PROFESSIONAL RESPONSIBILITY

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INTRODUCTION

The *Survey* year has produced incremental changes and developments in several areas including advertising, electronic presence, and the consequences of using electronic media, as well as several developments in disciplinary matters, court decisions, and

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Ethics Committee opinions which merit some discussion.

I. AMENDMENT OF THE ADVERTISING RULES

Readers of this *Survey* know that most amendments to New York's Code of Professional Conduct regarding lawyer advertising were invalidated after a challenge brought by Alexander & Catalano, P.C. immediately upon the effective date of the amended advertising rules on February 1, 2007.[1] The decision was carefully reviewed in a prior *Survey* article.[2] Subsequent to the decision of the district court, New York replaced Disciplinary Rule 2-101 with Rule 7.1 without substantive change.[3] The newly adopted Rules of Professional Conduct became effective on April 1, 2009.[4] The district court decision was affirmed on appeal by the Second Circuit;[5] as the court noted, its determination was unaffected by the adoption of the new rule during the pendency of the appeal.[6] A further review of the Second Circuit decision was denied.[7]

Thereafter, Rule 7.1 was amended to eliminate all the objectionable content-based restrictions contained in the earlier version.[8] Prohibitions in the rule now number only four:

> (c) An advertisement shall not:
>
> (1) include an endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;
>
> (2) include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;
>
> (3) use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;

1. *See generally* Alexander v. Cahill, 634 F. Supp. 2d 239 (N.D.N.Y. 2007), *aff'd in part, rev'd in part*, 598 F.3d 79 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 820 (2010).

2. Lydia Arnold Turnipseed, *Professional Responsibility, 2006-07 Survey of New York Law*, 58 SYRACUSE L. REV. 1101, 1103-10 (2008).

3. *See generally* N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (2009); N.Y. RULES OF PROF'L CONDUCT R. 7.1 (2010).

4. *See generally* N.Y. RULES OF PROF'L CONDUCT R. 7.1.

5. *Alexander*, 598 F.3d. at 83; *see generally*, James T. Townsend, *Professional Responsibility, 2009-10 Survey of New York Law*, 61 SYRACUSE L. REV. 905 (2011).

6. *Alexander*, 598 F.3d. at 103 n.3.

7. Cahill v. Alexander, 131 S. Ct. 820, 820 (2010).

8. N.Y. RULES OF PROF'L CONDUCT R. 7.1(c).

(4) be made to resemble legal documents.[9]

The overarching principle governing lawyer advertising, solicitations, and any general web presence remains unaltered by these decisions and the resulting rule changes. The focus of any analysis begins with Rule 7.1(a) and prohibits the use, dissemination, or participation in the use of any advertising that "contains statements or claims that are false, deceptive or misleading."[10] Such statements fall outside of the protection afforded commercial speech under the various tests reviewed in the *Alexander* decisions and the previous *Survey* articles.[11]

II. SOME PERILS OF ADVERTISING THROUGH WEBSITES

The American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 10-457 which addressed very common concerns about a lawyer's use of and reliance on websites.[12] Lawyers have recognized the advantage of providing to anyone with a computer access to information about the law and that lawyer's law firm. Unlike the telephone and other directory advertising, website advertising offers a round-the-clock market presence. Websites also provide a means for the public to have legal concerns addressed. However, "[f]or lawyers, website marketing can give rise to the problem of unanticipated reliance or unexpected inquiries or information from website visitors seeking legal advice."[13]

Advertising was commonplace in the early years of the United States. John Marshall, prior to his becoming chief justice, advertised in the *Virginia Gazette* along with other leading lawyers of his day.[14] Abraham Lincoln is known to have solicited clients during his years in private practice.[15] For centuries then, lawyers have sought through current methods to provide information about themselves and their law firms, and a greater knowledge in the public of the legal needs and

9. *Id.*

10. *See id.* 7.1(a).

11. *See* Turnipseed, *supra* note 2; Townsend, *supra* note 5; Alexander v. Cahill, 634 F. Supp. 2d 239, 243 (N.D.N.Y. 2007) *aff'd in part, rev'd in part*, 598 F.3d 79 (2d Cir. 2010), *cert denied*, 131 S. Ct. 820 (2010).

12. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010).

13. *Id.*

14. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 101 (Henry Holt & Co., Inc. 1996) (citing THE PAPERS OF JOHN MARSHALL, 1775-1788, at 126-27 (Herbert A. Johnson ed., Univ. of N.C. Press 1974) (1784)).

15. *See* DAVID HERBERT DONALD, LINCOLN 148, 155 (Simon & Schuster 1995).

services offered.

The Committee reviewed four components of website content: information about the lawyers, information about the law, inquiries from prospective clients, and appropriate disclaimers to visitors of the website.[16] These four should be part of every lawyer's thought process when creating an advertising and communication plan regardless of the media used. Advertising, as governed by Rule 7.1, is defined as, "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm."[17] Beyond the prohibition against false or misleading statements,[18] advertising websites may contain biographical information,[19] names of clients regularly represented,[20] bank references,[21] and information regarding fees for services.[22] The ABA Committee clearly states:

> Any of this information constitutes a "communication about the lawyer or the lawyer's services," and is therefore subject to the requirements of Model Rule 7.1 as well as the prohibitions against false and misleading statements in Rules 8.4(c) (generally) and 4.1(a) (when representing clients). Together, these rules prohibit false, fraudulent or misleading statements of law or fact.[23]

The opinion points out that the obligation to ensure compliance extends to "managerial lawyers in law firms by obligating them to make reasonable efforts to ensure the firm has in place measures giving reasonable assurance that all firm lawyers and nonlawyer assistants will comply with the rules of professional conduct."[24]

The ease of creating website advertising can also be its downfall; unlike directory listings which might be updated only once a year, a website can be updated easily.

However, because it can be updated, it must be updated on a regular basis to avoid misleading visitors to the website.[25] Updated and

16. Op. 10-457, *supra* note 12.

17. N.Y. RULES OF PROF'L CONDUCT R. 1.0(a) (2011). "Advertising" does not include communication to existing clients and other lawyers. *Id.*

18. *Id.* 7.1(a), 4(c).

19. *Id.* 7.1(b)(1).

20. *Id.* 7.1(b)(2).

21. N.Y. RULES OF PROF'L CONDUCT R. 7.1(b)(3).

22. *Id.* 7.1(b)(4).

23. Op. 10-457, *supra* note 12.

24. *Id.*; *cf.* N.Y. RULES OF PROF'L CONDUCT Rs. 5.1, 5.3. Also, R. 7.1(k) contains specific approval and retention requirements. *See id.* 7.1(k).

25. Op. 10-457, *supra* note 12.

currently valid information includes client permission for mention in a firm's website because, "[w]ebsite disclosure of client identifying information is not normally impliedly authorized because the disclosure is not being made to carry out the representation of a client, but to promote the lawyer or the law firm."[26]

A. Education or Advice?

The meteoric rise in the use of the internet has created many benefits for the general public. For years, lawyers have used more traditional routes to educate the public about the existence of legal problems. Comment [1] under Rule 7.1 states:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of competent legal counsel. Hence, important functions of the legal profession are to educate people to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.[27]

Lawyer websites can also assist the public in understanding the law and in identifying when and how to obtain legal services.

> Legal information might include general information about the law applicable to a lawyer's area(s) of practice, as well as links to other websites, blogs, or forums with related information. Information may be presented in narrative form, in a "FAQ" (frequently asked questions) format, in a "Q & A" (question and answer) format, or in some other manner.[28]

Like traditional means of advertising, websites can blur the lines between education and legal advice, and presentations which may lead to the retention of the lawyer may cross from one permitted function to an impermissible one. The rules clearly permit a secondary purpose of educational activities and make it clear that nothing precludes the lawyer from obtaining employment as the result of an educational presentation.[29] The ABA Opinion offers insight into establishing the line: "[t]o avoid misleading readers, lawyers should make sure that legal information is accurate and current, and should include qualifying statements or disclaimers that 'may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a

26. *Id.*
27. N.Y. RULES OF PROF'L CONDUCT R. 7.1 cmt. 1.
28. Op. 10-457, *supra* note 12.
29. N.Y. RULES OF PROF'L CONDUCT R. 7.1, cmt. 3.

prospective client.'"[30] There is a natural tendency in such an educational presentation for lawyers to answer fact-specific questions which might then cross the line to providing legal advice. "However, a lawyer who poses and answers a hypothetical question usually will not be characterized as offering legal advice."[31]

How does this advice work in the world of electrons? The ABA Opinion offers:

> To avoid misunderstanding, our previous opinions have recommended that lawyers who provide general legal information include statements that characterize the information as general in nature and caution that it should not be understood as a substitute for personal legal advice.
>
> Such a warning is especially useful for website visitors who may be inexperienced in using legal services, and may believe that they can rely on general legal information to solve their specific problem.[32]

B. Inquiries by Prospective Clients; Unintended Consequences of Websites

Rule 1.18, "Duties to Prospective Clients," is new territory for most states, including New York. As of 2007, it had been adopted by just over thirty states.[33] The New York version states:

> (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client."
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

30. Op. 10-457, *supra* note 12.

31. *Id.*

32. *Id.*

33. Kathryn A. Thompson, *The Too Much Information Age*, 93 A.B.A. J. 28, 28 (2007).

(d) When a lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;

(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the law firm would be able to provide competent and diligent representation in the matter.

(e) A person who:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client within the meaning of paragraph (a).[34]

Note that subsection (e) is peculiar to New York. The focus of this rule in most jurisdictions is the unintended and unwanted conflict of interest. "Prospective clients"[35] may provide "disqualifying information"[36] and the attorney receiving the information may or may not be disqualified depending on whether the prospective client's inquiry falls within the subsections under Rule 1.18(d).[37]

The Association of the Bar for the City of New York confronted

34. N.Y. RULES OF PROF'L CONDUCT R. 1.18(a).
35. *Id.*
36. *Id.* 1.18(c).
37. *Id.* 1.18(d)(3).

the problem in responding to an inquiry before the adoption of the new rule.[38] In its Opinion 2001-1, the Association stated:

> It does not follow, however, that the duty of confidentiality that may apply to a prospective client necessarily mandates that a law firm be disqualified from representing an existing client in the matter whose interests are adverse because a prospective client unilaterally transmits confidential information to the law firm . . . .
>
> In other situations that precede the formation of an attorney-client relationship, in which the lawyer voluntarily participates, such as in preliminary meetings, including beauty contests, or telephone conversations, the lawyer can and should appraise the prospective client that no information the client considers confidential should be imparted, because it will not necessarily be treated as confidential, unless and until conflicts are cleared and the lawyer accepts the matter. In the event that no such warning is given and the lawyer does receive confidential information before an attorney-client relationship is formed that could be significantly harmful to the client, the lawyer will be precluded from representing a client whose interests are materially adverse to the prospective client in a substantially related matter unless the lawyer actually reviewing the information is screened or consent is obtained . . . .
>
> Application of Rule 1.8 here would lead us to conclude that the law firm receiving the disclosed information could use it against the prospective client. Indeed, it could be reasonably, if not forcefully, argued that the prospective client's cavalier treatment of her own information undermines any bona fide claim that others should be required to afford it confidentiality protection, and the lawyer's obligation of zealous advocacy would suggest that a lawyer should be able to exploit the prospective client's mistake and make available to another client everything he learns.[39]

But, what is meant by "discuss?" What if an inquirer imparts more information than the attorney would have wanted? New York's version of Rule 1.18 has added the notion that there be a reasonable expectation that the lawyer is willing to have a discussion about forming an attorney-client relationship.[40] Comment [2] provides:

> Not all persons who communicate information to a lawyer are entitled to protection under this Rule. As provided in paragraph (e), a person who communicates information unilaterally to a lawyer, without any

38. Ass'n of the Bar of N.Y.C., Comm. on Prof'l & Jud. Ethics, Formal Op. 2001-1 (2001).

39. *Id.*

40. N.Y. RULES OF PROF'L CONDUCT R. 1.18(e).

> reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). Similarly, a person who communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule. A lawyer may not encourage or induce a person to communicate with a lawyer or lawyers for that improper purpose.[41]

Other states have placed emphasis on the inquirer's state of mind.[42] Does the person have a reasonable expectation that the information will remain confidential? There is no indication that New York will or will not follow these other states.

But, if the attorney has done nothing more than publish contact information, is there a reasonable expectation of any relationship or of confidentiality? If the firm's website invites more, or does not add an appropriate disclaimer in a visible location, the protection of subsection (e) may not be available.[43] "Lawyers have a similar ability on their websites to control features and content so as to invite, encourage, limit, or discourage the flow of information to and from website visitors."[44] The ABA opinion concluded with the advice, "[w]arnings or cautionary statements on a lawyer's website can be designed to and may effectively limit, condition, or disclaim a lawyer's obligation to a website reader."[45]

Not every inquiry to a lawyer in New York results in a lawyer-client relationship. Often, a lawyer may receive requests that are unsolicited and not expected. The New York State Bar Ethics Committee has stated, "[n]o provision of the New York Rules of Professional Conduct imposes a general obligation upon an attorney to promptly answer unsolicited mail—or to answer it at all."[46] In most situations, the New York Bar Association's Ethics Committee has held that no "lawyer-client relationship" ensues.[47] Warnings on a website that convey to an inquirer that any information given during that contact may not be confidential are certain to negate the establishment of prospective client or an attorney-client relationship: "[s]uch warnings or

41. *Id.* 1.18(e) cmt. 2.

42. *See, e.g.*, San Diego Cnty. Bar Ass'n, Op. 2006-01 (2006); State Bar of Ariz. Comm. on Rules of Prof'l Conduct, Op. 02-04 (2002).

43. Op. 10-457, *supra* note 12.

44. *Id.*

45. *Id.*

46. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 833, ¶ 2 (2009).

47. *Id.* ¶ 4.

statements may be written so as to avoid a misunderstanding by the website visitor that (1) a client-lawyer relationship has been created; (2) the visitor's information will be kept confidential; (3) legal advice has been given; or (4) the lawyer will be prevented from representing an adverse party."[48]

C. Use of photographs

Another advertising technique that law firms have used on their websites is the inclusion of photographs of the firm showing the non-lawyer staff as well as the lawyers. The New York State Bar Association Ethics Committee, following the lead of other states,[49] opined that the use of non-legal personnel in firm photographs is permitted.[50] That opinion followed an historical view that non-legal personnel may appear on letterheads and business cards as long as the status of the person is made clear.[51] The Committee concluded: "[a]n advertisement for a law firm may feature a photograph that includes non-lawyer employees of the firm provided that the advertisement, viewed as a whole, is not misleading about the size of the firm, its ethnic or gender diversity, or whether the people in the photographs are lawyers."[52]

D. Limitation on Firm Names

One issue left unresolved by the Second Circuit decision in *Alexander* is the prohibition on use of trade names in firm names beyond the use of attorneys' names.[53] Under Rule 7.4(a):

> A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law.[54]

However, when combined in a firm's name, the name of the lawyer and a practice area constitute an impermissible trade name under Rule 7.5.[55] The Committee was asked whether the use of a name such as "The

48. Op. 10-457, *supra* note 12.

49. *See, e.g.*, Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 92-27 (1992).

50. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 851 (2011).

51. *Id.*; *see also* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 500 (1978); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 640 (1992).

52. Op. 851, *supra* note 50.

53. *See* Turnipseed, *supra* note 2, at 1107.

54. N.Y. RULES OF PROF'L CONDUCT R. 7.4(a) (2011).

55. *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 869 (2011).

Smith Tax Law Firm" is improper.[56] The opinion observed that names "are subject to more stringent regulations than the regulations that govern advertising."[57] It then addressed Rule 7.5's requirement that, "a lawyer in private practice shall not 'practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm.'"[58] The Committee concluded that, "Mr. Smith may not use the name 'The Smith Tax Law Firm' because including a practice area in the firm name renders it an impermissible trade name and misleading to the extent it implies that there is an officially recognized entity called a 'tax law firm.'"[59] The Committee also addressed a related issue: whether a sole practitioner should adopt the word "firm" as part of the name.[60] The Committee stated, "the use of the word '[f]irm' would not suggest more that more than one lawyer is involved."[61]

III. SOLICITATION BY SOCIAL MEDIA

Rule 7.3 permits the use of targeted advertising under certain restrictions; solicitation is defined as an:

> [A]dvertisement initiated by and on behalf of a lawyer or law firm that is directed to . . . a specific recipient or a group of recipients, or their family members or their legal representatives, the primary purpose of which is the retention of the lawyer or the law firm, and a significant motive for which is pecuniary gain.[62]

New York has not addressed the solicitation ban against "real time" contact[63] through the use of social media. However, the Philadelphia Bar Association Professional Guidance Committee held that Rule 7.3 of the Pennsylvania Rules of Professional Conduct does not bar the use of social media for solicitation purposes.[64]

> Furthermore, even assuming that the recipient is sitting at his or her desktop when the e-mail comes in, he or she can exercise a choice of whether or not to open it; once opened, whether or not to read it

56. *Id.*

57. *Id.*

58. *Id.* (citing N.Y. RULES OF PROF'L CONDUCT R. 7.5(b) (2011)).

59. *Id.*

60. Op. 869, *supra* note 55.

61. *Id.* (citing N.Y. RULES OF PROF'L CONDUCT R. 1.0(h) (defining "law firm" to include a "sole proprietorship")).

62. N.Y. RULES OF PROF'L CONDUCT R. 7.3(b).

63. *Id.* 7.3(a).

64. *See* Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2010-6 (2010).

> carefully; and once read, to either respond at the moment, or later, or never.[65]

The Committee further observed that, "everyone realizes that, like targeted mail, e-mails, blogs and chat room comments can be readily ignored, or not, as the recipient wishes."[66] Here, Pennsylvania shows its willingness to adapt the Rules of Professional Conduct to modern technology. Whether New York might reach the same conclusion is impossible to predict. However, the last Comment under its Rule 7.3 does state, "[o]rdinary e-mail and websites are not considered to be real time or interactive communication."[67]

IV. SOCIAL NETWORKING VARIATIONS

The increasing use of social networking sites such as LinkedIn and Facebook have led to creative methods to attract visitors to these sites. One lawyer inquired to the New York Ethics Committee whether "a lawyer [can] offer a prize as an incentive to connect to the inquirer on social networking sites."[68] The Committee considered the prize offer first under Rule 7.1 and held that the offering of a prize may not be advertisement:

> If the prize offer is merely posted on the inquirer's own social networking sites and people gain a chance to win the prize simply by connecting with the inquirer—not for retaining the inquirer—it is not likely to be an "advertisement" even the site actually identifies the inquirer as an attorney.[69]

If, though, the prize itself is related to the attorney's services, the offer would be an advertisement.[70] If the prize offer on a social media site is an advertisement, it may also be a solicitation and, thus, may fall under the requirements of Rule 7.3.[71] The Committee then concluded "if the attorney does not communicate the offer in person, by telephone, or by a real-time or interactive computer-assisted communication . . . then the communications about the prize offer are not prohibited by Rule 7.3(a)."[72]

65. *Id.*
66. *Id.*
67. N.Y. RULES OF PROF'L CONDUCT R. 7.3 cmt. 9.
68. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 873 (2011).
69. *Id.*
70. *Id.*
71. *See id.*
72. *Id.*

V. CLOUD COMPUTING

As the use of the internet for data retrieval, advertising, and communications increases, the cost and ability to store and access data from multiple locations has become more important. The State Bar's Ethics Committee was asked to opine on the use of remote storage for client files.[73] It noted, "[v]arious companies offer online computer data storage systems that are maintained on an array of Internet servers located around the world. (The array of Internet servers that store the data is often called the 'cloud.')"[74] The Committee was asked about the use of the "cloud" to store client confidential information thereby providing a backup and protection against accidental loss of the clients' information.[75] Its opinion relied on an earlier opinion which addressed "the duty to preserve a client's confidential information when transmitting such information electronically. . . [and] . . . concluded that lawyers may transmit confidential information by e-mail, but cautioned that 'lawyers must always act reasonably in choosing to use e-mail for confidential communications.'"[76]

The Committee noted the lawyer's obligation to take reasonable steps to preserve the confidentiality of protected client information and "warned that the exercise of reasonable care may differ from one case to the next."[77] In the present inquiry, "[t]he online data storage system is password-protected and the data stored in the online system is encrypted."[78] Thus, the Committee repeated the test found in the comments, "a lawyer 'must take reasonable precautions' to prevent information coming into the hands of unintended recipients when transmitting information relating to the representation, but is not required to use special security measures if the means of communicating provides a reasonable expectation of privacy."[79] It also reminded lawyers that, "[t]echnology and the security of stored data are changing rapidly. Even after taking some or all of these steps (or similar steps), therefore, the lawyer should periodically reconfirm that the provider's security measures remain effective in light of advances in technology."[80]

73. N.Y. State Bar Ass'n. Comm. on Prof'l Ethics, Op 842, ¶ 1 (2010).
74. *Id.* ¶ 2.
75. *See id.*
76. *Id.* ¶ 6 (quoting N.Y. State Bar Ass'n. Comm. on Prof'l Ethics, Op 709 (1998)).
77. *Id*. (citing Op. 709, *surpa* note 77).
78. Op. 842, *supra* note 73, ¶ 2.
79. *Id*. ¶ 6 (quoting N.Y. RULES OF PROF'L CONDUCT R. 1.6 cmt. 17 (2011)).
80. *Id.* ¶ 10.

In conclusion, New York has followed other states' opinions[81] and permitted the use of "cloud storage" with certain conditions: "reasonable care to ensure that confidentiality is maintained; reasonable care to prevent others whose services are utilized by the lawyer from disclosing or using confidential information of a client"; an obligation to "stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information"; and last, "monitor the changing law of privilege to ensure that storing information in the 'cloud' will not waive or jeopardize any privilege protecting the information."[82] As long as these four considerations are met, lawyers in New York can meet their ethical obligations.

VI. CONFIDENTIALITY OF ELECTRONIC COMMUNICATIONS

The perils of emails extend beyond a lawyer's obligation to protect confidential client information. The expectation of confidentiality of an individual's communication was tested in *Parnes v. Parnes*,[83] a matrimonial action in which one party sought to use and obtain disclosure of emails between the other party and his lawyer.[84] The defendant husband had communicated about a possible divorce with an attorney friend from his computer in the common room of the marital residence.[85] His wife discovered the existence of these emails, as well as the password to gain access to the husband's email account by reading documents that were left on the desk near the computer.[86] The appellate division affirmed the determination of the trial court, finding that the emails were protected lawyer-client communications, and stating:

> On the other hand, defendant took reasonable steps to keep the e-mails on his computer confidential. Defendant set up a new e-mail account and only checked it from his workplace computer. Leaving a note containing his user name and password on the desk in the parties' common office in the shared home was careless, but it did not constitute a waiver of the privilege. Defendant still maintained a reasonable expectation that no one would find the note and enter that information into the computer in a deliberate attempt to open, read and

81. *See id.* ¶ 7.
82. *Id.* ¶ 13.
83. 80 A.D.3d 948, 915 N.Y.S.2d 345 (3d Dep't 2011).
84. *See generally id.* at 948-49, 915 N.Y.S.2d at 348-49.
85. *Id.* at 950-51, 915 N.Y.S.2d at 348-49.
86. *Id.*, 915 N.Y.S.2d at 349.

print his password-protected documents.[87]

Although *Parnes* forgave the husband's carelessness in protecting his password, it implied a warning to lawyers and clients to take more secure measures to protect the confidentiality of emails.[88] The Second Department was not as forgiving in *Willis v. Willis*.[89] Under similar circumstances, that court found, "it cannot be said that the plaintiff had 'a reasonable expectation of confidentiality' in the e-mail communications between herself and her attorneys, which communications were freely accessible by third parties."[90] The family computer on which the offending messages appeared "was regularly used by the children," and "the plaintiff used the same e-mail account to communicate with her attorneys."[91] Thus, the court concluded that the communications which would have otherwise been protected by the attorney-client privilege were subject to discovery.[92]

VII. IN-HOUSE COUNSEL RULE

Last year's *Survey* article contained a reference[93] to the State Bar Ethics Committee Opinion 835, which avoided an answer to an open question about the ability of an attorney admitted and in good standing in another jurisdiction to come into New York as in-house counsel for a large corporation based in New York.[94] The Opinion concluded that the question was not governed by the Rules of Professional Conduct, but rather was a matter of law.[95] New York State Bar Association House of Delegates did make a proposal to the Joint Administrative Board seeking the adoption of a rule permitting admission under certain circumstances.[96] That proposed rule was adopted and is now part of Rule 522.[97]

The new rule sets forth a simple registration process for attorneys employed full time for private entities in New York who are in good standing in another state.[98] An attorney must submit only four items to

87. *Id.* at 951, 915 N.Y.S.2d at 349.
88. *See Parnes*, 80 A.D.3d at 951, 915 N.Y.S.2d at 349.
89. 79 A.D.3d 1029, 914 N.Y.S.2d 243 (2d Dep't 2010).
90. *Id.* at 1031, 914 N.Y.S.2d at 245.
91. *Id.* at 1030, 914 N.Y.S.2d at 244.
92. *See id.* at 1031, 914 N.Y.S.2d at 245.
93. Townsend, *supra* note 5, at 923.
94. *See* N.Y. State Bar Ass'n. Comm. on Prof'l Ethics, Op. 835, ¶ 1 (2009).
95. *Id.* ¶ 8.
96. *See* NYSBA ST. BAR NEWS, Nov. 2010, at 1.
97. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 522 (2010).
98. *Id.* § 522.2.

the clerk of the appellate division where the attorney will work or reside.[99] The four items are a certificate of good standing, a letter from the grievance committee of the home jurisdiction, an affidavit agreeing to be subject to a New York grievance committee and that the legal duties meet the requirements of the rule, and a supporting statement from the employer attesting to the nature of the employment in this State.[100] The services permitted under this registration process are limited to in-house legal advice to the entity "on matters directly related to the attorney's work for the employer entity."[101] No other outside appearances or services are permitted such as, appearance before a tribunal or personal advice on behalf of others.[102] The new rule does not address how an attorney registered under this process, and subject to New York's Rules, might meet the exhortation to provide pro bono services,[103] but that is a concern for another year.

An interesting variation on the problems faced by in-house counsel prior to the adoption of the registration rule is the protection of communications between the employer corporation and its in-house counsel. Even though these attorneys are not admitted in New York and thus technically not "attorneys," a Southern District decision protected communications between them.[104] Gucci employed an attorney who was admitted in California and district courts in that state, but not in New York or New Jersey where he was providing services to Gucci.[105] The court found that Gucci had a reasonable basis for believing it was communicating with its attorney and thus granted these communications protection from discovery.[106]

VIII. CONFLICTS OF INTERST

A. Estate Planning

Just as last year's *Survey* year was ending, the Court of Appeals issued a major decision changing the liability of estate planning attorneys to their clients.[107] *Schneider* presented the issue, "whether an

99. *Id.*

100. *Id.*

101. *Id.* § 522.4(a).

102. 22 N.Y.C.R.R. 522.4(b).

103. *See generally* N.Y. RULES OF PROF'S CONDUCT R. 6.1 (2011).

104. *See* Gucci Am., Inc. v. Guess?, Inc., 271 F.R.D. 58 (S.D.N.Y. 2010).

105. *Id.* at 61.

106. *Id.* at 81.

107. *See generally* Schneider v. Finnmann, 15 N.Y.3d 306, 933 N.E.2d 718, 907 N.Y.S.2d 119 (2010).

attorney may be held liable for damages resulting from negligent representation in estate tax planning that causes enhanced estate tax liability."[108] The decision overturned a previous requirement of privity; "[w]e now hold that privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney."[109] With that, the Court held "that a personal representative of an estate may maintain a legal malpractice claim for such pecuniary losses to the estate."[110]

The *Schneider* decision raised several questions, including the potential ethical conflict representing "an executor in connection with the administration of any estate that the attorney had planned."[111] The Committee answered the question beginning with an analysis of Rule 1.7, which prohibits a lawyer from representing a client if "there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or other personal interests."[112] The opinion recognized three situations which might arise: "that he (the lawyer) may have committed legal malpractice and that the executor would have a colorable malpractice claim against him . . . [t]he lawyer at the outset . . . does not perceive any basis for claiming that he (the lawyer) committed malpractice"; or, "[t]he lawyer did not initially perceive any basis for a legal malpractice claim against him, but has come to realize during the representation" that one might exist.[113]

Addressing the first situation, the Committee opined, "the preparer can neither ask for the executor's consent to the conflict nor represent the executor if the executor volunteers consent to the conflict."[114] This non-consentable conflict will be imputed to all lawyers in the disqualified lawyer's firm.[115] The second situation had a simpler and different answer: "[i]f the preparer/drafter perceives no apparent basis for a claim of malpractice, then no 'significant risk' arises that the lawyer's professional judgment on behalf of the executor will be adversely affected . . . ."[116] In the third situation, where the conflict arises during the representation, the opinion likens the outcome to the

108. *Id.* at 308, 933 N.E.2d at 719, 907 N.Y.S.2d at 120.
109. *Id.* at 309, 933 N.E.2d at 720, 907 N.Y.S.2d at 121.
110. *Id.* at 308, 933 N.E.2d at 719, 907 N.Y.S.2d at 120.
111. N.Y. State Bar Ass'n. Comm. on Prof'l Ethics, Op. 865, ¶ 4 (2011).
112. *Id.* ¶ 5 (citing, N.Y. RULES OF PROF'L CONDUCT R. 1.7(a) (2011)).
113. *Id.* ¶ 6.
114. *Id.* ¶ 8.
115. *Id.*
116. Op. 865, *supra* note 111, ¶ 10.

first situation saying, "the lawyer is in the untenable position of having to counsel the executor on whether to sue the lawyer."[117] The Committee did not view *Schneider* as a change in conflicts principles and concluded:

> if the lawyer does perceive a colorable claim for legal malpractice before or during the representation, then the conflict is nonconsentable and the lawyer (and all other lawyers associated with his firm) must decline or withdraw from the representation and the lawyer must inform the executor of the facts giving rise to the claim.[118]

The lack of privity was the deciding factor in a case involving estate planning services rendered to a husband and wife. In *Leff v. Fulbright & Jaworski, L.L.P.*, the first case decided after *Schneider*, the plaintiff brought a malpractice action against the law firm that did her and her late husband's estate planning.[119] She believed that she was jointly represented and speculated that "her inheritance would have increased if defendants had advised her late husband about a separation agreement that required him to leave half of his probated estate to his son."[120] The First Department found that, "[d]efendants demonstrated that while they represented plaintiff in her estate planning and other matters, she was not in privity with them with regard to her late husband's estate planning."[121] This lack of privity was fatal to her claim for damages.[122] Similarly, the court refused to apply the "approaching privity" standard because "there is no evidence that defendants knew and intended that their advice to plaintiff's late husband was aimed at affecting plaintiff's conduct or was made to induce her to act."[123]

B. Disqualification

One case of interest was decided in the *Survey* year addressing "the unusual circumstance of a law firm seeking to simultaneously represent a defendant and a cooperating witness in the same criminal proceeding."[124] In a complicated multi-state proceeding regarding an alleged tax fraud conspiracy, the defendant's counsel was disqualified

117. *Id.* ¶ 11.

118. *Id.* ¶ 15.

119. 78 A.D.3d 531, 532, 911 N.Y.S.2d 320, 321 (1st Dep't 2010).

120. *Id.* at 532-33, 911 N.Y.S.2d at 321. The speculative nature of damages was deemed to be an additional flaw in plaintiff's case. *Id.* at 533, 911 N.Y.S.2d at 321.

121. *Id.* at 532, 911 N.Y.S.2d at 321.

122. *Id.*

123. *Leff*, 78 A.D.3d at 533, 911 N.Y.S.2d at 321.

124. United States v. Daugerdas, 735 F. Supp. 2d 113, 116 (S.D.N.Y. 2010).

because the law firm representing him also, through another office and other attorneys, was representing a witness to be called by the prosecution.[125] The law firm had a limited representation agreement for one of the actions and "ha[d] erected an ethical wall between the attorneys in its Dallas and Chicago offices 'such that there is no sharing of client confidences, non-public documents, privileged information or attorney work-product.'"[126] Noting that the witness would not waive any conflict, the government sought disqualification of the defendant's law firm because of the non-waivable conflict.[127] This decision is somewhat unusual, in that it begins with a familiar discussion of the constitutional right of a defendant in a criminal case to counsel of his choice.[128] The court noted that this right "is one of constitutional dimension, but it is not absolute."[129] It then reviewed the predicament that the lawyers were in because of the divergence of the loyalty to each client, and the actual conflict of the law firm on the motion to disqualify.[130] The court noted that the law firm "does not identify a single case in which a court permitted a law firm to *simultaneously* represent a defendant and a cooperating witness with adverse interests in the same criminal proceeding. The explanation for this seems clear: most firms do not entertain this type of concurrent representation."[131]

The disqualification can extend to the representation of former clients as well. Rule 1.9 prohibits an attorney from representing a current client whose interests are materially adverse to a former client absent consent in matters which are "substantially related."[132] The meaning of this phrase is elaborated in a Comment:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that *there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter*.[133]

125. *Id.* at 114.

126. *Id.* at 115.

127. *Id.*

128. *Id.*

129. *Daugerdas*, 735 F. Supp. 2d at 116 (quoting United States v. Fisher, 563 F. Supp. 1369, 1370 (S.D.N.Y. 1983)).

130. *Id.*

131. *Id.* at 118.

132. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (2009).

133. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 871 (2011) (quoting N.Y. RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2011)).

The Ethics Committee applied this language in order to guide an inquiring attorney who might oppose a former client in a family law dispute.[134] The two actions "plainly do not involve 'the same transaction or legal dispute,'"[135] but the Committee continued the matters might fall under Rule 1.9 and it applied the test "whether a reasonable lawyer would perceive a sizeable *risk* that a competent lawyer handling the prior matter would *normally* have gained confidential information about the former client that could be turned to the present client's advantage in the matter against the former client."[136] The decision for the attorney would thus turn on the reasonable lawyer's perception that such confidential information could be used against the former client.[137]

IX. PRIVILEGE SHIELDS COMMUNICATIONS TO FIRM'S IN-HOUSE COUNSEL

While it is clear that communications between a lawyer and client are shielded by the lawyer-client privilege,[138] whether the communication to a firm's in-house counsel enjoys the same protection has now been answered in *Equal Employment Opportunity Commission v. Kelley Drye & Warren, LLP*.[139] The case drew national attention for its challenge to the law firm's compensation system by its older partners, who were forced to accept a reduction in compensation.[140] The complainant before the Equal Employment Opportunity Commission (EEOC) was one of the firm's senior attorneys, who had communications with the firm's in-house conflict of interest counsel regarding the representation of a client in a matter unrelated to the EEOC matter.[141] The in-house counsel's recommendation was addressed to members of the firms' executive committee.[142] That document eventually came into the EEOC's possession through the

134. *Id.*

135. *Id*.

136. *Id.*

137. *Id.*

138. *See* N.Y. C.P.L.R. 4503 (McKinney 2007); *see also* N.Y. COMP. CODE R. & REGS. tit. 22, § 1200 (2009).

139. *See* 2011 WL 3163344 (S.D.N.Y. 2011); *Privilege Shields Memorandum Within Law Firm From Partner to In-House Counsel on Conflict Issue*, 27 LAW. MANUAL ON PROF. CONDUCT (ABA/BNA) Feb. 16, 2011, at 107.

140. *Privilege Shields Memorandum*, *supra* note 139. The matter eventually settled by Kelley Drye's change in policy.

141. *Id.*

142. *Id.*

complainant, who had disagreed with the firm's decision.[143] Kelley Drye claimed the document was privileged, and sought its return.[144] The magistrate judge agreed with the firm "that the memorandum is covered by the attorney-client privilege because it encompasses communications between a client—the law firm—and an attorney—the firm's in-house counsel—for the purpose of facilitating the rendition of legal services by the attorneys."[145]

The court noted that the in-house conflicts counsel "appears to have had a pre-assigned role as legal advisor to the law firm and to have played that role in this instance"[146] and thus extended the privilege to those communications saying, "[w]hen an entity is represented by counsel, that attorney's communications with personnel affiliated with that entity—be they management or employees–are covered by the privilege if the communications related to the attorney's performance of his counseling function."[147] Thus, the communications between lawyer and client are treated no differently when the lawyer is independent or integrated within the represented entity.

X. FIDUCIARY OBLIGATION TO CLIENTS

An interesting twist on the relationship between lawyers and their client is found is a case where the client turned on his lawyer after a purchase offer for certain real estate failed and, thereafter, that real estate and more was purchased by one of the lawyers.[148] The plaintiff instituted an action against their former law firm, claiming that it had breached its "fiduciary duty to plaintiff by allegedly using confidential information obtained during their representation of plaintiff to acquire the Kime property."[149] This case is noteworthy in that the court began with a discussion of a lawyer's fiduciary obligation to his clients: "the attorney-client relationship 'imposes on the attorney the duty to deal fairly, honestly and with undivided loyalty . . . including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the

143. *Id.*

144. *Id.*

145. *Privilege Shields Memorandum*, *supra* note 139.

146. *Id.*

147. Equal Employment Opportunity Comm'n v. Kelley Dry & Warren LLP, 2011 WL 280804 at *2 (S.D.N.Y. 2011).

148. *See generally* Country Club Partners, LLC v. Goldman, 79 A.D.3d 1389, 913 N.Y.S.2d 803 (3d Dep't 2010). "Kime" is the owner of the property. *Id.* at 1390, 913 N.Y.S.2d at 804.

149. *Id.*

lawyer's.'" [150] On this principle, the appellate division found that the facts supported the trial court's grant of summary judgment dismissing the plaintiff's cause of action.[151] The signal fact was that the owner of the property had advised the plaintiff that it was interested in selling all of its property, not a portion as proposed by the plaintiff; given this gap, the negotiations with the plaintiff ceased.[152] Thereafter, the owner entertained competing offers from other parties including the plaintiff's former attorney.[153] Eventually, the owner decided to accept the attorney's offer over the competing offers because it was the "stronger offer."[154]

"Equally fatal to plaintiff's claim is its inability to establish 'actual and ascertainable damages' . . . [by] plaintiff claim[ing] damages in the amount of $400,000, [but] . . . provided no evidence . . . [of] actually . . . [spending] any money in its unsuccessful effort to acquire an interest in the Kime property."[155] Based on the speculative nature of the damages incurred, the Third Department affirmed the grant of summary judgment in the law firm's favor.[156]

In another matter in the Second Department, the defendant-law firm did not fare quite so well.[157] In *Selechnik v. Law Office of Howard R. Birnbach*,[158] the appellate division refused to dismiss a claim of fraud and negligent hiring and retention by a law firm of an employee who evidently held himself out to others as an attorney without the firm's actual knowledge.[159] An employee of the defendant-law firm received large checks as payment for separate real estate transactions even though no closings occurred in either of those transactions.[160] The plaintiffs claimed, and provided an affidavit from their attorney, that they believed the person with whom they were dealing on behalf of the law firm was a licensed attorney.[161] After noting that the standard on a motion to dismiss was one of liberal construction, the court held there

150. *Id.* at 1391, 913 N.Y.S.2d at 805 (quoting Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1, 9, 856 N.Y.S.2d 14, 21 (1st Dep't 2008)).

151. *Id.*

152. *Country Club Partners, LLC*, 79 A.D.3d at 1392, 913 N.Y.S.2d at 805.

153. *Id.*

154. *Id.*, N.Y.S.2d at 805-06.

155. *Id.*, N.Y.S.2d at 806 (internal citations omitted).

156. *Id.*

157. *See generally* Selechnik v. Law Office of Howard R. Birnbach, 82 A.D.3d 1077, 920 N.Y.S.2d 128 (2d Dep't 2011).

158. *See generally id.*

159. *Id.* at 1078, 920 N.Y.S.2d at 130.

160. *Id.*, 920 N.Y.S.2d at 129.

161. *Id.* at 1079, 920 N.Y.S.2d at 131.

was sufficient basis to deny the motion as "allegations contained therein which give rise to permissible inferences that the law office had certain knowledge or information regarding Tolisano's employment with it and his activities thereunder that were not ascertainable by the plaintiffs" and:

> Furthermore, the complaint alleges that at the time Tolisano made his representations to the plaintiffs, which induced them to turn over their money to him, the law office knew or should have known "that its attorney-employee-impersonator, cloaked with the apparent authority that comes from employment at the [law office], would offer false representations."[162]

The court allowed the action to continue under the doctrine of respondeat superior and the theory of negligent hiring and retention.[163]

XI. DISCLOSURE OF CONFIDENCES

In one of the first opinions issued since the adoption of the revised Rule 1.6 of the Rules of Professional Conduct, effective on April 1, 2009, the State Bar Ethics Committee addressed the new provision, which now permits the disclosure of confidential information to prevent reasonably certain death or substantial bodily harm.[164] The Committee noted that "the facts presented here are ambiguous."[165] The nature of the disclosure of information to the inquiring attorney is somewhat confusing as well.

The inquiring attorney had overheard a conversation involving unidentified speakers saying that a principal in a company formed by the attorney intended to falsify water samples necessary for the grant of an operating license for the company.[166] Apart from that conversation, "[the] inquirer has no knowledge of the water quality at the proposed premises and no knowledge (as distinguished from belief or suspicion) of what in fact the company or anyone acting on its behalf said or did with respect to water quality to secure an operating license."[167]

The inquiry presented to the Committee sought advice on whether the Rules of Professional Conduct required, prohibited, or gave discretion to the attorney to disclose what he believed to be confidential

162. *Selechnik*, 82 A.D.3d at 1079, 920 N.Y.S.2d at 130-31.

163. *Id.* at 1079-80, 920 N.Y.S.2d at 131.

164. N.Y. State Bar Comm. on Prof'l Ethics, Op. 866 (2011) (citing, N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.00 (2011)).

165. *Id.* ¶ 13.

166. *Id.* ¶ 6.

167. *Id.*

information.[168] The Committee noted that the status of the clients, whether current or former, was unimportant to its opinion; the information would be confidential and entitled to protection in either circumstance.[169] The Committee then turned to the recently adopted exceptions to the duty of confidentiality which now contains two exceptions potentially relevant here:

> The first is Rule 1.6(b)(1) which provides that a "lawyer *may* reveal or use confidential information to the extent that the lawyer reasonably believes necessary (1) to prevent reasonably certain death or substantial bodily harm." (Emphasis supplied.) This exception recognizes "the overriding value of the life and physical integrity," but is a wholly discretionary exception–it says "may", not "must."[170]

The Committee continued its analysis of the first exception: "the lawyer must believe that death or substantial bodily harm is reasonably certain to ensue from the drinking water at issue here, and that belief must be reasonable, and the lawyer must conclude that disclosure is 'reasonably necessary' to prevent such death or bodily harm."[171] Based on the few facts given to the Committee, it concluded that it seemed unlikely that the lawyer could form a reasonable belief, based on the limited facts that he knew, that "substantial bodily harm [was] reasonably certain to occur." [172] Addressing the second exception to the confidentiality rule, which allows disclosure necessary to prevent the client from committing a crime,[173] the Committee concluded that if the conduct constituted a criminal violation[174] and:

> the lawyer reasonably believes that the client is engaged in a continuing crime or intends to commit a new crime, then to the extent necessary to prevent the continuation of the original crime or the commission of a new crime, the lawyer may (but need not) disclose the contents of the conversation.[175]

The Committee concluded that if certain standards were met, the attorney could disclose the information he had learned.[176]

168. *See id.* ¶ 7.

169. Op. 866, *supra* note 164, at ¶ 11.

170. *Id.* ¶ 24.

171. *Id.* ¶ 25.

172. *Id.*

173. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.00 (2009).

174. Issues of criminal conduct involve questions of law beyond the jurisdiction of the Committee. Op. 866, *supra* note 164, at ¶ 26.

175. *Id.*

176. *Id.* Conclusion ¶ 1.

XII. DISCIPLINARY SUSPENSION FOR IMPROPER SOLICITATION

A three-month suspension was an appropriate sanction for an attorney who directed a member of her staff to seek out and persuade a patient to retain her law firm.[177] The attorney had pled guilty to an unclassified misdemeanor: soliciting clients in violation of Judiciary Law section 479.[178] Apparently, the conduct was part of a larger insurance fraud scheme whereby a medical clinic, which was referring patients to several attorneys, had telephoned the respondent-attorney with the news that it had a patient it tried to refer to the attorney, but the patient refused.[179] Thereafter, the attorney "instructed her paralegal to seek out and persuade that patient to retain her law firm."[180] "The purported patient was actually an undercover officer, and the respondent was charged with violations of Judiciary Law [sections] 479 and 482, resulting in her plea of guilty to the charge under section 479."[181] Initially, the hearing panel recommended the sanction of public censure.[182] The Committee instead asked the appellate division for an "order disaffirming in part the determination of the Hearing Panel and suspending respondent from the practice of law. . . ."[183] The basis of the Committee's recommendation was a belief that "'in all likelihood' respondent engaged in other acts of improper solicitation of clients."[184] However, the court rejected the Committee's conclusory determination, finding that the credible evidence "fails to justify such a finding that respondent engaged in other acts of client solicitation."[185] The court also rejected other findings of the Committee, and thereby rejected the Committee's request for an eighteen-month suspension, imposing instead a three-month suspension, stating: "the undisputed misconduct for which respondent was convicted, [through] her use of an agent to solicit a potential client who . . . explicitly declined a referral to counsel, warrants suspension rather than the censure proposed by the Hearing Panel."[186]

177. *In re* Ravitch, 82 A.D.3d 126, 132, 919 N.Y.S.2d 141, 146 (1st Dep't 2011).
178. *Id.* at 127, 919 N.Y.S.2d at 142.
179. *See id.*
180. *Id.*
181. *Id.*
182. *Ravitch*, 82 A.D.3d at 127, 919 N.Y.S.2d at 143.
183. *Id.*
184. *Id.* at 128, 919 N.Y.S.2d at 143.
185. *Id.*
186. *See id.* at 131, 919 N.Y.S.2d at 145-46.

XIII. THE NEED TO REPORT MISCONDUCT

Frequently, lawyers will make an inquiry to the Ethics Committee seeking advice about another attorney's conduct in a usually thinly-veiled attempt to bring that conduct to light without filing a complaint to the Attorney Grievance Committee.[187] To overcome procedural and jurisdictional problems, these inquiries are framed in the context of the attorney's duty to report misconduct found in Rule 8.3.[188] A recent analysis divided the rule into its four criteria:

> (A) "[A]ctual knowledge" or a "clear belief" as to the pertinent facts, *i.e.*, more than a "mere suspicion" or a "reasonable belief";
>
> (B) None of the information . . . is protected as confidential information . . .;
>
> (C) [The lawyer] knows or has a "clear belief" that [the other lawyer] . . . violated one or more Rules of Professional Conduct; and
>
> (D) The violation "raises a substantial question" as to . . . "honesty, trustworthiness or fitness as a lawyer."[189]

The facts as presented in the inquiry disclosed that an associate, formerly employed by another lawyer, believed the other lawyer "wrongfully failed to pay wages and premiums on employer-provided health insurance, overbilled clients, and misrepresented to his clients the services that he could perform for them."[190] In its opinion, the Committee followed past practice and opinions in holding that it would not make any "factual determinations about circumstances that may well be disputed" or would "require us to evaluate the past conduct of an attorney other than the inquirer."[191] The Committee deferred to the inquiring lawyer's own conclusion and noted that if all four standards had been met, the lawyer must report the misconduct to the disciplinary authority.[192] Even if that conclusion is not reached by the inquiring attorney, he "is nevertheless *permitted* to report his reasonable suspicions of misconduct if the report does not reveal confidential

187. The mission of most ethics committees is to answer question from lawyers only about their future conduct.

188. Rule 8.3 states:

> A lawyer who knows 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 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 (2011).

189. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 854, ¶ 4 (2011).

190. *Id.*

191. *Id.* ¶ 5.

192. *See id.* ¶ 4.

information protected by Rule 1.6."[193] The Committee also concluded that the inquiring attorney was "*permitted* to disclose knowledge (as distinguished from suspicion) of . . . [the lawyer's] misconduct to the affected client or clients."[194] However, the Committee noted:

> a lawyer may not inform another lawyer's clients about mere suspicions of the other lawyer's misconduct. We recognized in N.Y. State 480 that a lawyer may properly report mere suspicions to an appropriate authority, but we perceived "a substantial danger in permitting a lawyer to approach present clients of the suspected counsel" because in that instance "the sanctity of the attorney-client relationship weighs far more heavily in favor of proscribing the communication. . . . [sic] Usually the interests of all can be best served by reporting suspicious conduct to an appropriate authority.[195]

CONCLUSION

These developments during the *Survey* year are only representative of the many issues that confront our self-regulated profession. Each of these has more examples, sub-issues and variations, and there are far more decisions and opinions than those treated here. All practitioners are well-advised to seek the help of mentors, ethics counsel, and the various ethics committees around the State to address different concerns presented in their day-to-day practice.

193. *Id.* ¶ 6.
194. Op. 854, *supra* note 189, at ¶ 8.
195. *Id.* ¶ 10 (alteration in original).