PROFESSIONAL RESPONSIBILITY REVIEW 2009

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Connecticut professionalism and ethics law develops in four general areas: case law; attorney regulatory decisions and advisory opinions; bar associations' formal and informal opinions; and changes to the rules of ethics. This article discusses recent developments in three of those areas of law in Connecticut because there were no significant changes to the ethics rules in 2009. The Case Law Developments are relatively insignificant, but a few cases decided by the Connecticut Appellate Court and the Superior Court are discussed. The Statewide Grievance Committee section provides a statistical analysis of the published disciplinary decisions, as well as a discussion of the common professional pitfalls. For example, trends in the profession have remained relatively static in that communications and diligence are the front-runners of attorney disciplinary matters. The Ethics Opinions Summaries section highlights the five Informal Opinions issued by the Connecticut Bar Standing Committee on Professional Ethics. Finally in the section entitled Looking Forward from 2009, this article addresses the impact that competition, the internet, and the pace of the practice have brought about, including outsourcing of legal support, unbundling of legal services, borderless and international legal practices, cloud computing and virtual law practices. Each of these changes challenges the traditional law practice model.

I. CASE LAW DEVELOPMENTS

A. *On Appeal*

In 2009, the Supreme Court did not issue any noteworthy decisions addressing issues of professionalism and ethics while the Appellate Court issued just three decisions in these areas. In *Peatie v. Wal-Mart Stores*,[1] legal counsel came dangerously close to a violation of Rule 8.2 by raising an unsub-

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1 112 Conn. App. 8, 961 A.2d 1016 (2009).

stantiated claim of judicial bias.[2] Juxtaposed to *Peatie* was *Goulet v. Zoning Board of Appeals of Cheshire*,[3] where the Appellate Court commended counsel for adhering to the duty of candor pursuant to Rule 3.3.[4] In the reply brief, legal counsel for the appellant had taken a position based on a version of a zoning regulation not applicable to the case.[5] After oral argument, counsel moved for permission to supplement its appendix with the correct regulation which, in fact, was counter to the position set forth in the reply brief.[6] This case serves as a prime example of a lawyer acknowledging his duty of candor to the court and addressing the error appropriately. Not only did the attorney bring the error to the court's attention, he did so where the error worked to his detriment.

Although the unauthorized practice of law is discussed generally, *infra*, in the section entitled Looking Forward from 2009, the Appellate Court, in *Ellis v. Cohen*,[7] construed General Statutes Section 51-88,[8] the governing statute on the unauthorized practice of law.[9] In a wrongful death action, the estate was represented by three successive attorneys until the co-executor, a non-lawyer, sought to enter a pro se appearance in his fiduciary capacity. The Appellate Court concluded that a fiduciary—in this case, the co-executor—does not act in "his own cause" as required under Section 51-88.[10] As a result, the Court held that a pro se appearance by a fiduciary

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2 *Id.* at 10.

3 117 Conn. App. 333, 978 A.2d 1160 (2009).

4 *Id.* at 340 n.8. Rule 3.3 states, in part, "A lawyer shall not knowingly (1) Make a false statement of material fact or law to a tribunal or fail to correct a false statement of materials fact or law previously made to the tribunal by the lawyer; (2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel..."

5 117 Conn. App. at 340 n. 8.

6 *Id.*

7 118 Conn. App. 211, 982 A.2d 1130 (2009).

8 General Statutes § 51-88(a) prohibits any person who has not been admitted as an attorney to practice law or appear as an attorney-at-law in any court. Subsection (d) provides that "[t]he provisions of this section shall not be construed as prohibiting ... any person from practicing law or pleading at the bar of any court of this state in his own cause...."

9 The rationale of *Ellis* was applied in *Gorelick v. Montanaro*, 119 Conn. App. 785, 990 A.2d 371 (2009), where the Appellate Court also found a violation of § 51-88.

10 118 Conn. App. at 214-15.

for an estate constituted the unauthorized practice of law.[11]

B. *Superior Court Cases*

The relevant Superior Court decisions in 2009 addressed sanctions against legal counsel, motions to disqualify, claims of obstruction of evidence, the authority of the probate court to discipline legal counsel, and due process in disciplinary matters, all of which are frequently raised in the trial court.

The imposition of civil sanctions and a motion to disqualify an attorney arose in *Faile v. Zarich.*[12] The plaintiffs alleged that defense counsel's conduct at depositions violated a prior order of the court, the rules of practice, and the Rules of Professional Conduct, including Rules 3.4(1), (3), (4), (6), and 8.4(4).[13] The court concluded that defense counsel's unlawful obstruction of the plaintiff's access to evidence was a violation of the Rule 3.4(1) and (3).[14] The court found that defense counsel knowingly violated a clear order and Practice Book Section 13-30[15] based upon her repeated conduct.[16] While not addressed in the decision, it is a well established principle of law in Connecticut that a court order must be complied with until it is successfully challenged.[17] The court denied a motion to disqualify the same defense counsel because "defense counsel's overzealous advocacy should not cost her clients their choice of counsel."[18] The court, however, imposed monetary sanctions, ordering defense counsel, and not the client, to pay the sanction.[19]

Three months later, in *Faile v. Zarich*,[20] in a motion for reargument/reconsideration, defense counsel challenged the trial court's earlier finding of misconduct. Although the court

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[11] *Id.* at 216.

[12] No. HHDX-04-CV-065015994-S, 2009 WL 2036786 (Conn. Super. Ct. Jun. 15, 2009).

[13] *Id.* at *5.

[14] *Id.* at *6.

[15] PRACTICE BOOK § 13-30 provides that "A person may instruct a deponent not to answer only when necessary to preserve a privilege . . . ."

[16] *Faile*, 2009 WL 2036786, at *6.

[17] *See, e.g.*, Sablosky v. Sablosky, 258 Conn. 713, 784 A.2d 890 (2001).

[18] *Faille*, 2009 WL 2036786, at *9.

[19] *Id.* at *14.

[20] No. HHDX-04-CV-065015994-S, 2009 WL 3285986 (Conn. Super. Ct. Sept. 10, 2009).

dismissed each claim regarding the rule violations,[21] the discussion regarding due process is remarkable. Essentially, due process requires notice and a meaningful opportunity to be heard.[22] The court concluded that defense counsel's due process rights had been protected and that she had notice of the issue because the defense counsel had personally presented arguments to the court in opposition to the claims of impropriety made by the plaintiff.[23]

The motion to disqualify continues to be a frequently used pleading in the trial court.[24] In *Neumann v. Tuccio*[25] the court addressed Rule 3.7[26] in holding the trial lawyer, but not the law firm, was disqualified. The trial court found no conflicts as to the law firm under Rules 1.7,[27] 1.9,[28] or 3.7(b).[29]

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[21] *Id.* at *6-8.

[22] The court held:

> In the context of attorney misconduct proceedings, notice must be sufficiently intelligible and informing to advise the attorney of the accusation or accusations made against her, to the end that she may prepare to meet the charges against her. If this condition is satisfied, so that the accused is fully and fairly apprised of the charge or charges made, the complaint is sufficient to give her an opportunity to be fully and fairly heard. A hearing such as this is not the trial of a criminal or civil action or suit, but an investigation by the court into the conduct of one of its own officers, and while the complaint should be sufficiently informing to advise the attorney of the charges made against her, it is not required that it be marked by the same precision of statement, or conformity to the recognized formalities or technicalities of pleadings, as are expected in complaints in civil or criminal actions. Thus, the notice afforded to an attorney subject to a disciplinary hearing may be oral or written, as long as it adequately informs the attorney of the charges against him or her and allows him or her to prepare to address such charges.

Id. at *9 (quoting Burton v. Mottolese, 267 Conn. 1, 20-21, 835 A.2d 998 (2003)).

[23] *Id.* at *10, 13.

[24] Wesley W. Horton & Kimberly A. Knox, Practice Book Annotated 105 (2010 ed.) *See also,* Mettler v. Mettler, 50 Conn. Supp. 357, 360 (2007) ("There is a dual test for necessity. First, the proposed testimony must be relevant and material. Second, it must be unobtainable elsewhere."); Ullmann v. State, 230 Conn. 698, 717, 647 A.2d 324 (1994) (under the compelling need test, "the party wishing to call [the attorney] to testify must show that the testimony of the [attorney] is necessary and not merely relevant, and that all other available sources of comparably probative evidence have been exhausted.") (citations and internal quotation marks omitted).

[25] 48 Conn. L. Rptr. 298 (2009).

[26] Rule 3.7 provides, "(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) The testimony relates to an uncontested issue; (2) The testimony relates to the nature and value of legal services rendered in the case; or (3) Disqualification of the lawyer would work substantial hardship on the client. (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."

[27] Rule 1.7 deals with conflicts of interest among current clients.

[28] Rule 1.9 deals with duties to former clients.

[29] *Neumann*, 48 Conn. L. Rptr. 298 (2009).

The Superior Court, in *Sherlock-White v. Probate Appeal*,[30] ruled on a novel question in Connecticut regarding the authority of the probate court to discipline an attorney. Procedural nuances aside,[31] the court held that the probate court likely had the authority to discipline an attorney.[32] Applying the rationale of *Fairfield County Bar v. Taylor*, which held that only the Superior Court has the power to admit attorneys to the practice of law and hence the power of "total suspension or displacement,"[33] the court stated "[a]ny other court than the Superior Court may fine an attorney for transgressing its rules and doubtless has the power to forbid him from appearing before it."[34] The Superior Court further held that an attorney subject to sanction or discipline by the probate court must be accorded due process.[35]

The question for the court in *Chief Disciplinary Counsel v. Cohen*[36] was: what process was due? A three member reviewing committee was scheduled to hear the disciplinary case.[37] One of the three members, an attorney, was ill and unable to attend the hearing.[38] The parties waived her appearance, requiring the remaining two members, an attor-

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30 48 Conn. L. Rptr. 115 (2009).

31 The court recognized that the appellant had not demonstrated a likelihood of success on this issue because it appeared clear. *Id.*

32 *Id.* The court noted that, "In particular, Conn. Gen. Stat. § 51-84 appears to specifically authorize the Probate Court to issue the type of order at issue here. Section 51-84(a) provides "attorneys admitted by the Superior Court shall be attorneys *of all courts* and shall be subject to the rules and orders of the courts before which they act." Section 51-84(b) in turn provides "*any such court* may fine an attorney for transgressing its rules and order an amount not exceeding one hundred dollars for any offense, and *may suspend or displace an attorney for just cause*." By its express terms, Section 51-84 clearly contemplates some level of discipline by courts other than the Superior Court. Further, the discipline imposed by Judge Purnell is precisely what is authorized in the statute. Thus, accepting that the probate courts are courts of limited jurisdiction, the Legislature has expressly authorized them to do what was done here.

"The fact that § 51-84 is meant to include the probate courts is also confirmed by the language of § 51-1a which includes the 'courts of probate' among the courts within the Judicial Department. Having specifically identified the probate courts among the courts covered by Title 51, one would expect the Legislature to have explicitly excluded them from the grant of authority in § 51-84, had it intended to do so." *Id.* (emphasis in original).

33 60 Conn. 11, 22 A. 441 (1891).

34 *Sherlock-White*, 48 Conn. L. Rptr. 115.

35 *Id.*

36 No. FST-CV-08-4014502, 2009 WL 5698081 (Conn. Super. Ct. Dec. 16, 2009).

37 *Id.* at *2.

38 *Id.*

ney and a lay person, to render a decision.[39] The two members, however, could not reach a decision.[40] With notice and no objection by the parties, the non-appearing committee member reviewed the record and transcripts of the hearing.[41] In a two to one decision, the committee ordered the Respondent be presented to the Superior Court for discipline.[42]

The lawyer filed a motion to dismiss, alleging that he was deprived of due process because the deciding vote was cast by the absentee member who was unable to assess the credibility of the witnesses.[43] The court rejected the due process claim, following *Lewis v. Statewide Grievance Committee*.[44] In *Lewis*, the Supreme Court specifically stated that even if the plaintiff's credibility had been at issue, "due process requires no more than the presence of two of the three reviewing committee members" at the hearing.[45]

The presentment in *Disciplinary Counsel v. Smigelski*[46] arose after a finding that the attorney violated Rule of Professional Conduct 1.5 by charging an unreasonable fee, and Rule 1.15(b)[47] by distributing funds to himself from the proceeds of the sale of estate assets and refusing to refund the funds when agents of the estate made a demand.[48]

Once suspended or disbarred, former lawyers who seek reinstatement must demonstrate a "present fitness to practice." In *Statewide Grievance Committee v. Friedland*,[49] the Superior Court denied an application for readmission based, in part, on

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39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 235 Conn. 693, 708, 669 A.2d 1202 (1996).

46 No. HHB-CV-08-4019323, 2009 WL 3086500 (Conn. Super. Ct. Aug. 31, 2009), *affirmed*, 124 Conn. App. 81, 4 A.3d 336 (2010).

47 Rule 1.15(b) provides, "A lawyer shall hold property to clients of third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the termination of the representation."

48 *Smigelski*, 2009 WL 3086500 at *1.

49 No. CV-90-0374445, 2009 WL 943708 (Conn. Super. Ct. Mar. 17, 2009).

its finding that the applicant's presentation "underscored that [he] lacks an understanding of the severity, or indeed, the existence of the violations which led to his disbarment."[50]

II. STATEWIDE GRIEVANCE COMMITTEE DECISIONS

Any person may file a grievance complaint against an attorney.[51] The complaint is generally referred to a grievance panel, which, upon consideration of the complaint and the attorney's response to that complaint, may either dismiss the matter or make a finding that probable cause exists that the attorney is guilty of misconduct.[52] In the event of a probable cause determination, the matter is scheduled for a public hearing before a reviewing committee.[53] The reviewing committee consists of at least three members of the statewide grievance committee.[54] The committee either makes a finding of misconduct or dismisses the matter. If there is misconduct, the committee may issue sanctions or recommend presentment.[55] The committee's decisions are published on the Connecticut Judicial Branch website.[56] The following discussion is derived from a review of the committee's published decisions.

A. *Statistical Analysis*

In 2009, there were fifty-five reported grievance decisions finding misconduct by the statewide grievance committee.[57] Of those fifty-five, twenty-nine resulted in Practice Book Section 2-82[58] Admissions of Misconduct, and twenty-six

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50 *Id.*

51 PRACTICE BOOK § 2-32(a).

52 PRACTICE BOOK § 2-32(i).

53 PRACTICE BOOK § 2-35(c).

54 PRACTICE BOOK § 2-35(a).

55 PRACTICE BOOK §§ 2-37, 2-47.

56 http://www.jud.ct.gov/SGC/decisions/

57 The authors reviewed fifty-five reported decisions by the statewide grievance committee, which were decided between the dates of January 1, 2009 and December 31, 2009, in order to compile the data referenced herein.

58 PRACTICE BOOK § 2-82 provides in relevant part:

> (a) The disciplinary counsel to whom a complaint is forwarded after a finding that probable cause exists that the respondent is guilty of misconduct may negotiate a proposed disposition of the complaint with the respondent or, if the respondent is represented by an attorney, with the respondent's attorney. Such a proposed disposition shall be based upon the respondent's admission of misconduct, which shall consist of either (1) an admission by

resulted in decisions by a reviewing committee. The most common probable cause finding in 2009 concerned communications, Rule 1.4, with twenty-seven findings. Rule 8.4, which deals with general misconduct, was a close second, with twenty-six findings. Third on the list was Rule 1.3 addressing diligence, with twenty-five findings. Failure to file timely responses to grievances, Practice Book Section 2-32, resulted in eighteen findings, while either making a false statement or failing to correct a known misapprehension, Rule 8.1, led to seventeen findings. There were fourteen findings under Rule 1.1 regarding the competence of attorneys and thirteen findings each regarding fees, Rule 1.5, and safekeeping property, Rule 1.15. Rule 1.7, conflict of interest with current clients, and Rule 3.3, candor towards the tribunal, each resulted in 5 findings.[59]

The most common probable cause findings, however, did not line up precisely with the most common findings of misconduct. Leading the list of misconduct findings were sixteen Rule 1.3 violations, followed by Rule 1.4, and Rule 8.1 and Practice Book Section 2-23(a)(1), each with thirteen violations. There were nine violations involving general mis-

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the respondent that the material facts alleged in the complaint, or a portion thereof describing one or more acts of misconduct to which the admission relates, are true, or (2) if the respondent denies some or all of such material facts, an acknowledgment by the respondent that there is sufficient evidence to prove such material facts by clear and convincing evidence.

(b) If disciplinary counsel and the respondent agree to a proposed disposition of the matter, they shall place their agreement in writing and submit it, together with the complaint, the record in the matter, and the respondent's underlying admission of misconduct, for approval as follows: (i) by the court, in all matters involving possible suspension or disbarment, or possible imposition of a period of probation or other sanctions beyond the authority of the statewide grievance committee, as set forth in Section 2-37; or (ii) by a reviewing committee of the statewide grievance committee, in all other matters. If, after a hearing, the admission of misconduct is accepted and the proposed disposition is approved by the court or the reviewing committee, the matter shall be disposed of in the manner agreed to. If any resulting admission of misconduct or proposed disposition is rejected by the court or the reviewing committee, the admission of misconduct and proposed disposition shall be withdrawn, shall not be made public, and shall not be used against the respondent in any subsequent proceedings. In that event, the matter shall be referred for further proceedings to a different judicial authority or reviewing committee, as appropriate.

[59] PRACTICE BOOK § 2-27(a) had 4 findings; PRACTICE BOOK § 2-27(d), § 2-27(b), and Rule 1.8 each had 2 allegations; and the following each had 1 allegation: Rules 1.6, 1.8(a), 1.16, 3.2, 3.5, 4.1, 4.4, 5.3, 5.5(a), 7.5(a), 8.3 and PRACTICE BOOK § 2-27.

conduct, Rule 8.4, and fees, Rule 1.5. There were four findings of misconduct involving conflict of interest, Rule 1.7 and Practice Book Section 2-27(a). In addition, there were three violations relating to competence, Rule 1.1, and two relating to candor to the tribunal, Rule 3.3.[60]

B. *Recurring Professional Issues*

As is borne out in the data noted above, the most common ethical issues which plague the profession are the failure to communicate with clients, a lack of diligence in representing clients, the charging and collecting of legal fees, and the failure to respond timely and with candor to a disciplinary complaint. The latter is a recent addition to the list while the others historically have been problematic for the profession.

C. *Diligence and Communication*

The duties of diligence and communication are set forth in separate Rules of Professional Conduct, but are often partners in attorney grievance complaints. In 2009, 14 percent of probable cause findings included a violation of the communications rule.[61] In addition, the failure to communicate with clients continues to be a top reason for professional grievance complaints filed by clients.

Lawyers must promptly respond to client communications, preferably within the next business day.[62] When occasions arise that a timely response is not feasible, lawyers must have an internal office procedure to ensure that all tele-

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[60] Each of the following had 1 violation each: Rules 1.6, 1.8(a), 1.16, 3.2, 3.5, 4.1, 7.5(a) and PRACTICE BOOK § 2-27 and § 2-27(b). Each of the following had no violations: 1.8(j), 4.4, 5.3, 5.5(a), 8.3 and PRACTICE BOOK § 2-27(d).

[61] Rule 1.4 provides, "(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objective are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

[62] Clients who are inordinately time demanding can be addressed with an explanation of the cost element of their repeated communications (if an hourly fee) or by a arranging a mutually agreeable periodic review of the file.

phone calls, emails or other communications are timely acknowledged by legal support staff. Alternatively, the active client should be assisted by another lawyer in the law firm. These efforts to keep the client informed are part of the lawyers' duties to the client and will prevent or mitigate any claim of a failure to communicate.[63]

Violations of Rule 1.4 arose from the simple failure to respond to telephone calls.[64] Another violation involved a lawyer's failure to inform a client clearly, at the time of initial retention, that failure to pay the retainer balance would result in the non-refund of the original partial retainer payment, unless she paid the full balance within six months.[65] Finally, failure to keep a client reasonably informed as to the status of the matter, including an arbitration decision, will result in a violation.[66]

Client communication requires successful time management strategies. One practical solution is to block off a period of the day solely to deal with outstanding telephone calls and emails in a timely manner. Communication issues can also be avoided by being aware of nonverbal signs of client dissatisfaction. For example, the non-paying client may indicate a breakdown in the attorney-client relationship. The non-paying client requires increased communications. It is imperative to determine the cause of the non-payment as soon as it is noted. If it is based on financial constraints, explore other avenues of payment.[67] If the problem—as is too often the situation—is the client's discontent with the representation, discuss and resolve the problem(s) immediately. The specific resolution of the problem should be memorialized in a letter to the client.

In addition to letters addressing specific situations, be sure to communicate regularly with the client in writing. Although

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[63] With respect to lawyers who are available to clients beyond business hours due to technological advances, lawyers should establish reasonable times and frequency of client communications. Although there are exceptional situations, lawyers are not required to be accessible to clients continuously.

[64] Rebelo v. Swartout, Grievance Complaint No. 08-0302; *see also* Grabon v. Onore, Grievance Complaint No. 08-1018.

[65] Guay v. Melchionne, Grievance Complaint No. 08-1023.

[66] Pagan v. Quraishi, Grievance Complaint No. 08-1019.

[67] The CBA fee arbitration program is another alternative. *See*, http://www.ctbar.org/article/articleview/210.

phone calls and memos to the file are a good practice, the best defense to a disciplinary or negligence complaint will be reliance on a good old-fashioned letter to the client. Client status letters should provide a specific explanation of the status of the matter and actions to be taken by the lawyer. The legal actions should be consistent with the client's objectives. The status letter should further explain the lawyer's expectations, if any, of the client.

A frequent partner to a communication violation is a diligence violation pursuant to Rule 1.3.[68] In 2009, 13 percent of probable cause findings included a lack of diligence in representing a client. The rule was the basis for a finding of misconduct in 15 percent of the total probable cause cases. Attorneys violated Rule 1.3 by failing to conduct negotiations and file suit prior to the statute of limitations;[69] failing to file a timely request for trial de novo;[70] and failing to file necessary pleadings on behalf of the client.[71]

The obligation to represent a client with diligence requires that client matters be handled timely. Many violations of Rule 1.3 could have been prevented by an effective calendaring system. In addition, the duty of diligence requires that a lawyer not accept more client matters than the lawyer has the time to prepare for and handle properly.[72] This issue may become more prominent in light of the soft economy and the increasing competition for a limited amount of business in Connecticut.

D. *Candor in the Disciplinary Proceeding Process*

The number of attorneys failing to respond timely to grievance complaints is remarkable because that failure, in itself, results in an automatic finding of misconduct.[73] As

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[68] Rule 1.3 provides, "A lawyer shall act with reasonable diligence and promptness in representing a client."

[69] French v. Evans, Grievance Complaint No. 08-0250.

[70] Pagan v. Quraishi, Grievance Complaint No. 08-1019.

[71] Grabon v. Onore, Grievance Complaint No. 08-1018.

[72] Rule 1.3, Official Commentary provides, "A lawyer's work load must be controlled so that each matter can be handled competently."

[73] There are a number of grievances where there was no violation of the rules on the merits of the grievance, but the failure to respond resulted in a finding of mis-

such, even if the statewide grievance committee determines that there is no rules violation on the merits of the complaint, there will be a finding of misconduct in failing to respond to the complaint.[74] Failing to respond timely to a disciplinary complaint reflects adversely on an attorney's diligence, communication, and competence.

Rule 8.1[75] has led to an emergence of new misconduct findings. A lawyer, in responding to a disciplinary proceeding, runs the risk of running afoul of this rule if she fails to disclose material information or misrepresents facts to the disciplinary authority.[76] As of 2009, Rule 8.1(a) has become a common violation.[77] This rule violation often corresponds to violations of Practice Book Section 2-32, which states the attorney's obligation to respond to the complaint.[78] Needless to say, attorneys must be timely and candid in responding to written communications from the office of the statewide grievance committee regarding a disciplinary complaint.[79]

E. *Fees*

Another prominent area of disciplinary actions concerns fees. Rule 1.5 requires that attorneys' fees be reasonable[80]

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conduct. *See* In Re Cronk, Grievance Complaint No. 08-0176; Gonzalez v. Swartout, Grievance Complaint No. 08-0450; Oczkowski v. Aires, Grievance Complaint No. 08-0527; Bibb v. Hulton, Grievance Complaint No. 08-0847; Cholewa v. Hulton, Grievance Complaint No. 08-0931; and Berescik v. Ficarra, Grievance Complaint No. 08-1158.

74 PRACTICE BOOK § 2-32(a)(1).

75 Rule 8.1 provides, "An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: (1) Knowingly make a false statement of material fact; or (2) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6."

76 As the Commentary to Rule 8.1 states, "Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct."

77 The statewide grievance committee found thirteen violations of the rule in the calendar year 2009.

78 The statewide grievance committee found violations of PRACTICE BOOK § 2-32(a)(1) in twelve of the thirteen cases in which there was a corresponding Rule 8.1(a) violation.

79 It is the authors' opinion that being represented by counsel during the process is preferable to proceeding without counsel. In addition, the cost of that representation may be covered by a policy of professional insurance.

80 Rule 1.5(a).

and contingency fees be in writing.[81] The disciplinary violations on fees generally arise due to the lack of a proper contingency fee agreement under subsection (b).[82] As written fee agreements are required in all new client matters,[83] attorneys must memorialize fee agreements with the client upon accepting the legal representation as a matter of course.[84] Failure to obtain a written fee agreement may result in a grievance in a matter that initially had nothing to do with fees. In matters, however, where the complaint is properly construed as a fee dispute, the statewide grievance committee has the authority to summarily dismiss the matter.[85]

F. *Attorney Advertising*

In *Zelotes v. Rousseau*,[86] the statewide grievance committee issued a landmark decision regarding group attorney advertising on the internet. The process involved five Connecticut attorneys who advertised their legal services through a Chicago company, Total Attorneys. The reviewing committee stated, "We are mindful that attorney advertising

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[81] Rule 1.5(b).

[82] Contingency fees are governed by a rule of reasonableness under Rule 1.5(a) and the statutory requirements of CONN. GEN. STAT. § 52-251c.

[83] Rule 1.2

[84] Good collections practices begin at the commencement of the representation. The lawyer must engage in an open discussion of the objectives and the anticipated legal fees and costs. The lawyer should inquire whether the client is able and willing to expend the contemplated legal fees. If not, the client may wish to consider different legal objectives which may be affordable. The lawyer and client should explore the many payment options available, *e.g.*, evergreen retainers. Always memorialize the fee agreement and scope of representation in writing. The official commentary to Rule 1.5, which is the lawyer's guide, provides that representation agreements must be provided to the client within 10 days after commencing the representation.

Keep the client informed of unusual legal fees. If there is an upcoming flurry of legal activity, remind the client that the legal fees will be increasing during that time period.

To be an effective collector, the lawyer must comply with the terms of the agreement. If the representation letter requires that the lawyer send monthly payments – do so timely. Do not expect a client who receives the January billing statement in April to be in any rush to pay. A professional approach to legal fees commences at the first client meeting and must continue throughout the representation.

[85] PRACTICE BOOK § 2-32(b).

[86] Zelotes v. Rousseau, Grievance Complaint No. 09-0412; Zelotes v. Wagman, Grievance Complaint No. 09-0414; Zelotes v. Lesko, Grievance Complaint No. 09-0415; Zelotes v. Lenz, Grievance Complaint No. 09-0416; Zelotes v. Small, Grievance Complaint No. 09-0418. The authors' law firm represented two respondents.

is commercial speech protected by the First and Fourteenth Amendments. *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)."[87] With regard to the internet as a medium for advertising, the committee stated:

> The internet is "an international network of interconnected computers that enables millions of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849, 117 S. Ct. 2329, 138 L.Ed.2d 874 (1997). "The internet is not as invasive as radio or television. [C]ommunications over the internet do not invade an individual's home or appear on one's computer unbidden. Users seldom encounter content by accident. *Id.*, at 869." [88]

The committee concluded that "the evidence did not establish that the websites recommended the participating attorneys to viewers of the website."[89] As such, there was no violation of Rule 7.2(c), the primary ethics rule at issue. Furthermore, the committee concluded "that the territorial exclusivity of the arrangement was not an implied endorsement and that the fees charged to the Respondents were the appropriate costs of advertising on the websites."[90]

The decision affirms that attorney advertising on the internet is subject to limited regulation as protected commercial speech. The Rules of Professional Conduct are broad enough to encompass the changes in the technology. That lawyer advertising has evolved from print ads, to television ads as discussed in *Grievance Committee for the Hartford-New Britain Judicial District v. Trantolo*,[91] to advertising on the internet, does not change the legal principles and analysis.

The statewide grievance committee issued sixteen attorney advertisement advisory opinions under Practice Book Section 2-28A. The submission of a request for an advisory opinion must be made in accordance with Practice Book

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87 *Zelotes*, Grievance Complaint No. 09-0412, at 5.
88 *Id.* (internal parenthetical omitted).
89 *Id.* at 7.
90 *Id.*
91 192 Conn. 15, 470 A.2d 228 (1984); 192 Conn. 27, 470 A.2d 235 (1984).

Section 2-28B. Attorneys may secure a binding approval of an advertisement. A finding of non-compliance with the Rules of Professional Conduct, however, is not binding in a disciplinary action. Attorneys must remain vigilant of the mandatory attorney advertising filing requirements under Practice Book Section 2-28A.

Of the sixteen advisory opinions, there were six opinions regarding electronic advertising, three on television,[92] one each on a website,[93] an electronic newsletter,[94] and an electronic billboard.[95] These advertisements were approved with one exception. The one ad which did not receive approval failed to include the name of a least one attorney licensed in Connecticut in the advertisement, as required under Rule 7.2.[96]

Print ads were considered in six separate opinions. The opinions addressed ads in law firm brochures,[97] a postcard,[98] a trade publication[99] and a newspaper.[100] In addition, the committee approved the use of a "tag line," which was a four word phrase.[101] The recurring problem in print ads was the impermissible use of superlatives to describe the law firm's practice. The committee rejected the phrases "superb results,"[102] "highest degree of legal skill,"[103] "exceptional capabilities,"[104] "extensive success,"[105] and "offering our expertise."[106] In Advisory Opinions 09-04741-A and 09-01114-A, the committee noted that disclaimers may be used in some instances to avoid the problem of creating unjustified

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92 Advisory Opinions 09-03156-A; 09-03158-A; and 09-03159-A.

93 Advisory Opinion 09-03322-A (the committee only considered a modification to the website, as the remainder of the website was the subject of a pending grievance matter).

94 Advisory Opinion 09-04874-A.

95 Advisory Opinion 09-06834-A.

96 *Id.*

97 Advisory Opinion 09-04741-A; 09-01453-A.

98 Advisory Opinion 09-06730-A.

99 Advisory Opinion 09-00658-A.

100 Advisory Opinion 09-01114-A.

101 Advisory Opinion 09-04941-A.

102 Advisory Opinion 09-01114-A.

103 *Id.*

104 Advisory Opinion 09-04741-A.

105 *Id.*

106 *Id.*

expectations that mislead the consumer.

The final category of advisory opinions addressed targeted solicitation of clients known to be in need of particular legal services. These ads must meet the additional requirements of Rule 7.3. The targeted recipients were derived from police logs[107] and logs of homeowners whose real estate was in foreclosure.[108] The use of superlatives was again disapproved.[109]

III. 2009 Ethics Opinions Summaries

In 2009, the Connecticut Bar Standing Committee on Professional Ethics issued five Informal Opinions. The Professional Ethics Committee provides opinions addressing ethical issues based upon factual inquiries from members of the bar. The opinions are available from the Connecticut Bar Association. The following is a brief summary of the 2009 Informal Opinions.

In Informal Opinion 09-01, the Committee considered whether the "Collaborative Divorce Process" model conflicts with the Rules of Professional Conduct, where, as a mandatory part of the process, both parties and their attorneys pledge in writing that if the process fails, each attorney will withdraw from the case. The Committee concluded that this disqualification agreement represents a permissible limited-scope representation in accordance with the Rules. The lawyers, however, *must* disclose at the outset the ramifications of participating in the Collaborative Divorce model. Additionally, the lawyers must explain the risks and alternatives to the process, and the client must give informed consent, confirmed in writing. The use of limited scope representations is a growing practice. This opinion acknowledges the safeguards and benefits to consumers who engage lawyers under a limited scope representation agreement.

In Informal Opinion 09-02, the Committee was asked

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[107] Advisory Opinions 09-06652-A; 09-04933-A.

[108] Advisory Opinions 09-06477-A (approved); 09-01229-A (not approved).

[109] Advisory Opinion 09-1229-A ("invaluable assistance" and "outstanding legal support and guidance" not permitted).

whether there could be ethical consequences for civil disobedience. The attorney intended to withhold payment of all or part of his income tax as a protest against the acts and policies of the federal government for the war in Iraq. The Committee concluded that exposure to sanctions was possible, and that absent controlling authority to the contrary, the attorney must at least anticipate that he will have to defend himself in a disciplinary proceeding.

A conflict of interest issue in workers' compensation practice was addressed in Informal Opinion 09-03. First, the Committee opined that, in the rare case where the interests of the employer and the insurer conflict, the attorney may not continue a concurrent representation. Second, the Committee concluded that, given the mandatory duty of confidentiality in the Rules, the compensation defense lawyer who becomes aware of such facts may not, absent informed written consent, disclose them to the insurer. With regard to communication with others, the Committee was asked whether the lawyer who represents a plaintiff-injured employee, may communicate with a corporation whose owner, and sole employee, is one person. The Committee opined that the lawyer may not engage in substantive communications with the owner/employee as an opposing party, but should engage with either the employer's insurer or the lawyer representing the corporation/owner/employee.

In Informal Opinion 09-04, the Committee concluded that a law firm may hire a licensed insurance adjuster as a non-lawyer employee to engage in negotiations of personal injury matters. The adjuster cannot practice law and must be supervised by an attorney. Legal fees cannot be shared with the adjuster under Rule 5.4. This opinion presents another deviation from the traditional practice, which is discussed more fully in the section on Looking Forward from 2009. Informal Opinion 09-05, which addresses the outsourcing of administrative, management, advertising, and data processing, is discussed in the next section, under Outsourcing.

IV. LOOKING FORWARD FROM 2009

A. *Social Networking and Professional Development – How Do They Mix?*

Facebook,[110] LinkedIn,[111] and Twitter[112] can be powerful and cost-effective tools for business development. One of the biggest benefits of these tools is the increased visibility they allow. In addition, these services provide the "tech savvy" attorney another avenue for gathering additional information about the client's case. These tools come with their own set of potential ethical pitfalls. From the law practice perspective, lawyers and law firms must have an understanding and acceptance of the mechanics and implementation of these tools as a component of the law practice. In the event the law firm approves the use of those media as a component of its practice, written policies are a prerequisite to avoiding ethical problems.

In the authors' opinion, written policies will not alleviate poor judgment in the use of social networking tools as demonstrated in three very recent examples. First, it is never a good idea to request a continuance of a trial based on a funeral if the judge, judge's secretary or judge's clerk is listed as a "friend" on Facebook and you plan on updating your Facebook page with stories of partying and drinking.[113] Second, do not call

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[110] "Facebook is a social networking service that lets you connect with friends, co-workers, and others who share similar interests or who have common backgrounds. Many use it as a way to stay in touch after finishing school, or as a way to share their life publicly." CNET News, *Newbie's Guide to Facebook*, Aug. 1, 2007, *available at* http://news.cnet.com/newbies-guide-to-facebook/.

[111] "LinkedIn is an interconnected network of experienced professionals from around the world, representing 150 industries and 200 countries. You can find, be introduced to, and collaborate with qualified professionals that you need to work with to accomplish your goals." LinkedIn, *About Us*, 2008, *available at* http://press.linkedin.com/. "LinkedIn is the world's largest professional network with over 60 million members and growing rapidly. LinkedIn connects you to your trusted contacts and helps you exchange knowledge, ideas, and opportunities with a broader network of professionals." LinkedIn, *What is LinkedIn*, 2009, *available at* http://learn.linkedin.com/what-is-linkedin.

[112] "Twitter is a service for friends, family, and co–workers to communicate and stay connected through the exchange of quick, frequent messages. People write short updates, often called "tweets" of 140 characters or fewer. These messages are posted to your profile or your blog, sent to your followers, and are searchable on Twitter search." Twitter, *Frequently Asked Questions – What Is It?*, Nov. 4, 2008, *available at* http://help.twitter.com/entries/13920-frequently-asked-questions.

[113] John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 12, 2009, available at http://www.nytimes.com/2009/09/13/us/13lawyers.html.

a judge names on the internet. A Florida attorney posted about a judge, calling her an "Evil, Unfair Witch."[114] Unsurprisingly, the First Amendment was not a sufficient defense, and the Florida Bar reprimanded and fined him for his comment.[115] An Illinois attorney was fired after posting comments on her blog which referred to a judge as "Judge Clueless" and provided details of a case.[116] Finally, blogging about present and former clients or pending client matters or cases will likely run afoul of the confidentiality rule.[117]

An effective policy will address the following three considerations. The rules of ethics apply in the virtual world. The professional license follows an attorney twenty-four hours a day, seven days a week. Also, be aware of your audience. Client confidences are much more difficult to protect in the virtual world where a posting or a "Tweet" could potentially be viewed by a vast number of people versus a face-to-face conversation between two people. Perhaps the most important rule in the online world is confidentiality of information under Rule 1.6. Posts, "Tweets," or updates must not reveal any information that would be protected under the rule. No information regarding a client or case should be re-broadcast without the client's express written consent.

Second, lawyers should be wary not to give legal advice inadvertently, because it may lead to the perception or creation of an attorney-client relationship where such a relationship was not intended. This can be accomplished by indicating that the post is not intended as legal advice. In addition, it is important, especially in light of the brevity of the posts, to articulate an opinion, comment or thought clearly and concisely. Trying to determine the meaning of a 140 character "Tweet" two years later could prove to be difficult. Finally, be aware of the solicitation rules.[118]

Where appropriate, the lawyers should use clear disclaimers which state that the views expressed by the author

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[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *See* Rules 7.1 and 7.3.

belong to the author alone and do not represent the views or opinions of the law firm. This may be effectuated, without a disclaimer, by writing in the first person. Again, Facebook updates and "Tweets" should clearly reflect the views of the individual and not the firm.

Be aware of the persona you present on the internet and the perceptions of the viewing public. Lawyers must be aware that their actions, captured via images, posts, "Tweets," or comments will reflect upon them and on their law firms. Whatever is published will be widely accessible. Most significantly, the contents will live in cyberspace for a long time, so content needs to be considered carefully. The six year time limitation for filing a grievance complaint in Connecticut is a long time.[119]

Remember, although each person is responsible for the content of social networking venues, every lawyer is responsible for his or her own conduct. When using these tools, a prudent lawyer should consider limiting the content of a post to general legal matters regarding the firm, limiting the recipients of social networking by using the appropriate controls available on the various services, and remembering that copyright laws apply online and that sources need to be cited as necessary to avoid claims of plagiarism.

B. *Outsourcing of Legal Support Services*

Lawyers and law firms are now outsourcing legal work and legal support services for cost efficiencies. Although "outsourcing" is not a novel concept to the practice of law, packaged legal support services in which a third party business offers multiple services have grown in recent years. In addition, outsourcing of legal services in the areas of brief writing, pleading preparation and discovery is now available like never before.[120] This section considers the non-lawyer aspects of outsourcing.

It comes as no surprise that the ethical propriety of out-

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[119] PRACTICE BOOK § 2-32(a)(2)(E).

[120] *See* Rama Lakshmi, *U.S. Legal Work Booms in India*, WASHINGTON POST, May 11, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/05/10/AR2008051002355.html; Anthony Lin, *Legal Outsourcing to India Is Growing, but Still Confronts Fundamental Issues*, N.Y.L.J., Jan. 23, 2008, *available at* http://www.law.com/jsp/article.jsp?id=1200996336809.

sourcing has been approved by both the ABA and the CBA in recent ethics opinions. In 2009, the CBA Ethics Committee published Informal Opinion 09-05 entitled "Outsourcing of Administrative, Management, Advertising and Data Processing." The committee relied, in part, on ABA Formal Opinion 08-451. Each of these opinions provides useful guidelines when contracting with third party vendors of legal support services. The CBA noted that "the current trend of law firms 'outsourcing' law related services has been accepted in various formats in various jurisdictions when the 'outsource' relationship enables the lawyer to exercise adequate supervision, independent professional judgment, ensure competence, and effective conflicts checks while preserving client confidentiality with the client's consent."[121] In the authors' opinion, the client is not required to consent to the outsourcing of legal support services. This situation is indistinguishable from in-house legal support services. There is no requirement that the lawyer obtain client consent for the legal support staff employed by the law firm on each given client matter. The lawyer is responsible for compliance with the ethics rules by the legal support staff whether those persons are in-house or outsourced.[122]

C. *Are Unbundled Legal Services Ethical?*

In an uncertain economy, lawyers are using unbundled legal services to expand their client base. The practice also addresses the needs of consumers who are unable to afford traditional legal services, which provide representation from the commencement to the conclusion of a matter. With unbundled legal services, consumers can more effectively target their limited resources to a narrow scope of representation.

Unbundling of legal services allows lawyers to offer limited scope representation agreements. Under such agreements, the lawyer does not appear in court, but assists a pro se litigant by preparing pleadings, discovery, and memoranda of law or

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[121] Informal Opinion 09-05.

[122] Rule 5.3 provides, in part, "With respect to a nonlawyer employed or retained by or associated with a lawyer. ... (2) A lawyer having direct supervisory authority over the nonlawyer shall made reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

briefs for filing with the court. This practice is also referred to as "ghostwriting." The ethical proprieties of unbundled legal services were resolved in Connecticut in the 1990's.[123]

Informal Opinion 98-5, citing to ABA Informal Opinion 1414, cautiously embraced unbundling of legal services, concluding that "[a] lawyer may provide advice to a pro se litigant and assist the litigant in the preparation of pleadings."[124] Both the ABA and CBA opinions required the lawyer to give notice to the court when the lawyer was preparing documents for a pro se litigant. Two reasons were proffered for the notice requirement. First, the ethics committee expressed concern that the court's deference normally accorded to pro se litigants would, but should not, apply in this circumstance. Second, a well drafted pleading would mislead the court as to the reality of the situation, apparently that the pro se litigant was not as well versed in the law as suggested by the pleadings.

ABA Formal Opinion 07-446 superseded CBA Informal Opinion 98-5[125] and ABA Informal Opinion 1414. Pro se litigants may engage a lawyer to assist in the preparation of legal documents for filing with the court and no disclosure of the lawyer's role is required. This unconventional practice of pro se litigants with well drafted pleadings may be a welcome relief to the Connecticut courts. The lawyer who provides unbundled legal services serves the court by providing procedurally proper, fully developed legal claims or defens-

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[123] The court noted potential ethical concerns with unbundling of legal services to prison inmates in Smith v. Armstrong, 968 F. Supp. 40 (D. Conn. 1996). In that case, the Department of Corrections had contracted with Inmates Legal Assistance to provide legal services to inmates regarding family and civil matters. Under the terms of the contract, ILA was unable to enter appearances, but prepared court documents for the inmates to file. While acknowledging that the issues was not ripe, the court was concerned that the contractual terms compromised the lawyers' ethical duties to identify themselves to the court or take responsibility for their work product. That dictum became, in part, the basis of Informal Opinion 98-5, which approved unbundled legal services with the caveat that the lawyer who prepares court pleadings must disclose that fact to the court.

[124] Informal Opinion 98-5 was relied upon in Informal Opinion 05-17.

[125] The reasoning in Informal Opinion 98-5 requiring disclosure to the court is flawed. It holds that the concealment of the lawyers' identities acts in a manner to evade the reach of Rules 3.1 and 3.3(a)(1) and (3). However, as discussed, *supra* note 4, those rules apply to lawyers who are advocates before tribunals. This is an example of the proverbial horse before the cart because the lawyers do not appear before the tribunal and owe no duty to the tribunal.

es, and a more confident and knowledgeable pro se litigant. Unbundled legal services are supported by the ethics rules.[126] This is yet another break with tradition in an ever-changing legal practice landscape.

D. *Unauthorized Practice of Law – the Rules Are Green*

The recent developments regarding the regulations governing the unauthorized practice of law provide the sensation of having watched a time lapsed film—normal speed accelerated.[127] The laws and regulations governing the unauthorized practice of law are ever-changing, scattered and complex.[128] The conceptual principles governing the acts that constitute the practice of law are likewise moving at a rapid pace. Unauthorized practice of law has two primary faces: out-of-state lawyers performing legal services occurring in Connecticut or for Connecticut residents and nonlawyers performing legal or legal-related services.

From 1986 through 2007, Connecticut had a short and simple rule on the unauthorized practice of law based upon the ABA Model Rule.[129] Connecticut also relied upon a common law definition of the meaning of the "practice of law."[130] In 2008, Rule 5.5 was completely revised to provide a comprehensive definition of the practice of law in Practice Book

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[126] Rule 1.2(c) provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." *See*, Restatement (Third) of Law Governing Lawyers, § 19. The Rules of Professional Conduct distinguish between the lawyer who provides legal assistance and advice in Rule 2.1, *et seq.*, and the lawyer who acts an advocate under Rule 3.1, *et seq.* Rules 3.1 through 3.4 provide the ethical guidelines for a lawyer who appears before a tribunal on behalf of the client. Finally, official Commentary to Rule 5.5 unambiguously states "a lawyer may counsel non lawyers who wish to proceed pro se."

[127] Quintin Johnstone, *Connecticut Unauthorized Practice Laws and Some Options for Their Reform*, 36 CONN. L. REV. 303 (2004), provides a historical presentation, but also a path for the future of Connecticut law on the subject. Professor Johnstone's thoughtful, analytical presentation and foresight on unauthorized practice are reflected in many of the reforms adopted in subsequent years.

[128] General Statutes § 51-88, PRACTICE BOOK § 2-47 and Rule 5.5.

[129] Rule 5.5 provided, "A lawyer shall not: (1) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (2) Assist a person who is not a member of the bar, who has resigned from the bar, who has retired from the bar, or who has been suspended, disbarred, or placed on inactive status in the performance of activity that constitutes the unauthorized practice of law."

[130] State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 234-35, 140 A.2d 863 (1958), and its progeny rather loosely defined the practice of law as the giving of legal advice and the preparation of legal documents.

Section 2-44A;[131] to allow multi-jurisdictional practice;[132] and to permit in-house counsel to provide legal services in Connecticut.[133] Although the latter two changes are each worthy of an independent article, suffice it to say that with these changes, numerous out-of-state lawyers were welcomed to Connecticut. The one caveat is that the out-of-state lawyers, who are recognized in the Rule, are required to provide notification to the statewide grievance committee of in-state representation prior to and at the termination of the legal matter.[134] The notice requirement provides accountability for all lawyers practicing in Connecticut.

There was and continues to exist a perception that the authorization of multijurisdictional practice created a loss of state barrier patrols on the practice of law or a threat to those licensed to practice in Connecticut.[135] In the authors' opinion, multijurisdictional practice will be seen as toddler steps in the years ahead. Although no crystal ball can reveal the future of the profession, these changes are unlikely to alter the need for Connecticut lawyers to represent clients in the matters directly under state law, such as criminal, civil, family, estate and probate, and workers compensation, to name but a few. In the meantime, Connecticut has addressed the issue of the unauthorized practice of law from two different angles: suspended or disbarred lawyers[136] and legal service form providers. In the 1990's, Connecticut saw an outcropping of legal form businesses. The consumer could purchase fill-in-the-blank legal forms for a will or divorce complaint.[137] In 2004, the pending unauthorized practice of law matters were the first files transferred from the statewide grievance com-

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[131] Rule 5.5(a).

[132] Rule 5.5(c).

[133] Rule 5.5(d).

[134] The notice filing requirements are set forth on the Connecticut Judicial webpage at http://www.jud.ct.gov/sgc/mjp/mjpmenu.html.

[135] *See* ABA, *A Legislative History, The Developments of the ABA Model Rules 1982-2005.*

[136] There are two unreported prosecutions of suspended lawyers who engaged in the practice since 2004. Statewide Grievance Committee v. Lafferty, No. CV-04-4004581-S, 2005 WL 2359310 (Conn. Super. Ct. Aug. 15, 2005) and State v. Ngobeni, No. CR-06-0129997, 2007 WL 4305581(Conn. Super. Ct. Nov. 16, 2007).

[137] Statewide Grievance Committee v. Zadora, 62 Conn. App. 828, 772 A.2d 681 (2001).

mittee to the newly created Disciplinary Counsel's Office.[138] These matters may arise from the advertising efforts of the person allegedly engaging in the unauthorized practice of law.

In 2009, the CBA formed a Task Force on Unauthorized Practice Law on the Internet.[139] The Task Force focused on several internet sites and concluded that the website providers of services were engaged in the unauthorized practice of law. The Task Force recommended to the CBA House of Delegates that the matter be referred to Commissioner of the Department of Consumer Protection to investigate and take appropriate action.[140] The Task Force did not recommend proceeding with litigation, in part, to "avoid any unintended interference with ongoing efforts to nurture unbundled legal services."[141]

E. *Cloud Computing*

"Cloud computing" is internet based computing.[142] Unlike traditional local area networks with dedicated onsite servers which contain client files and software, cloud computing employs shared resources.[143] Software and client information are housed on servers owned by a service provider and are located outside of the physical law firm, and often out of state.[144]

Cloud computing is a cost effective alternative for small firms and solo practitioners because it eliminates the need for costly hardware and software. There is, however, one overarching concern with respect to the cloud, and that is how to protect client confidences under Rule 1.6. Thus, presuming that there is an agreement with the service provider that makes clear that the lawyer owns the actual data, query what happens

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138 PRACTICE BOOK § 2-34A(b)(8).

139 CBA Task Force on Unauthorized Practice Law on the Internet was formed in February 2009 and issued an Interim Report dated July 22, 2009.

140 The recommendation to pursue the matter with the executive branch in lieu of the judicial branch, which has exclusive constitutional authority over the regulation of the practice of law in Connecticut, apparently was in response to extraordinarily limited judicial resources. Interim Report, n.1.

141 *Id.* at n.15.

142 Edward A. Adams, *Legal Ethics of Facebook, Twitter & Cloud Computing,* ABA JOURNAL, Aug. 2, 2009, *available at* http://www.abajournal.com/news/article/legal_ethics_of_facebook_twitter_cloud_computing_abachicago/.

143 *Id.*

144 *Id.*

with the metadata[145] generated and supporting the visible data. A second area for concern is data preservation. The CBA File Retention Guidelines provide that client files "shall be kept six years from the date of completion of services rendered by an attorney."[146] Furthermore, client financial accounts records, including IOLTA records, must be kept for "a period of seven years after final distribution of such funds or any portion thereof."[147] It is prudent to include in a contract for cloud computing the storage and return of, or access to, propriety data stored on the provider's server. This will cover changes in service providers or the sale or transfer of the business interest.

F. *ABA 20/20 Commission*

The impact of advances in technology on the practice of law in the past twenty years cannot be overstated. Cloud computing, social networking, outsourcing of legal services and legal support work, peer to peer legal work,[148] and virtual law firms are now all part of the new genre of law practice.

In response, the ABA Commission on Ethics 20/20 was created in August 2009.[149] The Commission is charged with studying whether the evolution of information technology and global trade may require changes in how lawyers in the United States are regulated.[150] If changes are required, the Commission is charged with recommending changes.[151] The Commission has a three-year period to undertake research, conduct public hearings, and report its findings and recommendations.[152] As part of its analysis, the Commission will

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[145] Metadata is "structured information that describes, explains, locates, or otherwise makes it easier to retrieve, use, or manage an information resource." *See* National Information Standards Organization, *Understanding Metadata 1* (2004), *available at* http://www.niso.org/publications/press/UnderstandingMetadata.pdf.

[146] *Available at* http://www.ctbar.org/article/view/304/1/35.

[147] PRACTICE BOOK § 2-27(b).

[148] "Peer to peer" legal work involves lawyers sharing work product online. ABA Commission on Ethics 20/20, Preliminary Issues Outline, p. 9 (Nov. 18, 2009), *available at* http://www.abanet.org/ethics2020/outline.pdf.

[149] The ABA Commission on Ethics 20/20 has a website, www.abanet.org/ethics2020, which provides transparency on the Commission's members, meetings and agendas. Most significantly, the Commission welcomes comments from lawyers, law firms and professional associations. Former Connecticut Bar Association President Frederic Ury of Westport, Connecticut, is a member of the Commission.

[150] *Id.*

[151] The ABA Commission on Ethics 20/20, Preliminary Issues Outline, *supra* note 193.

examine the present regulations governing the practice of law in light of these advances.[153]

While the Commission ponders these changes, practicing lawyers are left dealing with the day-to-day uncertainties of applying rules created in 1982[154] without consideration of the pace and mechanisms of current technology. Even the lawyer who is both technologically savvy and ethically conscientious is playing a game of roulette with the application of the ethics rules. The reason is not that the rules are rigid or inapplicable in today's day and age, but that the interpretation and application of the rules may be too rigid.

In Connecticut, the Rules of Professional Conduct are "rules of reason"[155] and should be applied as such. In the authors' opinion, most of the rules as written are broad enough to encompass technological advances. The Rules provide guidelines to the profession, which require lawyers to represent clients consistent with core professionalism values, to serve as an officer of the respective judicial system and to enhance access to an independent and improved judicial branch to meet the needs of all society. The rules must be broad enough to encompass these principles, and not so narrow as to run afoul of the next generation of technology.

The Commission's efforts in the area of technology will be enlightening. However, the authors wonder whether the Commission's analysis will address the technology that will exist in three years, let alone the technology that will exist in ten years. This Commission itself has recognized this problem.[156] In the meantime, lawyers must examine new technology in light of the existing rules, or a good faith basis for an extension or modification of a rule.[157]

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[152] *Id.*

[153] *Id.*

[154] The ABA Model Rules of Professional Conduct were approved in 1982. Connecticut adopted the Model Rules without significant changes in 1986. Both the ABA and Connecticut Rules of Professional Conduct have been amended. The most significant changes occurred following the ABA Commission 2000.

[155] Connecticut Rules of Professional Conduct, Scope.

[156] The ABA Commission on Ethics 20/20, Preliminary Issues Outline (Nov. 18, 2009), *available at* http://www.abanet.org/ethics2020/outline.pdf.

[157] Rule 3.1 states, in part, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

The ABA Model Rule on Licensing of Foreign Legal Consultants (FLC)[158] which has been adopted in thirty-one states, including Connecticut,[159] allows limited legal representation by foreign lawyers. To the extent that foreign lawyers are able to practice across borders in non-United States territories with greater ease, there is a corresponding impact on shifting the global legal market to territories outside of the United States. The Commission will be considering the issues of confidentiality, conflicts of interest, choice of law, national licensure, and alternative business structures for law firms.[160] Such novel business concepts, which include non-lawyer equity partners, multidisciplinary businesses and publicly traded legal business firms, are already present outside of the United States.

V. CONCLUSION

While some things change, others seem to remain constant. The constant advances in technology and the move towards a global economy are leading to significant changes in how attorneys are regulated in the United States, and specifically in Connecticut. With all this change surrounding us, what remains unchanged is that practitioners in Connecticut fall prey to the same violations of the Rules year in and year out. Ultimately, successful practitioners will continue to provide top notch representation to their clients while continuing to monitor the myriad changes that are occurring and which will have a profound effect on the practice of law.

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[158] *Available at* http://www.abanet.org/cpr/mjp/FLC.pdf.

[159] Although most jurisdictions adopted the FLC as a part of the multijurisdictional practice rule of ethics, Connecticut adopted FLC as a court rule. *See* PRACTICE BOOK §§ 2-17 through 2-21.

[160] ABA Commission on Ethics 20/20, Preliminary Issues Outline, p. 9 (Nov. 18, 2009), *available at* http://www.abanet.org/ethics2020/outline.pdf.