PROFESSIONAL RESPONSIBILITY REVIEW 2014

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We are all aware, or should be aware, of the old adage regarding the perils of assuming things. As lawyers we thoroughly prepare for every matter whether it is a trial or a business transaction. We study all of the law that applies to the matter before us and we never assume that the other side is right. Sometimes, however, lawyers assume things that get them in trouble later. For example, never assume that you have sufficient funds in your IOLTA to cover a check because one client told you that he lost the check that you gave him. Murphy's Law says that he will find and cash the check that day leaving you with an overdraft. Also, never assume that reading something once is sufficient. The authors were certain about what the three-strikes rule in Practice Book § 2-47(d) meant. After a second and third pass through the language and some additional thought, the authors still think their original interpretation is correct, but recognize that there is an argument to be made to the contrary.

I. STATEWIDE GRIEVANCE COMMITTEE

A. *Statistical Analysis of 2014*

In 2014, the 118 decisions issued by the Statewide Grievance Committee ("SGC") either full hearings on the merits or hearings after a conditional admission of misconduct pursuant to Practice Book Section 2-82 reveal the following on both sanctions and merits. Sixty-nine (58%) of the matters were dismissed while some form of discipline was imposed in the other forty-nine cases (42%).[1] The dismissal rate falls within the 50-60% observed over the last five years.

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* Of the Hartford Bar.

1 To compile the data discussed in this article, the authors reviewed 118 decisions by the Statewide Grievance Committee ("SGC") that were decided between January 1, 2014, and December 31, 2014. Two additional decisions pending appeal were not included. The authors included as violations each violation noted after a decision on the merits.

Of the forty-nine disciplinary actions, the following is a breakdown of the discipline based on whether the decision was a Practice Book Section 2-82 disposition or followed a hearing on the merits. We consider "conditions only" to be discipline.

Breakdown of Decisions by Type & Sanction

	Total Discipline	2-82 Dispositions[2]	On the Merits
Presentment	27/49	15/32	12/17
Reprimand + Conditions	4/49	2/32	2/17
Reprimand Only	8/49	6/32	2/17
Conditions Only	10/49	9/32	1/17
Total	49	32	17

In 2014, the most common rules violations were 1.1 (Competence), 1.3/1.4 (Diligence/Communications), 1.15 (Safekeeping of Property), 8.1 (Bar Admission and Disciplinary Matters, failing to timely respond); and 8.4 (Misconduct). Rule 1.3 and 1.4 so frequently arise together that they were tabulated as one category. The top rules violations remained constant from the preceding year.[3] The discipline for these rules violations is set forth below.

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[2] With respect to the Practice Book § 2-82 matters, the authors included as rule violations only those rules for which the attorney conditionally admitted there was some evidence of misconduct. This may vary from the probable cause finding which is generally recited in the decision.

[3] In 2013, the data for violations showed the same rules dominate, but in a different order. In 2013, there were thirty-seven violations of Rule 8.4 (Misconduct); thirty-three violations of Rule 1.4 (Communications); twenty violations of Rule 8.1 (Bar Admission and Disciplinary Matters, failing to timely respond); eighteen violations of Rule 1.3 (Diligence); and sixteen violations of Rule 1.15 (Safekeeping Property). Kimberly A. Knox & Brendon P. Levesque, *Professional Responsibility Review 2013*, 88 Conn. B.J. 73 (2014).

Top Rule Violations

	1.1	1.3/1.4	1.15	8.1	8.4
Presentment	5	10	10	9	12
Reprimand +	0	1	0	1	3
Reprimand Only	1	1	0	0	2
Conditions Only	0	3	0	0	4
Total Rule Violations in Cases with Discipline	6	15	10	10	21

Something the authors noticed this year is that twenty-five cases were heard by more than one reviewing committee.[4] This generally occurs when the initial reviewing committee rejects a Proposed Disposition pursuant to Practice Book Section 2-82 and the matter is assigned to a new reviewing committee for a hearing, which can delay the process. Across all 2014 grievances resulting in discipline, the average time from filing of the complaint to a decision was 265 days—or about nine months. The longest wait was 461 days (or about fifteen months).[5] And the shortest wait was 100 days (or about three months).[6]

B. *Top Professional Issues in 2014*

The profession continues to be plagued by a constant trickle of dishonest or incompetent lawyering. On the more

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[4] This data is compiled from the archived hearing schedules for the SGC from January 1, 2014, through December 31, 2014.

[5] King v. Serafinowicz, Grievance Complaint No. 13-0655 (imposing CLE).

[6] Bowler v. Stewart, Grievance Complaint No. 13-0886 (imposing presentment to consolidate case with another grievance already pending before the Superior Court).

blatant side, a lawyer in a real estate closing representing the sellers was directed to pay off their outstanding mortgage from the proceeds of the closing, but failed to do so. Needless consequences covering a span of years resulted, including a foreclosure action against the new buyers, who in turn brought a civil action against the sellers, who in turn filed an action against the responsible lawyer. A judgment of default and a monetary award eventually entered against the lawyer. This unethical conduct tainted the profession in the eyes of the public and resulted in a presentment.[7] In another case, failure to pay a judgment in a small claims legal malpractice case warranted a reprimand.[8]

Lawyers may also be held accountable for the larcenous conduct of their employees.[9] In one case, a lawyer's legal assistant stole over $10,000 in client funds. It came to light when the client—who believed her case was still pending—found out it had settled four years earlier. Lawyers have a duty under Rule 5.3 to "make reasonable efforts" to ensure that their employees comply with the rules of ethics. Here, the SGC found that the attorney's failure to account adequately for client funds, and his egregious delay in informing the client of her case's resolution,[10] constituted a lack of reasonable effort. Somewhat troubling, however, is the Committee's parting observation that although "it does appear that the Respondent was unaware of the larcenous acts of [his assistant]," nevertheless, "that the signature [on the settlement agreement] was photocopied" meant that he "ratified" the assistant's acts under Rule 5.3(3)(A).[11] The

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7 Nicocevic v. Barber, Grievance Complaint No. 13-0800. The SGC found violations of Rules 1.1, 1.15, 8.2 and 8.4 and Practice Book § 2-32 and directed the Disciplinary Counsel to file a presentment.

8 Jankura v. Piombino, Grievance Complaint No. 14-0065. The Statewide Grievance Committee was not persuaded that the respondent a suspended attorney had a lack of income to satisfy the judgment, which should have been made in the small claims action.

9 King v. Evans, Grievance Complaint No. 12-0841. The SGC directed a presentment to the Superior Court for discipline which was to include an additional charge under Rule 5.3 for failure to ensure that his employee acted in compliance with his ethical obligation.

10 A lawyer is ethically forbidden from settling a case without client authorization. *See* CONN. RULES PROF'L CONDUCT R. 1.2, 1.4.

11 *Evans*, Grievance Complaint No. 12-0841, at 3.

difficulty is that Rule 5.3(3)(A) expressly requires that an attorney have "knowledge of the specific conduct" in order to ratify it.

Taking risks with IOLTA accounts is another constant source of trouble for lawyers. In one case, an attorney wrote a check to a client from the attorney's IOLTA immediately upon receiving the money but a couple days before depositing it into the IOLTA.[12] He believed the check would be covered by the funds of another client, who had lost her check and needed the attorney to re-issue one to her. To the attorney's surprise, the second client found her check that day, which bounced when she tried to cash it.

The case would be a mundane Rule 1.15 violation were it not for what followed. When Disciplinary Counsel investigated the overdraft and requested the attorney's individual client ledgers, the attorney refused "because he frequently represents undocumented immigrants and did not want to disclose either their names or financial transactions to a governmental authority."[13] This earned him a violation of Rule 8.1 for failing to respond to Disciplinary Counsel's request and a presentment to the Superior Court for discipline—the most severe punishment the SGC can impose. The Committee noted that "[t]here is no undocumented immigrant exception" to Disciplinary Counsel's right to audit an attorney's IOLTA.[14] Of note, Rule 1.6 did not justify the attorney's conduct because it expressly permits disclosure of confidential client information to comply with "other law or court order" and Practice Book Section 2-27(c), which requires attorneys to allow audits of their IOLTAs by the SGC.

Several grievance decisions this year dealt with the unauthorized practice of law. Although the authors have previously discussed arrangements constituting the unauthorized practice of law in another state,[15] such cases are usually too

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12 Bowler v. Chan, Grievance Complaint No. 13-0443.

13 *Id.* at 4.

14 *Id.*

15 Kimberly A. Knox & Brendon P. Levesque, *Professional Responsibility Review 2011*, 86 CONN. B.J. 201, 211-12, No. 3 (2012).

egregious to provide much guidance.[16] This year, that changed slightly. In *Kowalski v. Rabel*, a Pennsylvania law firm retained a New York law firm as "of Counsel" which, in turn, hired a Connecticut attorney as an "Associate" so that the Pennsylvania firm could practice in Connecticut.[17] The network of law firms had a computer program that allowed its members to access and coordinate efforts on case files.[18] The Connecticut attorney received a guaranteed fee of $75 to make an initial "compliance call" and to "monitor the [Pennsylvania firm]'s initial actions" on the case.[19]

The SGC held that the Pennsylvania firm engaged in the unauthorized practice of law in Connecticut. Rule 5.5 generally forbids practicing in another state but makes limited exceptions, including where temporary legal services "are undertaken in association with a lawyer who is admitted to practice in [Connecticut] and *who actively participates in the matter*."[20] Here, the Connecticut attorney had provided minimal assistance, if any. Moreover, the Committee noted that it was unaware of any authority "which permits a non-Connecticut attorney to *directly* perform legal work for a Connecticut client under the type of 'attorney counsel network' utilized" here.[21] At issue was the Pennsylvania firm's faxing of several forms directly to the client for signing as well as sending demand letters directly to the client's mortgage company.[22] Nevertheless, on its face Rule 5.5 *does* authorize the direct provision of legal services, provided that Connecticut co-counsel "actively" participates.

In another matter, an attorney who was not licensed in

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16 *See, e.g.*, Dubois v. Dillon, Grievance Complaint No. 10-0379 (no affiliation with a CT attorney); Tobin v. Francisco, Grievance Complaint No. 10-0459A (no affiliation with a CT attorney); Dubois v. O'Toole, Grievance Complaint No. 11-0166 (no affiliation with a CT attorney); Dubois v. Chandler, Grievance Complaint No. 10-0380 (alleged CT attorney denied any affiliation). *But see* New Haven Judicial District Grievance Panel v. Saas, Grievance Complaint No. 09-1109 (violation of Rule 1.4—Client Communication—where CT attorney inadequately supervised out-of-state law firm that used her as affiliated CT attorney).

17 Kowalewski v. Rabel, Grievance Complaint No. 13-0267, at 2.

18 *Id.*

19 *Id.* at 3.

20 CONN. RULES OF PROF'L CONDUCT R. 5.5(c)(1) (emphasis added).

21 *Kowalewski*, Grievance Complaint No. 13-0267, at 3 (emphasis added).

22 *Id.* at 2.

Connecticut took a $5,600 retainer to defend a foreclosure matter pending in the Connecticut Superior Court.[23] A judgment of strict foreclosure entered, which was eventually stayed through no help of the lawyer. The lawyer could not represent the client in Connecticut and should never have asked for or accepted money from the client. The SGC found violations of Rules 5.5, 8.1, 8.4 and Practice Book Section 2-32 and ordered a reprimand and restitution. The decision was also forwarded to the Chief State's Attorney, because the unauthorized practice of law constitutes a criminal violation.

Finally, two grievance decisions turned on—or perhaps, should have turned on—crucial procedural issues. In the first, the larger legal issue may have been obscured by the case's bizarre facts. In 2004, Attorney Elder answered two phone calls from a police officer, but identified himself using another lawyer's name.[24] He told the police officer he was "Attorney Spears." The police officer, who was in the process of a criminal investigation of a suspect, believed he was talking to Attorney Spears when, in fact, he was speaking with Attorney Elder. In 2014, Attorney Spears filed a grievance complaint against Attorney Elder.[25]

Leaving aside the merits of the grievance, the authors wonder whether this complaint should have been dismissed based on the six-year limitation contained in Practice Book Section 2-32.[26] Pursuant to that section, a complaint can be dismissed if "the complaint alleges that the last act or omission constituting the alleged misconduct occurred more than six years prior to the date on which the complaint was filed."[27] In this case, there is no dispute that the statements

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23 New Haven Grievance Panel v. Berger, Grievance Complaint No. 14-0040.

24 Spears v. Elder, Grievance Complaint No. 14-0272.

25 *Id.*

26 PRACTICE BOOK § 2-32 provides that within seven days of the receipt of a grievance complaint the statewide bar counsel must review the complaint and take one of three courses. One of them is to "refer the complaint to the chair of the statewide grievance committee or an attorney designee of the chair and to a nonattorney member of the committee, and the statewide bar counsel in conjunction with the chair or attorney designess and the nonattorney member shall, if deemed appropriate, dismiss the complaint on one or more of the following grounds. . . ." One of those grounds is that "the complaint alleges that the last act or omission constituting the alleged misconduct occurred more than six years prior to the date on which the complaint was filed." PRACTICE BOOK § 2-32(a)(2)(E).

27 PRACTICE BOOK § 2-32(a)(2)(E).

in question occurred in 2004. In addition, there is no dispute that Attorney Spears was aware of the conduct of Attorney Elder in 2004. Although the six-year time limitation on grievances could arguably be tolled, the decision fails even to recognize the doctrine.

If there is a statute of limitations in the Practice Book, it should be applied. Lawyers rely on the finality thereby provided. For example, most lawyers properly destroy client files, with notice to the client, after eight to ten years from the conclusion of the matter. A former client, opposing party, other counsel, or some beneficiary to the matter, however, may file a grievance eleven years later, at a point when much, if not all, of the material necessary to defend against the grievance will have been destroyed. The time limitation on grievances should be enforced, absent a legally recognized exception to the rule.

Second, much like major league baseball, attorney discipline has a three strikes rule. Under Practice Book Section 2-47(d)(1), if an attorney has been disciplined by the SGC three times in the past five years, then any new violations "shall" result in a presentment to the Superior Court, regardless of the violation's severity. Practice Book Section 2-47(d)(1) provides in pertinent part:

> If a determination is made by the statewide grievance committee or a reviewing committee that a respondent is guilty of misconduct and such misconduct does not otherwise warrant a presentment to the superior court, but the respondent has been disciplined pursuant to these rules by the statewide grievance committee, a reviewing committee or the court ***at least three times*** pursuant to complaints filed within the five year period preceding the date of the filing of the grievance complaint that gave rise to such finding of misconduct in the instant case, the statewide grievance committee or the reviewing committee ***shall*** direct the disciplinary counsel to file a presentment against the respondent in the superior court.

The authors had previously assumed that Section 2-47(d)(1) was a mandatory minimum, removing the SGC's discretion to depart downward. This reading was based primarily on the word "shall" in the section's text. Nevertheless,

Connecticut courts have repeatedly held that the use of "shall" instead of "may" does not in itself make a statute mandatory.[28] The phrase "at least" must be given meaning, and what it must mean is that the SGC need not order a presentment after the fourth discipline.

A series of three grievance decisions is noteworthy because of the questions it raises with respect to Practice Book Section 2-47(d)(1).[29] In the first grievance decision issued on May 2, 2014, the SGC found violations of Rules 1.3, 1.4, 1.5(b) and 1.15(b). In ordering disciplinary counsel to file a presentment, the SGC considered three aggravating factors. First, the respondent had three previous reprimands stemming from grievance complaints filed within five years of this complaint. Second, the SGC noted a pattern of misconduct with immigrants. Finally, it considered the presence of a "serious law office management issue that is not limited to this grievance complaint."[30] The only provision the SGC relied on for the presentment was Section 2-35(i). Yet on its face, Section 2-47(d)(1) would have mandated a presentment for the first factor alone. The second two factors would be wholly superfluous.

Less than a month later, the SGC issued two more grievance decisions involving the same attorney. These two grievances were virtually identical to each other and were in fact filed by a husband and wife. In both cases the SGC found violations of Rules 1.1 and 1.3. The SGC stated that it would have reprimanded the lawyer except for the fact that it concluded that it was:

> mandated to present her to the court based on her prior disciplinary history. Pursuant to Practice Book § 2-47(d), since the Statewide Grievance Committee has sanctioned the Respondent more than three times in complaints filed in the five year period prior to the filing of this grievance complaint. (May 30, 2008 – May 30, 2013), we direct the Disciplinary Counsel to file a presentment against the Respondent . . . . [31]

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[28] Historic Dist. Comm'n v. Sciame, 152 Conn. App. 161, 170, 99 A.3d 207, *cert. denied*, 314 Conn. 933, 102 A.3d 84 (2014).

[29] Christoffersen v. Sporn, Grievance Complaint No. 13-0127; Kolami v Sporn, Grievance Complaint No. 13-0353; and Kolami v. Sporn, Grievance Complaint No. 13-0354.

[30] Christoffersen v. Sporn, Grievance Complaint No. 13-0127 at 5.

[31] *Kolami*, Grievance Complaint No. 13-0353, at 4.; *Kolami*, Grievance Complaint No. 13-0354 at 4.

The authors are somewhat confused by these three decisions. The SGC itself seems to be unsure whether Section 2-47(d)(1) is mandatory or discretionary. The three decisions discussed above and another read of the rule have convinced the authors that there is an argument to be made that the phrase "*at least* three times" in Section 2-47(d)(1) gives the SGC discretion automatically to present, or not, depending on whether the number of prior violations is so great as to warrant it. In short, there must be at least three strikes before the SGC can invoke this rule. But they would not have to invoke the rule until they thought it was appropriate.

C. *Five-Year Look-Back*

Over the last five years (2009-2013), the world of Connecticut attorney discipline in the land of steady habits has remained fairly consistent, with one notable exception, the rise in violations of Rule 8.4. Examples of consistency include the overall number of grievances that gave rise to discipline, the manner in which the grievances are disposed, and the most common rule violations.

As to the number of grievances, the five-year average for number of grievances resulting in discipline was roughly 70 (69.8) per year. In 2009 there were 55. That number skyrocketed to 85 in 2010. Admittedly, the authors do not have an explanation for this dramatic increase. On the other hand, the number of matters resulting in discipline has steadily declined since ending at 63 in 2013. The dismissal rate has been very consistent. Each year about one-half of the grievances that go to hearing are dismissed. So, for instance, in 2013 the SGC found probable cause to proceed to a hearing on 132 grievances. At those hearings, the SGC imposed discipline in 63 and dismissed the other 59.

In reviewing five years of data, the authors noted an interesting distinction between grievance prosecution and civil and criminal litigation. In almost every other area of law, trying cases is by far the exception, as the vast majority of cases settle. For example, in civil litigation less than 2%

of cases go to trial.[32] For criminal litigation, around 4% of cases go to trial.[33] By contrast, in every year but 2009, more attorneys went to a hearing on the merits (the "trial"of the grievance world) than negotiated Practice Book Section 2-82 agreements (the "settlement" of the grievance world). This is particularly surprising given that, as the authors have previously noted, disposition by a Practice Book Section 2-82 agreement can lead to a more favorable result for the grieved attorney.[34] One can only wonder what causes this anomaly.

The authors have come up with three possible explanations. First, many cases may go to full hearing based on the same unpredictability and disparity in punishment that the authors discussed in previous years. This unpredictability may make it difficult for both grieved attorneys and disciplinary counsel to assess the proper sanction in a given case. Another possible reason is that the disciplinary counsel, who act as prosecutors, have no effective nolo contender or dismissal authority.[35] It is a trial or compromise. Yet another possible reason may be that lawyers, who are defending not only their conduct, but their reputation and ability to earn a living, are emotionally invested which can cloud their judgment about accepting a "deal" to resolve the matter. A refusal to settle the matter means a hearing on the merits.

With respect to what rules are violated the most, four Rules

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[32] John Barkai & Elizabeth Kent, *Let's Stop Spreading Rumors about Settlement and Litigation*, 29 OHIO ST. J. ON DISP. RESOL. 85, 100 (2014) (discussing federal civil cases); *see also id.* at 99 (<3% trial rate for state civil cases). Of the civil cases that do not go to trial, about 70% settle and 27% end by dispositive motion, default, etc. *Id.* at 107 (discussing Hawaii civil cases).

[33] Dep't of Justice, *U.S. Attorneys' Annual Statistical Report*, at 4, 7 (2014), *available at* http://www.justice.gov/sites/default/files/usao/pages/attachments/2015/03/23/14statrpt.pdf (showing that of 59,555 federal criminal cases terminated that year, 2430 were by trial). Similarly, at the state level, 94% of convictions came from guilty pleas. Dep't of Justice, *Felony Sentences in State Courts, 2006 – Statistical Tables*, at 25 (2010), *available at* http://www.bjs.gov/content/pub/pdf/fssc06st.pdf (discussing state felony convictions).

[34] Kimberly A. Knox & Brendon P. Levesque, *Professional Responsibility Review 2010*, 85 CONN. B.J. 95, 98 (2011).

[35] SGC Rules and Regulations, Rule 11A provides for a motion to dismiss by disciplinary counsel. However, the motion is rarely granted, which diminishes its effectiveness in the arsenal of procedural tools.

have remained in the Top Five most common violations every year since 2009. Those are Rule 1.3, Diligence; Rule 1.4, client communications; Rule 8.1, failure to respond; and Rule 8.4, Misconduct. The rank ordering of these four varied by year. Two runners up were Rule 1.5, Fees; and Rule 1.15, Safekeeping of Property. Both of those Rules were in the Top Five for three of the past five years.

Rule 8.1 has been a big issue every year and it never ceases to amaze the authors how many lawyers do not grasp the concept that failing to respond to a grievance complaint is guaranteed to result in discipline. Rule 8.1 requires attorneys "to respond to a lawful demand for information from [a] . . . disciplinary authority," which includes responding to grievance complaints. In 2009, out of seventeen Rule 8.1 probable cause findings, 76% resulted in discipline. In 2013, out of twenty-three Rule 8.1 probable cause findings, 87% resulted in discipline. Violations of Rule 8.1 had, by far, the highest rate of discipline for any of the most commonly violated Rules.

The single biggest change, and in the authors' opinion the most interesting trend from 2009 to 2013, was the steady rise in Rule 8.4 violations. In 2009 there were nine violations. In 2010 there were thirteen. In 2011 there were twenty. In 2012 there were thiry-one. And in 2013 there were thirty-seven. What makes this all the more remarkable is that the total number of decisions imposing discipline has *declined* from 2010 to 2013.

Rule 8.4 has gone from barely making the Top Five in 2009 and 2010 to being the number one most frequent rule violation for 2011, 2012, and 2013. In the authors' opinion, the rise in violations of Rule 8.4 is likely due to two factors. First, as discussed in articles past, Rule 8.4 has been used increasingly as a catch-all for conduct that falls just short of violating another rule. Second, Rule 8.4 has been used, inappropriately in the authors' opinion, as a separate violation in addition to a violation of a clearly applicable rule in order to potentially amplify either the amount or severity or both of the discipline imposed.

II. Case Law Developments

Many of the notable cases in 2014 focused on the potential disqualification of counsel, either due to a potential conflict of interest or due to the attorney being a necessary witness. As always, there were cases that prove that lawyers, like everyone else in society, sometimes exercise poor judgment. Finally, there were a number of cases that should cause you to shake your head in wonder.

A. *Professional Discipline*

1. Ill-Advised Ideas

Lawyers should refrain from lying to their clients and from having romantic relationships with them. As the next two cases illustrate, this conduct will likely result in discipline.

In perhaps the most sensational case of 2014, a lawyer recommended to his client that they hire an expert, who was an FBI agent with influence over federal employees.[36] The "expert" was a forensic auditor.[37] When the client later complained that the attorney and the expert were overbilling him, the attorney requested a meeting at a fast food restaurant to discuss the fees.[38] The attorney explained that the client's money was being expended to avoid a federal investigation and that a portion had gone to pay off a federal employee.[39] The attorney claimed that the expert was actually an undercover FBI agent whose influence was key to the client's defense and emphasized the importance of resolving the fee dispute satisfactorily to the expert.[40]

This tale resulted in disbarment. The court found the lawyer's conduct to be a misrepresentation, and a violation

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[36] Disciplinary Counsel v. Oliver, HHD-CV-13-6047117, 2014 WL 4746524, at *1 (Conn. Super. Ct. Aug. 5, 2014).

[37] *Id.*

[38] *Id.* The client brought a recording device and recorded the conversation. *Id.*

[39] *Id.*

[40] *Id.* It turns out that the auditor had a sketchy employment record and prior to being hired by the attorney had been fired from her accounting firm. *Id.* at *2. She also appeared to pose as an "M.D.", "CIA" and "CFE" on various business documents. *Id.* She did, however, assert that she was not, nor ever claimed to be, an undercover agent for any federal agency. *Id.*

of Rule 8.4(3) because he had "no rational or reasonable basis for making the claims of [the expert's] status as a federal agent," a fact the consultant herself denied. The court also found that the lawyer knew or should have known that he was making misrepresentations to the SGC, in violation of Rules 3.3(a)(1) and (3) and 8.4(3). Finally, the attorney went to the expert's residence where he attempted to convince her to lie and change her testimony in his disciplinary action, a clear violation of Rule 3.4(2).[41]

In the continuing saga of a lawyer dating his client, the Appellate Court had the final word. In *Chief Disciplinary Counsel v. Zelotes*, the appellate court upheld a five-month suspension for violations of Rules 1.7(a)(2) and 8.4(4). There, the attorney befriended and began dating a woman in the middle of her divorce proceedings to "gain her confidence" and give her "the strength and the encouragement to move forward with" the divorce from her husband.[42] They kissed, drank wine, and went on dates.[43]

The appellate court found that the lawyer's conduct violated Rule 1.7(a)(2) because it "created a significant risk that his representation of [the client] would be materially limited by his personal interest."[44] As to Rule 8.4(4), the attorney made three arguments. First, he argued the rule was unconstitutionally vague. The Court disagreed, concluding that while the rule's text "may lack detail and precision," its meaning could be gleaned from the rules, official commentary, and case law.[45] In the authors' opinion, Rule 8.4(4) has become ambiguous through its overly broad appli-

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41 *Id.* at *1, *3-4.

42 Chief Disciplinary Counsel v. Zelotes, 152 Conn. App. 380, 388-90, 98 A.3d 852, *cert. denied*, 314 Conn. 944, 102 A.3d 1116 (2014).

43 *Id.* at 390-91. It is curious that the trial court found a violation of 8.4(4) even though the attorney had not engaged in sexual intercourse with the client. See Kimberly A. Knox & Brendon P. Levesque, *Professional Responsibility Review 2013*, 88 CONN. B.J. 73, 96-97 (2014) (arguing that courts should not find a violation of Rule 8.4 where the attorney's conduct falls just short of or is a preliminary step toward a specifically enumerated violation). In affirming the trial court, the Appellate Court relied on two out-of-state decisions reaching similar results.

44 *Id.* at 397.

45 *Id.* at 398-401.

cation.[46] Everyone would benefit if Rule 8.4 were made a little more precise.

Second, the attorney contended that by imposing discipline the court was trampling on his "right to pursue an intimate association." The Court disagreed, reasoning that it was the "timing and totality" of his behavior "not the time, place and manner of his dating" that was prejudicial to the administration of justice.[47]

Third, the attorney argued that he believed, in good faith, that his conduct was both constitutionally protected and outside the scope of the rules.[48] The Court brushed this argument aside, observing that the attorney's "misguided belief" was no defense.[49]

Switching gears, as a general matter, it is a bad idea for lawyers to communicate with the court *ex parte*. In one case this past year, the defendant's attorney delivered a letter to the Superior Court requesting a status conference but also relating hearsay allegedly relevant to the case at hand.[50] The letter provided "information on various issues the defendant's counsel believed needed to be dealt with."[51] He also sought "guidance from the court on how to proceed under the circumstances, in effect asking the court for an advisory opinion."[52] He also sent a copy to plaintiff's counsel.[53] Upon receipt by the clerk's office, the clerk immediately returned the letter to the attorney without any judge having read it.[54]

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[46] Moreover, as to Rule 8.4(3), any clarity is undermined by the conflict between the rule's plain language and its lack of a scienter requirement. Rule 8.4(3) prohibits "dishonesty, fraud, deceit or misrepresentation" but has been held to have no scienter requirement. This seems to be in direct conflict with the definition of fraud, which requires a purpose, or intent, to deceive.

[47] *Id.* at 402-04.

[48] *Id.* at 407-08.

[49] *Id.* at 410.

[50] Bruno v. Chase Home Finance, LLC, DBD-CV-13-5009149-S, 2014 WL 6996492, at *1 (Conn. Super. Ct. Oct. 31, 2014). The information provided was "premised on hearsay and presumptions." *Id.*

[51] *Id.* The attorney cited concerns over the "degree of merit of the plaintiff's claims", her truthfulness, her "standing to prosecute the pending case", and her litigiousness. *Id.*

[52] *Id.*

[53] *Id.* at *2.

[54] *Id.*

In imposing discipline, the court held that despite not being read by the court and being received by opposing counsel, the letter violated Rule 3.5 because "the opposing party was not made aware of the communication until after receipt by the court and . . . was deprived of the opportunity to reply . . . ."[55]

2. Other Disciplinary Cases of Note

a. *Connecticut*

As a general observation, the court in *Rogers v. Warden* held that although an appellate attorney's failure to discuss appellate claims might violate Rule 1.4, it is not *per se* ineffective assistance of counsel.[56]

In *Disciplinary Counsel v. Evans*, the court imposed discipline for misconduct even though not all of the attorney's actions fell squarely within an existing rule. His misconduct included: (1) failure to place settlement funds in an account pursuant to a court order; (2) failure to deliver promptly held funds to another attorney as ordered; (3) failure to comply with a Disciplinary Counsel request for information; (4) taking an additional unapproved $500 attorney fee out of the net settlement proceeds; and (5) failing to adhere to a signed probate court agreement.[57] The court found that he violated Rules 1.15 based on his improper handling of the client's money and failure to deliver funds timely. The violation of Rule 8.1(2) was based on his noncompliance with the lawful request for information. Finally, the court found a violation of Rule 8.4(4) because of the unreasonable delays, failure to abide by probate court orders, and unilateral actions.[58]

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[55] *Id.* at *2-4. The court also noted that the accuracy of the statements in the letter was irrelevant to whether it was to be considered an ex-parte communication. *Id.* at *4..

[56] Rogers v. Warden, CV-12-4004376, 2014 WL 4746529, at *8 (Conn. Super. Ct. Aug. 11, 2014).

[57] Disciplinary Counsel v. Evans, FST-CV-13-6020175-S, 2014 WL 5357010, at *5 (Conn. Super. Ct. Sept. 18, 2014).

[58] *Id.* at *13. The court later conceded that it overstated its position as to the absence of evidence of a fee agreement concerning the $500. Still, the court concluded such an error was immaterial given that discipline was imposed because of the attorney's lack of candor in seeking probate court approval for it, and not because it was excessive in violation of Rule 1.5. Disciplinary Counsel v. Evans, FST-CV-13-6020175-S, 2014 WL 6427903 (Conn. Super. Ct. Oct. 8, 2014).

The court properly noted that there need not be a "precise correlation between conduct and a specific rule" and that some behaviors, such as taking the unapproved $500, might contribute to the violations of another rule and despite "not clearly fitting precisely into any identified pigeonhole, [such behavior] stands out as problematic conduct of great concern."[59] Due to the "magnitude and number of offenses, the pendency of other discipline," the lack of diligence and the respondent's attitude towards the probate court, he was suspended for three months.[60]

In the authors' opinion, this is how Rule 8.4 should be used. The court found violations of specific rules based on specific conduct. It then looked at other troubling behavior and concluded – properly we might add – that the lawyer had engaged in conduct prejudicial to the administration of justice.

In *Barbierri v. Pitney Bowes, Inc.*, the plaintiff's attorney was not sanctioned under Rule 4.4 despite a finding that he had violated attorney-client privilege with respect to limited portions of interviews with two former employees of the defendant.[61] In deciding against punishment, the court cited the relevancy of the information sought from the former employees and the relatively small amount of privileged information obtained, but did note that plaintiff's counsel should have taken more extensive precautions.[62] The court also highlighted that Rule 4.2 does not bar an attorney from communicating *ex parte* with an adverse corporate party's *former* employee so long as they do not inquire into privileged matters.[63]

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[59] *Evans*, 2014 WL 5357010, at *13.; *cf.* Knox & Levesque, *supra* note 34, at 96-97 (arguing that a court should not find a violation of Rule 8.4 where the attorney's conduct is a less severe version of or a preliminary step toward another specifically-enumerated violation).

[60] *Evans*, 2014 WL 5357010, at *14.

[61] Barbierri v. Pitney Bowes, Inc., FST-CV-12-6014221, 2014 WL 5094271, at *5 (Conn. Super. Ct. Aug. 20, 2014).

[62] *Id.*

[63] *Id.* at *2-3.

b. *Second Circuit*

The Court of Appeals for the Second Circuit upheld a seven-year suspension for an attorney who engaged in the "corruption of a young and inexperienced lawyer, over whom she had power and authority."[64] The attorney ordered a first-year associate to "mark up" deposition transcripts in an attempt to bring them under the protection of attorney work-product privilege and thereby allow her to exclude them from a discovery order.[65] The lawyer also knowingly violated a confidentiality order by ordering extra copies of transcripts and using them in a separate action in Massachusetts.[66]

The Court relied on the district court's findings that the attorney refused to acknowledge wrongdoing, exhibited a pattern of placing blame elsewhere, was untruthful at hearings, came "dangerously close to engaging in bad faith obstruction of the disciplinary proceeding," and possessed substantial legal experience.[67] As this case illustrates, the failure to take responsibility for one's wrongful actions is not an effective strategy and will likely lead to an increase in the discipline imposed.

The Court also affirmed a one-year suspension for a New York attorney who had ceased work on client files due to nonpayment and filed "substantively deficient briefs" on several occasions.[68] The fact that the attorney had been instructed by his employer to stop pursuing the nonpaying clients' files did not mitigate his misconduct because he did not resist, discuss the issue with his employer, attempt to mitigate the detrimental effects of his conduct, seek advice from someone else, or report the matter to the Court or other relevant authority.[69] In his deficient briefs, he failed to raise seemingly dispositive issues and included issues

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64 Peters v. Committee for Grievances, 748 F.3d 456, 463 (2d Cir. 2014), *cert. denied*, 135 S.Ct. 448 (2014).

65 *Id.* at 459.

66 *Id.*

67 *Id.* at 462.

68 In re Tustaniwsky, 758 F.3d 179, 181 (2d Cir. 2014).

69 *Id.* at 182-83.

that had not been raised below, resulting in several appeals being barred on the basis of waiver or failure to exhaust administrative remedies.[70] He never explained to the court the reasons for his decision to omit viable claims and include barred ones, instead he argued that the court should have inferred them.[71]

B. *Beyond the World of Attorney Discipline*

1. Motions to Disqualify

The disqualification of attorneys has always been a prevalent non-disciplinary issue; 2014 was no exception.[72] In *Cutaneo v. Conco Wood Working, Inc.*, a former employee of the defendant sued for breach of his employment contract.[73] The defendant sought to disqualify plaintiff's counsel under Rules 1.9 and 3.7 because the attorney had previously served as the defendant's corporate counsel and had allegedly aided the plaintiff in usurping business opportunities, thereby making him a necessary witness.[74]

In denying the motion to disqualify under Rule 1.9, the court concluded that the attorney's representation of the plaintiff in the breach of contract action was not "substantially related" to his former representation of the defendant because "no patently clear relationship" existed between the two.[75]

Turning to Rule 3.7, the court denied the motion because the defendant failed to establish that the attorney was a necessary witness and, more fundamentally, the conversations between the plaintiff and his attorney were privileged.[76] The court reached a similar result in *Dinardo Seaside Tower, Ltd.*

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70 *Id.* at 183.

71 *Id.*

72 There are significant decisions on motions to disqualify counsel each year. *See* HORTON & KNOX, PRACTICE BOOK ANNO. 44-45, 57-58, 117-118 (2014-2015). In prior years, the authors have not discussed these decisions extensively.

73 Cutaneo v. Conco Wood Working, Inc., NNH-CV-14-5034826-S, 2014 WL 5097359 (Conn. Super. Ct. Sept. 4, 2014).

74 *Id.* at *2.

75 *Id.* at *3-4.

76 *Id.* at *5-6.

v. Sikorsky Aircraft Corp. There, the appellate court held there was no violation of Rule 3.7 because the defendant's counsel was not a necessary witness where the contents of letters sought to be admitted into evidence could be testified to by any number of company employees.[77]

A motion to disqualify based on Rule 1.9 was granted in *Alberta Management, Inc. v. Jones.* The court disqualified the plaintiff's two attorneys in a loan collection action where the attorneys previously represented both parties in a real estate closing a mere few months earlier.[78] The court held that the two transactions were "essentially the same" or "substantially related." The court distinguished an informal ethics opinion issued with similar facts by noting that the transactions in the latter case were separated by more than three years.[79] Memories can fade over time, but three months was simply not enough time for the court in this case.

The particularly harsh remedy of a nonsuit was ordered where the plaintiff's attorney was a material witness and had dragged out discovery for well over a year by avoiding being deposed and failing to find substitute counsel.[80] The case was a legal malpractice action in which the plaintiff alleged that the defendant's incompetent representation in a previous case forced him to hire a second attorney. The plaintiff was claiming fees paid to this second attorney as his damages. Yet, the same second attorney represented the plaintiff in the legal malpractice action. Because the dispute centered on the attorney's fee, the court reasoned that the attorney should have known from the inception that he would be a necessary witness.[81]

Once the lawyer acknowledged the need to find a replace-

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77 Dinardo Seaside Tower, Ltd. v. Sikorsky Aircraft Corp., 153 Conn. App. 10, 49-50,100 A.3d 413, *cert. denied*, 314 Conn. 947, 103 A.3d 976 (2014).

78 Alberta Mgmt. Inc. v. Jones, CV-14-5006244-S, 2014 WL 4637248, at *1-2 (Conn. Super. Ct. Aug. 6, 2014).

79 *Id.* at *2-3. The court distinguished CBA Informal Ethics Opinion 97-26. *Id.* at *3.

80 Null v. Jacobs, UWY-CV-11-6008749-S, 2014 WL 6428434 (Conn. Super. Ct. Oct. 20, 2014).

81 *Id.* at *1.

ment, his efforts to do so were lacking. His efforts consisted of two emails to a single lawyer who "had given him the impression that he would take the case" and a vague assertion that he had called other lawyers.[82] Given the lengthy period of time and the repeated delays, the lawyer's less than Herculean efforts failed to satisfy the due diligence required. The court entered the nonsuit as a result.[83]

2. Attorney's Fees

Rule 1.5(e) requires that the client be advised in writing and consent to a fee sharing agreement between lawyers working at different firms. The Rule was applied in In *Horner v. Bagnell*, where an attorney sued his former partner for his share of fees earned both before and after the dissolution of their two-man firm. The court disallowed the claims for fees earned post-dissolution because there was no client consent pursuant to the rule. Former partners in a since-dissolved firm, however, were able to share fees earned pre-dissolution.[84]

A violation of Rule 1.5 may be used as a special defense in a suit by a client's former lawyer. The court struck this special defense in *Allen A. Currier, LLC v. Barton Properties Connecticut, LLC*, where an attorney sued his former client's alter-ego corporation seeking to collect unpaid attorney's fees from the client.[85] The court struck the special defense because the corporation was unable to assert it on the client's behalf.[86]

Finally, the plaintiff in *Central Connecticut Lawn Service, LLC v. Mayer* was awarded attorney's fees of more than double the compensatory award. The company sued for compensatory damages in the amount of $11,443.31 for breach of a promissory note that also provided for reason-

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[82] *Id.* at *3, *6.

[83] *Id.* at *6-7.

[84] Horner v. Bagnell, FST-CV-10-6002982-S, 2014 WL 4814669, at *1 (Conn. Super. Ct. Aug. 21, 2014).

[85] Allen A. Currier, LLC v. Barton Props. Conn., HHB-CV-13-6019163-S, 2014 WL 4746541 (Conn. Super. Ct. Aug. 11, 2014).

[86] *Id.* at *5.

able attorney's fees.[87] In awarding fees in the amount of $23,171.51, the court took into account plaintiff's counsel's commendable efforts not just during trial but also in the negotiation and maintenance of the note prior to the breach. The court also considered that the defendant had dragged out the proceedings with multiple continuances.[88] Although an award of attorney's fees of twice the compensatory award may seem odd, in this case the authors' agree with the award and the court's rationale.

III. ETHICS OPINIONS

A. *ABA—Advisory Ethics Opinions*

The ABA issued four ethics opinions in 2014.[89] Three opinions are noted in passing due to the specificity of the affected practice area. The topics ranged from scoping out potential or sitting jurors on social media sites; management of lawyers and staff in a prosecutor's office; and authorized use of the prosecutor's letterhead by debt collection companies for correspondence to debtors which threatened criminal prosecution.[90]

The remaining opinion discusses how a lawyer selling a law practice is allowed to help the lawyer-buyer in transitioning active client matters for a reasonable period after the sale.[91] In the authors' opinion, what constitutes a "reasonable period" is going to vary based on the circumstances of each individual sale. Neither lawyer may charge a client for time spent in transitioning the client's matter. This opinion

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87 Central Conn. Lawn Servs., LLC v. Mayer, CV-12-6018080, 2014 WL 4637892, at *1 (Conn. Super. Ct. Aug. 13, 2014). The parties negotiated the note after the defendant was found to have unlawfully used a company credit card. *Id.* at *1-2.

88 *Id.* at *2-3.

89 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 ("Lawyer Reviewing Jurors' Internet Presence"); *id.*, Formal Op. 467 ("Managerial and Supervisory Obligations of Prosecutors Under Rules 5.1 and 5.3"); *id.*, Formal Op. 468 ("Facilitating the Sale of a Law Practice"); *id.*, Formal Op. 469 ("Prosecutors and Debt Collection Companies").

90 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 ("Lawyer Reviewing Jurors' Internet Presence"); *id.*, Formal Op. 467 ("Managerial and Supervisory Obligations of Prosecutors Under Rules 5.1 and 5.3"); and *id.*, Formal Op. 469 ("Prosecutors and Debt Collection Companies").

91 ABA, Formal Opinion 468.

eases the transition for a retiring lawyer.

A related issue is succession planning for the unexpected cessation of a law practice due to death or disability. This need was addressed in the adoption of ABA Model Rule 1.17, which allows for the sale of a law practice.[92] This rule recognizes the value in a law practice as quantifiable and marketable. This was a new perspective and moved the profession away from the historical prohibition against selling a law practice.

Succession planning or a prospective sale of a practice benefits the clients and the judicial process by ensuring that there is no disruption or damage to the objectives of the representation. The bench and the bar have a mutual interest in protecting the public, other parties, and third persons from the disarray or chaos which ensues following an unexpected departure of a lawyer from private practice. In the absence of a plan, the client's interests are unnecessarily jeopardized.

The disruption plumes beyond the affected law practice. The superior court in Connecticut will appoint a trustee to oversee the closing of the practice and the transition of the client matters to new counsel. This process requires that a member of the bar relinquish significant time from their own active practices. The members of the bar who serve as trustees are volunteers. They perform yeoman's service to the public and the bar in accepting the appointment. The bar has an interest in ensuring that all solo and small practices have a succession plan in the event that a key lawyer suddenly leaves the practice. Some professional liability insurers, perhaps in the vacuum of any mandate, are beginning to require succession planning for solo and small practice firms.

The most recent data about the percentage of lawyers who practice in a small firm, defined as 2-5 lawyers, or in a solo practice was sixty-three percent (63%).[93] The need for

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[92] ABA Model Rule 1.17 was adopted in 1990; and adopted in Connecticut in 2006.

[93] ABA Lawyer Demographics (2014).

these lawyers, in particular, to have a succession plan for the law practice is critical. Additionally, the number of lawyers who are practicing into their 70s and 80s is increasing, which is consistent with the trending rise in life expectancy,[94] and the increased number of lawyers aged over sixty-five years old who remain in the work force.[95] Many large law firms have a mandatory retirement age of 65 or 70 years, and these lawyers are opening a solo or small firm at that time. Today, it is probable that a greater percentage of lawyers will continue to practice longer than lawyers in the past. With more lawyers practicing later into life and a steady number of lawyers in small and solo practices, a succession plan for the unexpected is practical and beneficial to clients, the public, and the judicial process.

B. *CBA—Advisory Ethics Opinions*

The Connecticut Bar Association[96] issued seven ethics opinions in 2014. Four concerned attorney fees or IOLTAs. The Connecticut lawyer can rest assured that the practice of an advance payment for legal fees by credit card is ethically permissible. The opinion addresses in detail the mechanics for processing credit card payments. Like other advance payments, the credit card payment should be held in an IOLTA until the fees are earned. One recurring issue with

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94 "From 1968-1982 the rapid reduction in mortality resumed, averaging 1.8 percent for males and 2.2 percent for females, annually. From 1982-2001, mortality rates decreased an average of 1.0 percent per year for males and 0.4 percent for females." FELICITIE C. BELL & MICHAEL L. MILLER, LIFE TABLES FOR THE UNITED STATES SOCIAL SECURITY AREA 1900-2100: ACTUARIAL STUDY NO. 120 (2005).

95 The most recent information on lawyer demographics shows that the median age of practicing lawyers has increased steadily from age 39 in 1980 to age 49 in 2005. ABA Lawyer Demographics (2014) *available at* http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2014.authcheckdam.pdf.

96 CBA Comm. on Prof'l Ethics, Informal Op. 2014-01 ("Opinion Regarding the Billing of Attorney's Fees in Matters Subject to Probate Court Approval"); *id.*, Informal Op. 2014-02 ("Payment of Advance Fees and Costs by Credit Card"); *id.*, Informal Op. 2014-03 ("Referral Fee in Non-Contingency Fee Action Including Family Matters"); *id.*, Informal Op. 2014-04 ("Sharing Law Office Resources with Non-Firm Lawyer"); *id.*, Informal Op. 2014-05 ("Prior Work Conflict of Interest and Reimbursing Filing Fees"); *id.*, Informal Op. 2014-06 ("When Client Consent is Necessary in Limited Scope Representation of Chapter 7 Bankruptcy Debtor"); *id.*, Informal Op. 2014-07 ("Clients' Funds Held for Clients Whose Names and Addresses are Unknown").

IOLTAs concerns funds, usually in nominal or small sums, which have been carried for many years but lack an identifiable owner name or known address. These funds must be safeguarded until the escheat laws may be invoked.[97] In a continuum of hybrid fee matters, it may be permissible to receive a referral fee in non-contingency cases including family cases, if the total fee is reasonable and is not contingent on the outcome.[98] The Committee opined that under the new Probate Court Rules of Procedure, § 39-1, it is permissible to collect attorney's fees incurred in representing a fiduciary and subsequently seek probate court approval.[99] Although probate court approval is based on a "reasonableness standard," a finding by the probate court that fees are unreasonable, which is subject to review, is not tantamount to any ethics violation of the RPC.

Lawyers with shared resources have special issues. First, lawyers who are sharing law office space, equipment, and resources must institute appropriate safeguards to protect confidential client information and property, and must adhere to appropriate representations about their respective law practices.[100] Second, a lawyer who represents creditors may nevertheless enter into a limited representation of the debtor, and attend the first meeting of creditors without obtaining informed consent, so long as the representation does not amount to a concurrent conflict of interest.[101] In the authors' opinion, the client-creditors will not wish to see their lawyer at this meeting nor would the client-debtor be comforted by the relationship between the lawyer and the creditors; so the opinion should be limited to the unique nature of bankruptcy proceedings.

The Committee also opined on a situation that demon-

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97 *Id.*, Informal Op. 2014-07.

98 *Id.*, Informal Op. 2014-03.

99 Absent client consent, the attorney must maintain confidential information when requesting probate court approval of fees. In the event of a challenge to the reasonableness of the fees, the attorney may disclose information to the extent necessary to defend the reasonableness of the fees. *Id.*, Informal Op. 2014-01.

100 *Id.*, Informal Op. 2014-04.

101 *Id.*, Informal Op. 2014-06.

strates that the best of our profession can shine even when the worst occurs. In this matter, an attorney made a significant error in connection with a green card application that had adverse consequences for the client.[102] What the Committee did not opine about were the steps the attorney took on her own initiative to rectify the situation. The attorney informed the client, in writing and in person, of the error and the consequences.[103] The attorney informed the government agency of the error and requested that the client not be penalized.[104] She also offered to reimburse the client for the legal and filing fees, which were deemed to be permissible restitution.[105] The only remaining issue, which the Committee was asked to opine on, was whether the attorney could continue to represent the client, pursuant to the client's request. The Committee concluded that a "prior work" conflict of interest can arise when an attorney's personal interest in mitigating or eliminating a malpractice action conflicts with the client's interests.[106] In this case, there was no indication of this attorney's desire to mitigate his potential malpractice, so it was ethically proper to continue the representation.

C. *Connecticut Grievance Committee—Advisory Ethics Opinions*

In 2014, the SGC issued seven advertising opinions under the voluntary pre-approval process, which is one fewer than it published in 2013.[107]

The advisory opinion is effectively insurance against a grievance for a nominal fee. The opinion is binding in favor of the submitting attorney in a disciplinary proceeding.[108] This process should be employed whenever an attorney wants to publish new advertising and is uncertain of the

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102 *Id.*, Informal Op. 2014-05.
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 Connecticut Statewide Grievance Comm., *Advertising Advisory Opinions* (2015), http://www.jud.ct.gov/sgc/Adv_opinions/default.htm.
108 PRACTICE BOOK § 2-28B(c).

rules. If there are problems, the Committee will point them out and they can be corrected before running the advertisement and potentially subjecting oneself to discipline. A finding of non-compliance is not binding on the lawyer in a later disciplinary proceeding.[109]

Of the seven opinions, three concluded that the advertising complied with the rules. All three involved advertisements directed to potential clients under Rule 7.3.[110] Two of these opinions also concerned the use of trade names.[111] Of those two, one also dealt with pricing language.[112] Of the four advertisements that violated the Rules, one was a website advertising prepaid legal services,[113] another was a firm website,[114] a third was an internet advertisement through the Google Ad Network,[115] and the last was a letter mailed to prospective class action plaintiffs.[116]

The website advertising a company's prepaid legal services had two problems. The first was that it claimed that the company's approach "revolutionizes" both prepaid legal services and car insurance.[117] For just $100 per year for individuals or $200 per year for families, the company promised that if a plan member was involved in a car accident in Connecticut, the company would hire counsel at no additional cost to bring suit. The plan member would be entitled to their entire recovery, less litigation and court costs, rather than the standard two-thirds under traditional contingency fee arrangements.[118] The Committee found that the advertisement violated Rule 7.1 by using the term "revolutionizes" because it was misleading and the website contained insufficient information to substantiate such

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109 PRACTICE BOOK § 2-28B(c).

110 Advisory Opinion No. 14-06286-A; Advisory Opinion No. 14-06447-A; Advisory Opinion No. 14-06504-A.

111 Advisory Opinion No. 14-06447-A; Advisory Opinion No. 14-06504-A.

112 Advisory Opinion No. 14-06504-A.

113 Advisory Opinion No. 14-04961-A.

114 Advisory Opinion No. 14-08355-A.

115 Advisory Opinion No. 14-03932-A.

116 Advisory Opinion No. 14-03988-A.

117 Advisory Opinion No. 14-04961-A.

118 *Id.* at 3.

claims.[119] The second problem was that the website did not provide enough information as to how attorneys would be provided, including the process for obtaining one and their qualifications, and indicated a "lack of recourse if the representation was terminated."[120] The Committee found that this, too, violated Rule 7.1.

Another law firm website suffered from over exuberance in its terms. First, the committee rejected the phrases "the highest level of service" and "superior representation."[121] The Committee determined the statements to be "inherently misleading" because they are "subjective statement[s]" as to the quality of the firm's services that are "merely opinion" and which "cannot be objectively verified or substantiated."[122] The phrases impermissibly lead prospective consumers to form the "specific conclusion" that they would receive legal services superior to those of other firms.[123] The Committee ordered that the phrases be omitted, but suggested that they be reworded in the firm's goal or mission statement. The committee rejected the use of the word "expertise" on two pages, because the requesting attorney was not certified as having "expertise in representing municipalities."[124] Another use of "expertise" to describe the services offered by the firm's real estate paralegals was improper.[125] The firm's "File Retention Policy" on the last page of its website, which reserved for the firm "the right to charge administrative fees and costs associated with" managing a client's stored file, violated Rules 1.5 and 1.16 because it is a "general notice" that "does not qualify as an express agreement," as is required to charge fees for client file storage.[126]

The Committee may allow certain advertising claims with appropriate disclaimers. A proposed advertisement

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119 *Id.* at 4.
120 *Id.* at 5.
121 Advisory Opinion No. 14-08355-A.
122 *Id.*
123 *Id.*
124 *Id.* (violating Rules 7.4 and 7.4A).
125 *Id.* (violating Rule 7.4A(d)).
126 *Id.*

said it could help an individual "get what you deserve, up to $1500 per call."[127] The phrases created unjustified expectations of compensation. The Committee suggested revising the language to include a readable disclaimer reminding consumers that compensation is dependent upon the facts and circumstances of each individual case. By ascribing "some level of reasonableness" to potential clients in a disclaimer that they will understand, the Committee concluded that the phrase "get what you deserve" sufficiently qualified the "$1500" language.[128] A letter mailed to prospective class action clients violated Rule 7.3(c) because the envelope only contained "Advertising" in red ink and not the required full phrase "Advertising Material."[129]

IV. New Practice Book Rules

This past year saw a number of changes to the Practice Book's Rules of Professional Conduct.[130] The Commentary to Rule 1.1 governing competence (but not the rule) was amended to add that lawyers who contract with outside counsel now need to obtain informed consent and an agreed-on allocation of responsibility from the client.[131] The new commentary was prompted by the ABA Commission on Ethics 20/20 regarding outsourcing by lawyers.[132]

An amendment to Rule 1.2 exempted from disciplinary action legal services permitted under state law, namely "An Act Concerning the Palliative Use of Marijuana,"[133] which

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[127] Advisory Opinion No. 14-03932-A (discussing an internet advertisement aimed at consumers with a potential claims for damages under the Telephone Consumers Protection Act, which prominently featured "BlockCallsGetCash," along with "The Call Blocker that gets you money").

[128] *Id.*

[129] Advisory Opinion No. 14-03988-A.

[130] These changes were approved in 2014 and became effective on January 1, 2015, unless otherwise noted.

[131] Conn. Rules of Prof'l Conduct R. 1.1 and Commentary.

[132] Joseph J. Del Ciampo, *Superior Court Rules*, 76 Conn. L.J. 1, 33PB (July 1, 2014). Additional amendments regarding outsourcing were made to Rule 5.3 and the Commentary governing the supervision and oversight of non-lawyer assistance.

[133] *Id.*; An Act Concerning the Palliative Use of Marijuana, P.A. 12-55 (Reg. Sess.), effective Oct. 1, 2012. Although the amendment shields the lawyer from an ethics violation, it does not presume to protect the attorney from prosecution, if any, under federal law.

are not allowed under federal law.[134] Another amendment limited the circumstances where a former judge, who enters private practice, has conflicts of interest arising from the previous judicial office.[135]

Finally, the rule governing prospective clients was amended to create a brighter line by redefining "prospective client" from a person who "discusses or communicates" to a person who "consults" with a lawyer.[136] This term of art may avoid the transformation of ordinary social-hour discussion into the basis for an attorney client relationship. Still, attorneys should remain wary of the unexpected prospective client.

The duties of a prosecutor were significantly broadened to provide mandatory action by a prosecutor who knows of new and credible evidence creating a reasonable probability that a convicted defendant did not commit the offense.[137] The Commentary to Rule 1.12 addresses in detail the "to do's" for compliance with the new rule.

Although minor changes were made to the advertising rules, the most significant amendment is to the Commentary to Rule 7.2(c).[138] The rule remains unchanged. The catch is in the amendment to the Commentary, which attempts "to more precisely define the term 'recommendation' and thereby eliminate some of the confusion about the use of Internet-based lead generators and other client development tools."[139] Attorney advertising created and published by paid marketing professionals has been permitted in Connecticut for over four decades.[140] Attempts to delineate precisely the tension between lawyer advertising as protected commercial speech and the historic disapproval of

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134 CONN. RULES OF PROF'L CONDUCT R. 1.2(d)(3) and Commentary.

135 CONN. RULES OF PROF'L CONDUCT R. 1.12 and Commentary.

136 *Id.* R. 1.18.

137 *Id.* R. 3.8 and Commentary. The amendments are based upon the ABA Model Rules of Professional Conduct Rule 3.8. *See* Del Ciampo, *supra* note 1311, at 30PB.

138 CONN. RULES OF PROF'L CONDUCT R. 7.1–7.4A. Rule 7.2(c) provides that a lawyer cannot give anything of value to a person for recommending the lawyer's services.

139 Del Ciampo, *supra* note 1311, at 49PB.

140 *See* Heslin v. Conn. Law Clinic of Trantolo & Trantolo, 190 Conn. 510 (1983).

lawyer advertising shown by regulators will never keep pace with technology. Better to follow the one overriding and appropriate regulation on attorney advertising—that it shall not be false or misleading.[141] Finally, the ethics rule, which prohibits a lawyer from filing frivolous claims or actions, and is grounds for disciplinary action, is now also a rule of procedure upon which the court can order sanctions against the attorney.[142] That the Courts have always had the constitutional authority to do so, the rule is therefore redundant.

The amendments made to the rules governing disciplinary proceedings were few. The rules now allow an immediate presentment and interim suspension of an attorney found guilty of a serious crime, in Connecticut or in an out-of-state jurisdiction, by acceptance of a finding of guilt by plea or a trial verdict.[143] Amendments to the rules substantially adopted the ABA Model Rules for Lawyers Disciplinary Enforcement definition of "serious crime."[144] In addition, the rules prohibit an attorney who was disbarred for the misappropriation of funds from seeking readmission for a period of twelve years.[145] Now the rule governing disbarment is synchronized and requires the disbarment be for a minimum of twelve years.[146]

V. Professional Issues of the Day

A. *Attorney-Client Privilege for In-House Counsel*

The highest courts of Massachusetts, Georgia, and Oregon have held that the attorney-client privilege applies to confidential communications between a firm's lawyers and the firm's in-house counsel in a legal malpractice action

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141 Conn. Rules of Prof'l Conduct R. 7.1.

142 Conn. Rules of Prof'l Conduct R. 3.1. Practice Book § 1-25(a), effective January 1, 2015, provides that "No party or attorney shall bring or defend an action, or assert or oppose a claim or contention, unless there is a basis in law and fact for doing so that is not frivolous. Good faith arguments for an extension, modification or reversal of existing law shall not be deemed frivolous." *Compare* Conn. Rules of Prof'l Conduct R. 3.1.

143 Practice Book § 2-40 (in Connecticut); § 2-41 (in Another Jurisdiction).

144 *Id.*; *see also* Del Ciampo, *supra* note 1311, at 81PB-86PB.

145 Practice Book § 2-53.

146 Practice Book § 2-47A; Del Ciampo, *supra* note 1311, at 84PB-85PB.

brought by a current client.[147] In Massachusetts, the Court held the attorney-client privilege applies if four conditions are satisfied: (1) the firm has specifically selected an attorney or attorneys within the firm to serve as the firm's in-house counsel, (2) the designated in-house counsel has not worked on the client matter at issue or any substantially related matter, (3) the firm does not bill a client for the time spent on the communications between the firm's attorneys and the firm's in-house counsel, and (4) the communications are intended to be and are kept confidential.[148]

In reaching this conclusion, the Court analogized in-house counsel in a law firm to in-house counsel in a corporation or governmental entity, finding that the attorney-client privilege plays the same role of assuring that all relevant communications will be kept confidential in order to encourage those involved to provide the in-house counsel with the necessary information to procure sound legal advice in all three settings.[149]

Georgia subsequently reached the same conclusion, and noted that any conflict of interest under the Rules of Professional Conduct does not affect the applicability of the attorney-client privilege.[150] Georgia also held that the work product doctrine protects documents created by the in-house counsel in connection with defending the firm from a malpractice claim.[151]

Oregon adopted a broader three factor test which requires that the communications be (1) exchanged between a client and the client's lawyer, (2) confidential, and (3)

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147 RFF Family P'Ship, LP v. Burns & Levinson, LLP, 991 N.E.2d 1066, 1067–68 (Mass. 2013); St. Simon's Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 746 S.E.2d 98, 102 (Ga. 2013); Crimson Trace Corp. v. Davis Wright Tremaine LLP, 326 P.3d 1181 (Or. 2014).

148 *RFF Family P'Ship, LP*, 991 N.E.2d at 1067–68.

149 *Id.* at 1072.

150 *St. Simon's Waterfront, LLC*, 746 S.E.2d at 102 (discussing how the attorney-client privilege protects communications between a firm's attorneys and its in-house counsel if: (1) an attorney-client relationship exists, (2) the communications concern the matter on which the attorney(s) sought legal advice, (3) the communications were and remain confidential, and (4) no exception to the privilege applies). *Id.* at 104.

151 *Id.* at 109.

made for the purpose of providing legal services.[152] In addition several state appellate courts and at least one trial court have recently recognized that the attorney-client privilege protects communications between a firm's attorneys and its in-house counsel concerning a malpractice action.[153]

Federal courts recognize that attorney-client privilege protects communications between a law firm and its in-house counsel, but have excluded malpractice claims brought by a current client.[154] The current client exception provides: the attorney-client privilege is vitiated where a firm has a conflict of interest with a current client due to the malpractice action, seeks legal advice regarding the action from its in-house counsel, and continues to represent the client. In these situations, a current conflict arises because the firm's representation of itself in the malpractice claim may affect its ethical and fiduciary obligations to current clients.[155]

The Supreme Judicial Court of Massachusetts declined to follow the current client exception.[156] Massachusetts, Georgia and Oregon have also declined to adopt the fiduciary exception to the attorney client-privilege, which provides that, where a fiduciary seeks legal advice for the benefit of the beneficiary, the fiduciary may not protect these communications with counsel from the beneficiary.[157]

The authors are inclined to agree with the decisions in these three states. It makes little sense to privilege such consultations when with outside counsel but deny law firms the same privilege when consulting in-house counsel.

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[152] *Crimson Trace Corp.*, 326 P.3d at 1187–92.

[153] *See* Palmer v. Superior Court, 180 Cal. Rptr. 3d 620 (Cal. Ct. App. 2014); Garvey v. Seyfarth Shaw LLP, 966 N.E.2d 523 (Ill. App. Ct. 2012); Moore v. Grau, No. 2013-CV-150 (N.H. Super. Ct. Dec. 15, 2014).

[154] *See, e.g.*, United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996); *see also* Daniel Hirotsu Woofter, Note, *The "Attorney-Law Firm" Privilege: Protecting Intra-Firm Communications Regarding a Current Client's Potential Malpractice Claim*, 27 GEO. J. LEGAL ETHICS 987, 989 (2014).

[155] *See RFF Family P'Ship, LP*, 991 N.E.2d at 1076–77, 1077, n. 7 (citing cases); Woofter, *supra* note 154, at 989–90.

[156] *RFF Family P'Ship*, 991 N.E.2d at 1080.

[157] *See id.* at 1075; St. Simon's Waterfront, LLC, 746 S.E.2d at 107; *Crimson Trace Corp.*, 326 P.3d at 1195.

B. *Medical Marijuana*

Connecticut legalized medical marijuana in 2012.[158] Federal law, however, continues to prohibit the growing and sale of marijuana.[159] The Connecticut Bar Association's Professional Ethics Committee opined that attorneys may assist medical marijuana businesses in the rule-making and regulatory processes under state law.[160] The Maine Bar Board of Overseers, Professional Ethics Commission took a narrower stance than Connecticut by opining that its Rule of Professional Conduct Rule 1.2(e) allows an attorney to advise a client on complying with the law, but the lawyer may not assist a client in establishing a medical marijuana business.[161]

Connecticut's ethics opinion, however, did not insulate attorneys from disciplinary action if they provided such legal services.[162] Connecticut thereafter amended Rule 1.2, effective January 1, 2015 to do so. Before January 1, 2015, Rule 1.2(d) read as follows:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

As of January 1, 2015, Rule 1.2(d) now reads:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (1) discuss the legal consequences of

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158 P.A. 12-55 (Reg. Sess.).

159 CBA Comm. on Prof'l Ethics, Informal Op. 2013-02.

160 *Id.* at 2.

161 State of Maine Board of Overseers of the Bar, *Ethics Opinion #199 – Advising Clients Concerning Maine's Medical Marijuana Act* (2010), *available at* http://www.mebaroverseers.org/attorney_services/opinion.html?id=110134.

162 CONN. RULES OF PROF'L CONDUCT R. 1.2(d), however, prohibits lawyers from assisting in the functioning of a marijuana enterprise that, although legal under Connecticut law, violates federal law. Additionally, Rule 1.4(a)(5) provides that attorneys should inform their clients of their limited ability to assist clients in this context.

> any proposed course of conduct with a client; (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; or (3) *counsel or assist a client regarding conduct expressly permitted by Connecticut law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.*

(Emphasis added).[163]

The Illinois State Bar Association (ISBA) followed with a recommendation that its ethics rules be amended in a similar manner to that of Connecticut to address the ethical dilemma that arises where state law conflicts with federal law.[164] ISBA reached a different conclusion than the Connecticut[165] SBA, the former concluded that not only may attorneys advise their clients in the medical marijuana business on how to conform their business to state law, but attorneys may also assist clients in setting up a medical marijuana business, including negotiating and drafting legal documents, so long as the attorney is helping the "client to make a good-faith effort to determine the validity, scope, meaning or application of the law."[166] The State Bar of Arizona reached a similar conclusion to that of Illinois.[167] Arizona concluded that an attorney may advise a client on compliance with state law and the implications of conflicting federal laws, as well as assist a client in establishing a business and formally represent the client before govern-

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[163] *Id.* Nevada and Colorado have also added comments to their respective Rules 1.2 that contain similar language to the newly amended Connecticut Rule. For example, Comment 1 to Nevada Rule of Professional Conduct 1.2 provides that a lawyer "may assist a client in conduct that the lawyer reasonably believes is permitted by [Nevada law]," but the lawyer must also advise the client of the relevant federal law. *In the Matter of an Amendment to Rule of Professional Conduct 1.2 Regarding Medical Marijuana*, Order Adopting Comment [1] to Nevada Rule of Professional Conduct 1.2, No. ADKT 0495 (Nev. May 7, 2014); *see also* Rule Change 2014(05) (Colo. March 24, 2014).

[164] Ill. State Bar Ass'n, *ISBA Prof. Conduct Advisory Op. 14-07*, 5 (2014), *available at* https://www.isba.org/sites/default/files/ethicsopinions/14-07%20%28Board%20Revised%20Medical%20Marijuana%29.pdf. Currently, Illinois Rule of Professional Conduct 1.2(d) mirrors the previous version of Connecticut's that was in effect prior to January 1, 2015.

[165] *Compare CBA Comm. on Prof'l Ethics, Informal Op. 2013-02.*

[166] Ill. State Bar Ass'n Advisory Op. 14-07 at 4.

[167] State Bar of Ariz., Ethics Op. 11-01.

mental agencies concerning licensing and certification issues.[168]

In sum, there seems to be a consensus that, in line with the Rules of Professional Conduct, an attorney may advise a client on compliance with state law. States disagree, however, whether the Rules allow an attorney to assist a client in engaging in the medical marijuana business which is also subject to federal law. In the authors' opinion, so long as marijuana remains criminal at the federal level, it is difficult to understand how it is not prohibited conduct to advise a client on how to best produce it. The distinction between licensing advice and business advice is illusory at best.

On the flip side, the current state of the law on marijuana—with federal statute still forbidding it but the Attorney General issuing guidelines detailing when he will refuse to enforce that statute—is historically unique and may justify a departure from the ordinary rule.[169]

C. *Attorney Advertising Online*

There was some activity in the realm of advertising this year. There is one interesting case in Connecticut and a couple of informative opinions from other states. Although the Connecticut Professional Ethics Committee has not released any ethics opinion concerning attorney advertising on social media, an attorney was presented to the Superior Court for violating the advertising rules in February 2014. The SGC randomly selected the Respondent's website for review and audit.[170] The main page of the Respondent's website[171] stated "Successful Claims Totaling Over 40 Million Dollars." The website referred to $40 million in settlements and verdicts in three places, while also referencing "tens of millions of dollars of claims on behalf of [Respondent's] clients." The Respondent was unable to substantiate those numbers. The Respondent was found to have

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168 *Id.*

169 The ordinary rule being Rule 1.2(d).

170 Presentment of Attorney for Misconduct, at 1 (Conn. Super. Ct. Feb. 11, 2014).

171 Homepage, Devin Law Firm, http://freddevine.com (last visited May 29, 2015).

violated Rule of Professional Conduct 7.1 due to misleading claims on his website. He was also found to have violated Rule 7.1 because he omitted necessary facts that would have rendered the statements not misleading.[172] Interestingly, despite having been found to have violated Rule 7.1, the Respondent, at the time of the writing of this article, has still not removed these statements from his website.

The New York State Bar Association (NYSBA) is a leading authority on electronic attorney advertising and social media, and has released current ethics opinions and guidelines. First, a lawyer may only list areas of practice under a "specialties" heading on social media if the lawyer is certified in that area by the applicable governing body.[173] This is in accord with Connecticut's Rule 7.4(d). A law firm, however, may not list areas of practice as "specialties."[174] This opinion is in line with other bar associations to have considered the issue.[175] Tweets alerting potential clients of press releases concerning shareholder lawsuits are advertisements because the primary purpose of the tweets is to secure clients.[176] As advertisements, tweets must be preapproved by the lawyer or law firm for whom they promote, they must be retained by the firm for a period of one year, and they must be labeled as "Attorney Advertising."[177] Lastly, the NYSBA's Commercial and Federal Litigation Section, Social Media Committee published a set of Social Media Ethics Guidelines[178] this past year, which includes

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[172] *Id.*

[173] NYSBA Comm. on Prof'l Ethics Op. 972 (under Rule 7.4).

[174] *Id.* ¶ 5.

[175] *See* Philadelphia Bar Ass'n Prof'l Guidance Comm. Op. 2012-8; Fla. Advisory Advertising Op. (Sept. 11, 2013); N.H. Bar Ass'n, Ethics Corner: Listing "Skills and Expertise" On LinkedIn (June 21, 2013).

[176] NYSBA Comm. on Prof'l Ethics Op. 1009, ¶ 6 (applying New York Rule of Professional Conduct 7.1 governing advertising); see also State Bar of California, Standing Committee on Professional Responsibility and Conduct, Opinion 2012-186 (where an attorney posts a statement on social media concerning the attorney's "availability for professional employment," the posting must comply with the Rules of Professional Conduct governing advertising).

[177] *Id.* ¶¶ 8, 10, 11.

[178] NYBA, *Social Media Ethics Guidelines* (Mar. 18, 2015), *available at* http://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Ethics_Guidelines.html.

several rules aimed at advertising through social media. The guidelines, which are simple, warrant repeating.

An attorney's social media account is not subject to the attorney advertising rules if it is purely used for the attorney's personal purposes; however, if the primary purpose of the account is to promote the attorney's business, then it is subject to the advertising rules.[179] Attorneys may not list practices areas under a "specialties" heading if the attorney is not formally certified in that area.[180] The Rules impose a duty on attorneys to ensure compliance with the Rules; so, if a third party posts in violation of the Rules on the attorney's social media page, the attorney must either remove the content or ask that it be removed.[181]

If you use social media to advertise your practice, carefully consider the interconnectivity between social media and the attorney advertising rules in Connecticut.

VI. CONCLUSION

The practice of law is a learned profession. It takes a rigorous academic background; an examination; and a character and fitness review to be admitted to the bar. The learning does not cease at the moment of admission, however, it is a lifetime endeavor. The Rules of Professional Conduct and the definition of the practice of law are subject to change and interpretation each year. This article is intended to capture the essence of those changes, which affect Connecticut practitioners, so you are and remain learned professionals.

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179 *Id.*, Guideline 1.A.
180 *Id.*, Guideline 1.B (relying on NYSBA Opinion 972).
181 *Id.*, Guideline 1.C.