# PROFESSIONAL RESPONSIBILITY REVIEW 2011

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If one were forced to describe the area of Professional Responsibility in 2011, it would be best described as the proverbial "calm before the storm." There were no landmark court cases involving ethics in 2011 and the grievance committee decisions, although interesting and informative, did not represent a deviation from the norm. Enjoy the calm, however, because the authors expect that the next few years will bring myriad changes to the practice that will result in changes to our ethical obligations as lawyers.

## I. STATEWIDE GRIEVANCE COMMITTEE

Unknown to many practitioners but necessary for a complete understanding of the process are two points. First, any person can grieve a lawyer; the Rule is clear on that point, it provides "*[a]ny person*, including disciplinary counsel, or a grievance panel on its own motion," can file a grievance complaint.[1] The complainant does not have to be a former or current client or anyone dealt with in a professional capacity, for that matter. Second, once a grievance complaint is filed it cannot be withdrawn. Therefore, as a practitioner, it is paramount that a lawyer do what he or she can in order to avoid having a grievance complaint filed against him or her.[2]

### A. *Statistical Analysis*

In 2011, the authors reviewed seventy-three Statewide Grievance Committee decisions, down from the eighty-five reviewed in 2010.[3] Those decisions resulted in either findings of misconduct after a hearing or conditional admissions

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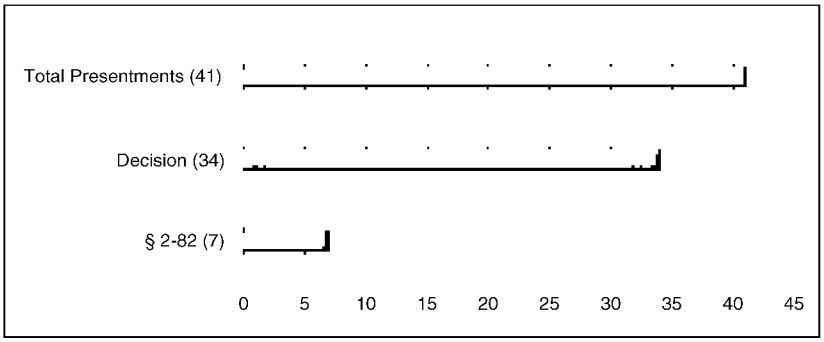
1 PRACTICE BOOK § 2-32(a).

2 For a detailed explanation of the grievance process from start to finish see Kimberly A. Knox and Brendon P. Levesque, *Professional Responsibility Review* 2010, 85 CONN. B.J. 95, 95-96 (2011).

3 In order to compile the data discussed in this article, the authors reviewed seventy-three decisions by the Statewide Grievance Committee which were decided between the dates of January 1, 2011 and December 10, 2011. The cases include both decisions following a hearing on the merits and dispositions pursuant to

of misconduct pursuant to Practice Book Section 2-82. There were a total of forty-one written decisions of findings of misconduct after a public hearing on the merits. This represents fifty-six percent of the overall dispositions. In addition, there were thirty-two approved Section 2-82 dispositions, representing the remaining forty-four percent of the overall dispositions. As noted in last year's article, following a hearing on the merits, roughly fifty to sixty percent of the matters are dismissed. Thus, there were approximately 150 hearings on the merits last year. That percentage remained the same as it was last year.

In 2011, of the forty-one decisions on the merits, twenty-two resulted in presentments to the Superior Court. Eight decisions resulted in reprimands while twelve resulted in lesser sanctions, including restitution or a requirement to attend Continuing Legal Education (CLE). Of the thirty-two Section 2-82 matters, twelve resulted in presentments,[4] eight resulted in reprimands, and twelve were resolved with lesser sanctions. Presentments accounted for forty-six percent of all of the decisions while reprimands constituted twenty-two percent and other sanctions made up the remaining thirty-two percent.

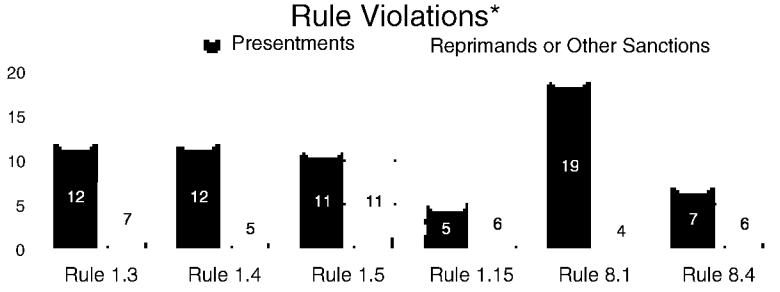



PRACTICE BOOK § 2-82. With regard to the § 2-82 dispositions, the authors included as rule violations only those rules for which the attorney conditionally admitted there was some evidence of misconduct. Finally, seven decisions stemming from the same nucleus of operative facts were considered as one decision. *See* Advanced Back and Neck Center v. Blank, Grievance Complaint Nos. 10-0469 to 10-0475.

4 All of the PRACTICE BOOK § 2-82 dispositions were approved to allow the subject disciplinary action to be consolidated with a disciplinary action that was then pending in Superior Court.

B. *Presentment on the Merits*

In 2010, two themes dominated presentments. The first theme was centered on the attorney-client relationship and Rules 1.3 and 1.4 while the second revolved around IOLTA accounts and Rule 1.15. In 2011, issues regarding the attorney-client relationship remain high on the list of violations. For example, violations of Rules 1.4 and 1.3 each represented eight percent of all violations. In 2011, violations of Rule 1.15 dropped and the new focal point appears to be Rule 5.5 and the unauthorized practice of law. As in years past, attorneys who violate Rules 8.1, 8.4, and Practice Book Section 2-32, rules which address misconduct and timeliness of grievance responses, were more likely to see their matters result in a presentment to the Superior Court. It is worth repeating that failing to respond to a grievance complaint is a direct slap to the face of disciplinary authorities and one should not be surprised by the harsh sanctions that come with it.




*There can be more than one violation in each case.

C. *Recurring Professional Issues*

For 2011, the following Rules had the highest number of violations: Rule 8.4 (Misconduct) with twenty violations, Rule 1.5 (Fees) with fourteen, Rule 8.1 (Bar Admission and Disciplinary Matters; failing to timely respond) with twelve, Rules 1.3 (Diligence) and 1.4 (Communications) with ten each and Rule 5.5 (UPL) with nine violations.

1. Misconduct

A violation of Rule 8.4 was present in seventeen percent of all of the reviewed cases. In those decisions, the Committee

concluded that the following conduct was prejudicial to the administration of justice: failing to uphold the duties as trustee and administrator[5] and holding oneself out as a licensed attorney when in fact one is not.[6] Other violations of the rule included filing a notice of deposition designed to embarrass and harass a private citizen;[7] misapplying a client's money orders;[8] ordering a transcript, not paying, then promising to "send out a check to you on Tuesday . . . ." and not sending the check;[9] ignoring a court order to pay a debt;[10] providing debt relief services in Connecticut in violation of the consumer finance laws;[11] filing an "inaccurate HUD-1 Settlement Statement";[12] failing to keep a ward's funds separate from the attorney's or others;[13] and inappropriate behavior at a client's home where the attorney in question was involved in an intimate relationship with his client who continues to reside in the marital residence with her soon to be ex-husband.[14] In the past, violations of Rule 8.4 were often based on or combined with other Rule violations; for 2011, that was not the case.

A suspended lawyer's failure to inform a bankruptcy attorney of a prior bankruptcy filing, where a petition had been filed by the bankruptcy attorney without disclosing the prior bankruptcy was a violation of Rule 8.4(4).[15] At the hearing on this matter, the suspended lawyer made a misstatement to the Committee when he stated that his partner was "no longer with us."[16] The statement was not true. Disciplinary counsel, however, agreed that the statement

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5 Norman v. Olejarczyk, Grievance Complaint No. 10-0751.

6 Barker v. Jacobs, Grievance Complaint No. 10-0988; Thompson v. Moniz, Grievance Complaint No.11-0018.

7 VonReyn v. Garlasco, Grievance Complaint No. 09-0911.

8 Gholian v. Kahn, Grievance Complaint No. 09-1066.

9 Jensen v. Evans, Grievance Complaint No. 10-0795 at 2.

10 Niziankiewicz v. Miller, Grievance Complaint No. 10-0997.

11 Dubois v. O'Toole, Grievance Complaint No. 11-0166. The conduct in this matter constituted violations of Rule 8.4(3) and 8.4(4).

12 Kealey v. Adamis, Grievance Complaint No. 10-0501, at 2.

13 Fairfield Judicial District Grievance Panel v. Maignan (SP), Grievance Complaint No. 10-0789.

14 Aliano v. Zelotes, Grievance Complaint No. 10-1013.

15 Frost v. Recio, Grievance Complaint No. 10-0738.

16 Waterbury Judicial District Grievance Panel v. Recio, Grievance Complaint No. 11-0459, at 2.

was not material.[17] Based on this misstatement, however, the Waterbury Judicial District Grievance Panel filed a complaint. Probable cause was found on Rules 8.1(1) and (2), 8.4(1), (2), (3), and (4), Practice Book Sections 2-27(d) and 2-32(a)(1).[18] Subsequently, the lawyer was reprimanded for violations of Rules 8.1(2), 8.4(1), (3), and (4), and Sections 2-27(d) and 2-32(a)(1).[19]

The decision is interesting. Based upon disciplinary counsel's representation in the earlier grievance that the statement was not material, the Committee concluded that there could not be a violation of Rule 8.1(1) or (2) based on the misstatement. Although "material" is mentioned in subsection (1), there is no mention of it in subsection (2). The authors are uncertain as to why the Committee considered materiality as a requirement in subsection (2). The Committee went on to conclude that there was no violation of Rule 8.4(2) or (4) because the statement was not material, it did not constitute a crime, and it was not prejudicial to the administration of justice. Although the first two reasons may withstand scrutiny, the authors take issue with the third because the Committee concluded that the statement about his partner's death was made to gain sympathy with the Committee.[20] That being said, the authors wonder how the statement was not material to the imposition of sanctions as the attempt to garner sympathy was clearly material to the sanctions that the Committee was considering. As a result, it should have formed the basis for a violation of 8.4.

Finally, the Committee concluded that because the Respondent was suspended from the practice of law, "we do not think his statements are given the same weight and authority as an active officer of the court. *If his license were active, we may have found a misstatement under oath to be prejudicial to the administration of justice without consideration of whether or not it was a material fact."*[21] That state-

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17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*

ment is troubling because although the rules of evidence are not strictly applied in disciplinary hearings, the authors believe that all witnesses under oath should be treated equally. In fact, juries are instructed to treat all witnesses equally whether they are policemen, experts, or criminal defendants. There does not appear any basis in the rules for treating a lawyer whose license is suspended differently from one whose license is active. A determination of credibility must necessarily be made on a case-by-case basis as opposed to a bright line rule. In the authors' opinion, the correct analysis involves consideration of whether the statement is prejudicial to the administration of justice regardless of whether it is material and regardless of the status of the lawyer's law license.

2. Fees

The golden rule with respect to fees is spelled out in Rule 1.5: the fee agreement, with limited exceptions, must be in writing and the fees themselves must be both earned and reasonable. The lack of a written fee agreement results in violations of this rule every year and 2011 was no exception.[22] The written agreement must communicate to the client the scope of the representation and the basis or rate of the fee and any expenses for which the client would be responsible. Even where you have represented a client in the past, the failure to spell out the terms of your representation, where the terms are substantially different, will likely result in a violation.[23] Other violations of the rule occurred where an attorney was paid a retainer yet failed to perform the work for the client[24] and where an attorney accepted a flat fee that was both unreasonable and unearned.[25] In *Larsen v. Kaligian*,[26] the Respondent accepted a $2,300 flat fee to commence a Chapter 7 Bankruptcy

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[22] *See* Fisher v. Mendelsohn, Grievance Complaint No., 10-0451 (PRACTICE BOOK § 2-82 disposition based on no formal written fee agreement); Lewitt v. Granger, Grievance Complaint No. 10-0836; Jin v. Wang, Grievance Complaint No.11-0023.

[23] *See* Parrotta v. Russell, Grievance Complaint No. 10-0435.

[24] Fogione v. Brown, Grievance Complaint No. 10-0683; Dubois v. O'Toole, Grievance Complaint No. 11-0166.

[25] Larsen v. Kaligian, Grievance Complaint No. 10-0925.

[26] Grievance Complaint No. 10-0925

and deal with the Complainant's creditors. In finding a violation of Rule 1.5, the Committee concluded that the bankruptcy had not been filed and the Complainant's creditors contacted his family and friends.[27]

Lawyers cannot change the terms of the fee agreement unless it is communicated and confirmed with the client in writing before the higher rates are incurred.[28] In *Christensen v. Bologna*,[29] the agreement called for a flat fee of $7,500 described as "deemed earned upon receipt."[30] During the course of the representation, the attorney attempted to collect additional amounts from the client claiming that the additional efforts required in this particular transaction justified the increased fee and that they were in fact negotiating items designed to reduce the deficiency on a short sale. The Committee concluded that, because the agreement was for a flat fee that necessarily covered the entire representation, any attempt to collect additional fees represented a violation of the rule.[31]

Finally, although not addressed directly as a violation of the rules, the Committee made it clear that the only way to ensure accurate billing is to keep time contemporaneously. In other words, attempting to reconstruct billing at the end of the month is not a good practice and should be avoided at all costs. Even those lawyers with the best of memories will be unable to recall accurately the exact amount of time spent on a client's file.[32] The result will either be an under billing of the client, which is bad for the attorney, or an overbilling of the client, which is bad for the client and worse for the lawyer when the Committee finds out that this has occurred.

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27 *Id.* at 3.

28 Rule 1.5(b).

29 Grievance Complaint No. 10-0954.

30 *Id.* at 1 ("upon the advice of counsel, [the lawyer] has modified his retainer agreement, including deleting the provision whereby fees were deemed earned upon receipt.").

31 *Id.*

32 *See, e.g.,* Brown v. Dolan, Grievance Complaint No. 10-0524 (the accounting requested by the client was not created from contemporaneous timekeeping, instead it was created after a review of the file).

3. Communications and Diligence

Rules 1.1 and 1.3 remain two of the most frequently violated rules each year. In fact, violations of these two rules combined made up sixteen percent of all violations and they were present together in four matters that resulted in presentments.

Communication and diligence form the foundation of the attorney-client relationship. An attorney is expected to be able to competently handle the matter for the client. What that means is that the lawyer must have the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[33] Adequate representation can be provided in an area of law that may be new to the lawyer if he or she either does the necessary research to understand the matter or associates with a lawyer who is competent in the particular area.[34] Moreover, during that representation the lawyer is required to communicate reasonably to the client the means by which the lawyer plans to accomplish the stated objectives. This obligation continues throughout the representation. Only in exigent circumstances should an attorney make a decision without consulting with his or her client.

As in years past, the failure to keep a client apprised of the status of litigation and failing to comply promptly with reasonable requests for information resulted in violations of Rule 1.3.[35] Failing to contact a client in writing and failing to obtain evidence necessary to file a motion to open combined with the failure to make an independent effort in writing to inform the client of an impending deadline resulted in a reprimand.[36] In reaching its conclusion, the Committee noted the attorney's extensive history, including a clear pattern of failing to follow through on agreements to do work, failing to communicate with clients, and failing to return the client's retainer unless the client complained to disciplinary authorities.[37]

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[33] Rule 1.3

[34] Rule 1.1 Official Commentary.

[35] Nicola v. Monaghan, Grievance Complaint No. 10-0824; Lewitt v. Granger, Grievance Complaint No. 10-0836; Zarotney v. Gegeny, Grievance Complaint No. 10-0862; Dubois v. O'Toole, Grievance Complaint No. 11-0166; Larsen v. Kaligian, Grievance Complaint No. 10-0925.

[36] Pilco v. Fernandez, Grievance Complaint No. 10-0745.

[37] *Id.*

In another matter involving multiple violations of the rules, it was no surprise that an attorney was reprimanded where he did not inform a client that a matter had been continued, failed to appear at mediation, conducted no legal research or evidence gathering, and did not inform the client about how her funds had been used.[38] Failing to perform duties as a trustee led to a violation of Rule 1.3 where the lawyer neglected to maintain property of the trust by failing to pay fees and taxes.[39]

An effective calendaring system is a necessary tool to avoiding diligence violations because missing a deadline or simply waiting an exorbitant amount of time to do what needs to be done for your client will likely result in discipline. For example, waiting until four years after a dissolution action to pursue a Qualified Domestic Relations Order ("QDRO") transferring ownership of property to one's client was a violation of Rule 1.3 resulting in six hours of CLE as a sanction.[40] Failing to timely file necessary documents is unacceptable and will result in a violation.[41] Because Rule 1.3 applies only in the context of an attorney-client relationship, the Committee correctly concluded there was no violation where the complainant was a conservator.[42]

4. Bar Admission and Disciplinary Matters; Failing to Respond Timely and Practice Book Section 2-32

Rule 8.1 prohibits attorneys involved in disciplinary matters from knowingly making a false statement of material fact, failing to disclose a fact necessary to correct a misapprehension, or knowingly failing to respond to a request for information from the disciplinary authority.[43] Practice Book Section 2-32 (a)(1) states that a respondent shall respond to the complaint within thirty days of the date

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38 Ocasio v. Boland, Grievance Complaint No. 11-0145.

39 Norman v. Olejarczyk, Grievance Complaint No.10-0751.

40 Robinson v. Reeves, Grievance Complaint No.10-1009.

41 Bagriyanik v. Marcus, Grievance Complaint No. 10-0243.

42 Fairfield Judicial District Grievance Panel v. Maignan, Grievance Complaint No. 10-0789 at 2 ("Rules 1.1 and 1.3 of the Rules of Professional Conduct in Connection with the Respondent's role as Conservator in this probate matter. Both Rule 1.1 and 1.3 expressly relate to attorney-client relationships.").

43 Rule 8.1.

notice is mailed unless good cause is shown. The Rule expressly provides that the failure to file a timely response constitutes misconduct unless there is good cause shown for the failure.[44] The authors wonder whether there should be a finding of a violation of Practice Book Section 2-32 or whether the rule contemplates that a failure to comply with the Practice Book will result in a finding of misconduct pursuant to Rule 8.4. Although it may seem like semantics, as a practical matter a violation of this Section and a violation of Rule 8.4 based upon the same conduct would appear to constitute double jeopardy especially where the severity of the sanction increases based on a determination that there are two violations as opposed to only one.

Once again, the authors are astounded by the number of attorneys who fail to respond to grievance complaints. The result of this failure is a virtual guarantee of some form of discipline and unfortunately for those that fail to respond, that failure more often than not results in a presentment. Violations of Rule 8.1 and Practice Book Section 2-32 were present in twelve of the twenty-two matters or fifty-five percent recommending a presentment after a hearing.

In the authors' opinion, there are three things that can be done to avoid this ethical pitfall. First, make sure your attorney registration is up to date. That will ensure that any grievance complaint that is filed actually reaches you. Second, if and when a grievance comes across your desk, you must respond within thirty days or risk suffering a finding of misconduct for the failure to respond in addition to any valid violations alleged in the complaint. Finally, as a general matter, you should not respond to your own grievance complaint.

Although it is not recommended that you rely on it, Section 2-32 does contain a "good cause" exception to the timing deadlines. In one case, however, the Committee found a violation of Section 2-32 where the complainant was allowed to file a late response. The Committee noted that even though the late response was allowed, it did not establish good cause for why a timely response was not filed.[45]

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44 PRACTICE BOOK § 2-32(a)(1).

45 Ocasio v. Boland, Grievance Complaint No. 11-0145.

5. Unauthorized Practice of Law

There were nine violations of Rule 5.5 in 2011. Five resulted in presentments, two in reprimands, and two with some lesser sanction. Query whether these violations are on the rise as attorneys seek other opportunities for income in these difficult financial times. Violations occurred in three distinct scenarios. First, there were two violations in related grievance matters involving an attorney assisting in the unauthorized practice of law. The attorney was located at the same address as a company that assisted in immigration matters. The complainants hired the company to address immigration issues. The company they hired then referred them to the respondent for legal services. The Committee concluded that the respondent assisted in the unauthorized practice of law where he shared office space with the other company, he maintained his name on the office door with the other company, and he accepted referrals from the other party and then subcontracted work back to the other party.[46]

Second, there were also violations of the rule based on Connecticut attorneys who were no longer licensed to provide legal services.[47] A suspended attorney was found to be holding himself out as an attorney where he had access to the firm's letterhead, sent letters on letterhead, continued to have office space at the law firm, and cashed a check mailed to the firm by a tenant.[48] Seeking to provide legal services under the guise of "non-legal" services did not protect a suspended attorney who undertook the legal representation of an incarcerated defendant. Although he attempted to claim the work was non-legal, drafting motions and visiting with the client and providing legal advice is the practice of law.[49]

The third scenario involved debt settlement, debt negotiation, and loan modification. Out-of-state lawyers engaged in debt settlement, debt negotiation, and mortgage modifi-

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[46] Alecrim v. Coco, Grievance Complaint No. 09-0857; Bressler v. Coco, Grievance Complaint No. 09-0858.

[47] Blackwell v. Olmer, Grievance Complaint No. 10-0708.

[48] Barker v. Jacobs, Grievance Complaint No. 10-0988.

[49] Thompson v. Moniz, Grievance Complaint No. 11-0018.

cation has been quite an issue in Connecticut in the last few years. Generally, in these matters, there is an out-of-state attorney who is not licensed to practice in Connecticut that elects to engage in the consumer debt negotiation, modification, or mortgage modification business with Connecticut clients.[50] Often, the out-of-state attorney partners with a Connecticut lawyer. There has been some concern with these arrangements when the local attorney does not really perform any legal services but instead simply serves as a rubber stamp for the out of state law firm.[51] Recognizing these concerns, the Committee addressed how a Connecticut attorney could be involved in a debt negotiation program with an out-of-state attorney or law firm. In terms of the unauthorized practice of law in this area, the Committee has discussed the framework that needs to be in place if a Connecticut attorney is going to partner with an out-of-state law firm to provide these legal services.[52]

D. *Statewide Grievance Committee Advertising Advisory Opinions*

There were five advertising opinions published pursuant to Practice Book Section 2-28B. A Connecticut attorney cannot solicit potential clients for defective medical device lawsuits, as referrals to out-of-state attorneys without disclosing the name and address of the out-of-state lawyers, where the out-of-state attorneys are also paying part of the advertising cost.[53] An attorney advertising letter and brochure enclosed with a payment reminder letter from an insurance agency to its clients is misleading and impermissible.[54] The opinion explained that the method of the mailing was problematic as it gave no notice of an unsolicited legal advertising inside and it included a return address for a business other than

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[50] Dubois v. Dillon, Grievance Complaint No. 10-0379; Tobin v. Francisco, Grievance Complaint No. 10-0459A; Dubois v. Chandler, Grievance Complaint No. 10-0380; Dubois v. O'Toole, Grievance Complaint No. 11-0166.

[51] New Haven Judicial District Grievance Panel v. Saas, Grievance Complaint No. 09-1109.

[52] *Id.*

[53] Advisory Opinion No. 11-07108-A.

[54] Advisory Opinion No. 11-05307-A.

the law firm. The remaining three published opinions demonstrate how not to run afoul of the attorney advertising rules as each proposed ad complied with the rules.[55]

## II. CASE LAW DEVELOPMENTS

### A. *On Appeal*

In a rare instance, the authors jump into 2012 to report on the United States Supreme Court's decision in *Maples v. Thomas*.[56] In *Maples,* the facts of the petitioner's habeas corpus proceeding arising from his conviction for capital murder can only be described as extraordinary. In the habeas proceeding, the petitioner's lawyers, who also handled the criminal case, ceased acting as his attorneys without informing him; failed to serve as his agent in any meaningful sense; and left him in a situation where he lacked the assistance of any authorized attorney; so, "that, in reality, he had been reduced to *pro se* status."[57] On that basis, the U. S. Supreme Court held that the petitioner had shown the requisite "cause" to excuse the procedural default where he was abandoned by counsel and left unrepresented at a critical time in the habeas litigation.

For our purposes, the most interesting component of this complicated matter was the Court's discussion regarding the conflict of interest that arose after the petitioner had been defaulted. In a footnote, Justice Ginsburg stated:

> The unclear state of the record is perhaps not surprising, given Sullivan & Cromwell's representation of Maples after the default. As *amici* for Maples explain, a significant conflict of interest arose for the firm once the crucial deadline passed. . . . . Following the default, the firm's interest in avoiding damage to its own reputation was at odds with Maples' strongest argument—*i.e.,* that his attorneys had abandoned him, therefore he had cause to be relieved from the default. Yet Sullivan & Cromwell did not cede Maples' representation to a new attorney, who could have made Maples' abandonment argument plain to the Court of

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55 Advisory Opinion Nos. 11-01513-A; 11-03329-A; 11-03423-A

56 132 S. Ct. 912 (2012).

57 *Id.* at 927.

> Appeals. Instead, the firm represented Maples through briefing and oral argument in the Eleventh Circuit, where they attempted to cast responsibility for the mishap on the clerk of the Alabama trial court. Given Sullivan & Cromwell's conflict of interest, Maples' federal habeas petition, prepared and submitted by the firm, is not persuasive evidence that Maples, prior to the default, ever "viewed himself" as represented by "the firm," rather than by his attorneys of record, Munanka and Ingen–Housz.[58]

Such conduct by lawyers is not only unethical, but is a blemish on the profession in long-lasting and profound ways.

The Second Circuit in *In re Liu* held that ghostwriting of court pleadings and documents without disclosing the identity of the author is permissible in the absence of a rule prohibiting it.[59] The nondisclosure aspect is a departure from court decisions and ethics opinions that require the identity of the ghostwriting lawyer be disclosed as part of the requirement of candor to the tribunal. The Second Circuit's opinion is relevant to a controversial proposal discussed in Connecticut in 2011 to allow for limited scope representation. Both ghostwriting and limited scope representation may be potential means to assist the legal system in addressing issues caused by an increased number of pro se litigants in the state courts. However, ethical issues with ghostwriting appear to be resolved, while they are not with limited scope representation.

There are several cases of note by the Connecticut state courts. In *Przekopski v. Zoning Board of Appeals*,[60] the Appellate Court held that the courts have the inherent power to sanction lawyers to ensure compliance with the rules, which includes not filing frivolous actions.[61] However,

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[58] *Id.* at 924, n.8 (internal citations omitted).

[59] In re Liu, 664 F.3d 367 (2011) (per curiam) (The Court's Committee on Attorney Admissions and Grievances recommended a public reprimand. The Court adopted the Committee's report with the exception of its discussion on ghostwriting.). Connecticut Informal Opinion 10-04 adopted ABA Formal Opinion 07-446 which allows undisclosed ghostwriting of court pleadings. Kimberly A. Knox and Brendon P. Levesque, *Professional Responsibility Review* 2010, 85 CONN. B.J. 95, 115 (2011).

[60] 131 Conn. App. 178, 199, 26 A.3d 657 (2011).

[61] In relying upon Rule 3.1, the Appellate Court noted, in *dicta* in *Janulawicz v. Commissioner of Correction,* 127 Conn. App. 576, 14 A.3d 488 (2011), that an attorney's failure to seek a petition for certification based upon a review of the

prior to any sanction, an attorney "has certain procedural rights including fair notice and an opportunity for a hearing on the record."[62] The court noted that this is particularly important where the basis for sanctions implicates the attorney's professional reputation. Juxtaposed to this decision was a proposal submitted to the Superior Court Rules Committee, to allow additional findings of probable cause to be added by Disciplinary Counsel to the finding of probable cause issued by the grievance panel. This would eliminate the opportunity for the attorney to be heard by the grievance panel on the added claims, but would create greater efficiency in the disciplinary process. In addition, any changes to the rule must comport with the due process requirements of notice and an opportunity to be heard. Thus, in the author's opinion, at the very least, any additional finding of probable cause must be provided to the attorney well. Effective January 1, 2013, Practice Book Section 2-35 is amended to allow Disciplinary Counsel to add allegations of misconduct to the panel's finding of probable cause in advance of any hearing and must identify the alleged rule violation and the factual basis for the claim.

As the authors' continually point out, even when a lawyer is not acting in a professional capacity, the lawyer may be disciplined. Rule 8.4 is a general rule for examining non-lawyering conduct. In *Disciplinary Counsel v. Villeneuve*,[63] a lawyer was disciplined for misrepresentations in an employment application, under Rule 8.4(c). A lawyer was also disciplined for unsupportable allegations of judicial misconduct in *Statewide Grievance Committee v. Burton*.[64]

In a new twist on attorney's fees, the Appellate Court in *Rostad v. Hirsch*[65] reversed an award of legal fees for two out-of-state attorneys who were a cousin of the litigant and the cousin's friend, and had no experience in the area of practice. The court remanded the case for a determination

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court's opinion did not support a claim of deficient assistance of counsel because there is no requirement for counsel to pursue claims wholly lacking in merit.

62 *Przekopski,* 131 Conn. App. at 198.

63 126 Conn. App. 692, 14 A.3d 358 (2011).

64 299 Conn. 405, 413, 10 A.3d 507 (2011) (violation of Rule 8.2(a) was upheld).

65 128 Conn. App. 119, 128, 15 A.3d 1176, 1181 (2011).

of what nominal amount, if any, could be recovered. While the case may be limited to its facts, Connecticut counsel should advise clients, who elect to have out-of-state counsel involved in Connecticut litigation, that the client may have to bear the cost of the out-of-state legal counsel. There may be an exception where the lawyer brings special knowledge or experience to the litigation.

The Appellate Court in *O'Connell, Flaherty and Atmore, LLC v. Richter*,[66] held that legal malpractice actions require expert testimony on both "the applicable standard of care and the evaluation of the plaintiff's [attorney's] performance with respect to that standard."[67] The legal malpractice was a counterclaim to a lawsuit brought for payment of attorney's fees. This case also highlights Newton's Third Law of Motion which states–for every action there is an equal and opposite reaction–if you sue for fees, you should expect a counterclaim attacking the quality of the legal work.

In *Anderson v. Commissioner of Correction*,[68] the Appellate Court held that public defenders who work in the same office may represent defendants with adverse interests. This case reflects an amendment to Rule 1.11 in 2007 to relieve government lawyers from the rigid application of the imputed disqualification under Rule 1.10. The case distinguished *State v. Webb*,[69] and *Williams v. Warden*,[70] which were decided under a prior version of Rule 1.10, which was also amended in 2007.

The Appellate Court, in two cases, praised legal counsel for making ethically proper, albeit difficult decisions, where the duty to the court and the client appeared to conflict. Legal counsel, in *Adams v. Commissioner of Correction*,[71] a habeas corpus appeal, was commended for adhering to the duty of candor to the tribunal in admitting a failure to disclose or rectify a material fact presented to the jury.

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66 130 Conn. App. 816, 823, 24 A.3d 1278 (2011).
67 *Id.*
68 127 Conn. App. 538, 545, 15 A.3d 658, 663 (2011).
69 238 Conn. 389, 689 A.2d 147 (1996).
70 217 Conn. 419, 432 n.5, 586 A.2d 582 (1991).
71 128 Conn. App. 389, 17 A.3d 479 (2011).

Similarly, in *LaSalle v. Commissioner of Correction*,[72] an attorney's refusal to offer perjured testimony by her client in a criminal case was lauded as properly handled in accord with Rule 3.3.

A. *Superior Court Decisions*

Perhaps the most intriguing of the cases involved sanctions for conduct occurring in the presence of the court. While the rule prohibiting sex with a client was considered by the authors a self-evident conflict of interest, Connecticut's first published case under Rule 1.8(j) was decided in the context of a divorce action.[73] In that case, the lawyer and the client wife engaged in an affair in violation of the rule. The court sanctioned the lawyer by ordering the lawyer disqualified from further representation of the wife. The husband filed a disciplinary complaint against the wife's lawyer. The Committee did not find clear and convincing evidence of a sexual relationship, but did find a conflict of interest under Rule 1.7.[74] In particular, the Committee found the lawyer's statements that a divorcing woman should "find a competent litigator and make him your boyfriend," and that the lawyer "would work twice has hard" for someone he "loves," to be a clear conflict of interest as the role as a lawyer was dependent on the personal relationship.[75]

In two cases, lawyers were sanctioned by the trial court for violations of the Rules of Professional Conduct which occurred before the court. In *Wildrick v. Kuppe*,[76] the sanction was disqualification of the law firm, which the court considered to be a minimal, but sufficient, sanction for cross-examining an opposing party in a contested client custody matter, when she previously represented the opposing party as a prior client in a Department of Children and Families investigation. In *Bradberry v. Peter Pan Bus Lines Inc.*,[77]

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72 No. CV064001260, 2011 WL 1888411(Conn. Super. Ct. Apr. 29, 2011).

73 Aliano v. Aliano, No. KNOFA104113119S, 2011 WL 522884 (Conn. Super. Ct. Jan. 24, 2011).

74 Grievance Complaint, 10-1013.

75 Grievance Complaint, 10-1013 at 6.

76 No. FA114115712S 2011 WL 3672070 (Conn. Super. Ct. Aug. 3, 2011).

77 No. CV106003611, 2011 WL 3891356 (Conn. Super. Ct. Aug. 2, 2011).

defense counsel was ordered to pay attorney's fees for bad faith conduct in the litigation. The court was explicit that the sanction not be passed on to the client. For due process requirements on attorney sanctions outside of the disciplinary process, see *Przekopski v. Zoning Board of Appeals.*[78]

Last year, the authors noted that a homeowner-lawyer who refused to pay a home improvement contractor, and further demanded the contractor pay him, the lawyer, violated several ethics rules.[79] In 2011, the saga continued when the contractor filed a lawsuit to recover damages against the homeowner lawyer. The original cost of the improvement was $13,500 and the defendant failed to pay a balance of $5,000 due under the contract. The jury awarded $7,700 in compensatory damages. The court added an additional $23,100 in punitive damages, $56,360 in attorney's fees, costs totaling $1,222.25, fees of $1,912.50, and prejudgment interest of $2,754.00 for a total of $93,068.75.[80]

In a novel argument, the plaintiff in *Peck v. Glucksman*,[81] claimed that the Statewide Grievance Committee exceeded the scope of its authority when it criticized his sending offensive emails to the defendant and then, in the last sentence of its decision, stated, "[f]or all of the foregoing reasons, this reviewing Committee dismisses the complainant (sic) with the criticism noted." The plaintiff argued that the criticism infringed on his rights and caused him harm. The court disagreed noting that although the plaintiff may have been "stung" by the criticism he had not been sanctioned. As a result, the court concluded that not only could he not prevail on his claims, but the matter should be dismissed because the court lacked subject matter jurisdiction as there was no practical relief that could be granted to the plaintiff.

The vast majority of professionalism decisions were on motions to disqualify opposing counsel. In this context, the conflicts of interest Rules 1.7 and 1.9 appear to be not so

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[78] 131 Conn. App. 178, 26 A.3d 657 (2011).

[79] *See* Knox and Levesque, *supra* note 59, at 95, 104 (citing to Grievance Complaint 09-0495).

[80] Creative Masonry & Chimney, LLC v. Johnson, No. CV095011943, 2011 WL 5083966 (Conn. Super. Ct. Sept. 30, 2011).

[81] No. HHBCV106009737, 2011 WL 4953898 (Conn. Super. Ct. Sept. 30, 2011).

much ethics rules, but more like a tool in the strategic litigation bag. Most cases dealt with claimed conflicts due to prior representations.[82] Legal counsel in a child custody dispute represented both the father and his "girlfriend," who was a called by the wife as a deposition witness.[83] The court found there was informed consent and the potential conflict was waivable. On the other hand, legal counsel for co-defendants successfully withdrew from the representation due to a breakdown in the relationship between two individual co-defendants in *Kamco Supply Corp. v. SP Drywall, LLC.*[84] The withdrawal, while appropriately protecting the client, is a credit to both the legal counsel, who acknowledged the conflict and remedied the situation while protecting their respective clients, and to the court in recognizing that unforeseeable events can occur, even mid-litigation.[85]

The trial court captured the hallmark of the profession in a routine ruling on an attorney–client privilege claim in *Caro v. Meerbergen.* [86] The court referring to Rule 1.6 noted that while the privilege is an evidentiary rule, it "seeks to protect a relation that is the mainstay of our system of justice."[87] Similarly, in *Hubbell v. Ratcliffe*,[88] another trial court remarked that Rule 1.6, governing client confidences goes to the essence of the integrity of the attorney-client privilege.[89]

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[82] *See* Rhyins v. Rhyins, No. FA104011962S, 2011 WL 3277213 (Conn. Super. Ct. July 6, 2011) (motion denied); Sullivan Construction Co., LLC v. Seven Bridges Foundation, Inc., No. FSTCV106005404S, 51 Conn. L. Rptr. No. 14, 517 (Conn. Super. Ct. Feb. 22, 2011) (motion denied); Lopez v. Pannone, No. FSTCV116009073S, 2011 WL 4031537 (Conn. Super. Ct. Aug. 17, 2011) (motion denied); Maillet v. Maillet, No. FA114011213S, 2011 WL 6004441 (Conn. Super. Ct. Nov. 10, 2011) (motion denied); and Calpitano v. Fountain Pointe, LLC, No. HHBCV106006235S, 2011 WL 1759804 (Conn. Super. Ct. Mar. 9, 2011) (motion denied).

[83] Harris v. Hamilton, No. FA054017313, 2011 WL 1168471 (Conn. Super. Ct. Feb. 28, 2011).

[84] No. CV095028372S, 2011 WL 3586506 (Conn. Super. Ct. July 19, 2011).

[85] The court relied on the Official Commentary to Rule 1.7. Kamco Supply Corp. v. SP Drywall, *LLC,* No. CV095028372S, 2011 WL 3586506 (Conn. Super. Ct. July 19, 2011).

[86] No. FSTCV085009523S, 51 Conn. L. Rptr. 18, 650 (Conn. Super Ct. Mar. 29, 2011).

[87] *Id.*

[88] No. HHDX04CV08403824S, 50 Conn. L. Rptr. 23, 856 (Conn. Super. Ct. Nov. 8 2011).

[89] Both *Caro* and *Hubbell* cite to *Gould, Larson, Bennett, Wells & McDonnell v. Panico,* 273 Conn. 315, 869 A.2d 653 (2005).

## III. Ethics Opinions

### A. *ABA Opinions*

The ABA issued four ethics opinions in 2011.[90] Two are noteworthy. The ABA considered the potential risks of internet communications with clients. Basically, lawyers should consider the risks of using certain internet modes of communication, which can be accessible by third parties, for client confidential communications.[91] The opinion takes a close look at the risks of using a client's work email for confidential matters. The author's advice is: to limit communications on a client's work email to matters appropriate for public consumption; and tell the client-employee the risks, namely that the work email address does not belong to the employee. It would be prudent to advise a client to set up an email address with any one of the numerous free email providers for communications between lawyer and client, rather than use their employment email. The second opinion considers the issue from the perceptive of the lawyer for employer, who receives an employee's emails on the employer's computer system. That situation raises a host of ethical issues for the lawyer for the employer and identifies some potential legal and procedural risks. Most important, before any disclosure or use of the emails can be made, the lawyer must provide information to the employer-client to allow for an informed decision on what to do with the employee's emails.[92]

### B. *CBA Opinions*

The Connecticut Bar Association Standing Committee on Professional Ethics issued eleven informal opinions in 2011. The authors selected a few for discussion.

Lawyers often struggle with the requisite knowledge and criteria needed to report another attorney. The actual standard is fact specific and set forth in Rule 8.3. In order

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[90] A lawyer who is considering modifications to existing fee agreements should read Formal Opinion 11-458. Party to party communications, when both are represented, is considered in Formal Opinion 11-461.

[91] ABA Formal Opinion 11-459.

[92] ABA Formal Opinion 2011-460.

to be required to report misconduct, the lawyer must have actual knowledge that "another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer . . . ."[93]

In one opinion, an attorney representing a party to a dissolution action had knowledge of irregularities in the other spouse's trust account.[94] However, the lawyer with this knowledge faced two competing ethical obligations: one, to protect client confidences under Rule 1.6; and two, to report the attorney spouse's misconduct under Rule 8.3.[95] The Ethics Committee followed a prior ABA Standing Committee opinion that "Rule 1.6 trumps Rule 8.3." However, the attorney may, and should, seek to obtain "informed consent" from the client to permit reporting.[96]

Law office management issues were addressed in several opinions. First, in the unlikely, but fortuitous event you are a lawyer who receives a client's offer of a voluntary, unsolicited, and unexpected bonus, be assured it is ethical to accept the bonus.[97] This seems readily apparent. On the other extreme a lawyer may not demand a bonus to continue the representation.[98] Whether there is a bright line test for an improper bonus is unclear. Proper storage of client files includes online storage, provided the attorney protects client confidences and client or third party property.[99] The opinion does not, and arguably could not, delve into the ever-changing nuances of the technological criteria required to meet these obligations.

Lawyers who perform real estate transactions are potentially subject to two types of audits: one is by the Statewide Grievance Committee and the other is by title insurers. Unlike the SGC audits which are permitted by court rules and under court procedures, the title insurer audits are sim-

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93 Rule 8.3
94 CBA Informal Opinion 2011-06.
95 *Id.*
96 *Id.*
97 CBA Informal Opinion 11-02.
98 Zimmerman v. Cohen, Grievance Complaint No. 06-0020.
99 CBA Informal Opinion 11-03.

ply a part of doing business. The Ethics Committee opined that a title insurer may audit a real estate IOLTA Trust Account and bank statements limited to transactions in which the title insurer issued policies.[100] There was one helpful caveat in the opinion: information about other title insurers and client identification or information may be redacted.

Litigation practice issues arose in an array of opinions. Defense counsel may contact putative class members prior to the court's order certifying the class, because the attorney filing the class action, without more, does not enjoy an attorney-client relationship with the class members.[101] Defense counsel in medical malpractice settlements should not request certain confidentiality provisions in settlement agreements.[102] The opinion, construing Rule 3.4(6), recommended that lawyers should not propose confidentiality agreements which attempt to gag the party from voluntary disclosure of factual matters to another party. The opinion did not resolve, but took passing note of some legal and public policy issues. The innovative concept of hiring a private investigator to "friend" an opposing party in litigation to develop evidence was firmly frowned upon by the Committee.[103]

The Ethics Committee accepts requests for opinions by CBA members who have concerns about the ethical propriety of their own conduct in all areas of practice, law firm management and advertising, to name but a few.[104]

## IV. Current And Future Professionalism Issues

In Connecticut and nationally, the historic perceptions of our profession were challenged on a number of fronts, and most of the discussions are still a work in progress as of the submission of this article. Therefore, the authors will endeavor to enlighten the reader about the issues, but cannot forecast what or when changes will occur. If it feels like a gale out there, just wait until 2012.

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[100] CBA Informal Opinion 11-07.

[101] CBA Informal Opinion 11-09.

[102] CBA Informal Opinions 2011-01 and 2011-08.

[103] CBA Informal Opinion 11-04.

[104] The request may be made to John Logan, Chair of the CBA Standing Committee on Professional Ethics or via the CBA website: www.ctbar.org.

**IOLTA**. The Practice Book rules governing IOLTA were amended and rearranged, but offer little in the way of clarification on how to manage IOLTA's.[105] One of the authors, in a separate article, offers a streamlined explanation of the lawyer's obligations with regard to clients trust accounts.[106] Remember, Connecticut licensed lawyers are responsible for the IOLTA, regardless of the administrative delegation of tasks.

**Minimum Continuing Legal Education.** This hot topic in Connecticut is more commonly known as MCLE, which the vast majority of states[107] have already adopted. A CBA proposal which was unanimously approved by its governing body, was submitted to the Superior Court Rules Committee in September 2011 where it received an initial, albeit brief, discussion at a public hearing in October 2011. A slightly modified MCLE proposal was submitted by the CBA to the Superior Court Rules Committee in January 2012, and it should be considered in 2012.

**Limited Scope Representation.** Another controversial topic in Connecticut in 2011 concerned a proposal for limited scope representation. Simply stated, limited scope representation would allow a lawyer to file a limited appearance in state court, which sets forth the nature and limited scope of the representation. For example, in a family relations matter, a limited appearance could be filed to argue a motion for pendent lite orders. When the representation has concluded, the lawyer would file a withdrawal of appearance stating the representation is complete. In the authors' opinion, this movement is a direct result of the increasing number of pro se litigants in state court, which arguably hinders the delivery of justice. Limited scope representation may be in the future for Connecticut, but as of this writing it is too early to predict.

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105 Rules of Professional Conduct, Rule 1.15 and Commentary; PRACTICE BOOK § 2-27.

106 Kimberly Knox, *A Primer on Managing Clients' Funds Accounts: the Business Acumen that Law School Fails to Teach,* 22(4) CONNECTICUT LAWYER 10-12 (2011).

107 Currently, Connecticut, Maryland, Massachusetts, Michigan, and South Dakota, and the District of Columbia do not have an MCLE requirement. *See* http://www.americanbar.org/publications_cle/frequently_asked_questions.html, last viewed February 28, 2012.

**ABA's Commission on Ethics 20/20.** This Commission "was appointed to look at the impact of technology and globalization on the legal profession and to determine what, if any, changes to the ABA Model Rules of Professional Conduct and other policies governing lawyer regulation should be proposed."[108] In 2010, the Commission held hearings, met with members of the profession and bars, and accepted submission on a national basis. In 2011, the Commission formulated written recommendations for general discussion. We offer but a limited synopsis of the issues presented for discussion in 2011.

The Commission considered and made recommendations for several amendments to the Model Rules on the topic of Technology.[109] The Commission endeavored to accommodate the role of technology as a means of communications both in the context of client representation as well as solicitation and development of new client relationships. It also suggested amendments to Model Rules 1.1, 5.3 and 5.5 to allow for Outsourcing, which was recognized as a national practice.[110]

Another topic examined by the Commission was entitled "Uniformity, Conflicts of Interest and Choice of Law."[111] The Commission proposed amendments to Model Rule 5.5 to ease the constraints on lawyers crossing jurisdictional lines to serve their clients, with attention made to client confidences. It recommended amending the Model Rule on Admission to ease the requirements for admission to a new jurisdiction. It suggested a new stand-alone Model Rule which would permit lawyers who are diligently pursuing admission in another jurisdiction to practice in the new jurisdiction while awaiting the admission process. Finally, the Commission noted that when lawyers change law firms, the process may cause a tension between client confidentiality and avoidance of conflicts of interest. The Commission proposed Model Rule amendments to resolve the issue.

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[108] The Commission's website is: http://www.americanbar.org/groups/professional-responsibility/aba_commission_on _ethics_20_2-.html.

[109] *Id.*

[110] *Id.*

[111] *Id.*

The White Paper on Alternative Litigation Finance ("ALF") considered third-party litigation finance.[112] It noted that there is both a demand of consumers and a supply of financiers supporting this type of transaction. The Commission closely examined the lawyer's obligations under the Model Rules of Professional Conduct and concluded that an ALF transaction can be accomplished in compliance with Rules. However, lawyers who engage in an ALF transaction must be mindful that the transaction complies with the lawyers' obligations regarding client confidences, reasonable and permissible fees, conflicts of interest and, of course, the lawyers' independent professional judgment.

The ABA Commission 20/20 issued a discussion draft on Alternative Law Practice Structures.[113] The Commission did not recommend amending the Rules of Professional Conduct to allow publicly traded law firms or outside nonlawyer ownership or investment of law firms. However, it acknowledged that U.S. lawyers and law firms were doing business or affiliating with alternative law practice structures. The Commission proposed amendments to Rules 1.5 on the sharing of fees and 5.4 governing the professional independence of a lawyer to allow U.S. lawyers to have associations with such business structures without running afoul of the Model Rules of Professional Conduct.

The globalization of the practice was most telling in the discussions and proposals by the ABA Commission with regard to foreign lawyers.[114] Two proposals by the Commission include expansion of the pro hac vice admission and in-house counsel registration rules to allow for foreign lawyers.

**Adapting to Technology.** With advances in technology come changes in the ethical obligations to your clients. In particular, the proliferation of electronically stored information has created new ethical issues for attorneys. The foundations of any attorney-client relationship are competent rep-

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112 *Id.*
113 *Id.*
114 *Id.*

resentation and confidentiality.[115] Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[116] Although not involving the use of technology, a good example of a violation of Rule 1.1 is the failure to ask appropriate questions of a client when preparing a will.[117] Where the technology is new to the attorney, the comment to the rule states, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[118] Simply stated, if you are going to employ new technology you need to understand what you are doing. If you fail to employ technology, however, you may also face issues of competence for failing to keep up.

As far as confidentiality, the comments to Rule 1.6 provide, a lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.[119] Obviously, the duty of confidentiality applies to stored electronic information as well.

In addition to a lawyer's responsibility under the Rules of Professional Conduct, the Connecticut General Assembly enacted a series of statutes designed to protect specific enumerated information. In Connecticut, no one shall "intentionally communicate or otherwise make available to the general public"[120] an individual's social security number. In addition, no one shall require another person to send another person's "Social Security number over the internet, unless the connection is secure or the Social Security num-

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115 *See* Rule 1.6 Official Commentary; *see also* Hubbell v. Ratcliffe, No. HHDX04CV08403824S, 50 Conn. L. Rptr. 856 (Conn. Super. Nov. 8, 2010) (confidentiality).

116 Rule 1.1.

117 Sanzo v. Barone, Grievance Complaint No. 10-0758.

118 Rule 1.1 Official Commentary.

119 Rule 1.6.

120 CONN. GEN. STAT. § 42-470.

ber is encrypted."[121] That statute has clear implications to the practice of law. Emailing an unencrypted deposition transcript that contains the deponent's social security number or e-filing a document with a party's unredacted social security number would likely run afoul of this statute, subjecting the attorney to monetary fines.[122]

The legislature has also seen fit to protect certain personal information from being disclosed due to a security breach.[123] A security breach is defined as the unauthorized access to any of the personal information that has not been rendered unreadable by technology. Personal information includes Social Security numbers, driver's license numbers, or account number, credit or debit card numbers, in combination with any required code or password that would allow access to a financial account. The loss of the information must be disclosed when there is a reasonable belief that there has been a breach. The failure to comply with the statute is a violation of CUTPA. More importantly, a lawyer's violation of these statutes could lead to a grievance.

It is important to note that this breach does not just apply to someone hacking your computer system. It applies to any unauthorized disclosure of personal information. Practically speaking, that would include lost zip drives, laptops, or smartphones as any of those is likely to contain some protected personal information. With respect to these types of devices, there are ways to lock them or encrypt the data on them to make the information they contain more difficult to access or read. It could be a costly mistake not to avail oneself of those defenses.

Rule 3.4 prohibits the destruction or concealment of evidentiary documents.[124] The comments to the Rule make it clear that "sub-division (1) applies to evidentiary material generally, including computerized information." What that

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121 CONN. GEN. STAT. § 42-470(b)(3).

122 The fine for a first offense is $100, second offense is $500, and each subsequent offense is punishable by either a $1000 fine or up to six months in prison. CONN. GEN. STAT. § 42-470.

123 CONN. GEN. STAT. § 36a-701b.

124 Rule 3.4.

means is that, in addition to standard paper evidence, the attorney must be careful not to destroy electronically stored data. Although that may sound simple, remember that electronic data is present in myriad places, including on Facebook and Twitter, in emails, and in addition to the devices listed above, any device containing electronic storage, like your copy machine

Finally, Rule 4.4 addresses inadvertently received information, including electronic data. The "claw back" provision, Rule 4.4(b) applies to "e-mail or other electronic modes of transmission subject to being read or put into readable form." Under Rule 4.4, a lawyer who receives information that he or she knows or reasonably should have known was inadvertently sent must promptly notify the sender so that the sender can take whatever corrective measures are necessary. Obviously, depending on the nature of the information inadvertently sent, the sender might have obligations to report the disclosure.

It is imperative, in light of the Rules of Professional Conduct and the two particular statutes discussed above, that attorneys adapt to new technology and understand both the benefits to increased technology as well as the potential pitfalls. Taking advantage of new technology does not mean simply buying new hardware and software, it requires an understanding of how the systems work and how your clients and your representation of them benefits from the new technology. The failure to adapt and understand could have dire consequences. The improper dissemination of your client's personal information could result in disciplinary or professional liability claims, fines and other legal actions, and the loss of any evidentiary privilege that may have attached to that information.