissal of the claim against one defendant shifting liability to the other, rises to a level that full disclosure and consent would not cure."]; *see also generally* Greene v Greene, 47 NY2d 447, 451-52 [1979] ["Because dual representation is fraught with the potential for irreconcilable conflict, it will rarely be sanctioned even after full disclosure has been made and the consent of the clients obtained]; *Tavarez v Hill,* 23 **Misc 3d** 377, 382 [Sup Ct, Bronx County 2009, Victor, J.].)

In *Meigel,* for example, the court noted that it was "difficult to imagine an attorney, who represented only the driver, agreeing that [the leasing company] was not negligent based on the fact that the driver, who is not an expert, thought there was nothing [wrong] with the car"; that an attorney representing only the driver would procure such an affidavit from the driver; that "an independent counsel would almost certainly at a minimum insist on conducting discovery" of the leasing company's maintenance and service records; that the driver would need for separate counsel to "evaluate whether there was a basis to argue" the inapplicability of the Graves Amendment to a particular case; and that "there [may] be situations in which [independent] counsel would conclude that having the leasing company remain in the case, if there is a legal basis for doing so, may increase the chances of a favorable settlement". These concerns, which may have been issues in this case had the driver, Mr. Regina, had separate counsel, are all relevant to the determination as to the first prong of Rule 1.7(b), *i.e.,* whether "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client."

Similarly, as to the third prong set forth in Rule 1.7(b), although neither the driver Mr. Regina nor the leasing company PV Holding has asserted claims against one another, one cannot say that, had they each had separate counsel, they would not have done so under the facts of this case. In any event, the Court need not offer any opinion as to whether "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal" since two of the other prongs have not been met.

In *Graca,* in which the court raised the issue of disqualification *sua sponte,* and which is analogous to the instant case on its facts, the court only disqualified the law firm from "continuing to represent both Defendants simultaneously", and stayed the action for "new counsel to be provided to [the driver, the leasing company], or both." (*See Graca v* ***Krasnik,*** **20 Misc 3d 1127**[A], 2008 NY Slip Op 51640[U], at *4.) In *Meigel,* the court only disqualified the law firm from representing the driver. (*See Meigel v Schulman,*24 **Misc 3d** 1242[A], 2009 NY Slip Op 51853[U], at *3.)

Since here the Court raised the issue of disqualification on its own, and respecting the general rule that a party is entitled to be represented by counsel of its own choosing (*see* *Dominguez v Community Health Plan of Suffolk*, 284 AD2d 294, 294 [2d Dept 2001]), the Law Firm shall, at this time, only be disqualified from representing defendant driver Mario Regina.

To the extent that the Law Firm contends that the Court is interfering with the defendants' election of counsel, the Law Firm does not submit any affidavit or writing from Mr. Regina nor any principal of PV Holding consenting to the dual representation. Indeed, as in many motor vehicle cases, the Law Firm may have been selected for Mr. Regina by his insurance carrier or the insurance carrier for PV Holding. Moreover, contrary to the Law Firm's contentions, for reasons stated in this decision, this is not a case where mere "multiple representation" presents no conflict of interest requiring disqualification. (*Cf.* *Dominguez v Community Health Plan of Suffolk, Inc.*, 284 AD2d at 294; *Rowe v DeJesus*, 106 AD2d 284, 284 [1st Dept 1984].)

Accordingly, defendant PV Holding Corp.'s motion is DENIED, with leave to renew within 30 days after substitution of counsel for defendant Mario Regina, or after 60 days of the date of this order, and the action shall be stayed for 60 days to allow new counsel to be substituted for Mario Regina. The Court offers no opinion as to whether, upon motion by any party, the Law Firm must be disqualified from representing defendant PV Holding Corp.

2008 NY Slip Op 51640 (U)

ROZALIA GRACA, Plaintiff,

v.

ALEKSANDR KRASNIK and HONDA LEASE TRUST, Defendants.

16121/2007.

Supreme Court of the State of New York, Kings County.

Decided July 28, 2008.

Dajka & Poplawski, Damian Dajka, Esq., Brooklyn, New York, Plaintiff's Attorney.

Law Offices of Robert Tusa, Debra L. Dash, Esq., Brooklyn, New York, Defendant Attorney.

WAYNE P. SAITTA, J.

Attorneys for Defendants, **KRASNIK** and HONDA LEASE TRUST, (hereinafter "Defendants"), move this Court for an Order pursuant to CPLR § 3211 (a)(7) dismissal for failure to state a cause of action against the Plaintiff and granting such further relief as this Court deems just and proper.

Upon reading the Defendants' Motion to Dismiss by Debra I. Dash, Esq., Attorney for the Defendants, ALEKSANDR **KRASNIK** and HONDA LEASE TRUST, dated January 3rd, 2008, together with the Affirmation in Support, dated January 3rd, 2008, together with all exhibits annexed thereto; the Affirmation in Opposition by Damian Dajka, Esq., Attorney for Plaintiff, ROZALIA **GRACA**, dated January 22nd, 2008, together with Affidavit by Plaintiff, ROZALIA **GRACA**, dated January 26th, 2008; the Reply Affirmation by, Debra I. Dash, Esq., Attorney for Defendant's, ALEKSANDR **KRASNIK** and HONDA LEASE TRUST, dated April 1st, 2008, and all exhibits annexed thereto; and after argument of counsel and due deliberation thereon, Defendants' motion for dismissal pursuant to CPLR § 3211 (a)(7) is denied for the reasons set forth below and counsel for Defendants is disqualified from continuing to represent both Defendants simultaneously.

FACTS

The underlying action involves a motor vehicle accident in which Plaintiff, who was a pedestrian, alleges she sustained personal injuries. The accident occurred on June 28th, 2006 at or near the intersection of 15th Avenue and 48th Street in Brooklyn, NY. Defendant **Krasnik** was the driver of the vehicle, and Honda Lease Trust the owner.

Plaintiff's complaint sets forth a cause of action against Defendant Honda Lease Trust, (hereinafter "Honda") as the owner of the vehicle to Defendant Aleksandr **Krasnik**, (hereinafter "**Krasnik**").

In its answer, Defendants' attorneys asserted on behalf of Honda the affirmative defense of the Graves Amendment, 49 U.S.C.A. §30106, which generally precludes claims based on vicarious liability against a leasing company that owns a vehicle. Defendants now move to dismiss the complaint against Defendant Honda only, based on the Graves Amendment.

During argument of the motion the Court raised the question of whether it was a conflict for Defendants' attorney to represent both the driver and the owner where they are moving to dismiss against the owner only.

ARGUMENTS

Defendants argue that Plaintiff's complaint alleges vicarious liability against Honda as the lessor of the vehicle driven by **Krasnik** and that the Graves Act provides an affirmative defense against such a claim.

Counsel for Defendants further deny that there is any conflict in interest in their representing both Defendants; they argue that the Graves Act renders any possible conflict regarding the joint representation as moot.

In opposition, Plaintiff argues that she did not allege that Honda was the lessor of the vehicle nor did Honda annex to its motion any documentation, a lease or affidavit from a person with knowledge, which would substantiate that claim.

Plaintiff did not submit any written position as to the conflict of interest issue at it was raised by the Court at oral argument.

ANALYSIS

Motion to Dismiss

Defendants move to dismiss the claim against Defendant Honda for failure to state a cause of action. Defendants assert that due to the existence of the Graves Amendment, Congress prohibited the imposition of vicarious liability against entities who rent or lease their vehicles when the driver has an accident. If in fact the Amendment is applicable, the appropriate relief for Defendants to seek would be summary judgment and the Court will treat the motion to dismiss as a motion for summary judgment.

Plaintiff argues that Honda has not submitted any evidence, either a lease agreement or an affidavit of a person with knowledge, in support of the allegation that the Graves Amendment is applicable here.

The police accident report annexed to Defendants' motion lists the owner as "Honda Lease Trust". The complaint alleges Honda was the owner of the vehicle **Krasnik** was driving, and that **Krasnik** was driving the vehicle with the "consent and permission of its owner, express or implied". Nothing further is stated or submitted as to the relationship between the Defendants.

Defendants, in their motion, assert that the Graves Amendment provides a basis for dismissal against Honda but they fail to provide any admissible evidence to demonstrate Defendants had a lessor/lessee relationship. Also Defendants provide no affidavit of a person with personal knowledge attesting that Honda Lease Trust is in the business of leasing cars. Although, Defendants, in reply submit a largely illegible copy of a lease, that lease appears to indicate a party other than Honda Lease Trust as lessor. Defendants fail to show that there are no questions of fact as to whether they are a lessor or in the business of leasing cars, accordingly summary judgment must be denied.

Conflict of Interest in Representation of Multiple Defendants

The Court has raised sua sponte whether it is a conflict for Defendants' attorney to represent both the driver and owner where the attorney moved to dismiss the action against the driver pursuant to the Graves Amendment. While the motion was made by the attorney for both Defendants, no affidavit in support from the driver was included and it is unclear that he gave informed consent to the motion.

An attorney's representation of multiple parties to the same action can create an impermissible conflict of interest.

Generally under the Code of Professional Responsibility, "an attorney may not represent adverse interests or undertake to discharge conflicting duties and must avoid even the appearance of representing conflicting interests, except where the conflict of interest is nominal or negligible, or where there has been complete disclosure or consent". 7 NY Jur. 2d Attorneys at Law § 162 As was articulated in *Hill v. Berkshire Farm Center and Services For Youth*, 137 Misc 2d 429, 521 NYS2d 358, N.Y.Sup.,1987, Ethical Consideration 5-14 of the Code of Professional Responsibility precludes acceptance of representation of multiple clients who have conflicting interests (See, also, EC 5-1 and EC 5-15). As the Court of Appeals has declared:

> "The standards of the profession exist for the protection and assurance of the clients and are demanding; an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests (*Rotante v Lawrence Hosp.*, 46 AD2d 199 [361 NYS2d 372]; Edelman v Levy, 42 AD2d 758 [346 NYS2d 347]).

Defendants' attorneys do not argue that no conflict exists but that because of the Graves Amendment, any concern about a conflict of interest is moot because legislation relieves a leasing company from vicarious liability as a matter of law.

However, the mere assertion of a Graves Amendment defense does not mean there are no questions of fact as to whether the Amendment applies. A party asserting the defense must show they are engaged in the business of leasing vehicles. Also, the Amendment is only a defense to vicarious liability, so a defendant must also demonstrate that there was no negligence on their part.

Furthermore, there is an inherent conflict of interest in representing two named defendants where, if the case against one defendant (owner/lessor) is dismissed pursuant to the Graves Amendment, the other defendant (driver) is left bearing full liability for the claims alleged in Plaintiff's complaint. Defendants' attorneys cannot zealously represent both Defendants where they seek dismissal of the claims against one of the defendants they represent while the other has no independent advocate to oppose the motion which would result in their shouldering full liability.

"[A]n attorney who undertakes the joint representation of two parties in a lawsuit [should] not continue as counsel for either one after an actual conflict of interest has arisen" because continued representation of either or both parties would result in a violation of the ethical rule requiring an attorney to preserve a client's confidences or the rule requiring an attorney to represent a client zealously. *Sidor v. Zuhoski*, 61 AD2d 529, 690 NYS2d 637 (2nd Dept. 1999), citing *Matter of H. Children*, 160 Misc 2d 298, 300.

The conflict exists at the point the attorney recognizes that one of their two clients may have a Graves Amendment defense.

Analogous to this situation is where a law firm is retained to cover both insurer, issuing a policy, and an individual insured, who purchased the policy, in an action for damages.

While an attorney representing an insured and his insurer has potentially differing interests, whether an attorney can fairly and adequately protect the interests of multiple clients in these situations depends upon an analysis of each case. When counsel, paid by an insurance company, undertakes to represent the policyholder, he owes to his client, the insured, an undeviating and single allegiance. If there is a conflict of interest, he cannot continue to represent both the insurer and the insured. 7 NY Jur. 2d Attorneys at Law § 165.

An exception to the conflict of interest in representing multiple clients may be found where any possible conflict is found to be one that can be effectively managed by the attorney, ensuring that the representation of each defendant is not compromised.

"Counsel considering representation of multiple clients must first determine whether a disinterested lawyer could competently represent the respective interest of all potential clients, and if the answer is yes, then, after full disclosure of the implications of simultaneous representations, the parties may give consent to the joint representation and waive the potential conflict of interest, but if the answer is no, then the conflict may not be waived and joint representation would be unethical." N.Y.Ct.Rules, § 1200.24 [DR 5-105]. *Dorsainvil v. Parker*, 14 Misc 3d 397, 829 NYS2d 851, N.Y.Sup.,2006.

Here, the issue giving rise to the conflict of interest, the dismissal of the claim against one defendant shifting liability to the other, rises to a level that full disclosure and consent would not cure. The driver has the right to an advocate who will zealously investigate and assess whether there is a basis to contest the applicability of the Graves Amendment, and if so, vigorously oppose the defense.

This Court has the authority to raise this issue sua sponte, despite the relief not having been sought by either party. Indeed, the Court has an obligation to intervene where it recognizes a possible conflict in a case before it.

Accordingly, Defendants' cannot be adequately represented by the same counsel where counsel seeks to have all liability dismissed as to Honda, leaving Defendant **Krasnik** without an independent opportunity to resist that motion. Separate counsel must be provided to Defendant **Krasnik**.

WHEREFORE, the Court denies Defendant's motion for summary judgment and disqualifies the Law Office of Robert Tusa from continuing to represent both Defendants simultaneously. This action is stayed 60 days from the date of entry of the Order for new counsel to be provided to Defendant **Krasnik**, Defendant Honda, or both. This shall constitute the decision and order of this Court.

2009 NY Slip Op 51853(U)

CHRISTOPHER MEIGEL, Plaintiff,

v.

MICKI SCHULMAN AND ELRAC, INC., Defendants.

42387/2007

Supreme Court, Kings County.

Decided August 12, **2009**.

Charles Haviv, Esq., Woodside, New York, Plaintiff Attorney.

Carmen Callahan & Ingham, Farmingdale, New York, Defendant Attorney.

WAYNE P. SAITTA, J.

Defendants MICKI SCHULMAN and ELRAC INC., move this Court for an Order pursuant to 49 USC §30106 dismissing the complaint against the Defendant ELRAC INC. (hereinafter "ELRAC").

Upon reading the Notice of Motion dated December 1, 2008, together with the Affirmation in Support of Tracy S. Reifer, Esq., dated December 1, 2008 and all exhibits annexed thereto; the Affirmation in Opposition of Charles Haviv, Esq., dated April 3, **2009**, and all exhibits annexed thereto; the Affirmation Tracy S. Reifer, Esq., dated June 4, **2009**, and all exhibits annexed thereto; the Supplemental Affirmation of Charles Haviv, Esq., dated June 4, **2009**, and after argument of counsel and due deliberation thereon, Defendants' motion is denied for the reasons set forth below.

FACTS

The underlying action involves a motor vehicle accident in which Plaintiff alleges he was injured when he was struck by a car driven by Defendant SCHULMAN and owned by Defendant ELRAC. Defendants have moved to dismiss the case against ELRAC on the grounds that ELRAC is a car leasing company and can not be held vicariously liable pursuant to 49 USC §30106, commonly known as the Graves Amendment. The Court sua sponte raised the issue of whether Defendants' counsel had a conflict in representing both Defendants while seeking to dismiss the complaint against only one of them.

ARGUMENT

Defendants argue that there is no conflict for one attorney to represent both Defendants because there is no viable cause of action against ELRAC, as it is in the auto leasing business and there is no question of negligence on its part. Defendant SCHULMAN submits an affidavit asserting that were no problems with the vehicle. Defendants further argue that because the leasing agreement between the Defendants requires SCHULMAN to indemnify ELRAC for any loss over $25,000, including attorneys fees, it is in SCHULMAN's best interest to have the case dismissed against ELRAC. Lastly, Defendants argue that there has been full disclosure of the potential for conflicts and the Defendants have both consented to the joint representation.

Plaintiff did not address the conflict issue, but argues that the motion to dismiss the complaint against ELRAC should not be granted at this time as Plaintiff has not had the opportunity to conduct discovery as to whether ELRAC properly maintained and serviced the vehicle.

ANALYSIS

An attorney's representation of multiple parties to the same action can create an impermissible conflict of interest where their interests turn out to be adverse.

Generally under the Code of Professional Responsibility, "an attorney may not represent adverse interests or undertake to discharge conflicting duties and must avoid even the appearance of representing conflicting interests, except where the conflict of interest is nominal or negligible, or where there has been complete disclosure or consent". 7 NY Jur. 2d Attorneys at Law § 162.

Each defendant is entitled to hold the expectation that its attorney will consider the interest of that defendant alone, undiluted by loyalty to the moving defendant, when discharge of a potential contributing, co-defendant is at issue. A motion for summary judgment in favor of one defendant of necessity has the potential for conflict of interest as regards other defendants. *Hill v. Berkshire Farm Center and Services For Youth*, 137 Misc 2d 429, 521 NYS2d 358, NY Sup.,1987 While there are cases where representation of joint defendants is permissible based on full disclosure and consent, where the defendants interests are in fact adverse, the conflict can not be waived. *Greene v Greene*, 47 NY2d 447, 418 NYS2d 379 (1979); *Dorsainvil v Parker*, 14 Misc 3d 397, 829 NYS2d 851, (NY Sup. 2006); *Booth v Continental Ins. Co.*, 167 Misc 2d 429, 634 NYS2d 650.

There is an inherent conflict of interest in representing two named defendants where, if the case against one defendant (owner/lessor) is dismissed pursuant to the Graves Amendment, the other defendant (driver) is left bearing full liability for the claims alleged in Plaintiff's complaint. The driver has no independent advocate to oppose the motion which would result in the driver shouldering full liability.

The conflict remains despite the provision in the lease that requires the driver, SCHULMAN, to reimburse ELRAC for any loss they suffer arising from her use of the vehicle.

Such a lease provision is enforceable, but not as to losses resulting from ELRAC's own negligence. This means that if ELRAC's motion to dismiss pursuant to the Graves Amendment was denied on the grounds that they were negligent in maintaining the vehicle, and ELRAC was found liable to the Plaintiff because of that negligence, ELRAC could not seek indemnification from Schulman for that percentage of the damages caused by its negligence.

Further, such an indemnification provision is enforceable only to the extent that the losses that exceed the minimum primary coverage ELRAC was required to provide pursuant to VTL §370. *Elrac v Ward*, 96 NY2d 58, 724 NYS2d 692 (Ct of Ap 2001); *Haight v Estate of DePamphilis*, 5 AD3d 547, 772 NYS2d 833 (2nd Dept. 2004). Thus ELRAC may only seek reimbursement for any losses that exceeded the $25,000 in coverage they were required to provide Schulman.

There is an inherent conflict in an attorney representing both the driver and the leasing company where there is a possibility that the leasing company may have been negligent. If ELRAC was negligent then the driver would be entitled to contribution from ELRAC and ELRAC could not seek indemnification for such contribution based on its own negligence.

In this case, counsel has produced an affidavit from SCHULMAN stating that there was nothing wrong with the vehicle, which counsel argues shows that there is no question as to negligence by ELRAC, and thus no conflict.

However, this line of reasoning conflates the issue of whether ELRAC was negligent with whether an attorney representing both ELRAC and the driver can vigorously investigate, on the driver's behalf, whether ELRAC was negligent.

It is difficult to imagine an attorney, who represented only the driver, agreeing that ELRAC was not negligent based on the fact that the driver, who is not an expert, thought there was nothing from with the car. It is even more difficult to imagine an attorney who represented only the driver, procuring such an affidavit from their client. An independent

counsel would almost certainly at a minimum insist on conducting discovery of ELRAC's maintenance and service records before conceding that ELRAC was not negligent.

There is also a need for separate counsel to evaluate whether there is a basis to argue that the Graves Amendment is not applicable in a given case, either on constitutional grounds or because the company is not a leasing company within the meaning of the act. While it is true that if ELRAC was held vicariously liable, the driver may be liable to reimburse ELRAC for its losses and attorneys fees that exceeded $25,000. However there many be situations in which counsel would conclude that having the leasing company remain in the case, if there is a legal basis for doing so, may increase the chances of a favorable settlement that outweigh the risk of having to reimburse the leasing company and pay additional legal fees. A client is entitled to the undivided loyalty of counsel, even for such strategic decisions.

Lastly, Plaintiff is entitled to conduct discovery as to the maintenance of the vehicle, before having to answer the summary judgment motion, as such information is both material and within ELRAC's sole control. Therefore summary judgment would be premature at this time.

WHEREFORE, Defendants' motion to dismiss is denied with leave to renew after separate counsel is provided for Defendant SCHULMAN and after the completion of discovery. This constitutes the decision and order of the Court.

FRANKLIN R. DRAKE, Plaintiff,

v.

STANISLAV KARAHUTA, CARAVAN LOGISTICS, INC., WELLS FARGO EQUIPMENT FINANCE, INC., Defendants.

No. 08-CV-00771(A)(M).

United States District Court, W.D. New York.

January 25, 2010.

REPORT AND RECOMMENDATION

JEREMIAH J. MCCARTHY, Magistrate Judge.

This action was referred to me by Hon. Richard J. Arcara for supervision of pretrial proceedings, including preparation of a report and recommendation on dispositive motions [3].[1] Before me is defendants' motion for partial summary judgment [16]. For the following reasons, I recommend that defendants' motion be granted in part and denied in part.

BACKGROUND

This case arises from a January 30, 2008 motor vehicle accident in Bethany, New York involving plaintiff's vehicle and a tractor-trailer operated by defendant Stanislav **Karahuta** ("**Karahuta**"). Complaint [1], ¶11. Plaintiff alleges that, at the time of the accident, **Karahuta** was employed by defendant Caravan Logistics, Inc. ("Caravan"). Id., ¶10; Gulisano Affidavit [16-2], Ex. D, pp. 11-13. **Karahuta's** vehicle was owned by defendant Wells Fargo Equipment Finance, Inc. ("Wells Fargo") and subleased to **Karahuta** from Rig Masters Transport Services LTD. Gulisano Affidavit [16-2], Exs. G and H.

Defendants move for partial summary judgment seeking to dismiss all claims asserted against Wells Fargo, and the claims of independent negligence (*e.g.,* negligent hiring, retention, supervision and training) asserted against Caravan.

ANALYSIS

A. Summary Judgment Standard

The standard to be applied on a motion for summary judgment in this Circuit is well settled. "`Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The party seeking summary judgment has the burden to demonstrate that no genuine issue of material fact exists. In determining whether a genuine issue of material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant. Summary judgment is improper if there is any evidence in the record that could reasonably support the jury's verdict for the non-moving party.'" Ford v. Reynolds, 316 F. 3d 351, 354 (2d Cir. 2003).

B. Plaintiff's Claims Against Wells Fargo

In seeking dismissal of all claims asserted against Wells Fargo, defendants rely upon the so-called "Graves Amendment", 49 U.S.C. §30106(a) (Gulisano Affidavit [16-2], Point A),[2] which provides that:

> "An owner of a motor vehicle that . . . leases the vehicle to a person . . . shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle . . ., for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if —
>
> (1) the owner . . . is engaged in the trade or business of renting or leasing motor vehicles; and
>
> (2) there is no negligence or criminal wrongdoing on the part of the owner . . . .".

The Graves Amendment "was enacted to protect the vehicle rental and leasing industry against claims for vicarious liability where the leasing or rental company's only relation to the claim was that it was the technical owner of the car." Rein v. CAB East LLC, 2009 WL 1748905, *2 (S.D.N.Y. 2009). It "expressly preempts the vicarious liability provisions of [NY Vehicle and Traffic Law] §388 for claims commenced after August 10, 2005". Id., *3; Berkan v. Penske Truck Leasing, Inc., 535 F. Supp. 2d 341, 345-6 (W.D.N.Y. 2008) (Larimer, J,) (upholding constitutionality of the Graves Amendment and granting summary judgment to the lessor).

Plaintiff does not challenge the applicability of the Graves Amendment to his claims against Wells Fargo. Instead, he argues only that because defense counsel represents all defendants, he has a conflict of interest which precludes him from asserting this defense on behalf of Wells Fargo. Plaintiff's Memorandum of Law [22], Point I.[3] In response, defendants argue that there is no conflict, or in the alternative, that any such conflict has been waived by Caravan. Defendants' Reply [24], Ex. A.

In Graca v. Krasnik, 2008 WL 2928557, *4 (Sup. Ct. Kings County 2008), the court held that "there is an inherent conflict of interest in representing two named defendants where, if the case against one defendant (owner/lessor) is dismissed pursuant to the Graves Amendment, the other defendant (driver) is left bearing full liability for the claims alleged in Plaintiff's complaint. Defendants' attorneys cannot zealously represent both Defendants where they seek dismissal of the claims against one of the defendants they represent while the other has no independent advocate to oppose the motion which would result in their shouldering full liability".

However, in Graca the court noted at least the possibility that the owner might be independently negligent: "the Amendment is only a defense to vicarious liability, so a defendant must also demonstrate that there was no negligence on their part". Id. *See also* Meigel v. Schulman, 2009 WL 2742807, *2 (N.Y. Sup. Ct. Kings County 2009) ("there is an inherent conflict in an attorney representing both the driver and the leasing company where there is a possibility that the leasing company may have been negligent. If [the lessor] was negligent then the driver would be entitled to contribution from [the lessor] and [the lessor] could not seek indemnification for such contribution based on its own negligence").

Unlike Graca and Meigel, in which the potential conflict of interest was raised *sua sponte* by the court in response to the defendants' motion to dismiss prior to discovery, in this case discovery is complete, and plaintiff has neither alleged nor sought to prove any basis other than vicarious liability for its claim against Wells Fargo. *See* plaintiff's interrogatory answers [16, Ex. C], ¶¶ (a) — (cc), which do not contain any allegations that the vehicle itself was defective or negligently maintained.

Plaintiff's failure to allege any basis for independent negligence against Wells Fargo (other than vicarious liability under NY Vehicle and Traffic Law §388) negates any possibility of independent liability by Wells Fargo. Therefore, defense counsel does not have a conflict of interest in asserting a Graves Amendment defense. Since plaintiff does not otherwise challenge the applicability of the Graves Amendment to his claims against Wells Fargo, I recommend that these claims be dismissed.

C. Plaintiff's Claims of Independent Negligence Against Caravan

Plaintiff's complaint alleges two causes of action against Caravan: first, that Caravan "is liable for the actions of **[Karahuta]** based on theory of respondeat superior", and second, that the incident "was caused as a result of the negligent [*sic*] carelessness, recklessness and unlawful conduct on the part of [Caravan], among other things, in failing and omitting to properly train its drivers, in failing and omitting to properly and adequately screen . . ., in failing and omitting to properly supervise its drivers, and in negligently hiring **[Karahuta]**". Complaint [1], ¶¶ 15, 20. Plaintiff's interrogatory responses also allege various allegations of negligent hiring, retention, training and supervision against Caravan. Gulisano Affidavit [16-2], Ex. C. Response to Interrogatory No. 10.

In moving to dismiss plaintiff's claims of independent negligence against Caravan, defendants argue that these claims are precluded by plaintiff's claim of vicarious liability against Caravan as **Karahuta's** employer. Gulisano Affidavit [16-2], ¶¶23-24. "Liability for negligent hiring, retention, training or supervision typically arises only when an employee acts outside of the scope of his employment and vicarious liability cannot obtain." Marotta v. Palm Management Corp., 2009 WL 497568, *4 (S.D.N.Y. 2009). This cause of action "does not lie where . . . the employee is acting within the scope of his or her employment, thereby rendering the employer liable for damages caused by the employee's negligence under the alternative theory of *respondeat superior*". Drisdom v. Niagara Falls Memorial Medical Center, 53 A.D.3d 1142, 1143 (4th Dept. 2008).

In opposing the motion for summary judgment as to these claims, plaintiff argues that questions of fact exist as to whether **Karahuta** was acting as an employee of Caravan and the scope of his employment relationship with Caravan at the time of the accident. Plaintiff's Memorandum of Law [22], p. 3. Plaintiff points out that defendants have *denied* the allegation in paragraph 10 of the complaint that **Karahuta** "was employed by . . . CARAVAN . . . and was acting within the scope of his employment". Bailey affidavit [20], ¶15. In fact, Caravan and **Karahuta** denied this allegation not only in their original answer [1, Ex. C, ¶3], but again in their amended answer which was served two months later [7, ¶4].

In his reply affidavit [24], defendants' attorney offers no explanation as to why defendants denied the allegations of ¶10 of the complaint if — as they now claim — **Karahuta** was an employee of Caravan and was operating in the course of his employment. Instead, he suggests that plaintiff may have violated Rule 11 by asserting a baseless claim. Id., ¶5. However, Rule 11 applies to defendants as well as plaintiffs, and requires that "responsive pleaders must have `evidentiary support' for their factual contentions . . . . and must undertake `an inquiry reasonable under the circumstances' before presenting any responsive pleading". 2 Moore's Federal Practice (Third Ed. 2009), §8.06[2].[4] "Defendants are to strictly comply with the requirement of Rule 11 that all denials be, to the best of their knowledge, information, and belief, formed after an inquiry into the facts reasonable under the circumstances". Greene v. C & K Landscaping, 2008 WL 5381822, *2 (M.D.Ala. 2008); White v. Smith, 91 F.R.D. 607, 608 (W.D.N.Y. 1981) (Elfvin, J.) ("denials are acceptable under the rule if they are made in `good faith'").

Absent an explicit acknowledgment from defendants that they themselves have violated Rule 11 by twice denying those facts which they now assert to be undisputed (*i.e.*, that **Karahuta** was operating in the course of his employment by Caravan at the time of the accident), I conclude that there must be at least some evidentiary support for that denial. That conclusion, in turn, creates an inference that the facts may not be as defendants now claim them to be, and that there may be evidence to suggest that **Karahuta** was not an employee of Caravan, and/or that he was not acting in the course of his employment at the time of the accident. Because I am obligated to draw all inferences in favor of plaintiff for purposes of this motion (Ford, supra), summary judgment cannot be granted.

Furthermore, I fail to see how — absent a further amendment of their answer (which has neither been sought nor granted) — defendants can disavow the denial in their answer in order to obtain summary judgment. "Pleadings are for the purpose of accurately stating the pleader's version of the case, and they bind unless withdrawn or altered by amendment." Sinclair Refining Co. v. Tompkins 117 F. 2d 596, 598 (5th Cir.1941); In re Ponderosa Development, LP, 2007 WL 1556866, *2 (Bk. E.D.Tex. 2007) ("it is elementary law that parties are bound by their pleadings").

Even if a second amendment of defendants' answer were to be allowed, defendants' original denial of the allegations of ¶10 of the complaint could still be considered by the trier of fact. *See* Andrews, supra, 882 F. 2d at 707 ("the district court's refusal to permit the jurors to be informed of the amendment and to examine the original [pleading] so that they could contrast it with the amended [pleading] was a substantial abuse of discretion. The amendment of a pleading does not make it any the less an admission of the party . . . . A party cannot advance one version of the facts in his pleadings, conclude that his interests would be better served by a different version, and amend his pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories").

CONCLUSION

For these reasons, I recommend that defendants' motion for partial summary judgment [16] be granted to the extent of dismissing plaintiff's claims against Wells Fargo, but otherwise be denied. Pursuant to 28 U.S.C. §636(b)(1), it is hereby

ORDERED, that this Report and Recommendation be filed with the clerk of this court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the clerk of this court within 14 days after receipt of a copy of this Report and Recommendation.

The district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but was not, presented to the magistrate judge in the first instance. See, e.g., Patterson-Leitch Co. v. Massachusetts Mun. Wholesale Electric Co., 840 F. 2d 985 (1st Cir. 1988).

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. Thomas v. Arn, 474 U.S. 140 (1985); Wesolek v. Canadair Ltd., 838 F. 2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules of Civil Procedure for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." Failure to comply with the provisions of Rule 72.3(a)(3), or with the similar provisions of Rule 72.3(a)(2) (concerning objections to a Magistrate Judge's Report and Recommendation), may result in the district judge's refusal to consider the objection.

SO ORDERED.

[1] Bracketed references are to the CM/ECF docket.

[2] Although Local Rule 7.1(e) requires that a memorandum of law accompany a summary judgment motion, no memorandum of law was included with defendants' motion. However, plaintiff does not object to this omission.

[3] Although he is not directly affected by the alleged conflict, plaintiff has standing to raise this argument. *See* Adams v. Village of Keesville, 2008 WL 3413867, *10 (N.D.N.Y. 2008) ("Given the court's oversight obligation, a motion to disqualify an attorney, even if brought by an unaffected party, is an appropriate means by which to bring the conflict issue to the court's attention."); Burg v. Brunswick Hospital Center Inc., 1987 WL 19431, *3 (E.D.N.Y. 1987) ("defendants contest plaintiff's standing to seek disqualification of opposing counsel in order to protect the rights of the defendant doctors. However, all attorneys, regardless of their position in the litigation, have an obligation to call to the Court's attention possible disciplinary rule violations. . . . Moreover, plaintiff's interest in finality of judgment gives it standing to complain of conflicts of interest which may impair the favorable results of any trial."); Estates Theatres, Inc. v. Columbia Pictures Industries, Inc., 345 F. Supp. 93, 98 (S.D.N.Y. 1972).

[4] For example, it is presumed that counsel has spoken to his or her client about the facts of the case prior to filing a pleading. Andrews v. Metro North Commuter Railroad Co., 882 F. 2d 705, 707 (2d Cir.1989).

23 Misc.3d 377 (2009)
870 N.Y.S.2d 774

JOSE TAVAREZ et al., Plaintiffs,
v.
OLEN HILL et al., Defendants.

Supreme Court, Bronx County.

Decided January 5, 2009.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York City, for Mohammed Musah and another, defendants. *Picciano & Scahill,* Westbury, for Olen Hill and another, defendants. *Gratt & Associates, P.C.,* Brooklyn, for plaintiff.

OPINION OF THE COURT

PAUL A. VICTOR, J.

378 *378 **Preliminary Issue Presented**

Should the court, sua sponte, stay the motion made for summary judgment until there is a final resolution of a potential "conflict of interest" issue arising from plaintiffs' counsel's representation of multiple parties in the same action?

Relief Requested

Defendants Mohammed Musah and A-One Transportation (hereinafter Musah) and the defendants Olen Hill and Robin Hill (hereinafter Hill) move for summary judgment and dismissal of the complaint pursuant to CPLR 3212, for the alleged failure of all four plaintiffs to establish that each sustained a "serious injury," as that term is defined in section 5102 (d) of the Insurance Law.

Background

The three-vehicle accident underlying this case took place on June **23**, 2003 on the Major Deegan Expressway near Park Avenue in the Bronx. At that time, the vehicle driven by plaintiff Jose Tavarez was in a collision with the vehicles owned and driven by the defendants. The plaintiffs Emely Esther Tavarez, Estephany Tavarez and Clara Guzman were passengers in the vehicle owned and driven by plaintiff Jose Tavarez, and each plaintiff (including the driver) alleges that he/she sustained a "serious injury," as that term is defined in Insurance Law § 5102 (d).

In support of the motion, the defendants have submitted, among other things, numerous affirmations from physicians in various specialties. In opposition, counsel for the plaintiffs has submitted only *unaffirmed* medical reports and test results and, in addition, failed to address arguments made by the defendants as to "gaps in treatment" and the failure to provide evidence of "recent" examinations supporting the serious injury claims made by each said plaintiff.

A review of the record reveals that the same attorney represents the plaintiff driver (Jose Tavarez) as well as the three passenger plaintiffs. Defendant Musah, in his answer, has interposed a counterclaim against plaintiff Jose Tavarez and cross claims against defendant Hill, and the defendant Hill has interposed cross claims against the Musah defendants.

Plaintiff Jose Tavarez had previously moved for summary judgment on the issue of liability, but this motion was denied
379 *379 with leave to renew by order of Justice Schachner, dated September 28, 2007. The court's records reflect that no additional motion on the issue of liability has been made and thus, there is a meaningful risk that counsel for plaintiffs may be burdened with a conflict of interest, since the issue of liability of each driver is yet to be determined, and, in this proceeding, the passenger plaintiffs may have interests adverse to those of their driver.

Discussion

An attorney who chooses to represent multiple parties in the same action will risk being held to have violated the Code of Professional Responsibility (and its applicable disciplinary rules) as well as being sanctioned for having engaged in a conflict of interest and, in addition thereto, suffering the indignity and cost of becoming a defendant in a malpractice action.

Code of Professional Responsibility EC 5-1 provides in part that "[t]he professional judgment of a lawyer should be exercised ... solely for the benefit of the client and free of compromising influences and loyalties." The Code's disciplinary rules further provide as follows:

> "*Conflicts of Interest; Simultaneous Representation*
>
> "(a) A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client *will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under subdivision (c) of this section.*
>
> "(b) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be *or is likely to be* adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under subdivision (c) of this section.
>
> "(c) In the situations covered by subdivisions (a) and (b) of this section, a lawyer may represent multiple clients *if a disinterested lawyer would believe* that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the
380 simultaneous representation and the advantages *380 and risks involved.
>
> "(d) While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under section 1200.20 (a), 1200.24 (a) or (b), 1200.27 (a) or (b), or 1200.45 (b) of this Part except as otherwise provided therein." (Code of Professional Responsibility DR 5-105 [22 NYCRR 1200.24] [emphasis added].)

Even the "possibility" or "appearance" of conflict is prohibited. The Code's disciplinary rules state that "[a] lawyer shall decline proffered employment if the exercise of professional judgment on behalf of a client *will be or is likely* ... to involve the lawyer in representing differing interests." (Code of Professional Responsibility DR 5-105 [a] [22 NYCRR 1200.24 (a)] [emphasis added].) It has been noted that "The standards of the profession exist for the protection and assurance of the clients and are demanding; an attorney must avoid not only the fact, *but even the appearance, of representing conflicting interests.*" (*Graca v Krasnik,* 20 **Misc 3d** 1127[A], 2008 NY Slip Op 51640[U], *3 [Sup Ct, Kings County 2008]; *Rotante v Lawrence Hosp.*, 46 AD2d 199 [1st Dept 1974]; *Edelman v Levy*, 42 AD2d 758 [2d Dept 1973]; *Sidor v Zuhoski*, 261 AD2d 529, 530 [2d Dept 1999].)

Sanction Includes Forfeiture of Fees

If a conflict is found to exist, the sanction imposed will most likely include a forfeiture of all fees claimed or received for services rendered. (*LaRusso v Katz*, 30 AD3d 240 [1st Dept 2006]; *Pessoni v Rabkin*, 220 AD2d 732 [2d Dept 1995]; *Alcantara v Mendez*, 303 AD2d 337 [2d Dept 2003]; *Sidor v Zuhoski*, 261 AD2d 529 [2d Dept 1999]; *Quinn v Walsh*, 18 AD3d 638 [2d Dept 2005]; *Shaikh v Waiters*, 185 Misc 2d 52 [Sup Ct, Nassau County 2000]; *Dorsainvil v Parker*, 14 **Misc 3d** 397 [Sup Ct, Kings County 2006]; *Ferrara v Jordache Enters. Inc.*, 12 **Misc 3d** 769 [Sup Ct, Kings County 2006]; Wolfram, Modern Legal Ethics § 7.3.3, at 353 [West 1986].) For discussion of dual representation in other contexts, see *Greene v Greene* (47 NY2d 447 [1979]) and *Mullery v Ro-Mill Constr. Corp.* (76 AD2d 802 [1st Dept 1980]).

Representation of Multiple Plaintiffs

In *LaRusso v Katz (supra)*, counsel was sued (by his former client, the wife/passenger) for legal malpractice because
381 of his representation of a husband/driver and wife/passenger as *381 plaintiffs in a tort claim arising out of a motor vehicle accident. In the underlying tort action the husband had separate counsel to defend him *on the counterclaim* brought by the direct defendant. However, despite this independent representation on the counterclaim, plaintiffs' former counsel (Katz) was made the defendant in the malpractice claim because he allegedly, among other things, failed to advise his client (the wife/passenger) of the risks inherent in his representation of both husband and wife as plaintiffs and because he failed to pursue all claims available as a result of the alleged negligence of her husband. In the underlying tort action the wife/passenger, although seriously injured, was forced to settle for the sum of $10,000, i.e., the policy limits of the other vehicle. Among the malpractice claims made against Katz (the former attorney) was his failure to commence an action against the dealership which owned and had loaned the husband/driver the vehicle which he was driving. Thus, the dealership's large insurance policy did not become potentially available to compensate the seriously injured wife/passenger.

Representation of Multiple Defendants

In *Graca,* above, the court, sua sponte, found that an impermissible conflict existed where a defendant's firm represented an individual driver as well as the leasing company from which this defendant had obtained the vehicle. The conflicted defense attorney had moved for summary judgment and dismissal of the complaint only as against the leasing company, which motion, if granted, would have left the individual driver solely responsible for any negligence attributable to his actions. In essence, the court found that the individual driver was left without a representative to argue in his best interest. The court stated: "Defendants' attorneys cannot zealously represent both Defendants where they seek dismissal of the claims against one of the defendants they represent *while the other has no independent advocate* to oppose the motion which would result in their shouldering full liability." (*Graca,* 2008 NY Slip Op 51640[U], *3.)

Client Consent Alone — Not a Defense

Reliance solely upon client waiver and consent as described in DR 5-105 (c) as justification for representation of a passenger and driver involved in a motor vehicle accident is insufficient and is, in any event, always hazardous. Subdivision (c) of DR 5-105 provides a two-prong test. It states that a lawyer may represent multiple clients (1) if any
382 disinterested lawyer would *382 believe that the lawyer can competently represent the interest of each; and (2) after full disclosure of the implications of the simultaneous representation and the advantages and risks involved, each consents to the joint representation.

Consent is only one prong, and even then it is only effective after "full disclosure." In any event, the first prong (the objective/disinterested lawyer requirement) must also be satisfied. The Court of Appeals has held that disclosure alone does not resolve the conflict issues created by dual representation. (*Greene v Greene*, 47 NY2d 447 [1979].) In *Greene* it was observed that "[b]ecause dual representation is fraught with the potential for irreconcilable conflict, it will

rarely be sanctioned even after full disclosure has been made and the consent of the clients obtained" (Greene, 47 NY2d at 451-452). It must be noted that the phrase "disinterested lawyer," as used in DR 5-105 (c) has been interpreted to mean "that a lawyer is not permitted to seek client consent to a conflict if a disinterested lawyer would advise the client to refuse consent, and that a client consent that is given is *not valid if the objective test of a disinterested lawyer is not met.*" (Shaikh, 185 Misc 2d at 56 [emphasis added]; *see also* Code of Professional Responsibility EC 5-16.)

Conflict Results in Total Disqualification

When a conflict exists, counsel is thereafter disqualified from representing *anyone* in the action. (Alcantara v Mendez, 303 AD2d 337 [2003]; Sidor v Zuhoski, 261 AD2d 529 [1999]; Quinn v Walsh, 18 AD3d 638 [2005]; Matter of H. Children, 160 Misc 2d 298 [Fam Ct, Kings County 1994].)

In *Matter of H. Children* (160 Misc 2d at 300), it was stated that "[a]n attorney who undertakes the joint representation of two parties in a lawsuit [should] not continue as counsel for either one after an actual conflict of interest has arisen."

In *Alcantara* (303 AD2d at 338), it was explained that "counsel's "continued representation of the plaintiffs would result in a violation of either the ethical rule requiring an attorney to preserve a client's confidences, or the rule requiring an attorney to represent a client zealously." The *Alcantara* panel concluded (at 338), therefore, that "(counsel) is disqualified from continuing to represent any plaintiffs in this action."

Entire Law Firm Disqualified

In addition, it should be observed that a disqualification of one attorney in a firm results in the disqualification of the
383 entire firm. (Code of Professional Responsibility DR 5-105 [d] [22 *383 NYCRR 1200.24 (d)]; Greene, 47 NY2d at 453 [conflict of interest involving even one lawyer in a firm taints the entire firm]; Cardinale v Golinello, 43 NY2d 288 [1977]; *see also* Kassis v Teacher's Ins. & Annuity Assn., 93 NY2d 611 [1999] [entire firm prohibited from representing defendant where one of its associates had previously been employed by plaintiff's firm, and had done work on instant litigation, although associate denied receiving any confidential information as part of that work]; Sidor v Zuhoski, 261 AD2d 529 [1999]; Ferrara v Jordache Enters. Inc., 12 **Misc 3d** 769 [2006]; Shaikh v Waiters, 185 Misc 2d 52 [2000].)

Rare Exceptions

It is extremely rare where dual representation does not pose an ethical and legal problem for counsel. (*See* Code of Professional Responsibility EC 5-15 ["(T)here are few situations in which the lawyer would be justified in representing in litigation multiple clients with potentially differing interests"].) One such instance, in a motor vehicle tort action with multiple plaintiffs, *might be* where liability has already been determined, and the plaintiff driver has been found to be free of fault. In such an instance, the interests of the plaintiff driver and passenger would no longer be in conflict. However, an attorney who undertakes to represent a driver and passenger, and thereafter fails to obtain summary judgment or a concession by the defendant on the issue of liability, will subject himself/herself to all of the adverse consequences discussed above. Moreover, it could result in a waste of limited judicial resources since a mistrial would be required if a conflict is "discovered" at trial, or worse, after an appeal is taken.

Prudence dictates that an attorney should, *at the very beginning,* decline to represent multiple parties with potentially conflicting claims (*see* Greene v Greene, 47 NY2d 447 [1979], discussed supra).

Conclusion

The motion and cross motion are stayed pending a review of the "conflict of interest" issue. All parties are directed to appear before this court on February 19, 2009 at 9:30 A.M. for a conference and, if necessary, a hearing with reference to the possible existence of an irreparable conflict of interest in the representation of all four plaintiffs by one attorney.

46 A.D.3d **141** (2007)
845 N.Y.S.2d 227

In the Matter of HAROLD MEYERSON, an Attorney, Respondent.
DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

Appellate Division of the Supreme Court of the State of New York, First Department.

October 25, 2007.

Thomas J. Cahill, Chief Counsel, Departmental Disciplinary Committee, New York City (*Jorge Dopico* of counsel), for petitioner.

142 *142 *Richard M. Maltz* for respondent.

MARLOW, J.P., BUCKLEY, SWEENY, McGUIRE and MALONE, JJ., concur.

OPINION OF THE COURT

Per Curiam.

Respondent Harold Meyerson was admitted to the practice of law in the State of New York by the Second Judicial Department on June 17, 1970. At all times relevant to these proceedings, respondent maintained an office for the practice of law within the First Judicial Department.

On January 27, 2004, respondent pleaded guilty to one court of employing an individual to illegally solicit clients in violation of Judiciary Law § 482, an unclassified misdemeanor, and was sentenced to an unconditional discharge. By unpublished order entered September 22, 2006, we determined this was a "serious crime" and referred the matter to the Disciplinary Committee for a sanction recommendation hearing.

The Hearing Panel conducted proceedings on January, 19, 2007, at which time respondent testified on his own behalf as to the circumstances that lead to his conviction. He also submitted 13 letters attesting to his good character. By report dated April 26, 2007, the Hearing Panel recommended censure.

The Committee seeks an order, pursuant to 22 NYCRR 603.4 (d) and 605.15 (e), confirming the findings of fact, conclusions of law and recommendation of censure set forth in the Hearing Panel's determination.

The undisputed facts reveal that respondent's misconduct occurred during a five-month period of time in the early part of 2003. During that time, his solo practice consisted of a high volume of personal injury matters, matrimonial and criminal defense cases, and general business litigation. Respondent admitted during his plea allocution that he paid Emil Izrailov a sum of money for referring clients to him who had been involved in motor vehicle accidents and who were receiving treatment from I.K. Medical, P.C., a clinic run by Izrailov. In his testimony before the Hearing Panel, respondent testified that he had agreed to pay Izrailov's clinic $800 for a narrative medical report of any patient referred to him by the clinic whom he accepted as a client. These reports were prepared by a physician and described the client's injuries, related those injuries to the accident, and set forth the course of treatment and prognosis. Respondent testified that providing these reports to the insurance carrier in the early stages of the settlement
143 negotiation process usually resulted in early and favorable results for his clients. He *143 also stated that if he referred any client to the clinic, there would be no charge for the narrative report.

Between February and June 2003, respondent paid for approximately 11 narrative reports and referred two clients to the clinic who were not charged when he ordered their narrative reports. Two of the 11 clients for whom respondent

purchased narrative reports did not continue treatment with Izrailov and decided against pursuing lawsuits. Izrailov refunded the cost of those reports.

Respondent denied paying Izrailov and money other than for the cost of the reports and believed that it would be necessary to purchase these reports at some point in the litigation in order to pursue settlement negotiations on behalf of his clients. While acknowledging that this type of arrangement could be viewed as an improper quid pro quo, he did not appreciate that fact at the time. In fact, he believed it was beneficial to his existing clients because they would receive free narrative reports if he referred them for treatment to one of Izrailov's clinics. During the 5 month period in question, respondent estimated that he was retained by approximately 30 patients referred by Izrailov. He resigned from these cases after his arrest to avoid what he believed to be a potential conflict of interest.

The Hearing Panel examined the allegations made in the felony complaint to ascertain whether respondent's conduct was more egregious than that to which he admitted in his plea allocution. The Committee did not offer any evidence to suggest that respondent was a participant in the broader conspiracy alleged in the felony complaint, i.e., conspiracy to commit insurance fraud. Respondent submitted third-party evidence demonstrating that he was not willing to be a party to an effort to inflate or submit false claims to no-fault insurers. The Panel concluded that respondent came to the attention of the Attorney General's Office (OAG) solely as a result of its targeting and wiretapping of Izrailov and his coconspirators and that the Attorney General's agreement to dismiss the complaint in return for a misdemeanor plea and a sentence of unconditional discharge was "strong circumstantial evidence that the OAG lacked sufficient evidence to prove that Respondent was a member of the charged conspiracy."

After reviewing recent precedents involving improper solicitation or illegal payment for the referral of clients, the Panel noted that either censure or a short suspension was imposed in those cases. Applying those precedents to this case,
144 the Panel *144 noted that, unlike those situations where attorneys paid money to the solicitor for each client referred, respondent agreed to purchase a narrative report in exchange for each referral that resulted in his retention. The Panel went on to note that the "evidence is compelling that the clients needed these reports in order [to] pursue their claims and would, in any event, have had to purchase them from another provider, if not Izrailov." Significantly, the Panel found that the $800 paid for each report was "the market price for such reports at the time." Noting the "unusual aspects" of this arrangement, including the fact that these reports would be provided free of charge if an existing client sought treatment from Izrailov's clinic, thus benefitting the client, the Panel found respondent's arrangement to be qualitatively different from the classic solicitation scenario. Taking into account the fact that respondent vigorously vetted the bona fides of each potential client's claims before accepting the case, his monitoring of his clients' medical treatment to guard against improper billing, his unblemished 37-year legal career which included public service, his prompt reporting of his conviction, full cooperation, absence of complaints from clients and sincere remorse, as well as letters from attorneys who had referred clients to respondent and stated they would do so again once the proceedings had concluded, as well as the severe financial loss to respondent who closed his law office as a result of these proceedings, the Panel recommended censure as an appropriate sanction in this case.

The findings of fact and conclusions of law regarding respondent's misconduct should be confirmed as they were fully supported by the record and admitted to by respondent.

While the respondent, a 61-year-old experienced attorney should have known that his arrangement with the clinic for client referrals under the apparent guise of paying for narrative reports was unethical and illegal, he expressed genuine remorse for his misconduct and testified that he has essentially stopped practicing law until the conclusion of these proceedings. Moreover, this matter is distinguishable from *Matter of Ehrlich* (252 AD2d 73 [1998]), where the attorney paid a hospital employee to solicit clients for him by handing out Ehrlich's business card to patients. The respondent in *Ehrlich* obtained 30 clients over a two-year period as a result of this arrangement and terminated the scheme because of the "low monetary value of the cases" (*id.* at 74). In confirming the recommendations of a three-
145 month suspension, we noted that Ehrlich only ended his scheme *145 because it was unprofitable, only began cooperating after being caught, and nearly three dozen instances of solicitation were involved during the two-year period.

In *Matter of Setareh* (264 AD2d 146 [2000]) and *Matter of Hankin* (296 AD2d 238 [2002]), both decided after *Ehrlich,* we noted the significance of the number of ethical misdeeds involved as a factor in determining the severity of the sanction. In *Setareh,* the attorney received a public censure for agreeing to pay an undercover informant who had approached him for two client referrals. In *Hankin,* the attorney also received a censure for paying a fee to a third party for referring one personal injury client and was convicted of criminal solicitation in the fifth degree.

Here, respondent testified that he did not think he was harming his clients by paying for the narrative reports that he ultimately needed in order to settle their claims expeditiously, and the Hearing Panel found he had provided truthful testimony. There are no aggravating factors in this case and the factors in mitigation, as discussed above, reflect an attorney who committed an uncharacteristic mistake for which he has taken full responsibility and for which he has demonstrated remorse. While respondent's arrangement was certainly improper, the Hearing Panel found that his quid pro quo arrangement was "qualitatively less pernicious than the classic cash-for-client solicitations depicted in *Ehrlich, Setareh, Hankin* and *Santalone.*"

Accordingly, the Committee's petition should be granted, the Hearing Panel's findings of fact and conclusions of law confirmed, and respondent publicly censured.

Respondent publicly censured.

80 A.D.3d 151 (2010)
915 N.Y.S.2d 22

In the **Matter** of ALBERT **RUDGAYZER**, an Attorney, Respondent. DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

M2486, M2125.

Appellate Division of the Supreme Court of New York, First Department.

Decided December 9, 2010.

Alan W. Friedberg, Chief Counsel, Departmental Disciplinary Committee, New York City (*Orlando Reyes* of counsel), for petitioner.

152 *152 *Law Office of Michael S. Ross* (*Pery D. Krinsky* of counsel), for respondent.

ANDRIAS, J.P., CATTERSON, RENWICK, DEGRASSE and ABDUS-SALAAM, JJ., concur.

157 *157 ## OPINION OF THE COURT

PER CURIAM.

Respondent Albert **Rudgayzer** was admitted to the practice of law in the State of New York by the Second Judicial Department on April 30, 1997. At all times relevant to this proceeding he has maintained an office for the practice of law in the First Judicial Department.

On August 19, 2008, respondent pleaded guilty to offering a false instrument for filing in the second degree, in violation of Penal Law § 175.30, a class A misdemeanor, and was sentenced to a one-year conditional discharge and ordered to pay about $120,000 in restitution and fines. In his plea agreement and at his plea allocution, respondent admitted that he knowingly caused to be filed with the Office of Court Administration (OCA) a closing statement with false information by indicating that his firm paid $500 for a medical narrative in a client **matter** when the payment was "also an inducement paid to [the clinic] to refer additional accident vehicle clients to [him]" and constituted "something of value for the solicitation of clients."

Respondent promptly reported his conviction to the Disciplinary Committee and joined in the Committee's petition for a determination that he was convicted of a "serious crime." By unpublished order entered September 28, 2009, we deemed respondent's misdemeanor conviction a "serious crime" pursuant to Judiciary Law § 90 (4) (d) and directed a Hearing Panel to conduct a hearing as to the appropriate sanction.

The Hearing Panel conducted hearings on December 9 and 16, 2009, at which time respondent testified on his own behalf as to the circumstances that led to his conviction. Respondent's three character witnesses testified as to his reputation for honesty and his expression of remorse. Respondent also submitted 26 letters and two affidavits attesting to his good character.

In 1998, respondent began what became a high-volume practice focusing on soft-tissue motor vehicle accident cases. Between June 2003 and January 2005, respondent accepted about 150 referrals from three medical clinics (the clinics), which constituted approximately 15% of his practice. Respondent purchased narrative medical report packages for $500 to $1,000 in each case the clinics referred to him. In addition, he testified that he agreed to
153 represent 10 to 15 clients from the clinics that *153 he did not want to represent and paid for medical report package fees for those cases in order to keep referrals flowing. As a result of his arrest and conviction, respondent's law firm

dissolved. He is currently a solo practitioner with reduced earnings, handles only a couple of new cases a year and makes per diem appearances for other attorneys, with a nearly 75% decrease in income from $500,000 per year to $130,000. Respondent expressed remorse and testified that he has since learned the importance of credibility and has been diligent in observing the ethical rules.

In post-hearing submissions, the Committee and respondent requested a two-year suspension and censure, respectively. In March 2010, the Panel issued its determination, recommending a two-month suspension. The Panel found the following mitigating factors: the abundant evidence of respondent's good character; his contrition; and that he had suffered financially and professionally as a consequence of his misconduct. In aggravation, the Panel found that respondent's $100 cash payment to a medical clinic manager was "somewhat troubling." The Panel stated that even if, as respondent claimed, the money was a contribution for a clinic employee's birthday party, "it was still putting cash in the hands of a person who referred clients to [r]espondent, and as such was improper." The Panel did not agree with the Committee as to the existence of additional aggravating factors. With regard to the 10 to 15 clients that respondent did not want but accepted, the Panel found there was "no evidence that [r]espondent represented those clients less than satisfactorily or that . . . anyone . . . influenced any decision made by [r]espondent in the course of the representation."

The Committee now moves to disaffirm the Hearing Panel's recommendation and to impose a suspension of two years, but in no case less than one year. Respondent cross-moves to affirm the Panel's recommendation of a two-month suspension and to deny the Committee's motion.

As this proceeding involved a "serious crime," the only issue herein is whether a harsher sanction than the two-month suspension recommended by the Hearing Panel is appropriate. In this regard, we find that the Panel's recommendation is in accord with this Court's own precedent (*see e.g.* ***Matter*** *of Meyerson*, 46 AD3d 141 [2007] [public censure for soliciting clients from a clinic by paying $800 for narrative reports of 11 referred clients over a five-
154 month period and obtaining *154 free narrative reports for the two clients he referred to the clinic, where the attorney had no prior disciplinary history, took responsibility for his actions, expressed remorse and did not think he was harming his clients by paying for reports needed to settle their claims]; ***Matter*** *of Ehrlich*, 252 AD2d 73 [1998] [three-month suspension for cash payments made to a hospital employee in connection with 30 client referrals where attorney did not self-report his criminal conviction]; ***Matter*** *of Santalone*, 301 AD2d 265 [2002] [three-month suspension imposed on attorney caught making a $1,000 cash payment for a client referral during a sting operation where no prior disciplinary record but in the absence of genuine remorse]; ***Matter*** *of Setareh*, 264 AD2d 146 [2000] [public censure imposed on relatively inexperienced attorney who twice paid a fee for the referral of clients and who had a drug addiction but stopped using narcotics and entered a drug treatment program after his arrest, where there was no prior disciplinary history and he was unwilling to take a case that lacked merit]; ***Matter*** *of Hankin*, 296 AD2d 238 [2002] [public censure imposed on attorney who paid an undercover investigator $375 for a client referral with mitigating factors including public and pro bono service, cooperation, and remorse]).

As recognized by the Panel, the misconduct here is more serious than in *Meyerson,* and less egregious than in *Ehrlich,* with the sole aggravating factor of a one-time $100 cash payment and several mitigating factors present, including the apparent lack of prior discipline (which was not noted by the Panel), respondent's expression of remorse and substantial character evidence.

While respondent admits that his acceptance of the 10 to 15 cases that he would have preferred not to handle was akin to a bribe and made in order to induce future referrals and thus constituted solicitation, there was no evidence that respondent's representation of those individuals was in any way compromised. Further, given the reduction in respondent's case load and his remorse and contrition, there is no reason to believe that he poses a future threat to the public. Additionally, while respondent's $100 cash payment to a medical clinic manager is troubling, there is no evidence that the conduct was ever repeated and the one-time payment is considerably less than the repeated
155 conduct which warranted only a three-month suspension in *Ehrlich* (252 AD2d at 75). *155 We also find that the payment for medical narratives in the subject 10 to 15 cases is less egregious than the cash payments Ehrlich paid for referrals since the "market price" was paid for the narratives, those documents are useful in prosecuting soft-tissue

motor vehicle accident claims, and they represent work actually performed by the clinics in preparing the reports. As recognized by the Hearing Panel in *Meyerson,* this type of "quid pro quo arrangement" is "qualitatively less pernicious than the classic cash-for-client solicitations depicted in *Ehrlich, Setareh, Hankin* and *Santalone*" (46 AD3d at 145).

***Matter** of Becker* (24 AD3d 32, 34-35 [2005]), relied upon by the Committee for the imposition of a longer sanction, states that "[g]enerally misconduct involving . . . filing false instruments. . . has resulted in sanctions ranging from a short suspension to disbarment depending on the repetitiveness of the misconduct and the desire for personal profit." In *Becker,* the attorney was suspended for three months for settling a case and accepting a settlement check on behalf of a deceased client, altering settlement documents, having them falsely notarized and filing a false closing statement with OCA, conduct more egregious than present here.

Likewise, the Committee's reliance on ***Matter** of Hanna* (282 AD2d 99 [2001]) is misplaced as the case involves more egregious conduct. There, the attorney was suspended for three years based on his federal conviction for filing 10 false immigration applications using names of fictitious spouses where the attorney falsely certified that he had seen original birth and marriage certificates. The other cases relied upon by the Committee are similarly distinguishable. In ***Matter** of Nasser* (231 AD2d 247 [1997]), an attorney was suspended for six months for knowingly making false statements in filings with the U.S. Department of Housing and Urban Development in order to allow homeowners to refinance. In ***Matter** of Adler* (302 AD2d 78 [2003]), the attorney was suspended for one year based on his conviction of offering a false instrument for filing in the second degree in connection with his forgery and false notarization of a deed and related tax documents.

Accordingly, the Committee's motion should be denied, respondent's cross motion should be granted, the findings of fact and conclusions of law of the Hearing Panel should be confirmed, and respondent should be suspended from the
156 *156 practice of law in the State of New York for a period of two months.

2010 NY Slip Op 50798

MICHAEL P. **KUSHNER**, ESQ., Plaintiff,

v.

CHRISTOPHER **ELIOPULOS**, ESQ. AND LINDA **ELIOPULOS**, ESQ., Defendants.

021460/10

Civil Court of the City of New York, Kings County.

Decided May 3, 2010.

Michael P. **Kushner**, Esq., 155 Water Street, Brooklyn, New York 11201, Plaintiff.

Christoper **Eliopulos**, Esq., 23 Stratton Road, Scarsdale, New York 10583, Defendant.

PAMELA L. FISHER, J.

Plaintiff Michael **Kushner** brought this action against Defendant Christopher **Eliopulos** and Defendant Linda **Eliopulos**, to recover fees for legal services provided on behalf of Linda **Eliopulos**. Plaintiff is suing in quantum meruit for two thousand two hundred and eighty seven dollars ($2,287.00) based on the number of hours he devoted to Defendant Linda **Eliopulos**' defense in the underlying criminal action. A trial was held before this Court on April 7, 2010. After considering and evaluating the trial evidence and upon weighing and assessing the credibility of the witnesses, the Court makes the following findings of fact and conclusions of law.

Defendants, both attorneys, concede that they secured Plaintiff's legal services to represent Defendant Linda **Eliopulos** in a criminal matter. Defendants allege that Plaintiff was terminated for cause because, as a result of Plaintiff's negligent representation, they were forced to terminate him and secure alternative counsel. Alternatively, Defendants question the amount of time Plaintiff billed for representation. Defendants counterclaimed against Plaintiff for intentional infliction of emotional distress, breach of contract, and breach of professional responsibility.

The parties agree that Plaintiff was engaged by Defendant Christopher **Eliopulos** on Saturday, January 10, 2009, when he telephoned Plaintiff to secure representation for his wife, Defendant Linda **Eliopulos**, after she was arrested. At the time of the initial consultation, Plaintiff informed the Defendants that his fee would be five thousand dollars ($5,000.00). Plaintiff proceeded to represent the Defendants. Plaintiff prepared and submitted a retainer agreement to the Defendants on January 30, 2009. Defendants never executed the retainer agreement and never submitted payment to Plaintiff.

The authority of an attorney begins when the attorney is retained. *Stone v. Bank of Commerce*, 174 U.S. 412 (U.S. 1899). The creation of the relationship of attorney and client by contract is essential to the right of an attorney to recover compensation for his services. *Jecjes v. Matsuda*, 503 F. Supp. 580 (S.D.NY 1980). The retainer agreement may be express or implied and thus no formal contract is necessary to create an attorney-client relationship as it may be implied from the conduct of the parties. *Haythe & Curley v. Harkins*, 214 AD2d 361 (1st Dep't 1995). Therefore, despite the fact that Defendants failed to sign the retainer agreement, there was an implied promise that Defendants would pay the costs for Plaintiff's legal services. Plaintiff proffered an agreement which the Defendants rejected. The absence of a signed written retainer agreement does not preclude the recovery of legal fees. *Minz v. Gold, LLP v. Hart*, 48 AD3d 526 (2nd Dept. 2008). An attorney who fails to obtain a written retainer agreement may recover the reasonable value of services rendered on a quantum meruit basis. *Seth Rubenstein, PC v. Ganea*, 41 AD3d 54 (2nd Dept. 2007); *Volosevich v. Nunziata*, 2008 NY Slip Op 51697U (NY Sup. Ct. 2008).

Here, Defendant Christopher **Eliopulos** engaged Plaintiff on behalf of Defendant Linda **Eliopulos**. It is clear from the testimony that Defendant Christopher **Eliopulos** contacted Plaintiff on a Saturday, explained the circumstances of the

arrest, sought Plaintiff's advice, and authorized Plaintiff to handle the matter. Plaintiff proceeded to contact the police precinct and appeared in court on behalf of Defendant Linda **Eliopulos**. The Court accepts the credible testimony of Plaintiff regarding his services that included: preparation for Defendant Linda **Eliopulos**' arraignment, an appearance at the arraignment, retrieval of Defendant Linda **Eliopulos**' personal belongings from the police precinct, the making of necessary phone calls regarding the case, and driving Defendant Linda **Eliopulos**' to the train station to return home.

It is well established that a client may terminate his relationship with an attorney at any time with or without cause. *Friedman v. Park Cake, Inc.*, 2006 NY Slip Op 8171 (1st Dep't 2006); *Campagnola v. Mulholl*, 76 NY2d 38 (1990). Defendants terminated Plaintiff on April 15, 2009. When an attorney is discharged for cause, the attorney has no right to compensation or a retaining lien, notwithstanding a specific retainer agreement. *Id.* When an attorney is discharged without cause, the attorney is limited to recovering in quantum meruit for the reasonable value of the services rendered. *Id.* In the instant matter, the evidence does not support a determination that Plaintiff was discharged by his clients for cause on the grounds of neglect. Instead, through the submission of phone logs and e-mails into evidence, the record supports the fact that Plaintiff adequately represented Defendant Linda **Eliopulos**, laid out a defense, advised Defendant Linda **Eliopulos** on how to proceed, and followed up on the progress of the case. Plaintiff kept the Defendants informed of the matter, complied with the client's request for information, informed the client of on-going developments, and explained matters to the client to permit the client to make decisions regarding their representation. There is no indication that Plaintiff ever neglected his clients' defense. Therefore, Defendants did not establish a basis for depriving Plaintiff counsel of his fee.

An attorney who is discharged without fault has an immediate right to recover the fair and reasonable value of the services rendered, determined at the time of discharge, and computed on the basis of quantum meruit, namely the value of the services. *Cohen v. Grainger, Tesoriero & Bell*, 81 NY2d 655 (1993); *Lai Ling Cheng v. Modansky Leasing Co.*, 73 NY2d 454 (NY 1989); *Reubenbaum v. B. & H. Express, Inc.*, 6 AD2d 47 (1st Dep't 1958); *In re Estate of Montgomery*, 272 NY 323 (1936). If a client exercises the right to discharge an attorney after some services are performed, but prior to the completion of the services for which the fee was agreed upon, the discharged attorney is entitled to recover compensation from the client measured by the fair and reasonable value of the completed services. *Id. at* 454; *In re Cooperman*, 83 NY2d 465 (1994). In general, factors to be considered include: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; (2) the lawyer's experience, ability, and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; (6) the results obtained; and (7) the responsibility involved. *Diaz v. Audi of Am., Inc.*, 2008 NY Slip Op 10118, 2 (2d Dep't 2008); *Matter of Thompson*, 2009 NY Slip Op 7855, 2 (2d Dep't 2009).

In applying these criteria to the facts at hand, the Court finds the fees submitted by Plaintiff to be fair and reasonable. Plaintiff performed substantial work on the matter including representation, defense strategy, and investigation. Plaintiff's representation included investigatory work concerning the underlying criminal matter, including speaking with store security about the incident and reviewing store video tape, phone calls and emails with Defendants, phone calls with the District Attorney's office, and phone calls with experts in anticipation of testimony at trial. Plaintiff also appeared at Defendant Linda **Eliopulos'** arraignment. Based on the foregoing, the hours that Plaintiff counsel spent on this case are reasonable given: (1) the time and labor required, (2) the skill required to handle the problems presented, (3) the benefit resulting to the client from the services, (4) the customary fee charged for similar services, and (5) the results obtained. Plaintiff submitted a "Description of Services" which was admitted into evidence at trial as Plaintiff's Exhibit 1. The Court credits Plaintiff with 9.0 hours of legal services and awards two thousand two hundred and fifty dollars ($2,250.00) for attorney's fees.

Defendants counter-claimed for intentional infliction of emotional distress, breach of contract, and breach of professional responsibility. Defendants failed to offer any evidentiary or testimonial proof to substantiate their counter-claims. In order to recover based on the intentional infliction of emotional distress, Defendants must establish that Plaintiff's conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and was utterly intolerable in a civilized community. See *Marmelstein v. Kehillat*, 2008 NY Slip Op 5767 (2008). Defendants were unable to establish such a claim.

With respect to breach of contract, the failure to perform constitutes a breach of contract. 22A NY Jur Contracts § 429. Defendants never entered into a written agreement with Plaintiff and Defendants did not establish that Plaintiff failed to perform with respect to any oral agreements reached by the parties. Therefore, the Court finds that Plaintiff is not liable for breach of contract.

Defendants also allege that Plaintiff breached his professional responsibility and that Plaintiff willfully violated the following New York Rules of Professional Conduct: Rule 1.3: Diligence, Rule 1.4: Communication, Rule 1.16: Declining or Terminating Representation, and Rule 8.4: Misconduct. An attorney's alleged violation of a disciplinary rule does not, by itself, give rise to a private cause of action. *Steinowitz v. Gambescia,* 2009 NY Slip Op 51370U, 2 (NY App. Term 2009). However, in some cases conduct constituting a violation of a disciplinary rule may constitute evidence of malpractice. *Steinowitz v. Gambescia,* 2009 NY Slip Op 51370U, 2 (NY App. Term 2009). In legal malpractice actions the claimant must establish that "but for" the attorney's negligence the result of the prior case would have been more favorable. *Carmel v. Lunney* 70 NY2d 169 (1987); *Lemke v Zurich N. Am.*, 2009 NY Slip Op 29545 (NY Misc. 2009).

In the instant case, the factual assertions made by Defendants are insufficient to support a claim for legal malpractice. Despite the fact that Defendants never executed the retainer agreement and never submitted payment to Plaintiff, Plaintiff continued to represent the Defendants until they terminated him on April 15, 2009. Even if the Defendants had plead a counterclaim of malpractice, the evidence presented at trial does not offer factual support for maintaining a malpractice claim against Plaintiff. Plaintiff represented Defendant Linda **Eliopulos** at her arraignment, laid out a defense, followed up on the matter, and never missed a court appearance. Defendants were unable to prove that Plaintiff was negligent in his duties. Accordingly, Plaintiff's counter-claim for breach of professional responsibility is dismissed.

In summary, judgment in favor of Plaintiff in the amount of two thousand two hundred and fifty dollars ($2,250.00). Defendant's counter-claims for intentional infliction of emotional distress, breach of contract, and breach of profession responsibility are dismissed.

This constitutes the decision and order of this Court.