

**Garden State CLE presents:**

# **Attorney Ethics & the Internet**



**Lesson Plan**

# Introduction

**Regulation of private activities by the Supreme Court:**

**In re Mattera, 34 NJ 259, 264 (1961)**

**Hence the disciplinary power is not confined to the area covered by the canons. It has long been settled here and elsewhere that any misbehavior, private or professional, which reveals lack of the character and integrity essential for the attorney's franchise constitutes a basis for discipline.**

**The reason for this rule is not a desire to supervise the private lives of attorneys but rather that the character of a man is single and hence misconduct revealing a deficiency is not less compelling because the attorney was not wearing his professional mantle at the time. Private misconduct and professional misconduct differ only in the intensity with which they reflect upon fitness at the bar. This is not to say that a court should view in some prissy way the personal affairs of its officers, but rather that if misbehavior persuades a man of normal sensibilities that the attorney lacks capacity to discharge his professional duties with honor and integrity, the public must be protected from him.**



# **Part I – Sources of Law**

## **Article VI, Section II, Paragraph 3**

**The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.**

### **RULE 1:14. Codes of Ethics**

**The Rules of Professional Conduct and the Code of Judicial Conduct of the American Bar Association, as amended and supplemented by the Supreme Court and included as an Appendix to Part I of these Rules, and the Code of Conduct for Judiciary Employees, also included as an Appendix to Part I of these Rules, shall govern the conduct of the members of the bar and the judges and employees of all courts of this State.**



## **1:9-6. Effect of Published Opinions (ACPE)**

**Published opinions of the committee shall be binding upon the Ethics Committee in their disposition of all matters.**

## **1:19A-3(c) (CAA)**

**Published opinions shall constitute constructive notice to, and shall be binding on, all members of the bar and in connection with any ethics proceedings, unless revised pursuant to section (d) or reconsidered.**



## Part II – Social media



**Facebook**  
**Twitter**  
**Blogs**

**Rule #1 – Social media posts are: Immediate, Global and Forever.**

**Rule #2 – The technology is running years ahead of the RPC's and case law. You must analogize and base your actions on current law that may later prove to be inadequate or inapplicable.**

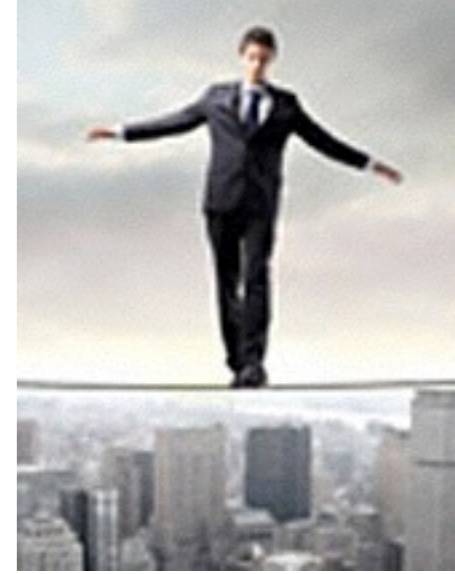


**Open issues:**

**Client testimonials and critiques.**

**Attorney retaliation through postings.**

**These issues are infused with significant 1<sup>st</sup> Amendment concerns.**



# **Part III – Expectation of Privacy**

- a.) Generally speaking, an employee has no expectation of privacy in a workplace computer. *State v. M.A.*, 402 N.J. Super. 353 (App. Div. 2008).**
- b.) See also *Doe v. XYZ Corp.*, 382 NJ Super 122 (App. Div. 2005) (Child Porn)**
- c.) One possible exception to this rule relates to communication between an attorney and client from a workplace computer. *Stengart v. Loving Care*, 201 NJ 300 (2010)**

## **d. Criminal prosecution**

***In re Cohen*, 220 NJ 7, 18-19 (2014)**

**Until now attorneys have not had clear notice of the more stringent approach we will take in disciplining attorneys for egregious offenses. Today, attorneys must be on notice that engaging in this form of unlawful activity may be considered grounds for losing the privilege of membership in a distinguished and trusted profession. While we do not establish a per se rule of disbarment, convictions in egregious cases may result in disbarment going forward so as to align with society's sharper understanding of, and indignation over, the harm caused by the exploitation of child victims of pornographers.**



**We recognize that different factors can affect the level of discipline imposed in any disciplinary case, including child pornography cases. Such factors include whether the case involved touching, physical violence, or actual dissemination to others, the number of pictures or videos, or whether the perpetrator suffered from mental illness or sexual abuse himself or herself.**

**In the case at hand, after analyzing and weighing the circumstances of respondent's criminal offense, as well as respondent's alleged mental illness, his own experience being sexually abused as a child, and his cooperation in seeking treatment and his progress thus far, we have determined to impose, for the first time, discipline not formerly used. We hold that respondent shall serve an indeterminate period of suspension, pursuant to *Rule 1:20–15A(a)(2)*. This form of discipline is a step short of disbarment and is the most severe suspension that can be imposed on an attorney.**

**Imposition of the indeterminate suspension in this case places all attorneys on notice of the consequences that may follow sexually-related offenses. Respondent may not seek reinstatement for five years from the date of his temporary suspension. In addition, he must establish his fitness to practice law prior to being readmitted to the practice of law in New Jersey. Proof of fitness will be subject to vigorous review.**



## Part IV - Sexual Harassment



# **POLICY PROHIBITING DISCRIMINATION IN THE WORKPLACE**

## **I. POLICY**

### **a. Protected Categories**

**The State of New Jersey is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. Under this policy, forms of employment discrimination or harassment based upon the following protected categories are prohibited and will not be tolerated: race, creed, color, national origin, nationality, ancestry, age, sex/gender (including pregnancy), marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability.**

**To achieve the goal of maintaining a work environment free from discrimination and harassment, the State of New Jersey strictly prohibits the conduct that is described in this policy. This is a zero tolerance policy.**



## Sexual Harassment

**Examples of prohibited behaviors that may constitute sexual harassment and are therefore a violation of this policy include, but are not limited to:**

- ☒ Generalized gender-based remarks and comments;**
  
- ☒ Unwanted physical contact such as intentional touching, grabbing, pinching, brushing against another's body or impeding or blocking movement;**
  
- ☒ Verbal, written or electronic sexually suggestive or obscene comments, jokes or propositions including letters, notes, e-mail, text messages, invitations, gestures or inappropriate comments about a person's clothing;**



# Part V – Discrimination

## RPC 8.4. Misconduct

It is professional misconduct for a lawyer to:

**(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.**



**In re Witherspoon, 203 NJ 343 (2008) (Suspension)**

**In re Geller, 177 NJ 505 (2002) (Reprimand – Religious)**

**Finally, *RPC 8.4(g)* provides that an attorney shall not engage in conduct involving discrimination.**

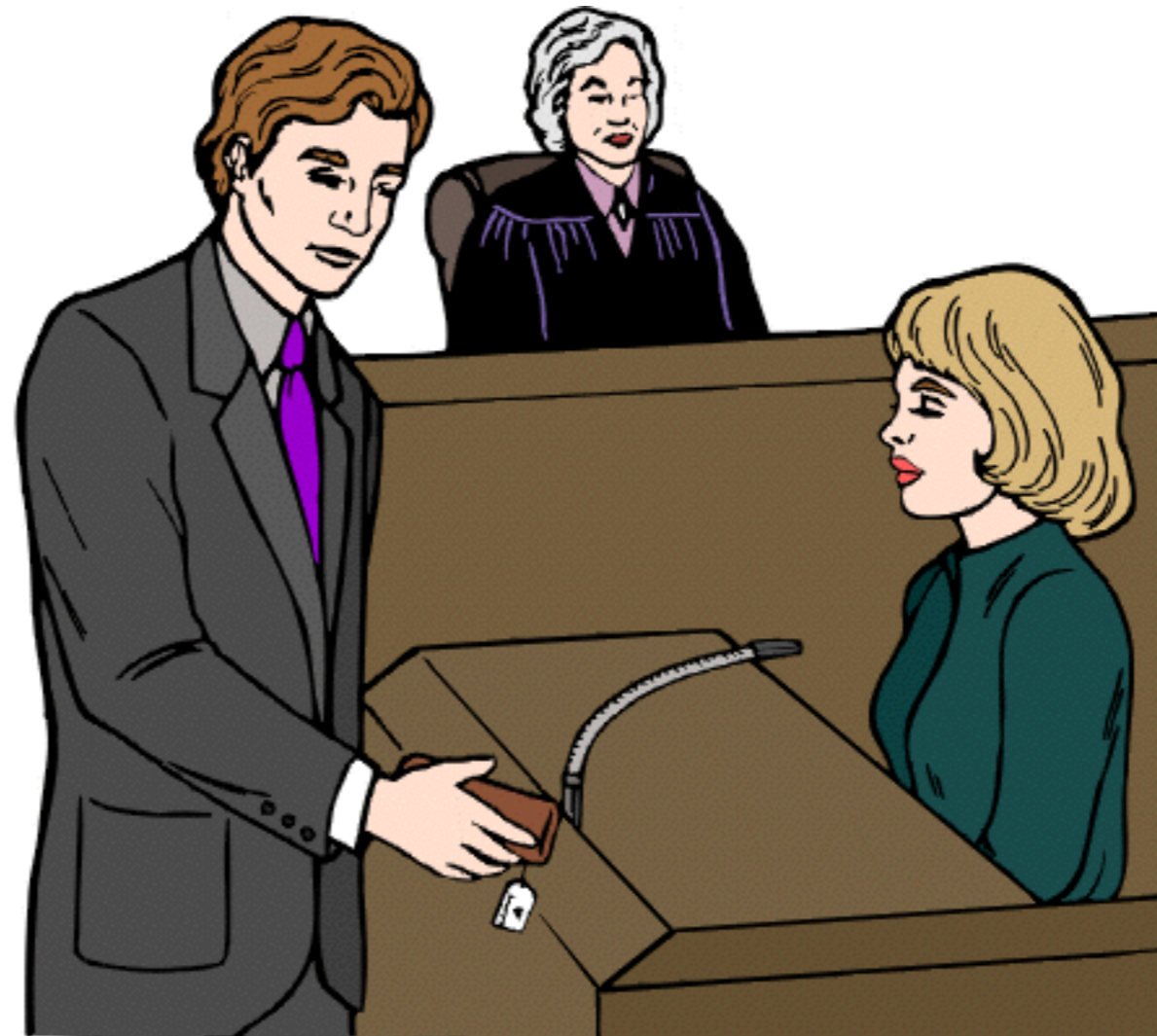
**Respondent's accusation of religious bias was not an act of discrimination; he was expressing his belief that he was the victim of discrimination. He exhibited ethnic bias, however, when he remarked that "Monmouth County Irish have their own way of doing business," referring to Judge**

**Cavanaugh's rulings. *See In re Vincenti, 114 N.J. 275, 283 (1989)* ("In the context of either the practice of law or the administration of justice, prejudice both to the standing of this profession and the administration of justice will be virtually conclusive if intimidation, abuse, harassment, or threats focus or dwell on invidious discriminatory distinctions.")**



## **In re Pinto, 168 NJ 111 (2000) (Reprimand) (Sexual)**

**Respondent argued that he did not violate RPC 8.4(g) because he did not intend to harm [the victim]. However, the rule also prohibits an attorney from engaging in discriminatory conduct likely to cause harm. According to the comments to the rule, the term discrimination is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.**



## Part VI – Web Site Content



### a. In general:

### **In re Hyderally, 208 NJ 453, 461-62 (2011)**

**Notwithstanding our decision on the record of this case, we remind the Bar that attorneys are responsible for monitoring the content of all communications with the public—including their websites—to ensure that those communications conform at all times with the Rules of Professional Conduct. No attorney who has not complied with the requirements of *Rule 1:39* should display the New Jersey Supreme Court Certified Attorney seal on a website, in other advertising, on letterhead or in any other form of communication, or otherwise state or imply that he or she has been certified pursuant to *Rule 1:39*. Prospectively, attorneys who are not authorized by *Rule 1:39* to utilize the New Jersey Supreme Court Certified Attorney seal, but who display that seal on their websites or in other communication, will be subject to appropriate discipline. Whether a website is created by an outside consultant or developed and maintained by an attorney or his or her staff, all language and design that appears on it should be reviewed frequently for compliance with *Rule 1:39* and all Rules of Professional Conduct.**

## **b. Advertising**

### **RPC 7.1. Communications Concerning a Lawyer's Service**

**(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:**

**(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;**

**(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;**

**(3) compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey"; or**

**(4) relates to legal fees other than:**

**(i) a statement of the fee for an initial consultation;**

**(ii) a statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;**

(iii) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(iv) a statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter;

(v) the availability of credit arrangements; and

(vi) a statement of the fees charged by a qualified legal assistance organization in which the lawyer participates for specific legal services the description of which would not be misunderstood or be deceptive

(b) It shall be unethical for a lawyer to use an advertisement or other related communication known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee or as provided by Rule 1:19A-3(d).

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ATTORNEY AT LAW  
Former U.S. Marine

TED A. LIGGETT  
ATTORNEY AT LAW  
Trial Lawyer

2006  
BEST  
LAWYER

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- Medical Malpractice
- Pain & Suffering
- Wage Loss
- Medical Expenses

24 Hour Hospital Visits

Free Consultations

## RPC 7.2. Advertising

**(a) Subject to the requirements of RPC 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, internet or other electronic media, or through mailed written communication. All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.**

**(b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used.**

**(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by RPC 1.17; and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.**

**For misleading content – see CAA Opinion 43**



## c. Prohibited content

### CAA - OPINION 36

#### Internet Advertising and Disclaiming Impermissible Lawyer Referral Service

The inquiring attorney asks whether listing the attorney's web page on a web site run by a private commercial advertising and marketing enterprise, where the attorney pays a flat fee for the listing and receives an exclusive listing for a particular county in a specific practice area - in this case criminal law - is permissible under the Rules of Professional Conduct.

To forestall such a possibility, we conclude that a lawyer who seeks to give anything of value in order to participate in such a listing must, before doing so, ensure that the listing or advertisement contains a prominently and unmistakably displayed disclaimer, in a presentation at least equal to the largest and most prominent font and type on the site, declaring that “all attorney listings are a paid attorney advertisement, and do not in any way constitute a referral or endorsement by an approved or authorized lawyer referral service.” With such disclosure, the proposed activity is permissible, as long as it otherwise complies with *RPC 7.1* and *7.2*, as noted above.



# **C A A - O P I N I O N 31**

## **USE OF JUDICIAL PHOTOGRAPHS BY ATTORNEYS**

**The Committee has been asked for its opinion as to the propriety of including photographs of judges on an attorney's Internet webpage. Publication of judges' photographs for other than promotional purposes is permissible. However, if judicial photographs are presented as part of an advertising or marketing venture their use is controlled by and subject to the Rules of Professional Conduct and the Code of Judicial Conduct.**

**Electronic advertising communications may constitute constitutionally protected commercial speech. However, electronic communications, either directly or through a link, may violate the Rules of Professional Conduct in that portrayal of a judge, in the context of an attorney's promotional communication, is tantamount to an unspoken and prohibited testimonial or endorsement.**

**Including the image of a judge on an attorney's website is improper because “it is likely to create an unjustified expectation.” *RPC 7.1(a)(2)* because of the implicit endorsement by the judge who appears on the website. Further, a commercially appropriated judicial image may “imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.” *RPC 8.4(e)*.**

**The Committee has, therefore, determined that an attorney may not include on a professional or personal website, either directly or through a link, an image of a judge if the purpose of the site is to advertise or market that attorney's practice.**

# **CAA Opinion 42 – Super Lawyers Designation [RPC 7.1(a)(3)]**

## **In re Opinion 39, 197 NJ 66 (2008)**

**RPC 7:1(a)(3) - compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey";**



# **Super Lawyers®**

## **Client Testimonials CAA Opinion 33**

**[T]he Committee has come to the opinion that endorsements and testimonials by lay persons as to the legal effectiveness of an attorney do not serve the ultimate end of attorney advertising: truthful communication of factually relevant information which gives the lay public a competent basis to judge whether a particular lawyer has the requisite knowledge, skill, competence and ethical qualities to better serve in a particular area of law or in a specific matter. Accordingly, the Committee is withdrawing Opinion 15 and superseding it as follows when a lawyer uses client endorsements or testimonials as a marketing tool in an advertising or marketing campaign.**

**Client endorsements or testimonials which extol in any manner the professional efficiency or effectiveness of a lawyer are prohibited. An endorsement is a subjective statement reflecting the opinion or belief of the client furnishing the endorsement or testimonial. Such endorsements or testimonials, if addressed to the professional effectiveness of the lawyer, may create unjustified expectations, *RPC 7.1(a) (2)*, as to results which the lawyer can achieve. An endorsement or testimonial also measures, without professional expertise, the results obtained for the client with results that might be obtained by the lawyer in representing a future client in different circumstances.**

**A lawyer or law firm may, however, utilize endorsements or testimonials from clients addressed to the satisfaction of the client based on the interaction between lawyer and client, for example, that the lawyer was sympathetic or concerned, returned calls, communicated frequently, was prompt in responding to client requests, or was professional in their dealings, if:**

**(a) the endorsement or testimonial as to these matters is, in fact, that of the client, is truthful in all respects and does not compare one lawyer with another;**

**(b) does not describe the work or the quality of the work which the lawyer has performed for the client; and**

**(c) the client consents to the use of such an endorsement or testimonial in the marketing or advertising program of the attorney.**

**Additionally, the use of any endorsement or testimonial given by a client under the above guidelines must cease when the lawyer no longer has a reasonable basis to believe that the client's opinion remains essentially unchanged. In this regard, notification of a change in the client's opinion need not come directly from the client. Such changes may be implied or inferred from subsequent events that would lead to a reasonable belief that the client is no longer satisfied with the lawyer or the law firm.**

# Part VII – Confidentiality

## RPC 1.6: Confidentiality of Information

**(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).**

**RPC 1.6 prohibits a lawyer from revealing any “information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted” as one of six specific exceptions expressly set out in the rule. The broad command in RPC 1.6 to preserve the confidentiality of information relating to the representation of a client has routinely been held to include keeping the identities of clients whom a lawyer represents confidential, and some authorities have also expressly disapproved revealing the identities of clients on a lawyer's website. It is likewise a violation of RPC 1.6 to publish information relating to identifiable matters in which the lawyer represents a client.**



**Web Site allows or encourages submission of questions for the purpose of obtaining legal advice. [Two-way channels of communication]**

**Communicate by email with the website owners.**

**Such communications via a law firm's website may create duties of loyalty and confidentiality if the persons sending them thus become “prospective clients” under RPC 1.4. Commentary to the rule suggests that “prospective client” status is likely to be found “if a lawyer ... through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations.” Even prior to the adoption of that comment in 2012, several ethics opinions had advised that, in order to avoid creation of unintended obligations, lawyer websites that include communication links should also include prominent disclaimers alongside the links.**

**21 No. 3 PROFLAW 18, 20-21 (2012)**



## **Advisory Committee on Professional Ethics**

### **Appointed by the Supreme Court of New Jersey - Opinion 701**

#### **Electronic Storage & Access of Client Files**

**The inquirer asks whether the Rules of Professional Conduct permit him to make use of an electronic filing system whereby all documents received in his office are scanned into a digitized format such as Portable Data Format (“PDF”). These documents can then be sent by email, and as the inquirer notes, “can be retrieved by me at any time from any location in the world.” The inquirer notes that certain documents that by their nature require retention of original hardcopy, such as wills, and deeds, would be physically maintained in a separate file.**

**With the exception of “property of the client” within the meaning of *RPC* 1.15, therefore, and with the important caveat we express below regarding confidentiality, we believe that nothing in the RPCs prevents a lawyer from archiving a client's file through use of an electronic medium such as PDF files or similar formats. The polestar is the obligation of the lawyer to engage in the representation competently, and to communicate adequately with the client and others. To the extent that new technology now enhances the ability to fulfill those obligations, it is a welcome development.**



**This inquiry, however, raises another ethical issue that we must address. As the inquirer notes, the benefit of digitizing documents in electronic form is that they “can be retrieved by me at any time from any location in the world.” This raises the possibility, however, that they could also be retrieved by other persons as well, and the problems of unauthorized access to electronic platforms and media (i.e. the problems posed by “hackers”) are matters of common knowledge. The availability of sensitive client documents in an electronic medium that could be accessed or intercepted by unauthorized users therefore raises issues of confidentiality under *RPC* 1.6.**

**The critical requirement under *RPC* 1.6, therefore, is that the attorney “exercise reasonable care” against the possibility of unauthorized access to client information. A lawyer is required to exercise sound professional judgment on the steps necessary to secure client confidences against foreseeable attempts at unauthorized access. “Reasonable care,” however, does not mean that the lawyer absolutely and strictly guarantees that the information will be utterly invulnerable against all unauthorized access. Such a guarantee is impossible, and a lawyer can no more guarantee against unauthorized access to electronic information than he can guarantee that a burglar will not break into his file room, or that someone will not illegally intercept his mail or steal a fax.**



# Part VIII – Internet Domain names

## CAA - OPINION 32

### LAWYERS' AND LAW FIRMS' SELECTION AND ADVERTISING OF

**As to the first issue, the Committee has decided that a law firm may adopt a domain name for its Internet Uniform Resource Locator (“URL”), that does not include the firm's name or that of any individual attorney within that firm, provided that the Internet web site to which the browser is directed clearly and prominently identifies the actual law firm name and its address; the domain name must not be false or misleading; the name must not imply that the lawyer has been recognized or certified as a specialist other than as provided by rules of professional conduct; and, the domain name must not be used in advertising exclusively as a substitute identifier of the firm.**



## **2. Use of Domain Names in Advertising**

**The Committee concludes that a firm may use a different form of its name for purposes of Internet access and retrieval of information about the firm and its services. The URL name form may be used provided the name selected is not false or misleading. RPC 7.1(a). The firm employing the domain name may not state, imply, or attempt to practice law using that name in violation of RPC 7.5. The selected name may not communicate false or misleading information “about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. RPC7.1(a). The domain name may not create an unjustified expectation RPC 7.1(a)(2), state or imply results that can be achieved by means that violated the Rules of Professional Conduct, RPC 7.1(a)(2), or compare the lawyer's service with other lawyers' services, RPC 7.1(a)(3). Furthermore, the Internet form of the firm's name must be for location purposes only and may not state or imply recognition or certification of a specialty other than as authorized by RPC 7.4. The firm may not convert the Internet domain name to the formal name of the firm or use that name in lieu of the formal name as required by RPC 7.5.**

**The Committee has concluded that under the circumstances outlined in this opinion an attorney or law firm may adopt a domain name that does not include the name of the firm or any of its lawyers. The attorney may use the domain name in advertising as long as the name is for the purpose of locating and identifying a website, not as a substitute way to identify the attorney or law firm. Assuming the law firm is authorized to use the proposed domain name, the firm would also be permitted to use that name as a means to direct potential clients to the firm's web site.**

**Garden State CLE presents:**

# **Attorney Ethics & the Internet**



**Lesson Plan**