PROFESSIONAL RESPONSIBILITY REVIEW 2015

By Kimberly A. Knox and Brendon P. Levesque*

I. Introduction

In *A Connecticut Yankee in King Arthur's Court*, Mark Twain said, "You see, he [the king] knew his own laws just as other people so often know the laws: by words, not by effects. They take a meaning, and get to be very vivid, when you come to apply them to yourself." That quote applies to our own Rules of Professional Conduct. As a self-regulating profession continues to incorporate rapid changes in technology which impact how we practice law, lawyers must be ever vigilant. They cannot simply read the rules and memorize them, they must understand the purpose of the rules, especially when they apply the rules themselves.

II. Professional Issues of the Day

Rule 1.1 and the official commentary titled "Maintaining Competence" make it clear that lawyers have a duty to remain abreast of changes in technology and to assess the risks and benefits associated with new technology. In applying the law to present-day advances, the late Justice Antonin Scalia acknowledged, "[W]hatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."[1] If an originalist like Justice Scalia could apply the First Amendment to the latest technological advances, there is no excuse for not applying our current Rules of Professional Conduct to changing technology.

Advances in technology impact three important areas: communication with clients, advertising, and using new technology to gather information necessary to your case. As to communication, as the number of ways to communicate

* Of the Hartford Bar.

1 Brown v. Entm't Merch. Ass'n, 564 U.S. 786 (2011).

with a client expands, lawyers must continually assess the risks and benefits of the new technology. The intersection of that duty and how lawyers communicate with their clients makes for an interesting question. For example, is a lawyer who fails to text message his client violating Rule 1.1 or Rule 1.4, both, or neither?

The Statewide Grievance Committee (SGC) had the opportunity, but did not reach the Rule 1.1 issue in *Worcester v. O'Doherty*.[2] The client resorted to texting her lawyer after failing to receive any responses to phone calls and emails. Although the lawyer testified that she told the complainant "that she did not text nor understand texting," the SGC found a violation of Rule 1.4. Part of the problem was that the SGC rejected the attorney's excuses for not responding to a client. Those excuses included, "a cat bite;" the "computer is infected and still being worked on;" "I did not recognize your voice;" and a "serious case of the flu." The other issue was that the lawyer had failed to respond to phone calls and emails as well. The record was clear that the attorney had failed to communicate with the client. Query whether there could have been a violation of Rule 1.1 only for the lack of texting ability.

To be clear, at the initial consultation with the client, the authors believe that it is perfectly acceptable to inform a client that they will not communicate via text. There are a variety of reasons a lawyer may do this. First, there are issues as to confidential information contained in a text. You must ensure that the phone is at the very least password protected. You should not allow others to have access to your phone. Finally, iOS and Android both have features that allow the user to wipe all information remotely from the phone if it is lost or stolen.

There is also an issue with retention of text messages. With emails and letters a lawyer stores the communication so it will be available, if needed. Texts are presumptively

---

[2] Grievance Complaint No. 14-0520. Attorney informed the client that she did not understand texting. Nevertheless, the committee found the attorney's delays in responding to the electronic communications with a client violated rule 1.4.

not stored and if they are deleted from your phone it was presumed that you would not be able to retrieve them. Now, there are a few ways to address this issue. First, forward the text message to your email. Second, obtain software for your phone that will retain the messages. Finally, summarize the text message or messages in a writing sent to your client either via email or regular mail.

On the other hand, as long as you understand the risks and benefits of texting clients, there is no prohibition on texting and it certainly offers some benefit to today's more technologically savvy lawyers and clients. Moreover, at some point, even if you tell clients that you will not communicate via text, it may become required behavior to text message clients. In this respect, texting is to email as email was to letters.

Although it has been of prevalent use for much longer, lawyers must be aware of proper email use because sending an email to the wrong person could result in breach of confidentiality, in violation of Rule 1.6. One should also ensure that any attached document is accurately "scrubbed" as to not contain metadata unintended for the recipient. This involves knowledge of both redaction and sanitation, skills with which all attorneys should keep up to date.

Advertising methods have also greatly expanded in recent years. Social media has provided attorneys with a new outlet that allows them to reach more people than ever before. In turn, lawyers must be aware of how the ethics rules apply to such advertising. Last year, the New York State Bar Association issued a formal ethics opinion[3] that may serve as a valuable resource, as well as fair warning, for attorneys in their online presence. Attorneys should exercise caution in this area because something as simple as a blog post, even on an attorney's personal profile, can be subject to advertising and solicitation rules.[4] This is especially true for a LinkedIn profile, where a subjective state-

---

[3] New York Cnty. Lawyers Ass'n Prof'l Ethics Comm., Formal Op. 748 (2015).

[4] *Id. See also* MODEL CODE OF PROF'L CONDUCT R. 7.1 and P.B. § 2-28A.

ment on an attorney's skills, areas of practice, endorsements, or testimonials may be regulated as advertising. Attorneys should also be careful of third-party posts and should prevent or remove any content by other social media users that violates the Rules.[5] This means that if a user on LinkedIn offers a misleading endorsement, for example a high school classmate you have not seen in thirty years endorses you for litigation, you should probably reject it.

Because advertising methods have become so diverse and far-reaching, we could easily write a separate article on these ramifications. For now, the authors suggest that attorneys seek out approval pursuant to Practice Book Section 2-28A if they are concerned about posting any kind of advertisement on the Web. This is the best way to avoid any negative repercussions.

Finally, attorneys must realize that they may get themselves into trouble by *not* staying updated with the latest technology. The processes of research and investigation are now so greatly facilitated by use of the Internet that an attorney can put the client at a disadvantage by ignoring the Web in the practice of law. This is otherwise known as the "Duty to Google." Failure to grasp how electronic information is created, stored and retrieved can result in a violation of Rule 1.1 (Competence). A Florida appellate court recently questioned an attorney's effectiveness where the attorney failed to use the Internet to find an address. The court opined that by only checking directory assistance in the modern era, the attorney was using methods equivalent to "the horse and buggy and the eight track stereo."[6]

The effectiveness of social media use in investigation was recently demonstrated in a Connecticut case where a jury relieved the Trumbull Mall from liability where a woman was injured while riding the escalator.[7] While visiting the mall in March 2011, the plaintiff tripped on the escalator and fractured her right ankle. She needed multiple surgeries

---

5 *Id.*

6 Dubois v. Butler, 901 So.2d 1029, 1031 (Fla. Dist. Ct. App. 2005).

7 Christian Nolan, *Defense Verdict Allows Mall to Escape Liability for Escalator Rider's Injury*, CT LAW TRIBUNE (June 7, 2016).

and incurred $56,000 in medical bills. The plaintiff appeared at trial with a cane and appeared to be seriously injured. She testified that her ankle injury greatly incapacitated her in many aspects of life. The defendant's attorney reviewed the plaintiff's Facebook page and found recent posts of the plaintiff working as a Zumba instructor.[8] At trial, defense counsel enlarged pictures from the plaintiff's Facebook that showed her at various Zumba classes. The jury deliberated for only nineteen minutes before rendering a defense verdict. The authors are confident that the Facebook posts were devastating to the plaintiff's case.

But the use of social media evidence is not unprecedented. In fact, in a 2010 study by the American Academy of Matrimonial Lawyers, eighty-one percent of respondents used social media as a form of evidence in their cases.[9] So although the Connecticut lawyer's use of social media made for an incredible case, the authors wonder if he could have been grieved had he not investigated social media. This makes for an issue not only with competence but also diligence under Rule 1.3. Is an attorney providing zealous advocacy if the attorney fails to take advantage of gathering information on social media? A California appellate court held that an attorney's failure to investigate social media, which contained recantations of a purported molestation victim, could constitute ineffective assistance of counsel.[10]

That being said, attorneys should still proceed with caution in utilizing social media. An attorney may not "friend" someone on Facebook under false pretenses. It is also important to understand how evidentiary rules put restrictions on social media behavior. A trial court in Virginia recently sanctioned an attorney $542,000 for advising his client to "clean up" his Facebook page because "[w]e don't want any

---

[8] Zumba is a form of exercise that puts Latin dance steps to fast-paced contemporary music.

[9] *Big Surge in Social Networking Evidence Says Survey of Nation's Top Divorce Lawyers*, American Academy of Matrimonial Lawyers (Feb. 10, 2010), http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey-.

[10] Cannedy v. Adams, No. ED CV 08-1230-CJC, 2009 WL 3711958 (C.D. Cal. Nov. 4, 2009).

blow-ups of this stuff at trial."[11] In that case, the client's wife had been killed in a car accident after a concrete truck lost control of his vehicle and tipped over onto their car. Among others, the plaintiff filed a complaint against the concrete company and the truck driver, seeking compensatory damages.

After his wife's death, the plaintiff posted a picture on Facebook of him wearing a T-shirt which read, "I <<heart>> hot moms." After finding this post, defense counsel issued a discovery request to the plaintiff's attorney, seeking production of all pages from the plaintiff's Facebook page. This prompted the plaintiff's attorney to suggest that his client clean up his page. The plaintiff subsequently deleted his Facebook page, but after the defendant filed a motion to compel discovery, the plaintiff reactivated his Facebook and deleted sixteen photos. The plaintiff and his legal counsel were ultimately sanctioned and upon referral to the state bar, the attorney was suspended for five years. This should serve as a warning to attorneys that old rules still apply to new technology. If the Supreme Court can apply the First Amendment, a creation of the eighteenth century, to video games, there is nothing stopping the courts from applying rules of evidence to current technological advancements.

Mandating minimum continuing legal education (CLE) has been a topic of discussion for almost a decade in Connecticut. On June 24th of this year,[12] Connecticut left the list of now three states that do not require any form of training or minimum CLE.[13] Connecticut lawyers are now required to complete twelve hours annually of CLE.[14] Given the remarkably high number of states to have adopted minimum CLE requirements, one could infer that there are benefits to doing so. The authors are split on this topic, but concur on the following observations about MCLE.

---

[11] Allied Concrete Co. v. Lester, 736 S.E.2d 699, 702, 285 Va. 295, 302 (2013).

[12] Michelle Tuccitto Sullo, *Conn. Judges Approve Mandatory Continuing Legal Education for State's Lawyers*, CT LAW TRIBUNE (June 24, 2016).

[13] Mandatory CLE, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/cle/mandatory_cle.html.

[14] Michelle Tuccitto Sullo, *supra* note 12.

In adopting a MCLE requirement, Connecticut lawyers will be joining other lawyers across the country as well as other professionals/technicians/or licensed service providers in this state, who are required to participate in continuing education in their fields.[15] MCLE will not deter attorney defalcations. An attorney who elects this course of criminal conduct has tossed good judgment and the rule of law aside. The approved proposal is "soft."[16] As these authors note in the introduction, competence is the hallmark of our profession. Competence requires knowledge which is achieved through education. As to the effectiveness of the rule, it is unquestionably wanting. But for a state with preserving reluctance to adopt a requirement, it is a start.

III. Case Law Developments

A. *Connecticut Supreme and Appellate Courts*

There were two notable Supreme Court decisions in the area of attorney professionalism in 2015. In *Persels and Assoc., LLC v. Banking Commissioner*,[17] a unanimous decision, the Connecticut Supreme Court held that the state debt negotiation statutes[18] which are regulated by the Banking Commissioner, encroach on the Judicial Branch's constitutional authority to regulate attorneys and offend the separation of powers provisions of the Connecticut Constitution to the extent the statutes attempt to regulate Connecticut attorneys providing debt-related legal services.[19]

---

15 Mandatory CLE, AMERICAN BAR ASSOCIATION, *supra* note 13.

16 77 (42) Conn. L.J. at 8PB-13PB (Proposed P.B. § 2-27A). The proposal requires an attorney to certify on the attorney registration form to having completed 12 hours of legal education in a calendar year. The education includes attendance at traditional CLE courses, self-study, teaching and writing of publications. The proposal provides that it is professional misconduct to fail to comply with the rule.

17 318 Conn. 652, 122 A.3d 592 (2015).

18 Conn. Gen. Stat. §§ 36a-671 through 36a-671e.

19 This decision was based on Article II of the Constitution which states, "The powers of the government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative to one; those which are executive, to another; and those which are judicial, to another."

In *Olszewski v. Jordan*,[20] the Supreme Court held that attorneys are not entitled to equitable charging liens on marital assets for fees and expenses in marital dissolutions cases. The Court distinguished old cases permitting attorney charging liens, holding that there were special concerns in marital dissolution proceedings.[21] In *Olszewski*, the father of a woman who was a party to a dissolution of marriage case filed a claim to collect an outstanding balance on her ex-husband's promissory note to him to be drawn from his Northwest Mutual account. Her ex-husband asserted that "by virtue of the 2009 dissolution judgement, he had a claim to proceeds in that account that was prior to that of the plaintiff." This was because the court ordered that fifty percent of the attorney's fees be paid out of that same account. The trial court disagreed and held that his attorney did not have a claim prior in right to that of his ex-father-in-law because "a charging lien in connection with a dissolution action would be prohibited by Rule 1.5(d)(1)." The Appellate Court reversed this ruling and was later reversed by the Supreme Court.

The Appellate Court issued numerous opinions regarding professional responsibility in 2015. In an unusual twist, it issued an order directing the attorney to appear before an en banc panel to show cause "why she should not be sanctioned" for her repeated failures in three appeals to comply with the Rules of the Court, to make timely filings, and for filing a frivolous appeal.[22] After a hearing, the Court suspended the lawyer from practicing before it for six months.[23] The Supreme Court dismissed a writ of error from the decision[24] and found no error in the Appellate Court's referral to the Office of Disciplinary Counsel for further investigation.[25]

---

[20] 315 Conn. 618, 637, 109 A.3d 910, 920 (2015).

[21] *Id*. at 635.

[22] *See* Miller v. Appellate Court, 320 Conn. 759, 761, 136 A.3d 1198 (2016) (citing Appellate Court orders in Addo v. Rattray, Doc. No. AC 36837; Willis v. Cmty. Health Servs., Doc. No. AC 36955; Cimmino v. Marcoccia, Doc. No. AC 35944; Coble v. Bd. Of Educ., Doc. No. AC 36677).

[23] *Id*.

[24] The court excluded one appeal from the order of suspension. After the lawyer again failed to file timely appellant's brief and appendix, the appeal was dismissed. *See* Miller v. Appellate Court, 320 Conn. at 759.

[25] *Id*. at 780.

The Court also affirmed a number of suspensions and addressed a reinstatement. In *Disciplinary Counsel v. Serafinowicz*,[26] the Appellate Court affirmed a 120-day suspension for violations of Rule 8.2[27] and Rule 8.4(4). The lawyer had disparaged the integrity of a superior court judge to the press.

Even after his suspension had ended, an attorney was not entitled to reinstatement where he failed to submit his IOLTA records for monthly audits pursuant to his agreement with Disciplinary Counsel.[28] The suspended lawyer claimed his records contained privileged information, despite the court order of an in camera review, and the protections of Practice Book Section 2-27 (e). Specifically, the Appellate Court stated:

> The commentary to rule 1.15 of the Rules of Professional Conduct provides that "[a] lawyer should hold property of others with the care required of a professional fiduciary." Subsection (b) of rule 1.15 requires a lawyer to keep "[c]omplete records of such account funds...." Practice Book § 2–27(c) complements that rule by requiring that the records of a client trust account be available for audit by the Statewide Grievance Committee or Disciplinary Counsel "[u]pon the filing of a grievance complaint or a finding of probable cause...."
>
> In this case, a grievance complaint was filed against the defendant, and a local grievance panel found probable cause that the defendant had violated rule 1.15(e) of the Rules of Professional Conduct. Additionally, in the agreement, the defendant admitted that there was sufficient evidence to prove that he had violated rule 1.15(e) of the Rules of Professional Conduct, and he agreed to provide the documents necessary for an IOLTA account audit. Consequently, our rules of practice and the parties' agreement provided ample authority for the court to order that the defendant comply with an IOLTA account audit prior to his reinstatement.[29]

---

[26] 160 Conn. App. 92, 103, 123 A.3d 1279, 1287 (2015).

[27] Rule 8.2(a) of the Rules of Professional Conduct provides: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory office."

[28] Disciplinary Counsel v. Evans, 159 Conn. App. 343, 362, 123 A.3d 69, 80 (2015).

[29] *Id*. at 358-59.

In *Sowell v. DiCara*,[30] a procedurally complex case, the Appellate Court affirmed the trial court's conclusion that the plaintiff's lawyer had violated Rule 4.2. The plaintiff's counsel, in a wrongful discharge suit against the executive director of a non-profit organization, sent a letter to the Board of Directors of the organization informing them that they may be individually liable for the plaintiff's claims. He also sent a copy of the letter to defense counsel. Defense counsel moved for a protective order based on Rule 4.2 which sought to preclude communication with the board, but did not seek sanctions. Over the plaintiff's lawyer's objections, the trial court granted the motion for protective order.

The plaintiff's attorney filed a writ of error and the case was transferred to the Appellate Court. In an interesting twist, after oral argument, the Appellate Court sought articulation from the trial court as to whether it found a violation of Rule 4.2. In its articulation, the trial court expressly stated that it found a violation of Rule 4.2. As a result, the Appellate Court affirmed the trial court. In a footnote, the Appellate Court noted:

> As the transcript of the proceeding in the trial court demonstrates, and as the trial court found, the agency did not wish to have the court sanction Mendillo. Its objective merely was to have the court grant the motion for a protective order; the facts related to the letters Mendillo sent were the basis of the agency's request. During the hearing on the motion for protective order, Mendillo was the person who sought to contest whether he had violated the Rules of Professional Conduct.
>
> By filing the writ of error, Mendillo has forced the trial court's hand to articulate its finding that he violated rule 4.2. When Tinley argued before this court, he iterated that he and the agency's position were not seeking to have Mendillo sanctioned, only that the court's order granting the motion for protective order be affirmed. Mendillo is the party pursuing the question of whether he violated the Rules of Professional Conduct.[31]

---

[30] 161 Conn. App. 102, 127 A.3d 356 (2015).
[31] *Id*. at 119 n.11.

The Appellate Court affirmed that there was no violation of Practice Book Section 2-47A where an attorney unilaterally transferred disputed fees of more than $350,000 into his own account.[32] The court reasoned that under that provision, the term "knowing" does not require a mandatory disbarment unless the attorney knew in fact that the funds he took did not belong to him.[33] The decision turned on the pivotal point that the lawyer acted negligently rather than willfully.[34] A petition for certification was granted and the case should be argued this fall.

The Appellate Court weighed in on the disqualification of government lawyers under Rule 1.11.[35] The plaintiff, in an action against the city, moved to disqualify the city's corporation counsel because one of its attorneys, prior to her appointment, had sent letters on behalf of the plaintiff concerning the same matter. The court correctly decided that Rule 1.11 and not Rule 1.9 governed this situation. The Court held that with respect to government offices the disqualification does not extend beyond the conflicted attorney although the commentary notes that it would be prudent to screen out other attorneys. The Court stated that this more permissive approach to government offices is in the interest of the government's "legitimate need to attract qualified lawyers as well as to maintain high ethical standards."[36] Unlike the Supreme Court decision in *Anderson v. Commissioner of Correction*,[37] which the authors roundly criticized in 2013, in this case, the Appellate Court applied the correct rule and applied it correctly.

Finally, the Appellate Court made clear that a dismissal from a grievance panel is the end of the line and is not subject to further review.[38] On the other hand, there is no final judgment and therefore no immediate appeal allowed from

---

[32] Disciplinary Counsel v. Parnoff, 158 Conn. App. 454, 119 A.3d 621, *cert. granted*, 319 Conn. 905, 122 A.3d 1279 (2015).

[33] *Id.* at 468.

[34] *Id.* at 466.

[35] Brown v. City of Hartford, 160 Conn. App. 677, 127 A.3d 278 (2015).

[36] *Id.* at 695.

[37] 308 Conn. 456, 64 A.3d 325 (2013). *See* discussion at Kimberly A. Knox & Brendon P. Levesque, *Professional Responsibility Review 2013*, 88 CONN. B. J. 73, 88-89 & n. 46 (2014).

[38] Rousseau v. Statewide Grievance Comm., 163 Conn. App. 765, 767, 133 A.3d 947, 949 (2016).

the SGC's decision directing that a presentment be filed against the attorney.[39]

B. *Connecticut Superior Court*

The court found an immigration attorney with over thirty years of experience violated the rules governing competence, diligence, communications, fees, and also failed to maintain her IOLTA.[40] In one client matter, the attorney failed to file for green card status based on the client's marriage to a United States citizen.[41] When the client informed her of her subsequent separation from her husband, the attorney waited over eighteen months to file an alternative application. She offered no explanation for the delay.

In two other cases, she failed to file appeals, correctly causing them to be dismissed.[42] While these clients asked about their appeals every month for nearly eight years, she never informed the clients that the matters had been dismissed in 2004. The two clients were arrested in 2011 and detained for sixteen months and eighteen months respectively. Sadly, the attorney showed little remorse for her clients' circumstances when she testified that "some unfortunate things happened."[43] Disciplinary Counsel sought a five-year suspension, but the court ordered a two-year suspension. This sanction is incongruent with the harm suffered by the clients, which, under the ABA Model rules for sanctions, is a valid consideration.[44]

A lawyer was reprimanded for demanding a payment of $70,000 in lieu of filing an ethics complaint against a California lawyer.[45] The two came to meet due to an issue

---

[39] Rozbicki v. Statewide Grievance Comm., 157 Conn. App. 613, 616, 115 A.3d 532, 534 (2015).

[40] Disciplinary Counsel v. Sporn, CV-14-6024035-S, 2015 WL 6144111 (Conn. Super. Ct. Sept. 18, 2015). Case currently pending before the Appellate Court, No. AC 38387.

[41] *Id*. at *2-5.

[42] *Id*. at *5.

[43] *Id*. at *16.

[44] Compare this case, which was contested, to the sanction in Disciplinary Counsel v. Bucci, CV-12-6030378-S, 2015 WL 1379659, at *4 (Conn. Super. Ct. Mar. 6, 2015). In *Bucci*, the lawyer *acknowledged* a series of violations of Rules 1.3, 1.4 and 8.1 as well as a number of administrative suspensions, but was suspended for three years.

[45] Shehu v. Statewide Grievance Committee, CV-14-6052929-S, 2015 WL 9920776 (Conn. Super. Ct. Dec. 30, 2015) (affirming SGC order of reprimand).

with a law-related blog. The California lawyer had a blog on urban development. The blog received "comment spam" that was allegedly unethical and inappropriate. The California lawyer traced the "comment spam" to an IP address with links to the Connecticut lawyer's website. A dispute arose between the parties. The Connecticut lawyer responded with threats to file a defamation lawsuit, which he subsequently filed. The California lawyer filed a grievance complaint against the Connecticut lawyer. The SGC found the Connecticut lawyer's threat for payment in lieu of filing an ethics complaint against the California lawyer violated Rule 8.4(4) and he was reprimanded. In the past, a threat to file a grievance would have been a violation of Rule 3.7. In light of Informal Opinion 15-01, that is no longer the case. The trial court discussed specific findings made by the SGC about the respondent's lack of candor, lack of remorse, failure to offer an explanation for the "comment spam," and his evasive answers. The authors suspect that this behavior affected the sanction imposed by the SGC.

The issues of defalcation and unauthorized practice of law (UPL) reared their ugly heads. An out-of-state, disbarred attorney accepted a personal injury claim against a Greenwich golf course and settled the case for $17,500, but never made a disbursement to the client.[46] The same out-of-state, disbarred lawyer settled a motor-vehicle accident case for another client for $75,000, but failed to disburse the funds.[47] When the client complained, the disbarred lawyer began making incremental payments. Most remarkably, the disbarred lawyer had the audacity to ask the client not to immediately deposit the check for the third and final partial payment due to insufficient funds. He completed the payments some seventeen months after the settlement was reached. Interestingly, he still managed to take out his attorney's fees after all that had gone on in the case. By the time the client received the funds, his medical bills had gone into collection and his bank account was attached. The

[46] Disciplinary Counsel v. Krawitz, CV-15-6057676-S, 2015 WL 7709405 (Conn. Super. Ct. Nov. 15, 2015).

[47] *Id.* at *1.

court, finding a violation of the unauthorized practice of law and other ethics violations, disbarred the lawyer in Connecticut for not less than fifteen years.[48] This person has also been prosecuted criminally for what appears to be a larger pattern of misappropriating clients' settlement funds. In September 2015, he was sentenced in New York to four to twelve years incarceration for stealing approximately $2 million worth of settlement funds from clients.

An attorney with multiple convictions for operating a motor vehicle while under the influence of alcohol/drugs received an interim suspension following his third guilty plea. After a disciplinary hearing held after the attorney was released from custody, the court weighed the aggravating and mitigating circumstances and ordered a retroactive suspension from the date he was placed on interim suspension until the date of the court's decision.[49] The court also required the attorney to apply for reinstatement but it allowed him to apply as of the date of the court's decision which was prior to the termination of probation.

A superior court expanded the litigation privilege enunciated by the Supreme Court in *Simms v. Simms*.[50] The plaintiff filed a lawsuit against his former wife's divorce attorney.[51] The parties' divorce judgment was based on a stipulated separation agreement. The plaintiff alleged extortion by his ex-wife's counsel in forcing him to sign the stipulated agreement. He also alleged fraud based on the claim that the lawyer coached his ex-wife in how to remove him from the home. The plaintiff alleged other unethical conduct, including violations of Rules 4.1 and Rule 8.4. The court granted summary judgment in favor of the attorney, concluding that the litigation privilege clearly applied to the fraud count. As a matter of first impression, the court expanded the privilege to apply to the remaining counts,

---

[48] The trial court found violations of Rules 1.2, 1.3, 1.4, 1.15, 1.16, 5.5, 7.1, 8.4, and 8.4 as well as Practice Book § 2–32(a)(1).

[49] Chief Disciplinary Counsel v. McDonough, CV-13-6045715-S, 2015 WL 777139 at *6 (Conn. Super. Ct. Feb. 4, 2015).

[50] Simms v. Simms, 283 Conn. 494 (2007).

[51] Gordon v. Perlmutter, CV-14-5034851-S, 2015 WL 5626188 (Conn. Super. Ct. Aug. 19, 2015).

including four counts of extortion, unethical conduct, and violation of the Rules of Professional Conduct.[52] As an alternate basis to grant summary judgement, the court reinforced the rule that violations of the Rules of Professional Conduct without more do not give rise to a cause of action.[53]

In the area of legal malpractice there can be a fine line between tort and breach of contract. A motion to strike a contract count was granted where the allegations were merely a disguised negligence claim[54] but was denied where the allegations were a failure to perform a promised task.[55]

In suspending an attorney for a year and without automatic reinstatement,[56] the court relied on the ABA Standards For Lawyer Sanctions.[57] In particular, the court considered,

> A dishonest or selfish motive, a pattern of misconduct that has occurred throughout these events, a refusal to acknowledge the wrongful nature of the respondent's conduct as detailed above, and the fact that the respondent has been an attorney for a considerable period of time. In mitigation, the court has considered the respondent's absence of a prior disciplinary record and the fact that the proceedings have been delayed a significant period of time.[58]

An attorney sued his client for legal fees. It should come as no surprise to anyone that the client counterclaimed with a legal malpractice claim and related actions.[59] The trial

---

[52] *Id.* at *1.

[53] *Id.* at *6.

[54] Therapy Kinections, LLC v. Clough, CV-14-6023130-S, 2015 WL 5626191 (Conn. Super. Ct. Aug. 21, 2015).

[55] Sroka v. Weed, CV-14-6055077-S, 2015 WL 5894241 (Conn. Super. Ct. Sept. 4, 2015).

[56] Spears v. Elder, Grievance Complaint No. 14-0272. In 2004, Attorney Elder answered two phone calls from a police officer but identified himself using another lawyer's name. He told the police officer he was "Attorney Spears." The police officer, who was in the process of a criminal investigation of a suspect, believed he was talking to Attorney Spears when, in fact, he was speaking with Attorney Elder. As a result of the misrepresentation, Attorney Spears was the subject of a grievance complaint and the subject of an arrest warrant for an incident in which he had no involvement.

[57] Disciplinary Counsel v. Elder, No. HHD-CV15-6057582, 2015 WL 5136008, at *3 (Conn. Super. Ct. July 29, 2015).

[58] *Id.*

[59] Febbroriello v. Babji, No. LLI CV 12-6006461-S, 2015 WL 5236995 (Conn. Super. Ct. July 31, 2015). The attorney sued based on a breach of contract, despite having no written contract, and unjust enrichment.

court in rejecting damages for unjust enrichment considered the attorney's conduct. The court found that the attorney did not begin his representation with diligence or urgency and that he did not keep his client reasonably informed on the status of her case. Further, it noted that there was no written agreement between the parties and the attorney over-charged the client for transcript costs. The court found that the most significant detriment to the client occurred when the lawyer unilaterally abandoned the representation in the underlying litigation action. The court held the lawyer forfeited the right to all outstanding fees and costs compensation due to abandonment.

C. *Second Circuit Court of Appeals*

The Second Circuit Court of Appeals addressed a hot topic regarding Internet searches of potential jurors under absurd facts. In *U.S. v Parse*,[60] a juror intentionally lied about or omitted material facts about her education, employment, address, name, her father's employment as a judge, her husband's criminal activity, her criminal activity in multiple states, her extensive alcohol addiction problems, that she was a suspended attorney, and her extreme bias in favor of the state among other things in order to make herself a more "marketable" juror.[61] This all was discovered after a jury verdict was returned and the juror in question sent a letter to the prosecutors congratulating them on their work and detailing how she was pulling for them from the beginning of the trial.[62]

The district court focused on the conduct of the defense counsel. The court found the lawyers had knowledge or should have had knowledge that the juror was lying. When the attorneys searched the juror's name during voir dire, a hit came up outlining that a woman of the same name had recently had her attorney's licenses suspended. After doing further Internet research, the attorney sent an email stating "Jesus, I do think that's her."[63] The district court con-

60 789 F.3d 83, 87-93 (2d Cir. 2015).
61 *Id*. at 91.
62 *Id*. at 87.
63 *Id*. at 97.

cluded that the attorneys' knowledge of the misrepresentations prior to the trial without objection was a waiver of the right to appeal this issue. The Second Circuit Court of Appeals reversed this holding that "thinking" and "knowing" are not the same and the defendants' Sixth Amendment rights[64] would not be so easily waived.[65] The Second Circuit focused on the attorneys' inconclusive search results. While attempting to do their due diligence, the attorneys found some suspicious information on the Internet. They were unable, however, to match this information with that of the juror on their case. It was not until after the verdict was rendered that they became aware that the juror and the disbarred attorney were one and the same. This decision appears to be consistent with other courts.[66]

The Second Circuit publically reprimanded and suspended three attorneys for misconduct. One attorney was suspended for eighteen months based on a demonstrated pattern of neglect in six criminal appeals.[67] The Second Circuit noted significant aggravating factors contributed to the sanction including a prior disciplinary history, a pattern of misconduct spanning several years, and the fact that the cases involved criminal appeals, where significant liberty interests were at risk. Perhaps most troubling was the attorney's failure to properly respond to significant portions of the order to show cause why discipline should not be imposed. The attorney's cavalier attitude about the court order appeared consistent with his overall approach to representing clients.

---

64 The Sixth Amendment to the U.S Constitution provides the following fundamental rights to those accused in all criminal prosecutions: "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

65 *Id*. at 116-117, 120.

66 *See* Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (Trial court did not abuse its discretion in finding intentional nondisclosure and ordering a new trial, but a party should make reasonable efforts to investigate selected jurors' litigation history on Case.net.); Roberts ex rel. Estate of Roberts v. Tejada, 814 So.2d 334 (Fla. 2002) (Case remanded because juror's nondisclosure of prior litigation history is material but trial counsel was not required to search public records of venirepersons to satisfy due diligence requirement regarding juror nondisclosure of information.).

67 In re Aranda, 789 F.3d 48 (2d Cir. 2015).

The Second Circuit also publically reprimanded an attorney for misconduct and general neglect in four criminal appeals and his failure to respond timely to an order to show cause why disciplinary action should not be imposed.[68]

IV. Statewide Grievance Committee 2015

A. *Statistical Analysis 2015/Interesting Trends*

In 2015 there were 136 decisions issued by the SGC, eighteen more than last year. Of these decisions, 78 (fifty-eight percent) resulted in dismissals. Some form of discipline was imposed in the remaining 57 (forty-two percent). For those who have read our review in prior years, this should come as no surprise. The dismissal rate has consistently remained between fifty and sixty percent. The following chart details the fifty-seven disciplinary actions that imposed some type of discipline or condition, breaking them down into Practice Book Section 2-82 dispositions[69] and hearings on the merits.

Breakdown of Decision by Type and Sanction

	Discipline Overall	**2-82 Dispositions**	**On the Merits**
Presentment	30	18	12
Reprimand + Conditions	2	1	1
Reprimand Only	11	7	4
Conditions Only	13	9	4
Other	1		1
Total	57	36	21

[68] In re Villanueva, No. 14-90028-am, 633 Fed. Appx. 1, 2015 WL 7729525 (2d Cir. 2015).

[69] The disciplinary counsel to whom a complaint is forwarded after a finding that probable cause exists that the respondent is guilty of misconduct may negotiate a proposed disposition of the complaint with the respondent or, if the respondent is represented by an attorney, with the respondent's attorney. Such a proposed disposition shall be based upon the respondent's admission of misconduct, which shall consist of either (1) an admission by the respondent that the material facts alleged in the complaint, or a portion thereof describing one or more acts of misconduct to which the admission relates, are true, or (2) if the respondent denies some or all of such material facts, an acknowledgement by the respondent that there is sufficient evidence to prove such material facts by clear and convincing evidence. P.B. § 2-82 (a).

In the land of steady habits it should also not come as a surprise that the most commonly violated rules in 2015 include 1.15 (Safekeeping of Property), 1.3/1.4 (Diligence/Communications),[70] 8.1 (Bar Admission and Disciplinary Matters), 8.4 (Misconduct) and Practice Book Section 2-32(a) (Filing Complaints). As in past years, presentment remains the most common outcome at the SGC level, accounting for fifty-one percent of all disciplinary actions and sixty-two percent of disciplinary actions for the most commonly violated rules.

Top Rule Violations

Rule	1.15	1.3/1.4	8.1	8.4	PB §2-32	Total
Presentment	7	7	7	13	8	42
Reprimand		2	1	4	2	9
Reprimand +		3				3
Conditions	3	6	2	1	2	14
Total Rule Violations in Cases with Discipline	10	18	10	18	12	68

In the past, the authors have been critical of the findings of violations of Practice Book sections, including, for example, Section 2-32. The authors concerns have not been assuaged, and in fact, in 2015, a local panel found probable cause that the Respondent in one case[71] violated Practice Book Section 2-44(a). However, Section 2-44(a) solely provides the definition of the practice of law. Although there was no discipline imposed in the Section 2-82 disposition, it is worrisome that such a finding, outside the realm of the ethics rules, even came about when Rule 5.5 is directly on point.

We also noted in our 2014 review the steady rise in violations of Rule 8.4 (Misconduct) over the preceding five years. The authors attributed this rise to the inappropriate

[70] Rules 1.3 and 1.4 occur so frequently together that they were grouped into one category.

[71] King v. Pearson, Grievance Complaint No. 13-0472.

use of Rule 8.4 as both a catch-all rule and as a separate violation in addition to a violation of a clearly applicable rule. We wondered whether Rule 8.4 violations would continue to rise or if they would eventually plateau in upcoming years. In 2015, the number of disciplinary actions entered for violations of Rule 8.4 actually took a slight dip, down to eighteen from last year's twenty-one. The authors are pleased with this decrease because although Rule 8.4 remains the most frequent rule violation, it is possible that the Rule is not being used as a catchall as much as it has in the past.

Finally, it is worth noting that violations of Rule 1.1 (Competence) were cited in 2014 as one of the most frequent violations and have since nearly dropped off the chart with only two disciplinary actions entered for such violations. This is significant because in the last few years, Rule 1.1 violations were steadily on the rise. We associated that rise with the falling economy and surmised that especially succeeding the 2008 financial crisis, many lawyers were dabbling in unfamiliar areas of law to compensate for their losses elsewhere. It is possible that the recent decrease in Rule 1.1 violations is due to the recovery (though modest) in the economy, allowing lawyers to focus back on the legal work with which they are best acquainted.

B. *Decisions of Interest/Developments*

1. Conflicts of Interest and Conflict Waivers.

Although many decisions discuss conflicts of interest as litigation tactics, the SGC issued an interesting decision that discusses conflicts and the reasonableness of conflict waivers.[72] The lawyer wore two hats: as a solo practitioner in two law firms and as the legal director of a surrogacy business, which matched parents to surrogacy mothers for pregnancy. The surrogacy business required clients to retain one of these law firms as an escrow agent pursuant to an agreement that the attorney drafted for use by the surrogacy business. Blurring the lines even more was the fact that the attorney's husband served as an office manager for

[72] Cislo v. Steenson, Grievance Complaint No. 13-0540.

the law firm and was the sole member of the surrogacy business. The law firm and surrogacy business also operated at the same address.

The SGC concluded that the attorney's representation of the surrogacy business and parents who were clients of that business constituted a non-waivable conflict of interest in violation of Rule 1.7(a)(2). "In this instance, there was a significant risk that the Respondent's representation of the Complainants would be materially limited by her responsibility to the client, the surrogacy business, and by her personal vested interest in that business."[73]

2. Diligence and Communication

Perhaps one of the most difficult things to do as a lawyer is to give clients bad news. But failing to give the client news, including bad news, will run afoul of Rules 1.3 and 1.4. For example, after an individual facing a civil suit retained him, an attorney failed to take any action beyond filing an appearance in the case, leading to a $55,000 default judgement against the client.[74] Another attorney whom the client retained to file a malpractice suit was unable to get the initial attorney to turn over his file in the case. Ultimately, the attorney admitted he had lost the file and taken to ignoring the case until he found it—which he never did, save for some of the pleadings. The reviewing committee ordered a presentment to Superior Court for violations of Rules 1.1, 1.3, 1.4(a)(2), (3) and (4), 1.15(e) and 8.4(4). Had the attorney admitted early on that he lost the file, perhaps he could have avoided a grievance complaint altogether.

3. Responding to a Disciplinary Authority and the Three Strikes Rule.

It is imperative that lawyers remain cognizant of both their past disciplinary history and the fact that they have an obligation to respond to requests for information from a disciplinary authority. Two cases demonstrate the potential for disaster when these two precepts are ignored.

---

[73] *Id.* at 6.
[74] Messina v. Cohen, Grievance Complaint No. 14-0437.

Jaramillo v. Radshaw[75] is notable for three things. First, a seemingly minor violation can have significant effects when it is preceded by three violations within a five-year period and where the attorney failed to respond to the grievance complaint despite obtaining additional time to do so. Apparently, he didn't respond because he thought the client would withdraw the grievance complaint once he completed settlement of his client's insurance claim.[76] Second, it cannot be stated enough, grievance complaints *cannot be withdrawn*. Finally, even though the record lacked sufficient evidence to support any of the violations alleged by the client, the attorney nonetheless was found in violation of Rule 8.1(2) and Practice Book Section 2-32(a)(1) for failing to respond to the grievance complaint. This only would have resulted in an order to attend continuing legal education courses, but instead resulted in an order for the Disciplinary Counsel to file a presentment in Superior Court.[77]

There was a similar outcome in *Leonti v. Piombino*.[78] There, the SGC ordered a presentment based on a fourth violation within five years for an offense that otherwise would have only resulted in an order to attend two continuing legal education courses.[79] The authors commented on an alternate construction of the three-strike rule last year that would allow the SGC some discretion in requiring a presentment. Based on decisions in 2015, it appears that the SGC is interpreting Practice Book Section 2-47(d) to mean that if there is a fourth violation found within five years that an order of presentment is mandatory.

Failing to respond to the grievance complaint is a colossal mistake and it hurts multiple lawyers every year. In *Capetta v. Chizinski*,[80] the attorney was grieved based on

---

75 Grievance Complaint No. 14-0822.

76 *Id*. at 4.

77 *Id*. at 6.

78 Grievance Complaint No. 14-0255.

79 In 2014, the authors discussed the "mandatory" nature of § 2-47(d), pondering whether the SGC had discretion to order a presentment after three previous sanctions within the last five years if the fourth violation was not serious. Kimberly A. Knox & Brendon P. Levesque, *Professional Responsibility Review 2014*, 88 Conn. B.J. (2015).

80 Grievance Complaint No. 14-0475.

his performance as attorney for an estate. The SGC ordered a presentment not for the alleged conduct but for the attorney's disregard of the disciplinary process.[81] The attorney failed to respond to the Disciplinary Counsel involved in the case more than once and failed to file responses with the SGC.

The same lawyer had another grievance filed against him based on his performance as guardian ad litem for two minor children whose parents were involved in a custody dispute.[82] One of the children had been sexually assaulted by a paternal grandfather, who was incarcerated. The SGC found the attorney to have all but ceased communication with the mother of the children though his firm remained assigned to the case. When a grievance was filed against him in relation to the matter, he likewise failed to respond to Disciplinary Counsel as in the *Capetta* matter.[83] The SGC found a violation of Rule 8.4(4) for the lawyer's failure to investigate allegations of sexual abuse diligently, failure to respond to a court order that he speak to the children's therapist, and for his lack of responsiveness with the mother of the two children. The reviewing committee ordered Disciplinary Counsel to file a presentment in Superior Court.[84]

4. Responsibility as an Attorney

All lawyers should read *Aguero v. Hughes*,[85] but young lawyers ought to pay special attention. A young attorney working with a firm took on a case representing a non-English-speaking client in a child support dispute. The client paid a retainer to the law firm. The young attorney appeared in court on his behalf. The young lawyer's first mistake was filing a personal appearance versus a firm appearance in a state court proceeding.[86]

Shortly thereafter, the firm laid the attorney off for lack

---

81 *Id.* at 5.
82 Daugherty v. Chizinski, Grievance Complaint No. 14-0522.
83 *Id.* at 5.
84 *Id.* at 7.
85 Grievance Complaint No. 14-0151.
86 *Id.* at 2.

of work. The attorney believed the firm—having accepted his clients' retainer fee—would contact the clients in order to advise them that another of the firm's attorneys would handle their case going forward. In fact, the firm sent such a letter to the client. It was unclear, however, whether the client received the letter. It is clear that he would not have been able to read it as it was only written in English.[87]

The lawyer worked briefly for another firm and updated his attorney registration. As the client's case progressed, the young attorney did not attend two court dates.[88] As a result, the client filed a grievance complaint and a criminal complaint against him. The client believed the lawyer had stolen his retainer fee. The lawyer did not update his registration after leaving the second firm. The second law firm received the grievance complaint but did not forward it to the lawyer. As a result, the lawyer did not answer the complaint.

The SGC found the attorney in violation of Rules 1.1, 1.3, 1.4, 8.1(2) and Practice Book Section 2-32(a).[89] The SGC rejected the attorney's argument that he believed his first firm would handle the case after he left as the retainer agreement was with the firm. The SGC relied on the fact that he filed a personal appearance. Because in doing so, "he represented to the court that he was personally responsible for the Complainant's matter."[90] By failing to notify the client or the court of his withdrawal from the case, he failed to do things "a competent attorney would have known to do."[91]

The SGC based the attorney's violation of Rule 1.4 on his reliance on the client's partner to translate any documents and conversations and his failure to communicate his withdrawal from the case.[92] The Rule 8.1(2) violation arose from the attorney's failure to answer the grievance complaint,

87 *Id.* at 3.
88 *Id.*
89 *Id.* at 3-4.
90 *Id.* at 3.
91 *Id.* at 4.
92 *Id.*

which had been sent to the firm for which he no longer worked. The SGC noted that "It was the Respondent's responsibility to update his address when he left the firm."[93]

Although the SGC considered the attorney's brief career and the fact that he had held several short-term positions, the SGC noted that it

> nonetheless . . . believe[s] it is important that the Respondent understand that he has certain independent duties as a lawyer. One of those duties is to assist a client once he has begun work on a file and see it through. Another duty is to respect that, as an officer of the court, once an appearance is filed, the attorney must continue to represent the client before the court, unless the court gives permission to withdraw as counsel or another appearance is filed in lieu of the attorney's appearance.[94]

The authors commend the SGC in its imposition of three hours of CLE as discipline in this case. Although there were multiple violations, the SGC properly weighed the goals of attorney discipline and certain mitigating factors in reaching a fair result. In addition, the SGC also pointed out some failings that were not on the part of the young lawyer.

Danbury Judicial District Grievance Complaint v. Miller[95] provides guidance on the question of when a lawyer knowingly makes false statements in a pleading. In 2010, an attorney filed a lawsuit against the Bridgeport Board of Education and Bridgeport City Attorney alleging that they discriminated against her in failing and refusing to pay for her "valuable legal services performed."[96] After the defendants filed a motion for sanctions including two affidavits that contradicted the plaintiff's allegations, the district court found that the Respondent attorney knowingly made false statements of fact in her amended complaint. The court fined her $1,500 and referred the matter to the SGC. After a hearing, the SGC concluded that the Respondent

---

93 *Id.*
94 *Id.*
95 Grievance Complaint No. 14-0803.
96 Miller v. Bridgeport Bd. of Educ., No. CV 106011406, 2011 WL 1886562 (Conn. Super. Ct. Apr. 21, 2011).

engaged in unethical conduct in violation of Rule 8.4(3).[97] She violated Rule 3.3(a)(1) by failing to correct the false statement when given the opportunity. Finally, she violated Rule 8.4(4) when in a letter to the defendants in response to a safe harbor letter, she referenced "economic terrorism."

5. Defalcations

The SGC continues to have little tolerance for attorney defalcations. In *Gezelman v. Monagner*,[98] the attorney settled a personal injury case with two insurers for $100,000 and notified the client of receipt of the checks, which were deposited into an IOLTA. The client, however, never received the funds or an accounting. In 2013, the lawyer was suspended indefinitely pursuant to a reciprocal suspension in New York.[99] In 2014, after futile efforts to reach the now suspended attorney, the client filed a grievance. The SGC found the attorney converted the funds and directed the filing of a presentment.[100]

C. *Statewide Grievance Committee Advertising Opinions*

In 2015, the SGC issued eleven Advisory Opinions under the voluntary pre-approval process, which is the "pass card" for a grievance complaint based on the advertisement.

If an area of law is not a recognized field of certification under Rule 7.4A(e), a lawyer may not state that she has an "expertise" or a "specialization" in that area.[101] The terms "focus" and "concentrates" in an area of law are ethical. Testimonials from real people describing their experience or giving their opinion of the attorney are permissible.[102] A law firm motto that includes "we win" is likely to create unjustified expectations as to results and is not permissible.[103] The SGC noted that an appropriate disclaimer would address

---

97 Grievance Complaint No. 14-0803, at __ (need page cite).
98 Grievance Complaint No. 14-0722.
99 *Id*. at 4.
100 *Id*. at 9.
101 Advisory Opinion No. 15-08143-A ("Website Language Advertising Expertise Rule 7.4A Certification as a Specialist").
102 Advisory Opinion No. 15-02062-A ("Law Firm Website Advertising Client Cases, Confidentiality and Disclaimers").
103 Advisory Opinion No. 15-04768-A ("Firm Motto and Logo").

the problem. Practically speaking, however, that would take away the punch of a short motto.

The SGC reviewed seven television advertisements, six were submitted as script and one on a DVD.[104] With only one exception, the SGC found compliance with the rules. The one that did not comply was easily revised. The advertisement was missing the requirement that the name, address, and telephone of one Connecticut lawyer be displayed in bold for fifteen seconds or the duration of the commercial, whichever is less.[105]

When a lawyer collaborates with non-lawyers in the delivery of professional services, the lawyer has an obligation to ensure the collaborative website complies with the lawyer advertising rules. An attorney who sought an advisory opinion received guidance on how to bring the website into ethical compliance.[106] The lawyer recognized that marketing, even on another entity's website, requires compliance with the ethics rules. The SGC Advisory Opinions, which guide the requesting attorney through the applicable rules, are an underutilized resource on attorney advertising.

V. 2015 Ethics Opinions

A. *ABA Formal Opinions*

The ABA issued three Formal Opinions in 2015.[107] Formal Opinion 472 addressed communications in providing

---

[104] Advisory Opinion No. 15-02038-A ("Television Commercial #One Rule 7.1-Results Disclaimers and Dramatization"); Advisory Opinion No. 15-02039-A ("Television Commercial #Two Rule 7.1-Results Disclaimers and Dramatization"); Advisory Opinion No. 15-02040-A ("Television Commercial #Three Rule 7.1-Results Disclaimers and Dramatization"); Advisory Opinion No. 15-02041-A ("Television Commercial #Four Rule 7.1-Results Disclaimers and Dramatization"); Advisory Opinion No. 15-02042-A ("Television Commercial #Five Rule 7.1-Results Disclaimers and Dramatization"); Advisory Opinion No. 15-02043-A ("Television Commercial #Six Rule 7.1-Results Disclaimers and Dramatization"); Advisory Opinion No. 15-06382-A ("Television Advertisement Bankruptcy Services Rule 7.2(d)").

[105] Advisory Opinion No. 15-06382-A.

[106] Advisory Opinion No. 15-02007-A.

[107] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 470 ("Judicial Encouragement of Pro Bono Service"); *id*., Formal Op. 471 ("Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled"); *id*., Formal Op. 472 ("Communication with Person Receiving Limited-Scope Legal Services").

limited-scope legal services.[108] In Connecticut, the advent of limited-scope representation has created concerns about the "no contact" rule with a represented party. In a limited-scope representation, a person is, at some times, self-represented. At other times, the person is represented by legal counsel. This should be black and white, but it is not. In practice, there is a lot of gray. The ABA recommends that when a lawyer has reason to believe, based on the circumstances, that an unrepresented person has received limited-scope services, the lawyer should begin conversations with the unrepresented person by asking if he or she is or was represented on the matter to be discussed.[109] This will guide the lawyer in whether to speak with the opposing lawyer under Rule 4.2 or directly with the person under Rule 4.3.

B. *CBA Informal Decisions*

The Connecticut Bar Association issued eight decisions in 2015.[110] Two opinions discuss Rule 3.4(7) which provides, "A lawyer shall not: . . . (7) Present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Although a threat to initiate a grievance may implicate other rules, it does not implicate Rule 3.4(7).[111] The Committee has changed course from Opinion 93-23, where it interpreted that it is not a violation.

The committee concluded that settlement of a legal malpractice action cannot include an agreement not to file a grievance complaint. If a lawyer's obligation to report pro-

---

[108] *See* Kimberly A. Knox, *Limited Scope Representation and the Engagement Agreement*, 26(6) CONN. LAWYER (April 2016).

[109] ABA, Formal Opinion 472 at 1.

[110] CBA Comm. on Prof'l Ethics, Informal Op. 2015-01 ("Lawyer May Not Properly Condition Settlement of a Civil Matter on Agreement Not to Report Professional Misconduct"); *id*., Informal Op. 2015-02 ("Signing Unenforceable Home Improvement Contract"); *id*., Informal Op. 2015-03 ("Dual Role as Attorney and Real Estate Agent in the Same Transaction"); *id*., Informal Op. 2015-04 ("Lawyer's Participation in a Barter-Exchange Program"); *id*., Informal Op. 2015-05 ("Criminal and Civil Case under Rule 3.4(7)"); *id*., Informal Op. 2015-06 ("Whether a Lawyer May Practice Law Simultaneously in More Than One Law Firm"); *id*., Informal Op. 2015-07 ("Duty to Follow Instructions of Client with Diminished Capacity in Appealing Probate Court Order"); *id*., Informal Op. 2015-08 ("Sale of Law Practice").

[111] *Id*., Informal Op. 2015-01 (Revising Informal Opinion 93-23).

fessional misconduct is triggered under Rule 8.3, that "lawyer cannot propose that as part of a settlement he or she will agree not report the misconduct."[112] The committee also opined that a lawyer representing a personal injury client could negotiate for a statement of liability from the defendant in exchange for which the client would agree not to object to the defendant's application for a pretrial diversionary program in connection with the accident.[113] A true statement of liability would further the civil claim for compensation for the injuries sustained by the defendant who was arrested for driving under the influence in connection with the accident. The committee concluded that Rule 3.4(7) did not apply because a criminal action was already pending and there was a corollary benefit to the client in the civil action.[114]

The committee addressed two inquiries about the sale of a law practice, under Rule 1.17.[115] This Rule allows solo practitioners to benefit from the value of the goodwill of a legal practice, provides continuity of representation to the practitioners' clients, allows a ready path to retirement, and allows a transfer of a practice to interested attorneys. Informal Opinion 15-08 is a worthy read and offers a nuts and bolts approach to a sale.

The ethical concerns in representing clients with diminished capacity continues to present fact-determinative situations and questions. The issue was addressed again in Informal Opinion 15-07, which discusses other ethics opinions and *Gross v. Rell*.[116]

VI. Changes to the Rules of Practice

There were two notable rule changes passed in 2015.[117] The first were amendments to Rule 1.15 including provisions for the safekeeping of disputed property. Subsection (f)

---

[112] *Id.*
[113] *Id.*, Informal Op. 2015-05.
[114] *Id.* at 2.
[115] *Id.*, Informal Op. 2015-08.
[116] *Id.*, Informal Op. 2015-07 (citing 304 Conn. 234, 40 A.3d 240 (2012)).
[117] 76(42) Conn. L.J. at 9PB-31PB.

requires that if "two or more persons (one of whom may be the lawyer) have interests, the property shall be kept separate by the lawyer until the competing interests are resolved." The phrase "competing interests" replaces the prior reference to a "dispute." In the authors' opinion, this is just a clarification. The definition of "interest" is set forth in the Commentary and includes a valid judgment, a valid statutory or judgment lien, or other lien at law, and a letter of protection. A new subsection (g), which is expressly limited to client's funds, now provides a process by which a lawyer may try to ascertain the validity of the third party's "interest." More significantly, if the party with the competing interest fails to comply timely with the lawyer's requests for information within sixty days, the lawyer may disburse the funds to the client.

The other significant rule change is found in the new Practice Book Section 2-47B, and it restricts the activities that can be performed in the legal field by an attorney who is disbarred, suspended, resigned, or on inactive status. This rule addresses a recurring problem with suspended or disbarred lawyers working as alleged "paralegals." The line between practicing law by a disbarred or suspended lawyer and a paralegal had a significant potential to be blurred. Practice Book Section 2-47B now states, "No deactivated attorney[118] shall be permitted to engage in any law-related activities or to be employed as a paralegal or legal assistant unless expressly permitted by the court."

In 2015, twenty cases were heard by more than one reviewing committee. In the 2014 review, the authors commented that twenty-five cases were heard by more than one reviewing committee and that generally occurs when the initial reviewing committee rejects a proposed disposition pursuant to Practice Book Section 2-82. Until May 2016, if a reviewing committee rejected a proposed disposition, the admission of misconduct and proposed disposition "shall be withdrawn, shall not be made public, and shall not be used against the Respondent in any subsequent proceedings."[119]

---

[118] "Deactivated" is defined as, "an attorney who is currently disbarred, suspended, resigned, or on inactive status." Practice Book § 2-47B(a)(1).

[119] Practice Book §2-82(b).

This was a safety net for an attorney willing to enter into a plea-like disposition. As of May 24, 2016, the SGC adopted an amendment to the SGC Rules of Procedure that now requires "the subsequent reviewing committee shall review the previously rejected proposed disposition and affidavit." The impact on number of rejected proposed dispositions remains to be seen.

VII. Conclusion

The professional and ethical management of a law practice is neither intuitive nor constant. The ethical obligations and requirements for lawyers are changing and demanding. Competence is not limited to a lawyer's conduct in representing clients because competence in ethics requires so much more. Many law firms now have dedicated managers and in house ethics counsel. Although that may not be financially practical for small and solo practices, lawyers must ensure compliance with ethics in the management of the practice of law through continuing legal education or with the assistance of ethics counsel. The consequence of wandering off the path of ethical compliance reflects adversely on the public's perception of the lawyer's competence.