PROFESSIONAL RESPONSIBILITY

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INTRODUCTION

The activity in this *Survey* year reflects the continuing explosion of the electronic world and the challenges of maintaining a stable law practice in difficult economic times. This Article will address advertising and marketing efforts in this changing environment and, along the way, will demonstrate new methods to reach potential clients within this new environment. In past years, this Article, ethics opinions, and court decisions often focused on conflict of interest issues and disciplinary matters. However, during this *Survey* year, the bulk of the inquiries and attention of the courts have dealt with advertising, web-

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based communications, and other creative means to take advantage of the Internet.

I. WARNING!! INTERNET INQUIRIES FROM POTENTIAL CLIENTS MAY NOT BE WHAT THEY APPEAR

In the past *Survey* year, your reviewer, and the author of this Article, has seen several modern versions of the Spanish Prisoner, the Nigerian 419, and other confidence frauds involving the advance payment of fees. Most practitioners have learned not to respond to letters or facsimile requests for money to help liberate assets locked in a foreign country, or money to help a friend who has lost everything while traveling in a foreign country. These approaches were becoming more predictable and usually no more than a source of some embarrassment to the friend whose e-mail contact list had been hijacked or otherwise compromised. These confidence schemes have become pedestrian in comparison to the recent explosion of apparently legitimate requests from foreign businesses seeking U.S. counsel on a matter within the jurisdiction of the targeted counsel.[1] The warning from the case and the opinion which follow is that all practitioners must be particularly vigilant to determine the legitimacy of a request from an unknown potential new client.

A Court of Appeals case within the *Survey* year, while decided on grounds not relevant to this Article, demonstrated the dramatic effect on a firm of an advance payment confidence scheme. *Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*[2] demonstrates how sophisticated these frauds have become. The stories all begin with a familiar script. In *Greenberg*, the plaintiff law firm "received an e-mail from a representative of Northlink Industrial Limited ("Northlink") a Hong Kong company. The e-mail stated that Northlink was looking for legal representation to, among other things, assist it in the collection of debts owed by its North American customers."[3] The law firm requested a $10,000 retainer and

> was informed that a Northlink customer had sent a payment to GTH and that GTH could take its retainer from those funds. A Citibank check for $197,750 was received by GTH and GTH was instructed,

1. *E.g.*, the recipient mark receives a communication offering a large recovery or payment with a request to share in the recovery; the recipient is then asked to send an advance payment to the scammer. Similarly, a law firm might receive an advance deposit for a particular matter that is larger than expected and then is asked to return a smaller portion of the advance payment to the sender.

2. *See generally* 17 N.Y.3d 565, 958 N.E.2d 77, 593 N.Y.S.2d 43 (2011).

3. *Id.* at 571, 958 N.E.2d at 78, 593 N.Y.S.2d at 44.

> via e-mail, to remit the funds to Northlink while retaining $10,000 as a retainer. The email also provided wiring instructions to Citibank in Hong Kong.[4]

The outcome of the fraud on the Greenberg law firm was, of course, that the initial $197,750 payment was a forgery, but by the time the forgery was discovered, Greenberg had wired good funds out of its trust account.[5] Greenberg believed that it had been informed by its bank that the funds were available to it in its trust account.[6] The foundation of this decision lies in the Uniform Commercial Code and thus this case does not contain important principles relevant to a discussion of professional responsibility.[7] The importance here is that the outcome represents a very real example of the fertile field of Internet scams. The unfortunate and unsuspecting law firms who receive these requests should be forewarned.

What is a lawyer's responsibility to an apparently legitimate request from a prospective client in these circumstances? Rule 1.18 of the Rules of Professional Conduct introduced a new concept in 2009; from the date of its adoption onward, lawyers owed certain duties to individuals inquiring about the availability of legal representation.[8] The New York version states in part:

> (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.[9]

This Rule is designed to provide some confidentiality protection to the communications with an individual seeking legal advice before that individual becomes a client or a formal attorney-client relationship is

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4. *Id.*

5. *Id.*

6. *Id.*

7. The law firm was unsuccessful in its claims against the two banks involved in the clearing process based on the courts analysis of Article 4 of the Uniform Commercial Code. *See generally Greenberg, Trager & Herbst*, 17 N.Y.3d at 571, 958 N.E.2d at 78, 593 N.Y.S.2d at 44.

8. *See* James T. Townsend, *Professional Responsibility*, *2008-09 Survey of New York Law*, 60 SYRACUSE L. REV. 1061, 1062 (2010) (for a general discussion of the changes brought by the adoption of the Rules of Professional Conduct).

9. N.Y. RULES OF PROF'L CONDUCT R. 1.18 (2009).

formed.[10] Whether this Rule protects an inquiry from a person who is later learned to be interested only in the modern form of an advanced fee fraud outlined in *Greenberg*, was not decided until the New York State Bar Association's Committee on Professional Ethics ("the Committee") issued its Opinion 923.[11] In that opinion, the inquiring attorney had received a referral of a "would-be client [who] held himself out to be a Japanese investor who was interested in purchasing a [co-op] apartment."[12] After discussing the details of the transaction and the potential relationship, "[t]he purported investor suggested that he would send a check to be deposited into the inquirer's escrow account, from which the inquirer could close on the purchase and pay all required fees including the inquirer's own legal fee."[13] This exchange "would lead one to believe that the investor would have a reasonable expectation that an attorney-client relationship may be formed."[14] Thus, on its face, these communications fall within the protection afforded potential clients by Rule 1.18. However, the Committee concluded:

> [a] person who communicates with a lawyer seemingly for the purpose of forming a relationship to obtain legal services is presumptively a 'prospective client' entitled to the protection of confidentiality under the Rules. However, if the purported prospective client is actually seeking to defraud the lawyer rather than to obtain legal services, then the person is neither an actual nor a prospective client and is not entitled to those confidentiality protections.[15]

The importance of this holding is that attorneys who receive inquiries from prospective clients that, upon further investigation, appear to be part of a fraudulent scheme, are not bound by the rules of confidentiality and may reveal to banks and law enforcement officials the contents of those communications. The attorney making the inquiry that resulted in Opinion 923 had taken several steps to determine the legitimacy of the payment he received and learned that the check was fraudulent.[16] The attorney asked "whether it is permissible to provide the bank with (a) the original check; (b) the cover letter and envelope

10. *Id.* 1.18 cmt. 1.

11. *See generally* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 923 (2012), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=66826.

12. *Id.* ¶ 2.

13. *Id.*

14. *Id.*

15. *Id.* ¶ 28.

16. Op. 923, *supra* note 11, ¶ 3.

from the third party; and (c) the emails with the investor" notwithstanding the obligations of confidentiality.[17] The confidentiality rules apply to prospective clients who have discussed with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.[18] However, because the inquiring attorney "concluded—reasonably, we believe—that the purported investor was not actually seeking legal services. It follows from that conclusion that no attorney-client relationship was formed. However, that does not end the inquiry as to whether the inquirer owes any duties of confidentiality."[19] In reaching its conclusion, the Committee stated, "[i]t follows from the inquirer's conclusion about the purposes of the consultation that purported investor was not a 'prospective client' within the meaning of Rule 1.18(a)."[20] And, thus, it concluded, "the inquiring attorney may report the scheme to affected banks or law enforcement authorities, and may supply information and documents to those investigating the scheme, without violating any duty of confidentiality that would be owed persons genuinely seeking legal services."[21]

II. DAILY DEALS ADVERTISING PERMITTED

The use of discount or promotional coupons for services is not a new concept in the legal profession. For years the phonebook and newspapers have carried 'clip and save' coupons entitling the presenter to services at a bargain rate. Discount coupon advertising has long been permitted in New York.[22] This practice has now moved to the Internet. In the past year, New York has joined two other states in approving the use of daily deal sites like Groupon and Living Social.[23] The difference between these sites and the newspaper coupons of the past comes from an economic model which compensates the website by sharing a percentage of the overall purchase price paid by the consumer for the

17. *Id.* ¶ 5.

18. *See id.* ¶ 12 (quoting N.Y. RULES OF PROF'L CONDUCT R. 1.18(a) (2009)).

19. Op. 923, *supra* note 11, ¶ 24.

20. *Id.* ¶ 25.

21. *Id.* ¶ 28.

22. *See generally* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 563 (1984), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=4919.

23. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 897, ¶ 23 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&ContentID=60251&template=/CM/ContentDisplay.cfm; *see also* S.C. State Bar Ass'n Ethics Advisory Comm., Op. 11-05 (2011).

specified goods or services.[24] Like the coupons of the past, the holder or purchaser of the daily deal obtains access to given legal services for a price less than the normal charge for the service. The "deal of the day" "website collects the cost of the coupon via credit card from the consumers who purchase it. Upon the close of the deal of the day, the website deducts a percentage of the gross receipts as its compensation and pays the balance to the participating vendor."[25]

The Committee considered several questions regarding the use of such a website. The two most important issues were "[w]hether the arrangement is an improper payment for a referral, Rule 7.2 (a)"[26] and

> [w]hether the logistical arrangement of payment in advance for a legal service, before the lawyer has had the opportunity to check for conflicts or determine whether the lawyer is competent to perform the service and whether the client needs the service, constitutes premature and improper formation of a lawyer-client relationship, Rule 1.1, Rule 1.10 (e).[27]

In answering the first of these questions, the Committee noted an opinion from South Carolina approving the use of such a website and concluding "that the money retained by the website was payment for 'the reasonable cost of advertisements.'"[28] The New York Committee reached a similar conclusion stating that "[t]he website has not taken any action to refer a potential client to a particular lawyer—instead it has carried a particular lawyer's advertising message to interested consumers and has charged a fee for that service."[29] Thus, the Committee found there was no violation of the rule prohibiting payments for referrals.[30]

Of greater concern was the "premature and improper formation of a lawyer-client relationship."[31] Stating the problem succinctly, the Committee noted that "[t]he danger is that the arrangement could be taken to establish a lawyer client relationship before the lawyer has had any opportunity to check for conflicts, determine whether the described legal services are appropriate for the consumer and whether the lawyer is competent to provide those services."[32] The Committee's opinion

24. Op. 897, *supra* note 23, ¶ 3.
25. *Id.*
26. *Id.* ¶ 7A.
27. *Id.* ¶ 7D.
28. *Id.* ¶ 11 (citing Op. 11-05, *supra* note 23).
29. Op. 897, *supra* note 23, ¶ 12.
30. *Id.* ¶ 13.
31. *Id.* ¶ 21.
32. *Id.* ¶ 19.

requires that the lawyer take appropriate steps to satisfy these conditions and that, "[i]f the lawyer determines that the lawyer-client relationship is untenable for these reasons, the lawyer must give the coupon buyer a full refund."[33] Presumably, this full refund is payable even after the normal rescission period granted by the daily deal site for a full refund of the charge for the transaction.[34]

The Committee also added the caveat that, as required by Rule 7.1(a)(1), the advertising must not be false, deceptive or misleading; for instance, "[t]he offered discount must not be illusory, but must represent an actual discount from an established fee for the named service."[35] It also repeated the requirement of Rule 7.1(f) that the subject line of the e-mail offering the deal of the day contain the words "Attorney Advertising."[36]

III. COMPENSATION OF NON-LAWYER MARKETERS

The Committee addressed three related inquiries regarding compensation to non-lawyer marketers and marketing firms. These inquiries demonstrate the increased use of marketing services by law firms and the creative methods to address the prohibition of Rule 7.2(a) which provides, "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . ."[37]

This prohibition does not prevent

> a lawyer from paying for advertising and communications permitted by these Rules, including the costs of print directory listings, online directory listings, newspaper ads, television and radio airtime, domain name registrations, sponsorship fees, banner ads and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel and web site designers.[38]

The permissible methods of compensation for these services are not set forth in the Rule or the Comments. In the past, it has been

33. *Id.* ¶ 21.

34. *See Terms*, GROUPON, http://www.groupon.com/terms (last visited Jan. 26, 2013).

35. Op. 897, *supra* note 23, ¶ 18 (citing N.Y. RULES OF PROF'L CONDUCT R. 7.1(a)(1) (2012)).

36. Op. 897, *supra* note 23, ¶ 18 (internal quotation marks omitted) (citing N.Y. RULES OF PROF'L CONDUCT R. 7.1(f))..

37. N.Y. RULES OF PROF'L CONDUCT R. 7.2(a).

38. *Id.* 7.2(a) cmt. 1.

recognized that lawyers may not participate in networking organizations, may not purchase bundles of "leads" to potential clients, nor pay a commission based on the volume of business developed; the common theme to these early opinions was a fear of "hard-sell tactics or other improprieties."[39]

In one inquiry, the Committee was asked whether an attorney might pay a marketing company for introduction to a network of doctors from whom the attorney could seek collection work and proposed to compensate the marketing company "if and when the doctor retains the attorney in a certain number of collection cases[.]"[40] In a brief response, the Committee opined that:

> [t]he proposed fee arrangements are inconsistent with the text of Rule 7.2(a) and with our prior opinions. Payment of a fee to the marketing firm for an introduction and meeting with a potential doctor client would be a payment to recommend or obtain employment by a prospective client. Paying the firm an additional fee if and when the doctor retains the attorney in a certain number of collection cases would violate the prohibition of rewards for having made a recommendation resulting in employment by a client.[41]

Thus, the Committee viewed the compensation for introductions in the same light as it had previously viewed the payment for bundles of leads to potential clients.[42]

Other bonus compensation schemes were met with a more detailed analysis and provided guidelines for compensation to non-lawyers based on the volume of business. The Committee concluded:

> [a] lawyer or law firm may have a non-lawyer marketer who engages in only that advertising and solicitation in which the lawyer or law firm could engage. The lawyer or law firm may have a profit-sharing plan that pays bonus compensation to the non-lawyer marketer based on the overall profits of the firm or on a percentage of the employee's base salary. However, the bonus compensation may not be based on referrals of particular matters and may not be based on the profitability of the firm or the department for which the employee markets if such

39. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 902, ¶ 8 n.2 (2012), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=63788 (citing N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 565 (1984)).

40. Op. 902, *supra* note 39, ¶¶ 1-3.

41. *Id.* ¶ 9.

42. *See* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 779 (2004), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&ContentID=55487&template=/CM/ContentDisplay.cfm.

profits are substantially related to the employee's marketing efforts.[43]

This opinion was also based in part on the prohibition against lawyers sharing legal fees with a non-lawyer found in Rule 5.4(a); however, subdivision 3 creates a "significant exception" which permits a limited profit-sharing arrangement within a law firm "based on the total profitability of the law firm or a department within a law firm" as long as the fee does not result from a single case.[44]

A later opinion from the Committee narrowed the holding of the previous Opinion 887 and held that:

> [a] law firm may ethically pay a bonus to a nonlawyer employee engaged in marketing based on the number of clients obtained through advertising provided the amount paid is not calculated with respect to fees paid by the clients. The law firm may not pay a fee for the referral or recommendation of a specific client.[45]

The distinction created in this opinion from the previous opinions is that if "the marketing by the nonlawyer employee is advertising and does not constitute solicitation, it would be permissible to pay the marketing employee based on the number of clients obtained so long as that payment does not relate to fees earned from those clients."[46] These narrow distinctions allowed the incentive-based compensation proposed by the inquiring law firm.

IV. PUBLIC EDUCATION VIA THE INTERNET

It has long been recognized that lawyers are permitted, and indeed have an obligation, to educate the public regarding the need for legal services and the substantive nature of particular areas of the law.[47] In an opinion nearly forty years ago, the Committee set forth the guidelines applicable to such educational programs.[48] Among those standards are a few that have specific interest for the current year. Although some of the standards are clearly dated in their tone, two that retain their vitality

43. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 887, ¶ 12 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&ContentID=58443&template=/CM/ContentDisplay.cfm.

44. *Id.* ¶ 8 (citing N.Y. RULES OF PROF'L CONDUCT R. 5.4(a)(3) cmt. 1B (2012)).

45. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 917, ¶ 7 (2012), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=65341.

46. *Id.* ¶ 5.

47. N.Y. RULES OF PROF'L CONDUCT R. 7.1 cmt. 9.

48. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 283 (1973), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=48809.

today are that:

> [t]he seminar must have as its purpose the imparting of information to the participants, that is, its purpose must be educational in nature. It is improper for a lawyer to participate in a seminar the main purpose of which is to publicize, or make money for, its sponsors, the lawyer, or others.[49]

And "[i]t is improper for an attorney to answer questions of laymen concerning their specific individual problems."[50] The so-called "primary purpose test" is also found in the comments under Rule 7.1, which state that lawyers "should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise."[51] These activities have included radio call-in shows, newspaper question-and-answer columns, and have now found a place in Internet chat rooms.[52] In a recent opinion, "[a] lawyer asks whether he may visit real-time interactive Internet or social media sites on which individuals post legal questions and, if so, whether he may answer questions and advise individuals of his availability as a lawyer."[53] This question raises a slightly different concern from newspaper or radio programs because the ban on solicitation found in Rule 7.3(a)(1) prohibits a lawyer from engaging in contact "by realtime or interactive computer-accessed communication."[54] Comment 9 under that Rule explains "instant messaging, chat rooms and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."[55] However,

> Comment [9] to Rule 7.1 also says that lawyers 'should encourage and participate in educational and public relations programs concerning the legal system, with particular reference to legal problems that frequently arise.' A lawyer's participation in an educational program 'is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients.'[56]

49. *Id.* ¶ 1(2).

50. *Id.* ¶ 1(7).

51. N.Y. RULES OF PROF'L CONDUCT R. 7.1 cmt. 9.

52. *See, e.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 899, ¶ 11 (2012), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=60961&Template=/CM/ContentDisplay.cfm.

53. *Id.* ¶ 3.

54. N.Y. RULES OF PROF'L CONDUCT R. 7.3(a)(1).

55. *Id.* 7.1 cmt. 9.

56. Op. 899, *supra* note 52, ¶ 13 (quoting N.Y. RULES OF PROF'L CONDUCT R. 7.1 cmt.

What is the permissible response to a chat room participant who then asks a specific question whether the lawyer could represent the chat room participant? Opinion 899 gives the answer:

> the lawyer may post a response such as, 'My communications on this site are for the purpose of educating the general public about legal issues. If you are seeking an individual consultation, please visit my website at *www.jones.com*.' Alternatively, the lawyer may provide an office phone number, email address, and/or mailing address, without giving any information about the lawyer's services. If the person who requested the lawyer's services then uses one of these methods to contact the lawyer directly outside the real-time or interactive site, then the lawyer will not violate the restrictions on solicitation by preparing and delivering a proposal or other writing that responds to the specific request made by that prospective client.[57]

The primary purpose test of bona fide educational programs was also addressed in an inquiry from a lawyer who wished to post an Internet video designed to educate lay individuals about a legal subject and to distribute flyers inviting the public to view the video.[58] As Comment 9 explains, if the primary purpose of the program "is to educate and inform rather than attract clients," it will not be considered advertising.[59] Therefore, the Committee concluded that "the inquirer's proposed course of action does not violate the Rules. The inquirer proposes a legal education program governed by the general principle that such programs are not only permitted but encouraged. The format of the presentation—a video published on the internet—does not change the analysis."[60]

However, as is often the case, there is a secondary consideration in the mind of the presenter, but "[a]s long as the video does not go beyond a *bona fide* educational presentation, an inquiry into the existence of additional motivations for preparing that presentation is not required."[61] Therefore, the Committee concluded that "the lawyer may be subject to the advertising and solicitation requirements under the Rules if the video or the flyers include statements or suggestions that

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57. Op. 899, *supra* note 52, ¶ 18.

58. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 918, ¶ 1 (2012), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=65710&Template=/CM/ContentDisplay.cfm.

59. *Id.* ¶ 5 (quoting N.Y. RULES OF PROF'L CONDUCT R. 7.1 cmt. 9).

60. Op. 918, *supra* note 58, ¶ 1.

61. *Id.* ¶ 9.

the viewers should hire the creator of the video."[62]

V. WEBSITE CONTENT

Websites are powerful tools for lawyers to describe their practice areas, to provide valuable information to clients and the public, and a means for clients and potential clients to contact the firm. Websites are advertising, of course, within the meaning of Rule 7.1, which prohibits the inclusion of false, deceptive, or misleading statements.[63] The Rule also provides examples of information that may be included on a website,[64] but these examples do not include a reference to prior experience.[65] However, in the "analogous context of professional announcement cards, Rule 7.5(a)(2) more broadly authorizes such cards to state 'biographical data' that is in accordance with Rule 7.1."[66] The Committee concluded that the inclusion of biographical data, authorized by Rule 7.5, could be included on a firm's website.[67] In the same opinion, the Committee found it permissible to include on a website "accurate quotations from a publication about the lawyer's work if the web site and the quotations comply with all applicable requirements of Rules 7.1 and 7.5."[68] The opinion contained important caveats; for example, the disclosure that a statement is a paid endorsement, as well as the requirement for a factual basis to support the statements on the website.[69] And last, "the statements [must] be accompanied by the specific disclaimer that 'prior results do not guarantee a similar outcome.'"[70] In conclusion, the Committee stated that a

> web site may also accurately quote bona fide professional ratings, or comments from any ratings publication, if the comments were capable of factual support when published, the required disclaimer about prior results is included, and the lawyer obtains and confirms in writing the client's informed consent to any testimonial or endorsement with respect to a matter still pending.[71]

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62. *Id.* ¶ 13.
63. *See* N.Y. RULES OF PROF'L CONDUCT R. 7.1(a)(1).
64. *Id.* 7.1(b).
65. *See id.*
66. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 877, ¶ 2 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=56438&Template=/CM/ContentDisplay.cfm.
67. *Id.* ¶ 5.
68. *Id.*
69. *Id.* ¶ 6.
70. *Id.*
71. Op. 877, *supra* note 66, ¶ 8.

The website may include links to and from another website of a non-legal entity if the links are clearly "informational links to third-party websites" and "the lawyer ensures that neither the inclusion of the link nor the material to which the link is made will create confusion or misrepresentation."[72] If the links are reciprocal, "greater care must be exercised."[73] There should be no financial relationship, mutual referral agreement, or other compensation between the linking entities.[74] "If the link is part of a cooperative business arrangement between the lawyer and a non-legal professional, the lawyer must comply with Rule 5.8(a)," which governs contractual relationships between a lawyer and a non-legal professional service firm.[75] Similarly, a law firm which has formed a non-legal consulting entity may provide a link to that entity, but firms that choose to do so must be conscious of Rule 5.7, which provides that the Rules of Professional Conduct may apply to "the provision of both legal and nonlegal services" if the non-legal services are provided by an entity owned by a lawyer or law firm.[76]

In all these circumstances, great care must be taken by the law firm to comply with Rule 7.1(k), which requires an attorney in the firm to be responsible for and approve the content of all advertising, and Rule 5.3, governing the conduct of non-lawyers, including those who administer the firm's website.[77]

VI. MISDIRECTED COMMUNICATIONS

The New York City Bar Association addressed an inquiry regarding "the ethical obligations of the lawyer who receives a misdirected document."[78] In a previous opinion, that committee had addressed an issue under the former Code of Professional Responsibility, which contained no provision similar to the current Rule 4.4(b).[79] The recently adopted version of Rule 4.4(b) provides that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document

72. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 888, ¶ 5 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=58444.

73. *Id.* ¶ 6.

74. *Id.*

75. *Id.* ¶ 8.

76. N.Y. RULES OF PROF'L CONDUCT R. 5.7(a)(1) (2012).

77. *Id.* 7.1(k), 5.3.

78. N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-1 (2012).

79. *See* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2003-4 (2003) (the Association changed its name and is now known as the New York City Bar Association).

was inadvertently sent shall promptly notify the sender."[80] The committee noted that the term 'document' could include "email and other electronically stored information" and addressed "the obligations that arise with respect to documents that are 'inadvertently sent.'"[81] The NYCBA committee observed that the "rule would not apply if, for example, a lawyer obtained possession of a document that was deliberately sent to the lawyer's attention" by a person who may have obtained the document improperly.[82] A prior opinion issued by the committee, before the Rules of Professional Conduct became effective, "required a lawyer who received a misdirected communication not only to notify the sender, but also, with limited exceptions, to refrain from reviewing the communication and to return it or destroy it on request."[83] That earlier opinion was withdrawn by the New York City Bar Association.[84]

An example of a communication that was not "inadvertently sent" and still came into the possession of opposing counsel is an e-mail between an employee and her counsel marked "Attorney-Client Confidential Communication" found on the employee's workplace computer; the employee's business e-mail file was then given by the employer to its outside counsel.[85] The American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility noted that "Rule 4.4(b) does not expressly address the situation, because e-mails between an employee and his or her counsel are not 'inadvertently sent' by either of them," therefore the notice requirements of Rule 4.4 are not triggered.[86] As noted by both the New York City Bar Association and the ABA Ethics Committee, there may be additional obligations imposed by statute or court rule and practitioners should be careful to follow those obligations.[87]

VII. SECOND CIRCUIT LIMITS ADVERTISING DISCLAIMER

Rule 7.4(c) permits a lawyer to identify a practice specialty under two conditions:

80. N.Y. RULES OF PROF'L CONDUCT R. 4.4(b).

81. Formal Op. 2012-1, *supra* note 78 (quoting N.Y. RULES OF PROF'L CONDUCT R. 4.4 cmt. 2).

82. Formal Op. 2012-1, *supra* note 78.

83. *Id.* (citing Formal Op. 2003-4, *supra* note 79).

84. Formal Op. 2012-1, *supra* note 78.

85. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-460, 1 (2011) (internal quotation marks omitted).

86. *Id.* at 3.

87. *Id.*; Formal Op. 2012-1, *supra* note 78.

> [a] lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: 'The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys in this field of law.'[88]

This provision was challenged in what had been a multi-year battle between an attorney in Buffalo and the Eighth Judicial District Attorney Grievance Committee.[89] The attorney had placed ads on billboards claiming his specialty as a civil trial advocate certified by the National Board of Trial Advocacy.[90] The Grievance Committee took issue with the print size of the disclaimer on one of the billboards, claiming it did not comply with the "prominently made" requirement.[91] Thereafter, the attorney brought a declaratory judgment action seeking a declaration that the requirement was unconstitutional on its face and as applied and enjoining the Grievance Committee from enforcing the requirement.[92] He was unsuccessful at the trial level, which found that the state had a substantial interest in protecting consumers from potentially misleading attorney advertisements.[93] The Second Circuit reversed the lower court and held "[b]ecause enforcement of the two components of the required disclaimer statement would violate the First Amendment and because the absence of standard guiding administrators of Rule 7.4 renders it unconstitutionally vague as applied to Plaintiff-Appellant Hayes, we reverse with directions to enter judgment for the Plaintiff-Appellant."[94]

The discussion in the Second Circuit's lengthy opinion reviewed efforts by other states and Bar Associations to limit advertising of specialties in particular areas of the law and found that thirty-two states have provisions similar to the ABA model rule and New York's current rule.[95] It stated, "[e]fforts by states or bar associations to restrict lawyer

88. N.Y. RULES OF PROF'L CONDUCT R. 7.4(c)(1) (2012).

89. *See* Hayes v. N.Y. Attorney Grievance Comm. of the Eighth Judicial Dist., 672 F.3d. 158, 161-62 (2d Cir. 2012).

90. *Id.*

91. *Id.* at 162.

92. *Id.* at 163.

93. *Id.* The lower court relied on the Supreme Court's decision in *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990), and *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). *Hayes*, 672 F.3d at 163.

94. *Hayes*, 672 F.3d at 161 (internal citations omitted).

95. *Id.* at 163-64.

advertising, particularly ads asserting accreditation in specialized areas of the law, inevitably create some tension between legitimate concerns to protect the public from misleading claims and guild mentality maneuvers to stifle legitimate competition in the market for legal services."[96] The court then reviewed the standards for certification of a specialized field and found that the standards of the NBTA exceeded the ABA requirements.[97] Before discussing the individual components of the disclaimer required by Rule 7.4, the Second Circuit repeated the familiar four-prong test found in *Central Hudson*:[98]

> [f]irst, for commercial speech to merit any First Amendment protection it must 'concern lawful activity and not be misleading.' Next, the government must assert a substantial interest to be achieved by the restriction. If both these conditions are met, the third and fourth prongs are "'whether the regulation directly advances the governmental interest asserted' and whether the regulation 'is not more extensive than is necessary to serve that interest.'"[99]

The Second Circuit reviewed the two earlier U.S. Supreme Court decisions regarding disclaimers[100] and answered, "we are left to wonder whether to follow *Peel*'s apparent approval of some sort of disclaimer to avoid at least some potentially misleading aspects of a certification statement."[101] Thus, the court divided its analysis of Rule 7.4 (c)(1) into four aspects.

First, the court found:

> no First Amendment infirmity in the required assertion that the certifying organization, i.e., the NBTA, is not affiliated with any governmental authority. Absent this assertion, which is entirely accurate, there would be the risk that members of the public would believe that New York State or its judicial branch had authorized the NBTA to certify lawyers in their field of specialty.[102]

And, "[a]voiding such a possible misconception furthers a substantial governmental interest in consumer education and is not more intrusive

96. *Id.* at 164.

97. *Id.* at 164-65.

98. *Id.*

99. *Hayes*, 672 F.3d at 165 (quoting Anderson v. Treadwell, 294 F.3d 453, 461 (2d Cir. 2002)).

100. *Hayes*, 672 F.3d at 165 (citing Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 110 (1990); Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 143-49 (1994)).

101. *Hayes*, 672 F.3d at 167 (italics added).

102. *Id.*

than necessary to further that interest."[103]

As to the second part of the disclaimer, "[t]he statement that certification is not a requirement for the practice of law is more questionable."[104] The court noted that "the alleged harm is surely not self-evident" and thus found it could not be enforced.[105]

The third part drew even more judicial scorn. The disclaimer that certification "'does not necessarily indicate greater competence than other attorneys experienced in this field of law'. . . has a capacity to create misconceptions at least as likely and as serious as that sought to be avoided by the first assertion."[106] The court then reviewed the rigorous requirements of the NBTA, which, it had noted, exceeded the ABA standards, and concluded "[t]hese qualifications may reasonably be considered by the certifying body to provide some assurance of 'competence' greater than that of lawyers meeting only the criterion of having some experience in the field, and a contrary assertion has the clear potential to mislead."[107]

Having found that one of the three requirements was valid, the court then addressed the plaintiff's challenge to the entire disciplinary rule on the ground of vagueness.[108] As to the requirement that the disclaimer be "prominently made," the court repeated the familiar constitutional requirements that a statute give a "'person of ordinary intelligence a reasonable opportunity to know what is prohibited'" and provide "at least as much notice of what is required."[109] The decision contains several references to examples of adequate notice of visibility requirements and concluded, "[w]e consider it a close question whether 'prominently made' provides adequate notice to lawyers as to the required placement and type font of the Disclaimer in writings . . . . Specificity would be helpful . . . ."[110]

Apparently, the court was troubled by the acknowledgment by one of the grievance counsel "that his successor would likely apply a different standard of 'what constitutes prominently made.'"[111] It then carried this thought into a misunderstanding of the rules of grievance

103. *Id.*
104. *Id.*
105. *Id.* at 168.
106. *Hayes*, 672 F.3d at 168.
107. *Id.*
108. *Id.*
109. *Id.* at 168-69 (quoting United States v. Strauss, 999 F.2d 692, 697 (2d. Cir. 1993)) (citing Rock of Ages Corp. v. Sec'y of Labor, 170 F.3d 148, 156 (2d Cir. 1999)).
110. *Hayes*, 672 F.3d at 169.
111. *Id.* at 170.

committees. It stated, "[a]lthough the uncertainties as to how the prominence requirement will be enforced could be alleviated if the Grievance Committee would give pre-enforcement guidance to inquiring attorneys, such guidance was not available to Hayes."[112] Thus, the court conflated the role of a grievance committee, which addresses only attorneys past conduct, with that of an ethics committee, which deals with future conduct and thus might be the place for an attorney to obtain guidance.[113]

An example of such advance guidance is found in the response from an attorney who wanted to advertise "[w]e will stop your foreclosure."[114] The Committee found such statements false, misleading, and deceptive because there was "reasonable inference from the proposed advertisement—that the foreclosure proceeding will cease and terminate" when there could be no guarantee that the proceeding would be terminated.[115]

VIII. CONFLICTS

While the bulk of the review in this Article mirrors the activity of the year, focused on the advantages and disadvantages of the Internet, there were some opinions of interest relating to the imputation of conflicts from paralegals, spouses, and simultaneous representation of a corporation and its individual officers and directors.

A. Paralegals Who Become Lawyers

A newly-minted associate attorney who had been a paralegal at a firm opposing his current employer in a litigated matter was not disqualified, nor was the current employer disqualified because the new lawyer had acquired confidential information in his prior employment.[116] The Committee found that Rules 1.9 and 1.10 do not apply to a person who was not an attorney associated with the opposing firm such as a paralegal.[117] However, the current employer and the

112. *Id.*

113. *See* ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED xi (2012 ed.).

114. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 921, ¶¶ 1, 7 (2012), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=66817&Template=/CM/ContentDisplay.cfm (internal quotation marks omitted).

115. *Id.* ¶ 7.

116. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 905, ¶ 19 (2012), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=63791&Template=/CM/ContentDisplay.cfm.

117. *Id.* ¶ 7.

prior employer have "an obligation to ensure that he preserves any confidential information he acquires regarding the plaintiff . . . ."[118] A law firm should instruct the newly hired lawyer not to divulge confidential information. The firm should also perform a conflicts check reasonable under the circumstances.[119] If the lawyer acquired confidential information in a matter while working as a paralegal or legal assistant, the lawyer ordinarily must be screened from any personal participation in the matter . . . .[120]

B. Spousal Conflicts

Spousal conflicts, at least in civil matters, are not necessarily imputed to other members of each spouse's firm.[121] Rule 1.10(h) prohibits spouses from representing clients with adverse interests in litigation except on certain conditions.[122] This conflict is not automatically imputed to other members of each spouse's firm in a civil eviction matter.[123] This opinion differs from a previous opinion in which the district attorney's spouse and her firm were prevented from representing a criminal defendant.[124] That earlier opinion

> [e]numerated certain factors that should be considered in determining whether a conflict was imputed in a given case: 'Relevant facts would include the size of the spouse's firm, the spouse's position in the firm, whether the spouse will derive direct or indirect financial or other benefit as a result of the defendant's employment of the firm, and whether the spouse plays any role in the defendant's seeking representation by the firm.'[125]

That earlier opinion "rested heavily on the fact that the case was a criminal matter and the concern that the public might perceive favoritism in the district attorney's handling of the matter."[126] Those considerations are not present in a civil matter. However, if there was a

118. *Id.* ¶ 11.

119. *Id.*

120. *Id.* ¶ 19.

121. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 890, ¶ 6 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=58446.

122. N.Y. RULES OF PROF'L CONDUCT R. 1.10(h) (2009).

123. Op. 890, *supra* note 121, ¶¶ 1, 6; N.Y. RULES OF PROF'L CONDUCT R. 1.10(h).

124. *See generally* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 654 (1993), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=54879&Template=/CM/ContentDisplay.cfm.

125. *Id.* (citing Op. 890, *supra* note 121, ¶ 7).

126. Op. 654, *supra* note 123, ¶ 7.

personal interest conflict under Rule 1.7, which might otherwise be imputed, such "conflict can be cured by consent of the affected clients as long as the lawyer involved reasonably believes that, notwithstanding that risk, he or she will in fact be able to provide competent and diligent representation to the affected client."[127]

Rules 1.7 and 1.10(h) were also considered in an inquiry regarding one spouse who occasionally used the facilities of the firm where her spouse was a managing partner. The inquiry asked whether the firm and the sole practitioner could represent adverse parties in a litigated matter.[128] The Committee reached the same conclusion: that the personal interest conflict under Rule 1.7(a)(2) could be waived "only if she reasonably believes that she can provide competent and diligent representation and her client gives informed consent, confirmed in writing."[129] The occasional use of the other spouses' facilities did not make the two a firm within the meaning of Rule 1.0(h).[130]

What if the spouse using her spouse's office also used the address and phone number as her own contact information? That information was viewed as potentially misleading, unless the spouse was to take further steps indicating "that she has made arrangements for her spouse's firm 'to respond in a timely fashion to all inquiries [to the sole practitioner] addressed to that office,' and that she herself will 'provide legal services from that office as the need may arise' and 'hold meetings there.'"[131]

C. Revocation of Consent

Consents to conflicts may be revoked at any time just as a client may terminate the lawyer's services at any time. But what happens "[w]hen a lawyer jointly represents co-defendants in litigation pursuant to a validly obtained consent to the dual representation and to any future conflicts that might arise between the clients, and one client later revokes consent, may the lawyer continue to represent the non-revoking

127. *Id.* ¶ 9 (citing N.Y. RULES OF PROF'L CONDUCT R. 1.7(b)(1)).

128. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 895, ¶ 1 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=59696&Template=/CM/ContentDisplay.cfm; N.Y. RULES OF PROF'L CONDUCT R. 1.7, 1.10(h).

129. Op. 895, *supra* note 128, ¶ 12 (citing N.Y. RULES OF PROF'L CONDUCT R 1.7(b)(1), 1.7(b)(4)).

130. Op. 895, *supra* note 128, ¶ 18; N.Y. RULES OF PROF'L CONDUCT R. 1.0(h).

131. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 881 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=55935&Template=/CM/ContentDisplay.cfm.

client?"[132] The consent in this inquiry "did not address how the parties or [l]awyer would proceed if either client later changed its mind and revoked consent."[133] At the outset of the underlying matter, both clients had no differing interest and executed informed consents to the joint representation; however, during discovery, differing interests arose and one party revoked his consent.[134]

At the point of revocation, the now former client became entitled to the protections of Rule 1.9, which prohibits a lawyer from opposing a former client in a substantially related "matter in which that person's interests are materially adverse . . . unless the former client gives informed consent, confirmed in writing."[135] However, in the inquiry there was no indication that the revoking client consented to the continued representation of the remaining client.[136] In answering the inquiry, the Committee turned to Rule 1.7 Comment 21, which says it depends on the circumstances such as the nature of the conflict, the change of circumstances, the reasonable expectations of the other clients, and whether there is material detriment to the other clients.[137] The Committee added a cautionary note that even if the revoking client gave informed consent, confirmed in writing, to the continued representation, the lawyer might not be able to use confidential information previously obtained from the revoking, now former, client.[138]

D. Conflicts in Closely-Held Corporations

The concurrent representation of an officer and a closely held corporation in two different hypothetical circumstances led the Committee to conclude, "[s]imultaneously representing both a corporation and a director, officer or shareholder of that same corporation can create conflicts, but if the conflicts are consentable, then the conflicts can be cured by obtaining informed consent from each affected client, confirmed in writing."[139] The inquirer had represented a

132. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 903, ¶ 1 (2012), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=63789.

133. *Id.* ¶ 2.

134. *Id.* ¶¶ 2-3.

135. *Id.* ¶ 11; N.Y. RULES OF PROF'L CONDUCT R. 1.9 (a).

136. Op. 903, *supra* note 131, ¶ 1.

137. *Id.* ¶ 13.

138. *Id.* ¶ 16; N.Y. RULES OF PROF'L CONDUCT R. 1.7 cmt. 21.

139. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 901, ¶ 19 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=63783&Template=/CM/ContentDisplay.cfm; N.Y. RULES OF PROF'L CONDUCT R 1.6.

minority shareholder on several transactional matters including the negotiation of agreements with the corporation in which the client was a shareholder.[140] After the conclusion of those negotiations, the corporation's CEO asked the inquirer to become the corporation's counsel for future matters.[141] The shareholder agreed to the representation with the understanding that the lawyer would not represent the corporation against him and would be available to him for future matters unrelated to the corporation.[142] The opinion noted the addition to Rule 1.13, "Organization as a Client," that specifically allows simultaneous representation of an organization and its constituents, "subject to the provisions of Rule 1.7."[143] This addition brings the "differing interests" test into the analysis.[144] The analysis could lead to varying outcomes depending on the nature of the interests; are they truly unrelated or directly adverse? In the first, no consent may be needed, but in the second, a thorough review of all the factors listed in Rule 1.7(b) must be followed.[145] Because each hypothetical is fact intensive, the opinion provides no bright-line answers but rather the framework to reach a conclusion.

IX. ADVICE TO REPRESENTED AND UNREPRESENTED ADVERSARIES

Communications with persons represented by counsel are governed by Rule 4.2, and those with unrepresented persons, by Rule 4.3. Three opinions from the Committee address novel variations on these rules. In one, a lawyer who is also a party in a litigated matter may not contact the opposing party who is represented by counsel, even if he himself is represented by counsel.[146] The key to the opinion is "focused on the professional *status* of the lawyer (*i.e.*, the simple fact that the lawyer was a lawyer) rather than on the lawyer's *role* in a particular matter (*i.e.*, representing a client.)"[147] Thus, the Committee concluded, "[u]nless authorized by law, the lawyer must not engage in direct communications with a party the lawyer knows to be represented by

140. Op. 901, *supra* note 139, ¶ 3.

141. *Id.* ¶ 4.

142. *Id.*

143. *Id.* ¶ 11; N.Y. RULES OF PROF'L CONDUCT R. 1.13.

144. Op. 901, *supra* note 139, ¶ 12.

145. *Id.* ¶ 15.

146. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 879, ¶ 1 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=58705.

147. *Id.* ¶ 7.

counsel" without complying with Rule 4.2 (a) or (b).[148]

What constitutes "the subject of the representation" for the purposes of Rule 4.2 was construed by the Committee to exclude the service of process and conversations establishing the identity of the party served; however, "[c]onversation on the subject matter of the representation, if not included within the authorization for service of process, remains prohibited."[149]

A similar outcome came in answer to a question from a lawyer representing a debt collector about the lawyer's ability to advise the debtor of a required statement in a communication when the collector is seeking to enforce the debt beyond the statute of limitations.[150] The required communication began, "WE ARE REQUIRED BY LAW TO GIVE YOU THE FOLLOWING INFORMATION ABOUT THIS DEBT."[151] Rule 4.3 prohibits giving "legal advice to an unrepresented person other than the advice to secure counsel . . . ."[152] In addressing this inquiry, the Committee stated, "[t]aking into account the purpose of Rule 4.3 and the setting in which the mandated notice is given, we believe that merely providing that mandated notice to the debtor would not constitute giving legal advice within the meaning of the Rule."[153]

X. FOURTH DEPARTMENT CENSURES ATTORNEY FOR COMMENTS CRITICAL OF JUDGE

The Albany County District Attorney had undertaken "an investigation of the alleged illegal sale of prescription medicine to Albany County residents by certain individuals who were operating a pharmacy located in Florida."[154] The cases were presented to the grand jury and received much media attention across the state and nation.[155] While the criminal actions were pending in Albany County, the

148. *Id.* ¶ 20.

149. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 894, ¶¶ 10-11 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=59694&Template=/CM/ContentDisplay.cfm.

150. *See generally* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 898 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=60960&Template=/CM/ContentDisplay.cfm.

151. *Id.* ¶ 3.

152. *Id.* ¶ 5 (quoting N.Y. RULES OF PROF'L CONDUCT R. 4.3 (2012) (internal quotation marks omitted)).

153. Op. 898, *supra* note 150, ¶ 8.

154. *In re* Soares, 97 A.D.3d 242, 243, 947 N.Y.S.2d 233, 234 (4th Dep't 2012).

155. *Id.*

defendants brought a civil action in Florida claiming unlawful arrest and defamation, among other claims.[156] The Albany County Court justice dismissed the last indictment and, at the same time, disqualified the District Attorney's Office "from further prosecuting that matter based on a conflict of interest arising from the federal civil action pending in Florida."[157] In response, the District Attorney's Office

> sent an electronic message to a newspaper reporter, which stated the following: 'Judge Herrick's decision is a get-out-of-jail-free card for every criminal defendant in New York State. His message to defendants is: if your DA is being too tough on you, sue him, and you can get a new one. The Court's decision undermines the criminal justice system and the DA's who represent the interest of the people they serve. We are seeking immediate relief from Judge Herrick's decision and to close this dangerous loophole that he created.'[158]

The factual allegations were not disputed, and the court pointed out that the subsequent reinstatement of the District Attorney's Office, as well as the dismissal of the Florida civil action, did not factor into the court's decision.[159] It concluded that

> respondent has violated rule 8.4(d) of the Rules of Professional Conduct (22 NYCRR 1200.0)-engaging in conduct prejudicial to the administration of justice. Inasmuch as Judge Herrick appointed a special district attorney and granted that prosecutor leave to re-present the dismissed indictment, we conclude that respondent's statement . . . was objectively false. For the same reasons, we conclude that his statement that Judge Herrick created a 'dangerous loophole' was reckless and misleading.[160]

The court considered certain factors in mitigation and respondent's prior disciplinary history and issued an Order of censure.[161]

XI. ACCEPTANCE OF SECURITIES AS A LEGAL FEE

New York has joined other jurisdictions

> in concluding that a lawyer who wishes to accept an equity interest in a client must comply with the provisions of Rule 1.8(a). This means the terms of the transaction must be fair and reasonable to the client, fully disclosed and transmitted in writing in a manner that can be

156. *Id.*
157. *Id.*
158. *Id.* at 244, 947 N.Y.S.2d at 234-35 (internal quotation marks omitted).
159. *Id.*, 947 N.Y.S.2d at 235.
160. *In re Soares*, 97 A.D.3d at 244-45, 947 N.Y.S.2d at 235.
161. *Id.* at 245, 947 N.Y.S.2d at 235.

> reasonably understood by the client, with the client being advised of the desirability of seeking independent legal advice and given reasonable chance to do so, and the client signing a writing that describes the transaction and the lawyer's role in the deal, including whether the lawyer was acting for the client in the matter.[162]

The opinion also discusses the additional question of "whether the business transaction involving the acceptance of an equity interest as a legal fee occasions a conflict of interest between the lawyer and the client."[163] To address this concern, the opinion points to Comment 4D to aid a lawyer in deciding whether "the lawyer will be able to provide competent and diligent representation."[164] In the course of obtaining informed consent to the transaction, the opinion "requires disclosure of, among other things, the risks inherent in the representation of a client by a lawyer . . . as counselor and lawyer as stockholder; and the risks that privileges could be in jeopardy unless the communications between the two concern confidential legal advice."[165]

CONCLUSION

This has been a very active year in the challenging field of professional responsibility. The application of our profession's core principles continues to adjust to meet our ever-changing technological world. Careful analysis of these principles and an understanding of new technologies are necessary to fulfill our obligations. The opinions cited in this Article are important, but all practitioners should be encouraged to consult local and state ethics committees and seek counsel from all these resources.

162. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 913, ¶ 10 (2012), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=65368&Template=/CM/ContentDisplay.cfm.

163. *Id.* ¶ 13.

164. *Id.* (citing N.Y. RULES OF PROF'L CONDUCT R. 1.8(a) cmt. 4D (2009)).

165. Op. 913, *supra* note 162, ¶ 14.