A Presentation on Ethical Issues in Technology Law: Background Legal Materials

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I. Duty of Competence

A. Ethics Rules

1. MR 1.1. ABA'S MODEL RULES OF PROFESSIONAL CONDUCT (2004).

2. Rule 1.1. NEW YORK RULES OF PROFESSIONAL CONDUCT.[1]

B. Discussion

1. According to MR 1.1 and Rule 1.1(a), "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

2. Lawyer competence is usually enforced through legal malpractice claims, not disciplinary proceedings.[2]

3. A 2000 study revealed that the largest category of disciplinary actions on a national basis related to issues of competence, diligence and failure to communicate with the client. *See* Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 811 (2004) (in a 2000 national study of disciplinary actions, the two most common categories were "competence or diligence," which was the basis for 17% of all disciplinary actions, and "communications with client," which was the basis for 14% of all disciplinary actions).

C. Competence – Attorney's Level of Experience

1. How knowledgeable must an attorney be about technology before he or she is competent to undertake a case or deal involving technology issues?

Comment 2 to MR 1.1 and Rule 1.1 states that "a lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar." It also states that a lawyer can obtain competence and "provide adequate representation in a wholly novel field through necessary study." Further, an attorney "may accept representation where the requisite level of competence can be

[1] Replaces DR 6-101 as well as DR 7-101(A)(1) and (3), NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY.

[2] While the violation of a Rule of Professional Conduct is highly probative of legal malpractice, it does not necessarily constitute legal malpractice. *See* Swift v. Choe, 242 A.D.2d 188, 194, 674 N.Y.S.2d 17, 21 (1st Dep't 1998).

achieved by adequate preparation before handling the legal matter."[3] See Comment 4, Rule 1.1.

If an attorney represents that she has broad expertise and experience in an area, then she may be held to a higher standard than "reasonable care." *See* Comment 1, Rule 1.1; Restatement (Third) of Law Governing Lawyers § 52 cmt. d ("[A] lawyer who represents to a client that the lawyer has greater competence or will exercise greater diligence than that normally demonstrated by lawyers in good standing undertaking similar matters is held to that higher standard, on which such a client is entitled to rely.").

2. When must an attorney who is not knowledgeable about technology associate with another attorney who is knowledgeable about the topic?

Rule 1.1(b) of NEW YORK RULES OF PROFESSIONAL CONDUCT, which is virtually identical to former DR 6-101(A)(1), prohibits a lawyer from "[h]andl[ing] a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it." However, competence may be achieved through adequate preparation as opposed to association in many circumstances. Comment 4, Rule 1.1.

3. At what point does an attorney who is not knowledgeable about technology have to hire a professional to advise him or her?

a. Former DR 6-101(A)(2) forbade a lawyer from "[h]andl[ing] a legal matter without preparation adequate in the circumstances." Meanwhile, former EC 6-3 observed that "[p]roper preparation and representation may require the association by the lawyer of professionals in other disciplines." The new rule does not include a provision analogous to former DR 6-101(A)(2). However, the comment states that competence includes adequate preparation, which is determined by the circumstances. In discussing special training or prior experience, the comment states that competent representation can be provided "through the association of a lawyer of established competence in the field in question."

b. Comment 1 to MR 1.1 and Rule 1.1 states that, in determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors to be considered include the relative complexity and specialized nature of the matter, the

[3] If an attorney intends to achieve competence through research and study, she should inform the client of that fact and ensure that preparation does not result in unreasonable charge or delay to the client. *See* Rule 1.5(a) (prohibiting excessive fees); Rule 1.3(a) (requiring that the attorney act with reasonable diligence).

lawyer's general experience as well as specialized experience in the field in question, and "the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question." The Comment acknowledges that certain circumstances may call for expertise in a particular field.

c. "When a lawyer is confronted with a legal matter requiring non-legal skills or knowledge outside the lawyer's experience or ability and these skills or knowledge are necessary for the proper preparation of the legal matter, DR 6-101(A)(2) appears to require that the lawyer associate with professionals in other disciplines who possess the requisite skills or knowledge needed by the lawyer to prepare the legal matter." Comm. on Prof'l & Judicial Ethics, Ass'n of the Bar of the City of New York, Formal Op. 1995-12 (1995) (holding that, when a lawyer cannot effectively communicate with his or her client due to a language barrier, the lawyer must hire an interpreter or run the risk of breaching his duty of competent representation).

4. What is an attorney's due level of care?

a. Generally, an attorney "may be held liable for ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action." *MCEG Sterling, Inc. v. Phillips Nizer Benjamin Krim & Ballon*, 169 Misc. 2d 625, 629, 646 N.Y.S.2d 778 (1996) (citing *Bernstein v. Oppenheim & Co.*, 160 A.D.2d 428, 430, 554 N.Y.S.2d 487 (1st Dept. 1990)). However, an attorney "is not held to the rule of infallibility and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt." *Id.* In *MCEG*, the plaintiff sued the defendant law firm for malpractice, alleging that the law firm had failed to properly perfect a security interest in the collateral for a loan. The firm failed to record or file the security interests—which were in accounts and royalties arising out of copyrighted films—with the federal Copyright Office. Only one case could have possibly supported the premise that, to be perfected as a security interest, licenses and accounts receivable relating to copyrights must be recorded with the Copyright Office. Further, this case did not exist at the time of the loan in question. The court held that a law firm may not "be liable for failing to anticipate a new development in the law, or for failing to protect its client against a future novel legal claim, the merit of which is unknown." 169 Misc. 2d at 625-26. According to the court, counsel did not have "a duty to employ a 'belt and suspenders' approach to perfecting, so as to prevent any possible legal

challenge, regardless of whether any support existed for such a theoretical assault." *Id.* at 629.

b. In some cases, reasonable care may "call for the lawyer to stay abreast of technological advances . . ." Comm. On Prof'l Ethics, NY State Bar Ass'n, Op. 782 (2004). In particular, the NY State Bar Association has noted that, in making decisions regarding transmitting information to a client via e-mail, counsel may need to know about related technological developments to be able to consider "the potential risks in transmission in order to make an appropriate decision . . . ." *Id.* In a similar vein, Comment 6 to M.R. 1, which is part of the recent Technology Amendments to the ABA rules, states: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." *See* Model Rules of Prof'l Conduct R. 1.1 cmt. 6 (2012). Further, the New York City Bar Association has noted that lawyers using cloud computing to store client information must "take reasonable steps to ensure that information stored in the cloud is properly maintained, organized, kept confidential when required, and accessible when needed" to fulfill the duty of competence. *See* NEW YORK CITY BAR ASS'N, THE CLOUD AND THE SMALL LAW FIRM: BUSINESS, ETHICS AND PRIVILEGE CONSIDERATIONS 14 (2013), *available at* http://www2.nycbar.org/pdf/report/uploads/20072378-TheCloudandtheSmallLawFirm.pdf.

II. Attorney-Client Privilege

A. The Law

The attorney-client privilege is a rule of evidence, not a rule of professional responsibility. The privilege applies only to (1) a communication (2) made between privileged persons (3) in confidence (4) for the purposes of obtaining or providing legal assistance for the client. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68. In other words, the attorney-client privilege protects communications between clients and their attorneys that were made for the purpose of seeking and rendering legal services, so long as the communications were intended to be and were kept confidential. *See, e.g.*, *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997). The privilege generally extends to both communications by the client to the lawyer and communications by the lawyer to the client. *See, e.g.*, *In re Six Grand Jury Witnesses*, 979 F.2d 939, 944 (2d Cir. 1992). The privilege, however, does not protect facts known by the client, or facts learned by the attorney from sources other than the client. *See, e.g.*, *Baptiste v. Cushman & Wakefield, Inc.*, 2004 WL 330235, at *1 (S.D.N.Y.

Feb. 20, 2004). In New York State, the attorney-client privilege is partially codified in § 4503 of the CIVIL PRACTICE LAW AND RULES, which defines a privileged communication as "a confidential communication made between the attorney or his or her employee and the client in the course of professional employment."

Federal Rule of Evidence (FRE 502), effective September 19, 2008, addresses many of the problems associated with the federal common law governing waiver of attorney-client privilege and the effect of certain disclosures protected by the privilege. In drafting the new rule, the Evidence Rules Committee sought to establish a national, uniform standard governing waiver and to address the large amount of effort and expense devoted to preserving the privilege and avoiding finadvertent waiver. The Rule provides that, with respect to disclosures made in a federal proceeding that waive the privilege, the "waiver extends to an undisclosed communication or information [covered by the attorney-client privilege or work-product protection] in a Federal or State proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." FRE 502(a). Thus the rule limits the scope of the waiver to the communication of materials disclosed in the federal proceeding and not to the entire subject matter of the communication unless "fairness" requires further disclosure. In addition, an inadvertent disclosure is not a waiver in a federal or state proceeding if "[2.] the holder of the privilege or protection took reasonable steps to prevent disclosure; and [3.] the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)." FRE 502(b). *See Chen-Oster v. Goldman Sachs & Co.*, 293 F.R.D. 547 (S.D.N.Y. 2013) (applying FRE 502(b) and holding that attorney-client privilege was not waived where databases prepared for legal advice were inadvertently disclosed); *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 216 (E.D. Pa. 2008) (applying FRE 502(b) and five common law factors for determining the reasonableness of steps taken to prevent an inadvertent disclosure).

B. Consultants – Application of Attorney-Client Privilege to Non-Lawyers Employed by Attorney

1. To be privileged, a confidential communication generally must occur solely between the attorney and the client. Therefore, the presence of a third party at the time of the communication usually constitutes a waiver of the privilege. However, "the inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client." *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999).

Currently, no reported cases address the privilege issue with respect to computer software consultants or experts. The following cases would likely be cited by analogy in a dispute in this area:

a. *Tax Accountants*. The Second Circuit, in its landmark decision *United States v. Kovel*, held that the presence of a third-party accountant does not constitute a waiver of the attorney-client privilege when "the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." 296 F.2d 918, 922 (2d Cir. 1961). Of course, for the privilege to apply, the communication must still be made in confidence and for the purpose of obtaining legal advice from the lawyer. *Id.* In reaching its conclusion, the Second Circuit recognized that "accounting concepts are a foreign language to some lawyers" and that, therefore, an accountant can be analogized to an interpreter or translator, whose presence does not constitute a waiver of the privilege. *Id.* at 921-22. *Kovel* protection has since been expanded to include other experts assisting counsel. *See, e.g., Gucci Am., Inc. v. Guess?, Inc*., 271 F.R.D. 58, 72 (S.D.N.Y.2010) ("Kovel has been construed broadly to include . . . investigators, interviewers, technical experts, accountants, physicians, patent agents, and other specialists in a variety of social and physical sciences."). While some courts have interpreted *Kovel* broadly, *see, e.g.*, *id.*, others have interpreted it more narrowly, *see, e.g.*, *Ackert*, 169 F.3d at 139 (third party involvement must be "necessary" to facilitating attorney-client communication as opposed to merely helpful). Support for a narrow interpretation of *Kovel* can be found in the language of *Kovel* itself: "Nothing in the policy of the privilege suggests that attorneys, simply by placing accountants, scientists, or investigators on their payrolls and maintaining them in their offices, should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the latter are operating under their own steam." *Kovel*, 296 F.2d at 921. *Egiazaryan*, which is discussed *infra* under "public relations consultants," suggests that New York has generally adopted a narrow interpretation of *Kovel*.

b. *Engineer or Technical Consultants.* In *Complex Systems, Inc. v. ABN AMRO Bank N.V.*, 279 F.R.D. 140, 150 (S.D.N.Y. 2011), the court held that an email between an outside consultant and defendant's employee regarding the defendant's data processing functions was not privileged, because the advice requested was primarily business related and no attorney had been copied on the correspondence. Nevertheless, the court also held that a forward of this same email to an attorney along with a request for legal advice was privileged. *Id.* In *Smithkline Beechman Corp. v. Apotex*

Corp., 232 F.R.D. 467, 475 (E.D.Pa. 2005), the court held that documents in plaintiff's privilege log which reflected an exchange of technical information between scientists and plaintiff's attorneys for use in prosecuting patent applications were protected by attorney-client privilege, because they were made for the purpose of securing legal advice or legal services, rather than business or technical advice. In *U.S. Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156 (E.D.N.Y. 1994), the court held that scientific consultants hired by the corporate vendor of a property to conduct environmental studies of soil, oversee remedial work and develop supplementary remedial programs were not attorney's agents for purposes of attorney-client privilege, because the studies and work performed by the consultants were not done in anticipation of litigation, the consultants' opinions were based on factual and scientific evidence, and the documents in question did not disclose client confidences or legal advice rendered. Similarly, in *Occidental Chemical Corp. v. Ohm Remediation Services Corp.*, the court held that documents prepared by the plaintiff's engineering consultant, who was hired to aid the design and development of a site cleanup and remediation plan, were not protected by attorney-client privilege because the assistance rendered by the consultant "was based on factual and scientific evidence obtained through studies and observation of the physical condition" of the site, rather than through client confidences; the consultant's function was not to put information gained by the plaintiff into "usable form" so that its attorneys could render legal advice. 175 F.R.D. 431, 437 (W.D.N.Y. 1997). In response to an argument that certain documents prepared by the consultant contained legal opinions and strategic considerations and therefore were protected, the court explained that the attorney-client privilege "must be based on the relationship between the consultant, the client and the attorney, not on the specific content of individual communications." *Id.* Accordingly, if the consultant "was not performing the function of an agent hired to assist in the rendition of legal services," communications to or from the consultant would not be privileged, regardless of their content. *Id.* at 437-38 (internal quotations omitted). Furthermore, for the privilege to apply, the purpose of the communication must be to obtain legal advice from an attorney, not from the consultant. *Sokol v. Wyeth, Inc.*, No. 07 Civ. 8442, 2008 WL 3166662, at *8 (S.D.N.Y. Aug. 4, 2008) ("Legal advice cannot be given by one who is not an attorney and no attorney-client privilege is afforded to any advice purporting to be legal from one who is not an attorney, even if that person was engaged by an attorney as a 'consultant' to provide 'technical expertise.'"). In *Ravenell v. Avis Budget Group, Inc.*, the court held that employees'

communications with a third party audit company did not fall within the *Kovel* exception because the company had exceeded the role of mere interpreter in providing attorneys with preliminary legal assessments of the employees. *See Ravenell v. Avis Budget Group*, No. 08–CV–2113 (SLT), 2012 WL 1150450 (E.D.N.Y. Apr. 5, 2012) (arguing that the audit company had "neither 'improve[d] the comprehension of the communications between attorney and client' nor provided advice outside the general expertise of attorneys") (citations omitted).

c. *Financial Consultants*. Courts have been willing, under certain circumstances, to find communications among the client, the attorney and financial consultants to be privileged. *See, e.g.*, *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 26 207, 209 (S.D.N.Y. 2000) (holding that communications relating to the preparation of an offering memorandum and other documents which took place among the client, the attorneys and an investment banking firm were privileged, because the investment bankers' expert advice was necessary for the attorneys to determine which facts were "material" from a business person's point of view). *But see*, *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999) (holding that a lawyer's communications with an investment banker for the purpose of providing legal advice for his client were not privileged, since the investment banker did not fulfill the role of translator or interpreter of client communications); *National Educ. Training Group v. Skillsoft Corp.*, 1999 WL 378337 *4-6 (S.D.N.Y. June 9, 1999) (holding that an investment banker's notes from a board meeting with counsel were not privileged, because her presence at the meeting was not necessary to clarify, facilitate or improve counsel's comprehension of attorney-client communications).

d. *Investigators*. According to *Gucci America Inc. v. Guess? Inc.*, "[f]actual investigations conducted by an agent of the attorney, such as 'gathering statements from employees, clearly fall within the attorney-client rubric.'" Gucci Am., Inc. v. Guess?, Inc., 271 F.R.D. 58, 71 (S.D.N.Y.2010) (citations omitted) (collecting cases). The Southern District recently affirmed this understanding in *Farzan v. Wells Fargo Bank*, where the court held that a consultant's internal investigation on behalf of Wells Fargo's in-house counsel for the purpose of representing Wells Fargo in a proceeding before the EEOC was privileged. *See Farzan v. Wells Fargo Bank*, No. 12 Civ. 1217(RJS)(JLC), 2012 WL 6763570, *1 (S.D.N.Y. Dec. 28, 2012) (protecting the consultant's conversations with Wells Fargo employees). Attorneys can take steps to ensure that communications with investigators remain privileged by making this clear in the representation agreement.

e. *Public Relations ("PR") Consultants.* Under certain conditions, the attorney-client privilege can extend to communications with public relations consultants conducted for the purpose of obtaining legal advice. Four recent decisions out of the Southern District of New York address attorney-client privilege with regard to public relations consultants:

(1) In *Calvin Klein Trademark Trust v. Wachner*, the Southern District found that the privilege did not protect communications among a law firm, its client and a PR firm for three reasons: (1) few, if any, of the documents contained confidential communications made for the purpose of obtaining legal advice; (2) the PR firm simply provided ordinary PR advice; and (3) there was no reason to expand the privilege to cover functions not "materially different from those than any ordinary public relations firm would have performed if they had been hired directly by [the plaintiffs] (as they also were), instead of by [their] counsel." 198 F.R.D. 53, 54-55 (S.D.N.Y. 2000).

(2) With *In re Copper Market Antitrust Litigation*, the Southern District held that the attorney-client privilege protected communications related to a PR firm's work on behalf of a foreign company, because, under the circumstances, the PR firm was the functional equivalent of an in-house department of the foreign company and, thus, part of the "client." 200 F.R.D. 213, 215, 219 (S.D.N.Y. 2001).

(3) The Southern District took a different approach with *In re Grand Jury Subpoenas Dated March 24, 2003*, where the client's law firm hired a PR firm to provide advice on how to handle the client's legal problems after one of the client's former employees became the target of a grand jury investigation. 265 F. Supp. 2d 321, 323-24 (S.D.N.Y. 2003). Building on *Kovel*, the Southern District held that "(1) confidential communications (2) between lawyers and public relations consultants (3) hired by lawyers to assist them in dealing with the media in cases such as this (4) that are made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege." *Id.* at 331. Note, however, that the attorney-client privilege would not have protected the communications if the client – as opposed to the law firm – had hired the PR firm directly, even if the client had done so solely for the purpose of improving its legal situation. *Id.*

(4) In *Egiazaryan v. Zalmayev*, plaintiff's counsel retained BGR, a public relations firm, in order to assist with the counsel's representation of plaintiff in certain arbitration proceedings through the development of a global media strategy. The Southern District rejected the plaintiff's invocation of attorney-client privilege under *Kovel* because plaintiff "ha[d] not shown that BGR's involvement was necessary to facilitate communications *between himself and his counsel*, as in the case of a translator or an accountant . . . ." *See Egiazaryan v. Zalmayev*, No. 11 Civ. 2670 (PKC) (GWG), 2013 WL 945462, at *7 (S.D.N.Y. Mar. 8, 2013). The mere fact that BGR had inserted itself into the legal decisionmaking process was insufficient to demonstrate the *necessity* of BGR's involvement in the provision of *legal* advice. *See id.* The court distinguished the cases above (#2 and #3) as applying principles of federal common law as opposed to New York privilege law, which embodies a "conservative approach" to attorney-client privilege. *See id.* (citing cases). It also distinguished these cases on the facts. *See id.* at *8 (distinguishing *In re Grand Jury Subpoenas Dated March 24, 2003* as involving "public advocacy on behalf of the client," which served a "circumscribed litigation goal"); *id.* at *9 (distinguishing *In re Copper Market Antitrust Litigation* as involving a PR firm that acted as the "functional equivalent" of company employees).

2. *Must an attorney always be present?* In certain situations, the attorney-client privilege might protect communications between the client and the third party, even when the attorney is not present. *See United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) ("[I]f the lawyer has directed the client…to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought to fall within the privilege."); *High Point SARL v. Sprint Nextel Corp.*, No. 09-2269, 2012 WL 234024, at *13 (D. Kan. Jan. 25, 2012) (holding that attorney-client privilege does not require an attorney to have either authored or received a document to maintain the privilege, and therefore documents created by non-attorney employees or consultants may still be privileged if made in confidence for the purpose of obtaining legal advice from a lawyer); *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 331-32 (S.D.N.Y. 2003) (holding that communications strictly between the client and the PR firm are protected by the privilege if directed at giving or obtaining legal advice, but finding that, under the facts of the case, the communications conducted without

the presence of an attorney were not made for the purpose of obtaining legal advice).

C. Application of Attorney-Client Privilege in the Context of Certain Business Transactions

1. *In-House Counsel.* Application of the attorney-client privilege to the corporate context poses unique problems. One such problem arises because in-house counsel often serve dual roles as legal advisors and business consultants. Accordingly, to determine whether counsel's advice is privileged courts will look to "whether the attorney's performance depends principally on his or her knowledge of applications of legal requirements or principles, rather than his expertise in matters of commercial practice." *Note Funding Corp. v. Bobian Investment Co.*, No. 93 CIV. 7427, 1995 WL 662402, at *3 (S.D.N.Y. Nov. 9, 1995). Moreover, "even if a business decision can be viewed as both business and legal evaluations, 'the business aspects of the decision are not protected simply because legal considerations are also involved.'" *Complex Systems, Inc. v. ABN AMRO Bank N.V.*, 279 F.R.D. 140, 150 (S.D.N.Y. 2011) (quoting *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109 (N.D.N.Y. 2007)); Craig v. Rite Aid Corp., 2012 WL 426275, at *20 (M.D.Pa. Feb. 9, 2012) (finding that internal communications regarding company leadership restructuring were not subject to the attorney-client privilege even though legal considerations regarding collective bargaining agreements were also discussed).

2. *Mergers & Acquisitions.* As mentioned above, a party's voluntary disclosure of confidential materials ordinarily waives the attorney-client privilege as to the materials disclosed. *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1195 (10th Cir. 2006) This poses a dilemma for corporations in the midst of certain business transactions, as disclosure of confidential materials is often necessary to accomplish a deal. *See High Point SARL v. Sprint Nextel Corp.*, No. 09-2269, 2012 WL 234024, at *13 (D. Kan. Jan. 25, 2012) (considering the applicability of attorney-client privilege to certain patent documents disclosed to third parties interested in purchasing the patents). In such circumstances, companies might assert the common interest exception to waiver of attorney-client privilege. *Id.* At *6. The Tenth Circuit has observed that the common interest doctrine "normally operates as a shield to preclude waiver of the attorney-client privilege when a disclosure of confidential information is made to a third party who shares a community of interest with the represented party." *Qwest Commc'ns*, 450 F.3d at 1185 (noting that the common interest doctrine "provides an exception to waiver because disclosure advances the representation of the party and the attorney's preparation of the case"). In the context of patent transactions, a party seeking to assert the common interest exception to waiver must show "a substantially identical legal interest in the subject of the communication with the entity receiving the

privileged material." *High Point*, 2012 WL 234024, at *9 (citing *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390 (Fed. Cir. 1996)). Although opposing parties negotiating the sale of a patent might have adversarial interests as to the business terms of their transaction, they still have "a common legal interest in the validity, enforceability, and potential infringement" of the underlying patents. *Id.* This has been held sufficient to invoke the common interest exception to waiver of the attorney-client privilege. *Id.*

D. The Crime-Fraud Exception to the Attorney-Client Privilege

The attorney-client privilege does not protect communications made by the client to the lawyer *in furtherance of* contemplated or ongoing criminal or fraudulent conduct. *See, e.g., U.S. v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997); *see also Complex Systems, Inc. v. ABN AMRO Bank N.V.*, 279 F.R.D. 140, 150 (S.D.N.Y. 2011) (spreadsheets exchanged between banking software licensee and alleged assignee of license did not fall within crime-fraud exception to the work product privilege, so they must be produced in copyright infringement suit brought by licensor of the software, since there was no indication that a crime or fraud had been committed; spreadsheets indicated that licensee had originally believed that assignee was owner of the software, and although licensee had changed its position to assert that assignee was not the owner, such change in position was not made to defraud licensor, but rather was due to a more detailed review of relevant facts of the case); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82.

To obtain in camera review of communications alleged to fall under the crime-fraud exception, the party seeking to invoke the exception need only show "a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Matter of New York City Asbestos Litg.*, 109 A.D.3d 7, 11 (N.Y. App. Div. 1st Dep't 2013) (quoting *United States v. Zolin*, 491 U.S. 554, 572 (1989)). Once that showing is made, it is in the court's discretion whether to allow in camera review. *Id.*

E. The Self-Defense Exception to the Attorney-Client Privilege

1. Rule 1.6 provides for certain exceptions to the general prohibition against revealing client confidences. In particular, "[a] lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary … to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct." Rule 1.6(b)(5)(i). In *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010), attorneys objecting to court sanction were permitted to conduct "almost unlimited" discovery and present to the

court thousands of their client's documents that might otherwise have been protected by the attorney-client privilege. In a prior decision, the court had determined that the self-defense exception applied because the attorneys had a due process right to defend themselves where there was "accusatory adversity" between the attorneys and their client. *Id.* at *1; *see also Qualcomm Inc. v. Broadcom Corp.*, No. 05CV1958-RMB (BLM), 2008 WL 638108, at *3 (S.D. Cal. Mar. 5, 2008).

2. The self-defense exception does not provide protection for lawyers who reveal client confidences in more public settings such as in online public forums. The San Francisco Bar's Ethics Committee recently advised that a lawyer may only respond to a negative online review by a former client if the client's matter has ended and no confidential information is revealed in the response, as revealing such information would violate the duty of confidentiality.[4] *See* San Francisco Bar Ass'n Legal Ethics Comm., Op. 2014-1 (2014); *see also In re Skinner*, No. S14Y0661, 2014 Ga. LEXIS 389 (Ga. May 19, 2014) (disciplining lawyer who responded to a former client's negative online review with confidential information about the client). Comment 10 to Rule 1.6 notes that Rule 1.6(b)(5)(i) does not permit a lawyer to disclose confidential information to counter adverse public criticism of the lawyer or the lawyer's employees and associates when a proceeding is unlikely to be brought.

F. Communications Between Law Firm Personnel and the Firm's In-House Counsel

The ABA recently adopted a resolution urging that the attorney-client privilege should apply to confidential communications between law firm personnel and their firm's in-house counsel in the same way such communications would be protected between firm personnel and the firm's outside counsel. 2013 ABA House of Delegates Res. 103, *available at* http://bit.ly/resolution103. There is no exception to the attorney-client privilege even where there is a conflict of interest arising out of a consultation regarding the firm's representation of a client and a potentially viable claim the client may have against the firm, provided the client is adequately informed of the potential claim. *Id.* Further, the fiduciary exception to the attorney-client privilege should not be applied to privileged communications between lawyers and either in-house or outside counsel regarding legal advice about the law firm's responsibilities, even if such communications involve representation of a current client. *Id.*

III. The Duty of Confidentiality

A. Ethics Rules

[4] There is no express self-defense exception in the California Rules of Professional Conduct.

1. MR 1.6. ABA'S MODEL RULES OF PROFESSIONAL CONDUCT (2004).

2. Rule 1.6. NEW YORK RULES OF PROFESSIONAL CONDUCT.[5]

B. Non-Privileged But Still Confidential

1. The attorney-client privilege is often confused with the duty of confidentiality. The attorney-client privilege applies only when a lawyer is being officially *compelled* to disclose information (e.g., in response to a subpoena or court order). The duty of confidentiality, however, is much broader.

   a. According to MR 1.6, confidential information encompasses all "information relating to the representation of a client."

   b. Former DR 4.101(A) referred to both "confidences" and "secrets." New Rule 1.6 eliminates both of these terms and combines what used to be "confidences" and "secrets" into the broad term "confidential information." "Confidential information" consists of information "gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."

2. An attorney should be aware that information which is not protected by the attorney-client privilege still must be held in confidence if the attorney learned of the information during the course of representing the client. For example, if a corporation's attorney, during the course of a due diligence investigation, comes across an internal company memo discussing the company's new software code, the information contained in the memo will not be protected by the attorney-client privilege (since it is not a confidential communication between an employee and an attorney for the purpose of obtaining legal advice), but the attorney is still subject to the duty of confidentiality and cannot disclose the information to outside parties (provided no exceptions to the duty of confidentiality apply – *see* MR 1.6(b); Rule 1.6(a)).

C. New Technology and the Duty of Confidentiality

1. One of the Technology Amendments to the Model Rules provides: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." MR 1.6(c). Factors to be considered when determining the reasonableness of the lawyer's efforts include: the

[5] Replaces DR 4.101, NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY.

sensitivity of the information, the likelihood of disclosure in the absence of safeguards, the cost of employing additional safeguards, the difficulty of implementing such safeguards, and the extent to which such safeguards adversely affect the lawyer's ability to represent clients. *Id.*

a. In a 1994 opinion, the New York City Bar Association urged lawyers to "exercise caution when discussing client matters on a cellular or cordless phone." Recognizing the potential for interception, the committee, while allowing lawyers to communicate with clients using the then-new phone technology, stated that "when appropriate, the called party should be warned that the lawyer is speaking on a cellular or cordless telephone and that confidential information should not be discussed." Comm. On Prof'l & Judicial Ethics, Ass'n of the Bar of the City of New York, Formal Op. 1994-11 (1994).

b. Similarly, while the New York State Bar Association has approved the use of e-mail to communicate with clients, it counsels caution; as previously mentioned, lawyers are directed to keep abreast of technological developments so as to ensure the security of confidential information discussed via e-mail. Comm. on Prof'l Ethics, NY State Bar Ass'n, Op. 709 (1998). Lawyers must consult clients as to the transmission of highly sensitive information related to the client's representation, in which case particularly strong protective measures may be warranted. ABA Op. 99-413 (1999). A lawyer may make use of an e-mail server that conducts scans of e-mails to generate advertising (e.g., Gmail) for confidential client e-mails, so long as the scans are not performed by human beings.[6] Comm. On Prof'l Ethics, NY State Bar Ass'n, Op. 820 (2008). It is also important to ensure that the service provider has not "reserved the right to disclose the e-mails or the substance of the communications to third parties without the sender's permission (or a lawful judicial order)." *Id.* In transmitting confidential documents via e-mail, lawyers must be careful not to transmit metadata, which might communicate important privileged information about the document in question.

[6] Gmail presents an additional issue related to Rule 1.6(a), which prevents a lawyer from "knowingly . . . [using] a confidence or secret of a client for the advantage of the lawyer or of a *third person*" unless certain exceptions apply (emphasis added). According to NY State Bar Ethics Opinion 820, the "incidental" advantage Gmail obtains in the form of advertising profits from the automated scanning is not "meaningfully different" from the advantage litigation support companies obtain with respect to client confidences in the course of providing litigation support services to firms. NY State Bar Ass'n, Op. 820 (2008). As long as humans are not exposed to confidential information, email scanning technologies do not raise ethical concerns, even if they have a marketing purpose like Gmail. *See* Kevin Raudebaugh, *Trusting the Machines: New York State Bar Ethics Opinion Allows Attorneys to Use Gmail*, 6 WASH. J. L. TECH. & ARTS 83 (2010).

Comm. On Prof'l Ethics, NY State Bar Ass'n, Op. 782 (2004). Metadata are data hidden in documents that are generated during the course of creating and editing such documents, including fragments of data from files that were previously deleted, overwritten or worked on simultaneously. *Id*. From the point of view of an e-mail recipient, lawyers cannot use technology to "surreptitiously examine and trace e-mail and other electronic documents," as doing so is "an impermissible intrusion on the attorney-client relationship in violation of the Code [of Professional Responsibility]." Comm. On Prof'l Ethics, NY State Bar Ass'n, Op. 749 (2001).

c. Lawyers must ordinarily warn employee-clients about the risk of sending or receiving email using a computer or other device where "there is a significant risk that a third party may gain access." Comm. On Prof'l Ethics, NY State Bar Ass'n, Op. 11-459 (2011). This risk often arises when a client is sending email from a company address or using a company computer to send email. Employers usually have policies allowing them to access employees' email correspondence via the employers' computers or other devices, including correspondence from a separate, personal email account. *Id.* In view of this risk, a lawyer should "as soon as practical" instruct an employee-client "to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client communications, because even seemingly ministerial communications involving matters such as scheduling can have substantive ramifications." *Id.* The time at which the lawyer's ethical obligation arises is when the lawyer "knows or reasonably should know that the client is likely to send or receive substantive client-lawyer communications via email or other electronic means." *Id.* This often occurs at the outset of representation, particularly in employment dispute cases, where the risk that a third party will see the communications is heightened. *Id.* If the lawyer becomes aware that a client is sending or receiving personal email on a company computer, then the lawyer has a duty to caution the client against doing so, and if that caution is not heeded, to stop sending messages to that particular email address. *Id.* In the hypothetical of an employment dispute, company counsel do *not* have an ethical obligation to notify opposing counsel of the "receipt of private, potentially privileged email communications between the [company employee/opposing party] and his or her counsel." Comm. On Prof'l Ethics, NY State Bar Ass'n, Op. 11-460 (2011). However, company counsel are advised to obtain a judicial ruling as to the admissibility of the employee's attorney-client communications "before attempting to use them and, if possible, before the employer's lawyer reviews

them" in order to minimize the risk of disqualification or sanction. *Id.*

(1) *Attorney-client privilege*. Recently, the Eastern District denied a motion to preclude the government from introducing an allegedly privileged email that the defendant's personal attorney sent to the defendant's work email account. *United States v. Finazzo*, No. 10-cr-457, 2013 U.S. Dist. LEXIS 22479 (E.D.N.Y. Feb. 19, 2013). The court held that defendant had no reasonable expectation of confidentiality with respect to his work email account given the company's computer and Internet usage policy, regardless of the fact that defendant was the *recipient* as opposed to the sender in this case. *Id.* (Although generally an attorney cannot unilaterally waive privilege for her client, this case was unique in that defendant had admitted to corresponding previously with his attorney via his work email account, thereby influencing the court's analysis of the defendant's "reasonable expectation.") The question of whether the attorney-client privilege extends to personal documents and emails stored on a company computer is more complex. *Compare Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 663 (N.J. 2010) (privilege applied to emails with counsel using a "personal, password protected" account that was accessed on a company computer), *with Long v. Marubeni Am. Corp.*, No. 05CIV.639(GEL)(KNF), 2006 WL 2998761, at *3–*4 (S.D.N.Y. Oct. 19, 2006) (privilege did not apply to emails created or stored on company computers notwithstanding use of private, password-protected email account). Courts generally apply a four-factor test to determine whether the employee possesses a subjective expectation of confidentiality, in which case privilege may apply: (1) Is there a company policy banning personal use of email? (2) Does the company monitor the use of its email? (3) Does the company have access to all emails? (4) Did the company notify the employee about these policies? *Id.*

2. In storing confidential client information online, lawyers also have a duty to make reasonable efforts to maintain client confidence. This may be accomplished by consideration of the following factors: ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, investigating the online data storage provider's security measures and ability to purge and wipe data, and employing available technology to guard against reasonably foreseeable

attempts to infiltrate the stored data. Comm. on Prof'l Ethics, NY State Bar Ass'n, Op. 842 (2010). The lawyer should also monitor the changing law of privilege to ensure that storing the information online will not cause a loss or waiver of any privilege. *Id.*

a. If an attorney uses a Smartphone or an iPhone, or uses web-based e-mail such as Gmail, Yahoo!, Hotmail or AOL Mail, or uses products such as Google Docs, Microsoft Office 365 or Dropbox, the attorney is using "cloud computing." Cloud computing includes several similar services under different names and brands including: web-based email, online data storage, software-as-a-service ("SaaS"), platform-as-a-service ("PaaS"), infrastructure-as-a-service ("IaaS"), Amazon Elsatic Cloud Compute ("Amazon EC2"), and Google Docs. Succinctly described, cloud computing is essentially "a fancy way of saying stuff's not on your computer." Comm. On Legal Ethics & Prof'l Responsibility, Penn. Bar Ass'n, Formal Op. 2011-200 (2011) (quoting Quinn Norton, *Byte Rights*, Maximum PC, September 2010, at 12). As mentioned above, a reasonable care standard governs the use of such services in New York. A recent ethics opinion from the Pennsylvania Bar Association provides a comprehensive survey of the similar standards applied in other jurisdictions. *Id.* For example, the New Jersey State Bar Association recognized that Internet service providers often have better security than a firm would, and thus attorneys need only exercise "sound professional judgment" in selecting the service provider. *Id.* Conversely, North Carolina's reasonable care standard requires, at a minimum, that there be an agreement between the attorney and the service provider disclosing how confidential client information will be handled; specifying the geographic area within which the firm's data will be hosted; and providing for a means of retrieving the data if the service provider goes out of business or otherwise has a break in continuity. *Id.*

b. As a general rule, lawyers are not required to obtain client consent to use cloud computing. *See* NEW YORK CITY BAR ASS'N, THE CLOUD AND THE SMALL LAW FIRM: BUSINESS, ETHICS AND PRIVILEGE CONSIDERATIONS 19 (2013), *available at* http://www2.nycbar.org/pdf/report/uploads/20072378-TheCloudandtheSmallLawFirm.pdf. However, where client information is particularly sensitive or if the client is suspicious of technology, consent may be required. *Id.* Some information may be so sensitive and important that it should never be stored in the cloud given its unavoidable risks. *Id*.

3. Proposed amendments to the ABA Model Rules reflect how changes in technology have impacted the attorney-client relationship. A proposed

amendment to MR 1.18 makes clear that an attorney-client relationship can arise without any oral discussion having taken place. Further, a proposed amendment to MR 7.2 is designed specifically to give lawyers more leeway in taking advantage of online client development tools. However, despite these proposed changes, many states' rules still limit lawyers' online activity. For example, in Arizona, a lawyer should not answer fact-specific legal questions in online chat rooms or newsgroups, or posed by the audience in legal seminars. *See* Comm. on the Rules of Prof'l Conduct, Az. State Bar Ass'n, Op. 97-04 (1997). The ABA generally cautions lawyers about using chat rooms, as they may inadvertently create an attorney-client relationship with the requesting party.

D. Duty of Confidentiality to Former Clients

1. According to NY Rule 1.9, which regulates lawyers' duties to former clients, a lawyer shall not "use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client *or when the information has become generally known*" (emphasis added). Recall that NY Rule 1.6 states: "A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate *or the disclosure of which would be embarrassing or would be likely to be detrimental to the client* unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation" (emphasis added).

2. Several factors should be considered to assess whether a given client is a current or former client and thus which duties are owed to him or her. These factors include: whether a termination letter was sent, passage of time, completion of contemplated services, a longstanding pattern of representation over the years, and the client's reasonable belief that a lawyer needs to perform additional legal work to fulfill the purpose of the representation. Comm. on Prof'l Ethics, N.Y. State Bar Ass'n, Op. 1008 (2014). Under NY Rule 1.9, a lawyer may not represent a client with interests that are materially adverse to those of a former client in a matter substantially related to the matter the lawyer handled for the former client, unless the former client gives written, informed consent. *Id.*

3. The Virginia Supreme Court recently issued a decision with important ramifications for attorney blogging. Horace Hunter, an attorney with Hunter & Lipton PC, authored a blog where he wrote about cases in which he obtained favorable results for his clients as well as criminal justice issues. The Virginia State Bar (VSB) determined that his blog

compromised client confidentiality in violation of VA Rule Rule 1.6.[7] The VSB argued that Hunter, by discussing clients' cases on his blog without their consent, had engaged in an unethical practice of revealing information that could embarrass or prove detrimental to his former clients. After a disciplinary hearing, the VSB publicly admonished Hunter and ordered him to remove case-specific content for which he had not received consent. Hunter argued that he had confined his blog to discussion of public matters, which have traditionally been protected by the First Amendment. The Virginia Supreme Court agreed with Hunter's interpretation of the First Amendment, holding that public information may only be regulated "if it poses a substantial likelihood of materially prejudicing a *pending* case." *Hunter v. Virginia State Bar* ex rel. *Third Dist. Cmte.*, 285 Va. 485, *8 (2013) (citation omitted). The court affirmed that "To the extent . . . information is aired in a public forum, privacy considerations must yield to First Amendment protections." *Id.* at *9. Some lawyers criticize this part of the court's holding. As Randel Phillips, general counsel to Moore & Van Allen, noted: "The court focused on privacy concerns but did not take into account that lawyers are widely thought to have some duty of loyalty, even to former clients. To me, the latter interest is not disposed of by the fact that others [like the news media] could have reported the same information." Similarly, Richard Zitrin, author of *The Moral Compass of the American Lawyer*, argued that the Virginia court's citations were inapposite because they had to do with freedom-of-the-press rather than with lawyers, whose speech may be restricted by their duties to clients. Richard Zitrin, *Viewpoint: Guard Your Clients' Public Secrets*, THE RECORDER, http://m.law.com/module/alm/app/ca.do#!/article/1004958664 (last visited Jun. 23, 2013). Moreover, as Zitrin pointed out, public information can still be embarrassing or detrimental to a client, particularly one trying to move on with his or her life. *Id.*

E. Duty of Confidentiality to Prospective Clients

1. Rule 1.18. NEW YORK RULES OF PROFESSIONAL CONDUCT.

a. 1.18(a) provides that "A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a 'prospective client.'" 1.18(b) provides that "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." 1.18(c) and (d) deal with conflicts of interest related to prospective clients. 1.18(e) provides the following limitations: "A person who (1)

[7] VA Rule 1.6 contains very similar language to NY 1.6.

communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or (2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, is not a prospective client."

b. According to NY City Bar Ethics Opinion 2013-1, "Rule [1.18] balances the need for protection of those who consult lawyers about a possible representation with the need for freedom of the parties to decide not to pursue the representation. It does so by subjecting the lawyers to duties regarding confidential information and adverse representations that are significant but more limited in scope than those owed to current or former clients." Comm. on Prof'l Ethics, NY City Bar Ass'n, Op. 2013-1 (2013). Although Rule 1.18 incorporates Rules 1.6 and 1.9 by reference, it has a narrower scope insofar as it applies only to information that is "learned in consultation" with the prospective client as opposed to information gained "during or relating to the representation of a client, whatever its source," as in the case of a former or current client. *Id.*

c. According to ABA Formal Opinion 10-457, "Web sites that invite inquiries may create a prospective client-lawyer relationship under Rule 1.18. Lawyers who respond to website-initiated inquiries about legal services should consider the possibility that Rule 1.18 may apply." In New York, just having a law firm web site constitutes an "implicit agreement" to consider the formation of an attorney-client relationship, suggesting a broad conception of "prospective client." If a lawyer wishes to avoid ethical obligations under 1.18, she should explicitly disclaim duties of confidentiality and representation on appropriate online forums. *See* Comm. on Prof'l Ethics, NY City Bar Ass'n, Op. 2001-1 (2001) ("Prospective clients who approach lawyers in good faith for the purpose of seeking legal advice [in response to an Internet web site maintained by a lawyer or law firm] should not suffer even if they labor under the misapprehension that information unilaterally sent will be kept confidential. Although such a belief may be ill-conceived or even careless, unless the prospective client is specifically and conspicuously warned not to send such information, the information should not be turned against her."). Where it is apparent to the prospective client that she cannot retain the lawyer — either because she is aware of a potential conflict of

interest[8] or because the lawyer has indicated she will not represent the person — no duty of confidentiality will arise. *Id.*

d. Confidential information obtained in the course of a beauty contest creates a 1.18(b) duty of confidentiality unless the bidding firm "took appropriate steps to implement and maintain an effective ethical screen" pursuant to 1.18(d). Comm. on Prof'l Ethics, NY City Bar Ass'n, Op. 2013-1 (2013). Neither the participating lawyers nor their firm would be subject to 1.18(b) if it could be established that the company communicated confidential information to the lawyers unilaterally with no reasonable expectation that the firm would represent the company in the lawsuit, or for the purpose of disqualifying the firm from representing the opposing company in the lawsuit. *Id.*

F. Exception to the Duty of Confidentiality: Crime or Fraudulent Activity

1. An attorney *may* reveal confidential information to the extent reasonably necessary "to prevent the client from committing a crime" or "to withdraw a [previously given opinion or representation] . . . where the lawyer has discovered that the opinion or representation . . . is being used to further a crime or fraud." *See* NY Rule 1.6(b)(2)-(3).

2. An attorney *must* reveal confidential information according to the terms specified by NY Rule 3.3(a)(3) and 3.3(b), which trump the lawyer's duty of confidentiality under NY Rule 1.6. *See* NY Rule 3.3(c); Comm. on Prof'l Ethics, N.Y. City Bar Ass'n, Op. 2013-2 (2013) (lawyer's duty to protect integrity of adjudicative process trumps duty of confidentiality and loyalty to client).[9] NY Rule 3.3(a)(3) provides: "If a lawyer, the lawyer's client, or a witness called by the lawyer has offered *material*[10] evidence and the lawyer comes to know of its falsity, the lawyer *shall* take reasonable remedial measures, including, if necessary, disclosure to the tribunal[11]" (emphasis added). This duty arises from the lawyer's

[8] *See* Geoffrey C. *Hazard, Ethics, The Would-Be-Client*, NAT'L L. J., Jan. 15, 1996 at A19 ("[T]aint shopping describes the behavior in which someone purporting to be seeking legal assistance interviews a lawyer or law firm for the purpose of disqualifying them from future adverse representation.").

[9] Rule 3.3 constitutes the only mandatory exception in New York to the lawyer's duty of confidentiality as contained in NY Rule 1.6.

[10] Determining whether evidence is material depends on the facts and factors relevant to the ruling, and especially "whether the evidence is of a kind that could have changed the result." Comm. on Prof'l Ethics, N.Y. City Bar Ass'n, Op. 2013-2 (2013). As long as the evidence is material, it doesn't matter if the falsity was intentional or inadvertent for purposes of the lawyer's duty to disclose. *See id.*

[11] "Tribunal" encompasses courts, arbitral panels, and legislative/administrative bodies acting in an adjudicative capacity. Comm. on Prof'l Ethics, N.Y. City Bar Ass'n, Op. 2013-2 (2013).

obligation "as an officer of the court to prevent the trier of fact from being misled by false evidence." NY Rule 3.3, cmt. 5. NY Rule 3.3(b) provides: "A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding *shall* take reasonable remedial measures, including, if necessary, disclosure to the tribunal" (emphasis added). According to NY City Bar Opinion 2013-2, a lawyer's remedial obligation under 3.3(a)(3) involves "disclosing the false evidence to the tribunal to which the evidence was presented as long as it is still possible to reopen the proceeding based on this disclosure," and "disclosing the false evidence to opposing counsel where another tribunal could amend, modify or vacate the prior judgment." Comm. on Prof'l Ethics, N.Y. City Bar Ass'n, Op. 2013-2 (2013). Thus, a lawyer's 3.3(a)(3) duty to disclose persists even *after* the conclusion of a criminal or civil proceeding. *See id.*; *see also* Comm. on Prof'l Ethics, N.Y. State Bar Ass'n, Op. 831 (2009) (duty to disclose continues "for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding — but not forever"). In this respect, the NY Rules depart from the ABA Model Rules, which explicitly cabin this duty: the lawyer's duty to disclose false material evidence "continue[s] to the conclusion of the proceeding," or "when a final judgment . . . has been affirmed on appeal or the time for review has passed." ABA Model Rule 3.3(c), cmt. 13.

3. Upon discovering that material false evidence was presented, the lawyer should first "remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction" of the falsity. NY Rule 3.3, cmt. 10. If the client will not cooperate or cannot be located with reasonable effort, then the lawyer should disclose both to the original tribunal — if still empowered to reopen the matter and consider new evidence — and to opposing counsel. Comm. on Prof'l Ethics, N.Y. City Bar Ass'n, Op. 2013-2 (2013). If the original tribunal is no longer empowered to consider the new evidence but another tribunal could consider such evidence with the ability to modify, amend, or vacate the prior judgment, the lawyer may disclose to opposing/successor counsel in order to discharge her 3.3(a)(3) duty. *Id.* Disclosure may involve more than submitting a letter or appearing before the tribunal; it may require research, diligence, and communication with a former client. *See id.*

IV. Communication with Persons Represented by Counsel and Client-to-Client Contact

A. Ethics Rules

1. MR 4.2. ABA'S MODEL RULES OF PROFESSIONAL CONDUCT (2004).

2. Rule 4.2. NEW YORK RULES OF PROFESSIONAL CONDUCT.[12]

B. Discussion

1. MR 4.2 prohibits a lawyer representing a client from communicating "about the subject of the representation with a *person* the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." The Model Rule does not state anything with respect to client-to-client contact.

2. New York's Rule 4.2 is both broader and narrower than the Model Rule. The New York rule is narrower in that it prohibits a lawyer representing a client from communicating "about the subject of representation with a *party* the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." NY Rule 4.2(a). The person/party distinction[13] narrows the scope of the New York rule as compared to the ABA Model Rules. For example, a New York lawyer may communicate with a non-party witness in a criminal matter without the consent of counsel representing the witness in a distinct but related matter, provided the lawyer does not violate Rules 3.4 or 8.4. Comm. on Prof'l Ethics, N.Y. State Bar Ass'n, Op. 884 (2011); *see also Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995) (criminal defense lawyer did not violate predecessor to NY Rule 4.2(a) by interviewing a witness in a drug conspiracy matter even though lawyer knew witness was represented by counsel in a related matter). The NY State Bar Association was careful, however, to limit Opinion 884 to the criminal context, which means the person/party distinction may not apply to the civil context. *See id.*; *see also* Comm. on Prof'l Ethics, N.Y. State Bar Ass'n, Op. 735 (2001) ("[W]e do not understand that the decision to retain the term 'party' was intended to cut back on the long-standing, universal understanding concerning the scope of the "no contact" rule in noncriminal cases."). Similarly, it's not clear that the person/party distinction applies to nonlitigation matters such as commercial transactions. Roy D. Simon, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 1021 (2013 ed.).

3. The New York rule is broader than its ABA counterpart in that it also prohibits a lawyer from "caus[ing] another to communicate" with a party

[12] Replaces DR 7-104, NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY.

[13] As a historical point, prosecutors pushed for the adoption of "party" in the old New York Disciplinary Rules so they could interview nonparty witnesses and grand jury targets without having to obtain prior consent. Roy D. Simon, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT 1021 (2013 ed.).

the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is otherwise authorized by law. Notwithstanding this prohibition, and unless otherwise prohibited by law, a lawyer "may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place." NY Rule 4.2(b).[14]

4. NY Rule 4.2(c) provides that a lawyer who is proceeding pro se or is represented by counsel in a matter is subject to 4.2(a), but may communicate with a represented person, unless prohibited by law and unless the represented person is not legally competent, provided there is reasonable advance notice to the represented person's counsel that such communications will be taking place.

5. When a client is a corporation, a "represented party" for the purposes of the rule includes "corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation … or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel." *Niesig v. Team I*, 76 N.Y.2d 363, 374 (1990). Also included are those members of the organization whose own interests are directly at stake in the representation. *Id.* at 375. All other employees may be contacted informally. *Id.* at 374. A law firm may not send out notices to potential employee witnesses offering representation in an attempt to prevent informal interviews by making them clients. *Rivera v. Lutheran Med. Ctr.*, 866 N.Y.S.2d 520 (N.Y. Sup. Ct. 2008) (disqualifying law firm from representing four witnesses who worked at the corporate employer for improperly soliciting them to insulate them from informal contact with opposing counsel).

6. The New York State Bar Association recently reviewed the question of whether a lawyer could use a social networking site to find (and use) publicly available information about an opposing party in litigation. Comm. on Prof'l Ethics, NY State Bar Ass'n, Op. 843 (2010). The Bar Association concluded that such action was acceptable so long as the lawyer only relied on "public pages posted by the party that are accessible to all members in the network" and so long as the lawyer did not try to "friend" the party in question. *Id.*; *cf.* Comm. on Prof'l & Judicial Ethics,

[14] "Counseling the client" includes the drafting of papers for the client to present to the represented person. However, the lawyer may not "advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel." NY Rule 4.2, cmt. 11.

N.Y. City Bar Ass'n, Formal Op. 2012-2 (2012) (opining that lawyers may also, consistent with NY Rule 3.5, use social networking sites to conduct juror research so long as such research does not result in "communication" with the juror).[15] The opinion takes care to distinguish itself from an earlier Philadelphia Professional Guidance Committee decision, which concluded that counsel could not have a third party "friend" an unrepresented witness.

7. In determining whether a party is represented by counsel for the purposes of the rule, "[a]n entity cannot claim a blanket protection from *ex parte* interviews by taking the position that house counsel is responsible for all future legal matters affecting that entity … Something must transpire before an attorney-client relationship arises and the requirements of DR 7-104 come into play." *Schmidt v. State*, 181 Misc. 2d 499, 504, 695 N.Y.S.2d 225 (1999) (holding that the serving of a notice of intention, by itself, was not enough to trigger the anti-contact restrictions of DR 7-104 and that claimant's attorneys were free to speak to lower level employees of the defendant until the defendant or its agents communicated with those employees or provided them with privileged information about the subject matter of the case).

V. Communication with Persons Unrepresented by Counsel

A. Ethics Rules

1. MR 4.3. ABA'S MODEL RULES OF PROFESSIONAL CONDUCT (2004).

2. Rule 4.3. NEW YORK RULES OF PROFESSIONAL CONDUCT.[16]

B. Discussion

1. Both MR 4.3 and Rule 4.3 provide that when a lawyer communicates on behalf of a client with an unrepresented person, the lawyer "shall not state or imply that the lawyer is disinterested." Furthermore, "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." A lawyer is prohibited from "giv[ing] legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

[15] Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer has an obligation to reveal the improper conduct to the court. Comm. On Prof'l & Judicial Ethics, Assc. Of the Bar of the City of New York, Formal Op. 2012-2 (2012).

[16] Replaces DR 7-104(A)(2), NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY.

2. The comments to MR 4.3 and Rule 4.3 provide its rationale: "An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client." Comment 1, Rule 4.3. To avoid giving the impression that the lawyer is disinterested, she "will typically need to identify [her] client and, where necessary, explain that the client has interests opposed to those of the unrepresented person." *Id.* The comments also clarify that "[w]hether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior and comments occur." Comment 2, Rule 4.3. For example, the rule "does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations." *Id.*

3. For a more detailed discussion of the ethics rules governing communication with unrepresented parties, *see* Comm. on Prof'l & Judicial Ethics, Assoc. of the Bar of the City of New York, Formal Op. 2009-2 (2009). The opinion was issued under former DR 7-104(A)(2), but is consistent with Rule 4.3 in that it concludes that a lawyer communicating with a self-represented person adverse (or potentially adverse) to the lawyer's client *must* explain or clarify her role and advise the person to obtain legal counsel "if she knows or should know that [the] self-represented person misunderstands the lawyer's role in the matter." Similar to the comments to Rule 4.3, the opinion emphasizes that "not all self-represented persons are alike" and that the lawyer's duty to explain or clarify her role depends on whether the self-represented person is a "highly sophisticated and experienced business[person], capable of handling delicate negotiations or maneuvering through the court system unaided," or someone who is "relatively uneducated and intimidated by the procedures of our legal system." On the other hand, the opinion may be in some conflict with Rule 4.3 to the extent it provides that a lawyer communicating with an unrepresented person adverse to the lawyer's client is permitted to make certain statements beyond the advice to obtain legal counsel or the statement of a client's legal position in the matter. The opinion allows for, "where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant." *Id.*

4. A lawyer may attempt to gain access to the social networking page of an unrepresented person, which includes "friending" on Facebook, provided the lawyer does not use false pretenses or deception in order to gain access to the unrepresented person's page. *See* Comm. on Prof'l Ethics, N.Y. City Bar Ass'n, Op. 2010-2 (2010); NY Rule 8.4(a)-(c) (prohibiting the use of "dishonesty, fraud, deceit or misrepresentation," either directly or indirectly through use of an agent); NY Rule 4.1 (prohibiting the "knowing[] mak[ing] of a false statement of fact or law to a third person" in the course of representing a client).

VI. Duty to Withdraw from Representation and Scope of Representation

A. Ethics Rules

1. MR 1.2(d); MR 1.16. ABA'S MODEL RULES OF PROFESSIONAL CONDUCT (2004).

2. Rule 1.2(d) and (f); Rule 1.16. NEW YORK RULES OF PROFESSIONAL CONDUCT.[17]

B. Mandatory Withdrawal

1. MR 1.16(a) provides three circumstances under which a lawyer *must* decline or withdraw from representation. A lawyer must decline or withdraw if "representation will result in a violation of the [Rules] or other law"; " the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client"; or "the lawyer is discharged." Sections 1.16(a)(1) and (b)(4) of New York's rules require that a lawyer decline or withdraw from representation if the lawyer knows, or reasonably should know, that the client or prospective client is bringing the legal action or is having steps taken for the mere purpose of harassing or maliciously injuring any person. Section 1.16(b) of New York's rules requires that a lawyer withdraw from representation if any of the three Model Rule circumstances apply — that is, in the circumstances of a violation of the Rules or law, physical or mental impairment, or discharge. Finally, section 1.16(a)(2) provides that a lawyer must decline representation if the lawyer knows or reasonably should know that such person wishes to "present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law."

2. The Comment for the Model Rules as well as New York's Rule makes a distinction between a client who demands that his/her attorney engage in illegal activity and a client who suggests but does not demand such

[17] Replaces provisions in DR 7-101, 7-102, 2-109, and 2-110, NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY.

activity. While a lawyer is required to decline or withdraw from representation if the client demands that the lawyer engage in illegal conduct, a lawyer is not obligated to decline or terminate representation if the client merely suggests but does not demand such conduct. *See* Comment 2 to MR 1.16 and Rule 1.16.

3. Rule 1.16(e) provides that in the event of withdrawal, a lawyer "shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules."

C. Optional Withdrawal

1. MR 1.16(b) provides seven circumstances under which a lawyer *may* withdraw from representation. A lawyer may withdraw if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;" "the client has used the lawyer's services to perpetrate a crime or fraud;" "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;" or "other good cause for withdrawal exists." Section 1.16(c) of New York's Rules provides 13 circumstances under which a lawyer may withdraw from representation, many of which overlap with the circumstances discussed in the Model Rules.

2. The Comment to both the Model Rule and New York's Rule states "[w]ithdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past, even if withdrawal would materially prejudice the client." *See* Comment 7 to MR 1.16 and NY Rule 1.16. New York's Rule 1.2(f), which deals with the scope of representation rather than withdrawal from or termination of representation, similarly provides that a lawyer "may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal."

VII. Unauthorized Practice of Law ("UPL")

A. Ethics Rules

1. MR 5.5. ABA'S MODEL RULES OF PROFESSIONAL CONDUCT (2004).

2. Rule 5.5. NEW YORK RULES OF PROFESSIONAL CONDUCT.[18]

B. Multi-jurisdictional Practice of Law

1. All states have "unauthorized practice of law" (UPL) provisions in their ethics rules or judiciary law statutes which, in addition to prohibiting non-lawyers from practicing law, also prohibit lawyers from practicing law in the jurisdiction unless they are licensed by the state or otherwise authorized to do so. In determining whether a lawyer with an out-of-state license has engaged in the practice of law, some states look to the repetitiveness of the lawyer's contacts with legal matters in the jurisdiction, while other states focus on the substantiality of the each particular contact. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 46.6 (3rd ed. 2007).

2. "Multi-jurisdictional practice" ("MJP") refers to the legal work a lawyer performs in a jurisdiction in which he or she is not admitted to practice law. Traditionally, a lawyer who is admitted to practice in one state cannot practice in another state unless he or she is admitted to the bar in that state. MJP provisions vary from state to state. *See* below (c).

a. In New York State, Rule 5.5(a) provides that a lawyer "shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction." Rule 5.5(b) provides that a "lawyer shall not aid a nonlawyer in the unauthorized practice of law." Meanwhile, New York's JUDICIARY LAW § 478 makes it "unlawful for any natural person to practice or appear as an attorney-at-law … without having first been duly and regularly licensed and admitted to practice law in the courts of records of this state and without having taken the constitutional oath." New York's unauthorized practice of law provisions "aim[] to protect [New York] citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." *Spivak v. Sachs*, 211 N.E.2d 329, 331 (1965).

b. New York JUDICIARY LAW § 470 makes it unlawful for nonresident attorneys to practice law in New York without maintaining an office within the state. In *Schoenefeld v. New York*, the U.S. District Court for the Northern District of New York declared the statute unconstitutional and enjoined the state and its officials from enforcing it. No. 1:09-CV-00504, 2011 WL 3957282, at *1 (N.D.N.Y. Sept. 7, 2011). In that case, although the plaintiff was licensed to practice law in New York, she was precluded from

[18] Replaces DR 3-101(B), NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY.

doing so under § 470 because she maintained her residence and law office in New Jersey. The statute therefore discriminates against nonresident attorneys by requiring them to bear a significant cost not required of New York residents who can practice out of their homes. Noting that "[t]he practice of law has long been held to be a fundamental right within the meaning of the Privileges and Immunities Clause because the profession has both a commercial and noncommercial role," the court held that such discrimination violates the Constitution.

c. Consider also the infamous *Birbrower* decision. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998). In *Birbrower*, the Supreme Court of California held that two New York lawyers, neither of whom were licensed in California, engaged in the unauthorized practice of law by traveling to California several times to conduct negotiations, prepare an arbitration proceeding and advise their California-based client. The court held that out-of-state lawyers who are unlicensed in California violate the state's UPL provision if they engage in "sufficient activities in the state" or create a "continuing relationship with the California client that include[s] legal duties and obligations." *Id.* at 5. The opinion's infamy rests on dicta, which states that physical presence in California is relevant to determining whether a lawyer practiced law in the state but not dispositive on the issue, and that, therefore, a lawyer can engage in the practice of law even if he or she only enters the state "virtually" by telephone, fax, e-mail, etc. *Id.* at 5-6. In *Birbower*, the California Supreme Court "declined[d]…to craft an arbitration exception to [the California] prohibition of the unlicensed practice of law in this state." *Id.* at 9. This aspect of *Birbower*, however, was promptly overruled by the California legislature. Cal.Civ.Proc.Code § 1282.4 provides an arbitration exception to unauthorized practice rules.

d. The court in *Prudential Equity Group, LLC v. Ajamie*, 538 F.Supp.2d 605 (S.D.N.Y. Feb. 27, 2008), held that under New York law, participation by a non-New York attorney in a New York arbitration was not an unauthorized practice of law. The defendant, a lawyer admitted only in Texas, was retained as one of a number of attorneys to arbitrate certain claims against Prudential. A dispute arose between the defendant and various attorneys over the distribution of attorney's fees. Noting an absence of appellate opinions definitively addressing unauthorized practice rules in the arbitration setting, the court stressed that arbitration is distinguishable from judicial proceedings because of the less formal setting and less stringent rules of procedure and evidence. *Id.* at 607-608. Although arbitration proceedings have become

more complex over time, "they still retain in most settings their essential character of private contractual arrangements for the relatively informal resolution of disputes." *Id*. at 608. Accordingly, "it would be incongruous to apply a state's unauthorized practice rules in such an informal setting." *Id.*

3. Given our increasingly nationalized economy, lawyers from one state often need to perform temporary legal services in another state. In response, many states have recently adopted multijurisdictional provisions which authorize out-of-state lawyers to perform certain legal work in their jurisdictions. For example, under the recently-amended ABA Model Rule 5.5(c), a lawyer may provide legal services on a temporary basis in another jurisdiction where he or she is not admitted so long as the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. At least 27 states have adopted liberal multijurisdictional rules similar to the ABA's amended MR 5.5. *See* ROY SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 458 (2006 Edition). In adopting new rules, however, New York has not chosen to mirror the ABA's amended rule.

C. New York's final new rules, effective April 1, 2009, include no provisions allowing a lawyer who is admitted to practice in another jurisdiction to provide legal services in New York on a temporary basis.

In 2007, the New York State Bar Association's House of Delegates had unanimously approved revisions including Proposed Model Rule 5.5 and 8.5, which governed the unauthorized practice of law.

1. Proposed Model Rules 5.5(a) and (b), which were in substance ultimately adopted in the final rules, continued the traditional prohibitions of DR 3-101(B) on assisting a non-lawyer in the unauthorized practice of law, and engaging in the practice of law where to do so would violate the rules of another jurisdiction.

The remainder of Proposed Model Rule 5.5 added significantly to the existing rule. Section 5.5(c) provided four circumstances in which a lawyer admitted to practice in another jurisdiction may provide legal services in New York on a temporary basis.[19] This section was never adopted in the final rules.

[19] The four circumstances were (1) when services are undertaken with a lawyer licensed to practice in New York who actively participates in representation of the client; (2) when the lawyer engages in conduct – such as client meetings, witness interviews, and document review – in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or reasonably expects to be so authorized; (3) when services are reasonably related to a pending or potential arbitration if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction

2. Proposed Model Rule 8.5 provided that a lawyer admitted to practice in New York is subject to discipline in New York regardless of where his/her conduct occurs. This provision was adopted in the final rules. This Proposed Rule also extended disciplinary authority to other lawyers not admitted to practice in New York who provide or offer legal services in New York. This latter provision was not adopted in the final rules.

According to Section 8.5(a) of the new rule, a lawyer who is admitted to practice in New York and in another state may be subject to the disciplinary authority of both states for the same conduct, regardless of where the conduct occurs. Section 8.5(b) sets out a choice of law provision to resolve conflicts arising when a lawyer is subject to more than one set of rules of professional conduct which impose different obligations. Section 8.5(b)(1) provides that a lawyer's conduct relating to a proceeding pending before a tribunal shall be subject only to the rules of the jurisdiction in which the tribunal sits. Furthermore, Section 8.5(b)(2) makes the determination of which set of rules apply by providing that a lawyer is subject to the rules of the jurisdiction in which the lawyer principally practices,[20] or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction will apply. The comments to this section note that when a lawyer's conduct involves significant contact with multiple jurisdictions and it is unclear where the predominant effect will occur, the lawyer will not be subject to discipline under Rule 8.5 so long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur. The choice of law provision also applies to transnational practice.

D. Negotiations

"Out-of-state lawyers have substantial leeway to engage in legal tasks related to matters they are handling in their home jurisdictions, and to participate with local lawyers in nonlitigative transactions (such as negotiations). Even here, however, they must take care not to step over the line marking what the host state considers to be the practice of law." 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 46.5 (3rd ed. 2007).

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in which the lawyer is admitted to practice; and (4) when services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within the aforementioned exceptions.

[20] Unlike the language of the Rule, Section 4 of the Comment states that Section (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, not of the jurisdiction where the lawyer principally practices. The remainder of the Comment is consistent with the language of the Rule.

E. Special Regulations for In-house Counsel

1. The work of in-house counsel for national and multinational corporations is often, by its very nature, multi-jurisdictional. Therefore, a number of states have special regulations concerning in-house counsel. Typically, these regulations either exempt in-house counsel from the state's UPL provisions or permit lawyers with out-of-state licenses to apply for special admission to practice as in-house counsel in the state without having to take the state's bar. *See, e.g.*, ARIZONA RULES OF PROF'L CONDUCT 5.5(d)(1); WASHINGTON ADMISSION TO PRACTICE R. 8(f). However, these regulations usually require that the attorney provide legal advice only to his or her employer and that the employer not provide legal services to outside clients. *See, e.g.*, NEV. SUP. CT. R. 49.10. New York recently amended the rules governing in-house lawyers to permit attorneys in good standing from other U.S. jurisdictions to act as in-house counsel for a New York organization without satisfying traditional admission requirements. *See* N.Y. CT. RULES § 522.1. The rules permit registration of an attorney actively employed full time in New York by any "non-governmental corporation, partnership, associate or other legal entity" that is not itself engaged in the practice of law or rendering of legal services outside such organization. The rules also contain a reciprocity requirement and permit registration only if the U.S. lawyer is from a jurisdiction permitting an attorney admitted to practice in New York to register as in-house counsel in that jurisdiction. Although the in-house lawyer may provide legal advice to her employer, she may not appear before a court, or make an appearance in a proceeding in which *pro hac vice* admission would be required. N.Y. CT. RULES § 522.4. Further, the lawyer may not provide personal legal services to any shareholders, customers, or agents, of the identified employer, and may not hold herself out as an attorney admitted to practice in New York except on the employer's letterhead with a limiting designation. *Id.* The New York City Bar Association has applauded the new rules for "recogniz[ing] the realities of modern practice and ma[king] it feasible for in-house counsel, who generally do not interact with the local justice system, to provide their legal expertise to their firm or organization when based in New York." *See City Bar Applauds In-House Counsel Rule*, New York City Bar (Apr. 11, 2011), *available at* http://www.nycbar.org/44th-street-blog/2011/04/12/city-bar-applauds-in-house-counsel-rule/.

2. The ABA'S MODEL RULES OF PROFESSIONAL CONDUCT (2004) also contains a special exemption for in-house counsel. *See* MR 5.5(d) (permitting a lawyer licensed in another jurisdiction to provide legal services to his or her organizational employer in another jurisdiction, provided that the services do not require *pro hac vice* admission). Recently, the ABA amended its Model Rules to allow lawyers of good standing admitted in *foreign* jurisdictions to serve as in-house counsel, provided that the services do not require *pro hac vice* admission and

provided that such services are undertaken in consultation with a U.S. lawyer authorized to produce such advice. *See* MR 5.5(d).

VIII. Organization as Client

A. Ethics Rules

1. MR 1.13. ABA'S MODEL RULES OF PROFESSIONAL CONDUCT (2004).

2. Rule 1.13. NEW YORK RULES OF PROFESSIONAL CONDUCT.[21]

B. Who is the Client?

1. When an organization, such as a corporation, employs or retains a lawyer, the lawyer's client is the entity itself, not the entity's constituents (*i.e.*, officers, directors, employees or shareholders). *See, e.g.*, MR 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."). When it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer must explain that the lawyer is the lawyer for organization and *not* for the constituents. NY Rule 1.13(a).

2. The realities of the corporate family further complicate this question of "Who is the client?" There are several exceptions to the business entity rule, as illustrated by *GSI Commerce Solutions, Inc. v. BabyCenter*. BabyCenter sought to disqualify counsel for GSI, Blank Rome LLP, on the grounds that Blank Rome LLP also represented BabyCenter's corporate parent, Johnson & Johnson ("J & J"), with whom it has a close relationship, creating a conflict of interest. GSI insisted that there was no conflict and that BabyCenter could not be considered a "current client" of Blank Rome LLP, relying in large part on an Engagement Letter between Blank Rome LLP and J & J. The Engagement Agreement expressly stated: "Unless agreed to in writing or we specifically undertake such additional representation at your request, we represent only the client named in the engagement letter [i.e., J & J], and not its affiliates, subsidiaries, partners, joint venturers, employees, directors, officers, shareholders, members, owners, agencies, departments, or divisions." Nevertheless, J & J periodically called upon Blank Rome LLP for legal advice related to its subsidiaries. (In fact, according to J & J, most of the work Blank Rome LLP did for them dealt with one of its operating companies.) Blank Rome LLP at one point provided advice to BabyCenter, though this advice was not related to BabyCenter's agreement with GSI. Blank Rome LLP had never specifically sought a prospective waiver from J & J for any conflict related to the GSI matter. The Southern District granted BabyCenter's

[21] Replaces DR 5-109, NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY.

motion to disqualify, holding that BabyCenter was "part and parcel"[22] of J & J such that the two should be considered a single entity, and noting that "[I]t would be a strange agreement – and one of doubtful enforceability – that would permit a law firm to sue the very company it is currently representing absent the most express and unequivocal waiver by all concerned." *GSI Commerce Solutions, Inc. v. BabyCenter, LLC*, 644 F.Supp.2d 333, 336–37 (S.D.N.Y. 2009). The court further noted that the Engagement Agreement provided only for a "limited prospective waiver" as opposed to an "unequivocal express waiver" specific to the instant case. *Id.* at 338. In view of the above, lawyers should define client relationships upfront and should avoid relying on blanket prospective waivers, particularly when engaging or seeking to engage in work that could undermine these waivers (as in the case here, where J & J provided some advice to BabyCenter and other J & J affiliates).

3. An attorney representing an organization may, however, simultaneously develop an attorney-client relationship with the organization's individual constituents, such as an employee or a board member, provided that there are no conflicts of interest. *See, e.g.*, MR 1.13(g) ("A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7, [governing conflicts of interest]."); NY Rule 1.13(d) (permitting a lawyer to represent an organization's constituents subject to Rule 1.7, which governs conflicts of interest).

    a. The attorney must be aware that representing both the organization and one or more of its constituents can present certain dangers. In particular, the interests of the organization and the constituent(s) may diverge, creating a conflict of interest. Therefore, an organization's lawyer must consider – throughout the period of representation – whether representing one of the organization's constituents will adversely affect or materially limit his or her representation of the organization itself. *See* MR 1.7. Also, if his or her constituent-client is engaged in wrongdoing against the organization-client, the attorney must be careful not to assist in the constituent's wrongdoing. *See* MR 1.2(d).

[22] In particular, the court noted that BabyCenter, a wholly subsidiary of J & J, "shares accounting, audit, cash management, employee benefits, finance, human resources, information technology, insurance, payroll, and travels service and systems with J & J," as well as relies on J & J's legal department. GSI Commerce Solutions, Inc. v. BabyCenter, LLC, 644 F.Supp.2d 333, 336–37 (S.D.N.Y. 2009). *See also* JP Morgan Chase Bank ex rel. Mahonia Ltd. V. Liberty Mut. Ins. Co., 189 F. Supp. 2d 20, 21, 23 (S.D.N.Y. 2002) (applying the doctrine of concurrent representation where the relationship between a parent and subsidiary "was extremely close and interdependent, both financially and in terms of direction" and where "the two share a wealth of common interests adversely impacted by the lawsuit in question").

b. For a detailed discussion of the ethics rules governing the joint representation of corporations and corporate constituents, as well as of the benefits and risks involved in such representation, *see* Comm. on Prof'l & Judicial Ethics, Assoc. of the Bar of the City of New York, Formal Op. 2004-02 (2004).

4. Even if an organization's attorney does not expressly form an attorney-client relationship with one of the organization's constituents, the attorney can still inadvertently generate an implied attorney-client relationship with a constituent.

a. The formation of an attorney-client relationship does not require an express agreement between the attorney and the client. *See, e.g.*, *Diversified Group, Inc. v. Daugerdas*, 139 F. Supp. 2d 445, 453-54 (S.D.N.Y. 2001). Instead, an attorney and client may form an implied attorney-client relationship if (1) the client manifested the intent that the attorney provide legal services and (2) a reasonable person in the client's position would have believed that the attorney agreed to provide him or her with legal services. *See id.* at 454 ("The formation of an attorney-client relationship 'hinges upon the client's [reasonable] belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.'" (quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978))). Often, an implied attorney-client relationship develops when the attorney receives confidential information from a person who reasonably expects that the attorney will keep such information confidential. *See Blue Planet Software, Inc. v. Games Int'l, LLC*, 331 F. Supp. 2d 273, 276 (S.D.N.Y. 2004); *Diversified Group*, 139 F. Supp. 2d at 454.

b. Be aware that, if the lawyer generates an implied attorney-client relationship with an individual constituent, and a conflict of interest arises between the representation of the constituent-client and the representation of the organization-client, the lawyer (and the law firm by imputation) may be disqualified from representing one or both clients.

c. The danger of inadvertently generating implied attorney-client relationships is particularly pronounced in the area of corporate internal investigations, where the organization's attorney, in investigating alleged corporate wrongdoing, must inevitably interview company employees. Therefore, when interviewing a corporation's employee during the course of an investigation, the corporation's lawyer must be careful not to give the employee the impression that the lawyer is representing him or her as an individual or that he or she will protect the employee's individual interests (as opposed to the interests of the organization). There

are certain measures that an organization's attorney can take to ensure that he or she does not inadvertently generate an implied attorney-client relationship. Before interviewing the employee, the attorney can provide the employee with a "Corporate Miranda Warning," in which the attorney makes clear that he or she represents the organization, not the interviewee, and that the organization has control over any confidential information disclosed during the interview. *See* Rule 1.13(a) (formerly DR 5-109(A)) ("When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents."). Be aware, however, that such a warning may make the constituent reluctant to talk to the attorney and, therefore, may impede the flow of information.

C. Reporting Up the Ladder

1. If an organization's attorney learns in the course of his or her investigations that a constituent of the organization is or may be engaged in wrongdoing that may result in "substantial injury" to the organization, the lawyer must "proceed as is reasonably necessary in the best interest of the organization." MR 1.13(b); Rule 1.13(b). Among the remedial measures that the attorney may take is to report the wrongdoing to a higher authority in the organization and, if necessary, the highest authority in the organization. MR 1.13(b); Rule 1.13(b)(3). If the attorney reports the wrongdoing to the highest authority in the organization and the highest authority persists in putting the organization's interests at risk, the attorney's next course of action depends on the jurisdiction. In jurisdictions that have adopted rules similar to the ABA'S MODEL RULES OF PROFESSIONAL CONDUCT (2004), the attorney may make a limited disclosure of confidential information to parties outside the organization. Under former DR 5-109(C) of the NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY, the attorney was allowed to resign but not to disclose confidential information to outside parties. New York's new Rule 1.13, however, allows the attorney not only to resign but to reveal confidential information if permitted by Rule 1.6.[23] Note, however, that

[23] Section (a) of Rule 1.6 provides that a lawyer *may* reveal confidential information when "the client gives informed consent"; "the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community"; "to the extent that the lawyer believes reasonably necessary . . . to prevent the client from committing a crime"; "to the extent that the lawyer believes reasonably necessary . . . to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was

these ethics rules do not *require* an attorney to report organizational wrongdoing to a higher authority in the organization or to take any other particular course of action; instead these rules merely provide the attorney with a possible course of action.

2. Following recent corporate scandals, the Government enacted the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). Section 307 of Sarbanes-Oxley requires that the Securities and Exchange Commission ("SEC") adopt minimum standards of conduct for attorneys appearing and practicing before the SEC. Sarbanes-Oxley Act of 2002, § 307, 15 U.S.C. § 7245 (2002). In response, the SEC adopted rules that require attorneys who represent public companies to "report up the ladder" any credible evidence of a material violation of federal or state securities laws or a breach of fiduciary duty by the company or company agents. 17 C.F.R § 205.3(b)(1). Unlike ethics rules such as MR 1.13(b) and New York's Rule 1.13, the SEC rules *require* an attorney who becomes aware of such evidence to report the evidence to the company's chief legal officer, CEO, and/or board of directors. *Id.* Failure to fulfill these "reporting up" obligations can be the basis for an SEC enforcement action. 17 C.F.R. § 205.6. SEC rules also permit (but do not require) an attorney, under certain situations, to disclose confidential information directly to the SEC without the organization's consent. *See* 17 C.F.R. § 205.3(d)(2).

IX. Truthfulness in Statements to Others

A. Ethics Rules

1. MR 4.1; MR 1.2(d). ABA'S MODEL RULES OF PROFESSIONAL CONDUCT (2004).

2. Rule 4.1; Rule 1.2(d). NEW YORK RULES OF PROFESSIONAL CONDUCT.[24]

B. Fraudulent Conduct

"[A] lawyer may not counsel or assist a client in fraudulent or criminal activity—even where doing so initially was unwitting—and must take steps to terminate aid having that effect as soon as the criminal or fraudulent character of the activity is

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based on materially inaccurate information or is being used to further a crime or fraud"; "to the extent that the lawyer believes reasonably necessary . . . to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm," inter alia. Rules 3.3(a)(3) and 3(b), which involve disclosure before a tribunal, provide that a lawyer *must* reveal confidential information when the lawyer discovers that material evidence presented before the tribunal was false or when the lawyer discovers that a person "intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding." *See supra* III.F.

[24] Replaces DR 7-102. NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY

discovered." 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.4 (3rd ed. 2007). Comment 3 to Rule 4.1 states that an attorney can avoid assisting a client's illegal or fraudulent activity by withdrawing from representation; see Rule 1.16(c)(2).

C. Limited Exceptions May Apply

1. Both MR 4.1 and Rule 4.1 prohibit the knowing making of false statements to third parties. Rule 4.1 prohibits *any* false statement of fact or law, whereas MR 4.1 is narrower and contains a materiality threshold (no "false statement of material fact or law"). The comments to both rules, however, contain an exception for "puffery" (i.e., bluffing) in the course of negotiations. The exception covers "estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim" as well as "the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud." Comment 2, MR 4.1; Comment 2, Rule 4.1.

2. There is a longstanding debate about just how much puffery is permitted before a lawyer must reveal the client's bottom line. *Compare* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-439, at 6 (2006) ("[A] lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's 'bottom line' position, in an effort to reach a more favorable resolution."), *and* James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiations*, 1980 AM. B. FOUND. RES. J. 926, 928 (1980) ("[T]o mislead an opponent about one's true settling point is the essence of negotiation."), *with* Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 LA. L. REV. 447, 476 (1995) ("The ethical basis of negotiations should be one of truth and fair dealing; that, as professionals, lawyers should not accept a result that is unconscionably unfair to the other party." (internal quotation omitted)).

D. Use of Undercover Investigators May Constitute Misrepresentation

1. New York Rule 8.4(a) provides that a lawyer shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." New York Rule 8.4(c) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

2. According to a 2007 opinion by the New York County Lawyers' Association on Professional Ethics, "it is generally unethical for a nongovernment lawyer to knowingly utilize . . . an investigator who will employ dissemblance in an investigation," though it may be acceptable "in a small number of exceptional circumstances where the dissemblance . . . is limited to identity and purpose and involves otherwise lawful activity

undertaken solely for the purpose of gathering evidence." Comm. on Prof'l Ethics, N.Y. Cty. Lawyers' Ass'n, Op. 737 (2007). Even in these limited circumstances, the lawyer should only utilize investigators when "the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently" or "the dissemblance is expressly authorized by law," *and* when the following three conditions exist: (1) "the evidence sought is not reasonably and readily available through other lawful means," (2) "the lawyer's conduct and the investigator's conduct . . . do not otherwise violate" the Rules or law, and (3) "the dissemblance does not unlawfully or unethically violate the rights of third parties." *Id.* Although this opinion is technically outdated as it was written under the old rules, the new rules (NY Rule 8.4) involve similar prohibitory language with respect to deception and circumventing the Rules through the acts of another.

3. In *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, Campaniello sought to preclude evidence obtained by Gidatex's investigators via three secret recordings of conversations between the investigators — who had posed as interior designers — and defendants' employees. Gidatex sought to prove that Campaniello was engaging in "bait and switch" tactics designed to pass-off non-"Saporiti Italia" registered products as "Saporiti Italia" registered products in violation of trademark law. Campaniello argued that Gidatex's secret recordings violated DR 1-102(a)(4), which prohibit a lawyer from "circumvent[ing] a disciplinary rule through actions of another" and "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." The Southern Distrct held that "hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation." *Gidatex, S.r.L. v. Campaniello Imports, Ltd*., 82 F. Supp. 2d 119, 122 (1999). The court further noted that the policy interest underlying the prohibition on misrepresentations was to protect parties from being tricked into making statements they otherwise would not have made with counsel present, not to protect parties from making statements they otherwise would have made in the course of an ordinary business transaction. *Id.*; *see also Apple Corps Ltd., MPL v. Int'l Collectors Soc*., 15 F. Supp. 2d 456, 475 (D.N.J.1998) ("The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.") (citation omitted); *Cartier v. Symbolix, Inc*., 386 F. Supp. 2d 354 (S.D.N.Y. 2005) (same). The court expressed concern that preventing such use of investigators would "permit targets to freely engage in unfair business practices, which are harmful to both trademark owners and consumers in general." *Gidatex*, 82 F. Supp. at 122. However, the ethical significance of *Gidatex* must not be overstated, as it involved an evidentiary rather than disciplinary motion. As the New York County

Lawyers' Association put it, "Much if not all of the judicial commentary on the issue of the ethical use of dissemblance [in *Gidatex*] is dicta" because the court did not have to exclude evidence obtained by violation of the ethical rules. Comm. on Prof'l Ethics, N.Y. Cty. Lawyers' Ass'n, Op. 737 (2007).

4. This area of law is highly unsettled, as courts all over the country have wrestled with this question to mixed results. *Compare, e.g., Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (under circumstances similar to *Gidatex*, court concluded that "[t]he duty to refrain from conduct that involves deceit or misrepresentation should preclude any attorney from participating in the type of surreptitious conduct that occurred here"), *with Gidatex*, 82 F. Supp. at 122. Some states have explicitly created an exception to the honesty rule for involvement in legitimate investigate activities. *See, e.g.*, FLA. RULES OF PROF'L CONDUCT R. 8.4(c).

X. Legal Advertising

A. Ethics Rule

1. Rule 7.1. NEW YORK RULES OF PROFESSIONAL CONDUCT.

B. Discussion

1. The New York Rules of Professional Conduct broadly define "advertisement" to include "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." *See* NY Rule 1(a). Note that marketing and branding items such as pencils or legal pads that bear the firm name do not constitute advertisements if their primary purpose is "general awareness and branding," rather than the retention of the law firm for a particular matter. Comment 8, Rule 7.1. Similarly, offering a prize to join a lawyer's social network does not constitute advertisement, as it falls within the category of *general* business development. Comm. on Prof'l Ethics, NY State Bar Ass'n, Op. 873 (2011). According to NY Rule 7.1, legal advertisements may include the following: (1) "statements that are reasonably likely to create an expectation about results the lawyer can achieve"; (2) "statements that compare the lawyer's services with the services of other lawyers"; (3) "testimonials or endorsements of clients, and of former clients"; (4) "statements describing or characterizing the quality of the lawyer's or law firm's services." However, this information must not be false, deceptive, or misleading or otherwise in violation of one of the Rules. Website advertisement that uses client testimonials or reports of past results is prohibited if its use creates unjustified expectations or is otherwise false, deceptive or misleading; a disclaimer — "Prior results do

not guarantee a similar outcome" — may cure misleading information if it is tailored to address the misleading information and is placed so that it is reasonable to expect that anyone who reads the testimonials will also read the disclaimer, but no disclaimer can cure false or deceptive testimonials. Comm. on Prof'l Ethics, NY State Bar Ass'n, Op. 771 (2003). In general, attorneys have a duty to avoid "self-laudatory descriptive verbiage" and puffery in advertisements. Comm. on Prof'l Ethics, NY State Bar Ass'n, Op. 68-89. A law firm using social media sites like LinkedIn may not list its services under the heading "Specialties," as this would constitute a claim that the firm is a specialist in a particular field of law in violation of Rule 7.4(c) absent certification. Comm. on Prof'l Ethics, NY State Bar Ass'n, Op. 972 (2013).

2. If a law firm's website contains links to third party websites, it must ensure that if the particular link and the related text qualify as "advertisements" under the Rules, then the firm must ensure conformance with Rule 7.1. Comm. On Prof'l Ethics, NY State Bar Ass'n, Op. 915 (2012). Similarly, a lawyer may produce and post a video online designed to educate lay individuals about a legal subject, and may invite members of the public to view the video, provided that the lawyer complies with Rule 7.1 if the video or invitations encourage participants to retain the lawyer. Comm. On Prof'l Ethics, NY State Bar Ass'n, Op. 918 (2012). Additionally, tweets by attorneys that are directed to potential clients constitute advertising and must therefore comply with Rule 7.1 and be labeled "attorney advertising." Comm. On Prof'l Ethics, NY State Bar Ass'n, Op. 1009 (2014). Tweets are also solicitations if directed to specific recipients, but they are not barred by the rule against interactive solicitation. *Id.*

3. *Hunter v. Virginia State Bar* ex rel. *Third District Committee* provides the most comprehensive and complex glimpse into the issues surrounding legal advertising in blogs to date. In addition to finding a violation of client confidentiality, *see* discussion *supra*, the Virginia State Bar held that Hunter's blog violated VA Rules 7.1 and 7.2, which regulate legal advertising. The VSB ordered Hunter to post a VA 7.2(a)(3)-compliant disclaimer[25] to his website in order to comply with these rules. Hunter

[25] The disclaimer would have essentially required Hunter to say that the blog was an advertisement and that the visitor should not expect similar results, as case outcomes vary. Some argue that the Virginia Supreme Court should have focused more on the First Amendment implications of the specific disclaimer restrictions imposed by VA Rule 7.2(a)(3), which include, inter alia, font size, color, boldness, and uppercase restrictions. *See* Gee v. Louisiana Attorney Disciplinary Board, 632 F.3d 212 (5th Cir. 2011) (court struck down disclaimer requirements related to font size and speed of speech on TV ads, inter alia); Richard Zitrin, *Viewpoint: Court Struggles to Regulate Attorney Blogging*, THE RECORDER (last visited Jun. 23, 2013). (Note: NY Rule 7.1, the analog to Virginia's rule, does not have such specific disclaimer restrictions, though it does require a general disclaimer for legal advertisements.)

argued that his blog constituted pure political speech, and that the required disclaimer would thus violate his First Amendment rights.[26] The Virginia Supreme Court held that Hunter's blog constituted commercial speech — even though there was some political commentary — because "[w]hen considered as a whole, the economically motivated blog overtly propose[d] a commercial transaction that [functioned as] an advertisement of a specific product."[27] *Hunter v. Virginia State Bar* ex rel. *Third Dist. Cmte*., 285 Va. 485, *6 (2013). Using the *Central Hudson* test for evaluating commercial speech, the court upheld the VSB's required disclaimer as directly advancing the government's substantial interest in protecting the public from an attorney's self-promoting and potentially misleading statements in a manner that was no more restrictive than necessary. *Id.* at *7. By contrast, the dissent argued that Hunter's blog clearly constituted political speech, as the dissent criticized the majority for "not giv[ing] sufficient credit to the fact that Hunter use[d] the outcome of his cases to illustrate his views of the system." *Id.* at *12 (Lemons, J., dissenting in part). The dissent also asserted that political speech may not be transformed into commercial speech just "because one of the multiple motivations of the speaker is marketing and self-promotion." *Id.* The New York State Bar Association recently weighed in on the topic of attorney-written blogs and found that where the blog does not discuss legal issues and its primary purpose is not the retention of the lawyer, the blog is not an advertisement, even if it is clear the author is an attorney. Comm. On Prof'l Ethics, NY State Bar Ass'n, Op. 967 (2013).

ABA's Model Rules of Professional Conduct (2004) available at:

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

NEW YORK RULES OF PROFESSIONAL CONDUCT[28]

[26] Hunter conceded that he had many reasons for writing his blog, one of which was to market and create a community presence for his law firm. However, he also claimed that his purpose was to combat the perception that defendants are "guilty until proven innocent" and provide a forum for the discussion of important criminal justice issues.

[27] The court pointed to a variety of factors to support its determination of commercial speech: (1) the blog was motivated in part by economic reasons; (2) the blog predominately described cases in which Hunter had received favorable results; (3) the blog posts referenced Hunter's law firm; (4) the blog was on his law firm's commercial website; (5) the blog used the same page frame as the one used by the firm for soliciting clients, including a "contact us" form; (6) the blog's homepage encouraged visitors to consider Hunter & Lipton for their representation; and (7) the blog was non-interactive. *Hunter v. Virginia State Bar* ex rel. *Third Dist. Cmte*., 285 Va. 485, *5–*6 (2013).

[28] Replaced NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY – DISCIPLINARY RULES on April 1, 2009.

Rule 1.1: Competence

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

…

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

…

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

Rule 1.9: Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Rule 1.13: Organization as Client

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent

shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.16: Declining or Terminating Representation

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

(11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

Rule 1.18: Duties to Prospective Clients

(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.

…

(e) A person who:

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

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

Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

Rule 4.2: Communication with Person Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

(c) A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Rule 4.3: Communicating with Unrepresented Parties

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 5.5: Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.

(b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

Rule 7.1: Advertising

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

(1) contains statements or claims that are false, deceptive or misleading; or

(2) violates a Rule.

…

(c) An advertisement shall not:

(1) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

(2) include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;

(3) use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same; or

(4) be made to resemble legal documents

(d) An advertisement that complies with paragraph (e) may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer's services with the services of other lawyers;

(3) testimonials or endorsements of clients, and of former clients; or

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in paragraph (d) provided:

(1) its dissemination does not violate paragraph (a);

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated

(3) it is accompanied by the following disclaimer: “Prior results do not guarantee a similar outcome.”

(4) in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing.

(f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize meta tags or other hidden computer codes that, if displayed, would violate these Rules.

…

Rule 8.4: Misconduct

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

…

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

…

Rule 8.5: Disciplinary Authority and Choice of Law

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver

When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

1. the waiver is intentional;

2. the disclosed and undisclosed communications or information concern the same subject matter; and

3. they ought in fairness to be considered together.

(b) Inadvertent disclosure.

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

1. the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding

When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

1. would not be a waiver under this rule if it had been made in a Federal proceeding; or
2. is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of court orders.

A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling Effect of a Party Agreement

An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule

Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions

In this rule:

1. "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

2. "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."

Comparison of New York's new Rules of Professional Conduct with the former Disciplinary Rules[29]

New York Rule of Professional Conduct	Analogous Former Disciplinary Rule	Remarks
1.1: Competence	6-101 7-101(A)(1) and (3)	The new rule draws from parts of former DR 7-101 (Representing a client zealously) and 6-101 (Failing to act competently) as well as EC6-1. The new rule is nearly identical in substance to the former sections.
1.2(d) and (f): Scope of Representation and Allocation of Authority Between Client and Lawyer	7-102(A)(7) and 7-101(B)(2)	Rule 1.2(d) is identical in substance to the old rule and Rule 1.2(f) is identical to the old rule.
1.6: Confidentiality of Information	4-101	The new rule is similar in substance to the former DR but contains the following differences: -Rule 1.6 applies to information not only gained during but also "relating to" the representation of the client, "whatever its source." Rule 1.6 also adds that confidential information "does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." -Rule 1.6 adds the following exceptions to confidentiality: (a)(2) "the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community," (b) when the lawyer reasonably believes disclosure is necessary "(1) to prevent reasonably certain death or substantial bodily harm," and "(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm."
1.13: Organization as Client	5-109	Sections (a), (b), and (c) of the new rule are identical to the former DR with the exception of minor differences in punctuation and wording in Section (b). Section 1.13(d), which refers to concurrent representation of an organization and its directors, officers, employees, shareholders, or other constituents, has no analogous provision in the old rules.
4.1: Truthfulness in Statements to Others	7-102(A)(5)	The new rule and former DR are nearly identical except that Rule 4.1 adds the phrase "to a third person."
4.2: Communication with Person Represented by Counsel	7-104(A)(1) and (B)	Identical in substance to former DR provisions; contains minor changes in phrasing.
4.3 Communicating with	7-104 (A)(2)	The new rule is substantially similar to former DR 7-

[29] These comparisons were adapted in part from Roy Simon, "Comparing the New NY Rules of Professional Conduct to the NY Code of Professional Responsibility," *New York Professional Responsibility Report*, accessed online at http://www.nyprr.com/New-NY-Rules-of-Professional-Conduct.php.

Unrepresented Parties		104(A)(2), but it is more explicit about what a lawyer must and may not say than the former rule, which provided only that a lawyer shall not "[g]ive advice to a party who is not represented by a lawyer, other than the advice to secure counsel." Rule 4.3 also adds a scienter standard ("if the lawyer knows or reasonably should know") and changes the word "party" to the word "person."
1.16: Declining or Terminating Representation	2-109, 2-110, 5-109(C)	Similar in substance to the former DR provisions and in many instances almost identical.
5.5: Unauthorized Practice of Law	3-101	The new rule and former DR are nearly identical except for a change in phrasing; rule 5.5(a) replaces "where to do so would be in violation of the regulations of the profession" with "in violation of the regulation of the legal profession."
Rule 8.5: Disciplinary Authority and Choice of Law	1-105	The new rule and former DR are identical.