Garden State CLE:

<u>Eleven Ethics Opinions You Should Probably Know About and Follow!</u>

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<u>Lesson Plan</u>

Part I
Welcome to the Advisory Committee on Professional Ethics - ACPE

a) The Advisory Committee has jurisdiction to accept and answer inquiries from a bar association, member of the bar, or this Court concerning proper conduct for a member of the legal profession under the Disciplinary Rules of the Code of Professional Responsibility and other rules of this Court governing the practice of attorneys. Its function is to interpret these rules and to provide appropriate guidelines regarding the conduct of attorneys. Its published opinions are made binding upon county ethics committees in their disposition of all matters. Higgins vs. ACPE, 73 N.J. 123, 124-25(1977).

To date, there have been 742 published opinions

Date Range is: 12-19-63 thru 10-6-21

Opinions can be found at:

http://njlaw.rutgers.edu/cgi-bin/ethics.cgi#acpe
or
https://law.justia.com/cases/new-jersey/advisory-committee-on-professional-ethics/

Established by Rule 1:19-1 thru Rule 1:19-8

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Administrative Office of the Courts
P.O. Box 970
Trenton, New Jersey 08625

Rules of Court

Rule 1:19-1

The Supreme Court shall appoint an Advisory Committee on Professional Ethics consisting of fifteen members of the bar and three lay members. Members shall serve for terms of three years with the terms of six such members expiring each year. No member who has served four full three-year terms shall be eligible for immediate reappointment. A vacancy occurring during a term shall be filled for the unexpired portion thereof. The Court shall annually designate a member of the committee to serve as Chairperson and another member to serve as Vice Chairperson. The Administrative Director of the Courts shall serve as secretary of the committee.

Rule 1:19-2

The committee shall accept inquiries only from the state bar association, from any county or local bar association, or from any member of the New Jersey bar, concerning proper conduct for a member of the legal profession under the Rules of Professional Conduct of the American Bar Association as amended by the Supreme Court and other Rules of this Court governing the practice of attorneys. It shall not consider an inquiry involving a pending action where its opinion might affect the interests of the parties, and it may decline to accept any inquiry without stating its reasons.

Rule 1:19-3

All inquiries shall be addressed to the secretary who shall transmit them to the committee. They shall be in writing, shall set out the factual situation in detail, shall be accompanied by a short brief or memorandum citing the rules of court or canons of ethics involved and any other pertinent authorities, and shall contain a certificate that any opinion of the committee will not affect the interests of the parties to any pending action.

Rule 1:19-4

The committee may act through parts consisting of not fewer than six members, but if the opinion of any such part is not unanimous the inquiry shall be referred to the committee as a whole. No opinion shall be given by the committee as a whole unless concurred in by eleven members thereof. The opinion of the committee on

any inquiry accepted for consideration shall be in writing and shall be filed with the secretary, who shall transmit a copy to the person making the inquiry and, where the committee so requests, make suitable arrangements for its publication. Published opinions shall not, as far as practicable, identify the party or parties making the inquiry. The committee, in its discretion, may conduct a hearing on any inquiry.

Rule 1:19-5

The committee as a whole shall consider and render opinions on such matters as the Supreme Court may from time to time submit to it. Such opinions shall not be published without prior approval of the court.

Rule 1:19-6

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

Rule 1:19-7

The committee shall, subject to the approval of the Supreme Court, determine the methods and procedure to be followed in considering inquiries and expressing opinions.

Rule 1:19-8

(a) Notice. Within 20 days after an opinion is published, or within 30 days after any final action of the Advisory Committee on Professional Ethics other than the publication of an opinion, any aggrieved member of the bar, bar association or ethics committee may seek review thereof by serving on the Attorney General a notice of petition for review by the Supreme Court and by filing the original notice with the Clerk of the Supreme Court. The notice shall set forth the petitioner's name and address and the name and address of counsel, if any. The notice shall designate the action of the Advisory Committee on Professional Ethics sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved.

(b) Deposit for Costs. Deposit for costs shall be made in accordance with Rule 2:12-5.

(c) Record on Petition for Review. If the petition for review is granted, the record on review shall be the formal opinion, if any, issued pursuant to Rule 1:19-4 or Rule 1:19-5, the inquiry, brief or memorandum submitted, and any documents or other evidence or proof relied upon by the Advisory Committee on Professional Ethics in arriving at its determination.

(d) Form of Petition for Review. A petition for review shall be in the form of a brief, conforming to the applicable provisions of Rule 2:6 and not exceeding 15 pages if printed or 20 pages if otherwise reproduced or typed, exclusive of tables of contents, citations and appendix. It shall contain a short statement of the matter involved, the question presented, the errors complained of and the arguments in support of the petitioner's position. It shall also contain a certification by the petitioner or counsel, if any, that the petition presents a substantial question and is filed in good faith and not for purposes of delay.

(e) Service and Filing of Petition for Review. Within 10 days after filing of the notice of petition for review, 2 copies of the petition shall be served on the Attorney General and the Secretary of the Advisory Committee on Professional Ethics and 9 copies thereof shall be filed with the Clerk of the Supreme Court.

(f) Response to Petition for Review. The Attorney General shall, within 30 days of the service of the petition, serve 2 copies of a brief in opposition to the petition and file 9 copies thereof with the Clerk of the Supreme Court. The brief shall be direct and concise, shall conform to the applicable provisions of Rule 2:6 and shall not exceed 15 pages if printed or 20 pages if otherwise reproduced or typed, exclusive of table of contents, citations and appendix. Within 10 days of such service, petitioner may serve 2 copies and file 9 copies of a reply brief not exceeding 9 pages if printed or 10 pages if otherwise reproduced or typed, exclusive of tables of contents, citations or appendix.

(g) Final Determination. The final determination of a petition for review may be either by written opinion or by order of the Supreme Court and shall state whether the opinion or other action of the Advisory Committee on Professional Ethics is affirmed, reversed or modified or shall provide for such other final disposition as is appropriate.

Part II
Selected Opinions of the ACPE

Opinion 738

Responding to Negative Online Reviews

Several lawyers have sought guidance from the Advisory Committee on Professional Ethics and the attorney ethics research assistance hotline regarding negative online reviews.

Lawyers have stated that former prospective clients or former clients have posted false, misleading, and/or inaccurate statements about the lawyer on online reviews and ask whether, consistent with Rules of Professional Conduct 1.6 and 1.18, they may publicly respond to these online reviews.

Rule of Professional Conduct 1.6(a) provides that [a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for . . . disclosures of information that is generally known . . . Rule of Professional Conduct 1.18(a) provides that [a] lawyer who has had discussions in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues.

Lawyers are permitted to respond to online reviews posted by clients, former clients, or prospective clients, but that response cannot reveal information relating to representation except information that is generally known, unless the client consents to the release of such information. (See R.P.C. 1.6(a)). Hence, while lawyers may express general disagreement with the prospective client's statements, they may not reveal confidential information relating to the representation unless the information is generally known.

Rule of Professional Conduct 1.6(d)(2) permits a lawyer to reveal confidential information to the extent the lawyer reasonably believes it necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved. Hence, pursuant to Rule of Professional Conduct 1.6(d)(2), a lawyer may disclose certain confidential information to the extent necessary to defend a discipline charge or legal malpractice action brought by the client, to pursue an

action seeking fees from the client, or similar matters when the information is relevant to the defense or the claim.

The Committee finds that an informal controversy between a lawyer and a prospective or former client, arising from the posting of a negative online review, does not fall within the Official Comment to Rule of Professional Conduct 1.6. The Court adopted the comment in the Restatement (Third) of the Law Governing Lawyers on confidential information, which states:

Whether information is "generally known" depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes [sic] and similar methods of access.

Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired if those facts are not themselves generally known. Lawyers may not disclose confidential information merely to protect their online reputation in response to negative comments of this type.

The Committee reviewed ethics opinions from other jurisdictions on revealing information in response to online reviews. There is general agreement that a lawyer may not disclose client information in response to a former client's negative online review, though a lawyer may respond in a proportionate and restrained manner and state that the lawyer disagrees with the facts presented by the reviewer.

Lastly, the Committee notes that lawyers' ethical obligations to maintain confidentiality under Rule of Professional Conduct 1.6 differs from their obligations to maintain lawyer-client privilege. As noted above, Rule of Professional Conduct 1.6 broadly requires lawyers to maintain confidentiality of information relating to representation of a client. In contrast, the attorney-client privilege protects only communications made in confidence between a lawyer and his or her client. The privilege is part of the Rules of Evidence and applies to admissibility of information in court proceedings. The body of law concerning waiver of the evidentiary privilege is inapplicable to lawyers' ethical obligations under Rule of Professional Conduct 1.6.

In sum, lawyers may respond to negative online reviews posted by clients, former clients, or prospective clients by stating that they disagree with the facts presented by the reviewer, but they may not disclose information relating to representation, except information that is generally known.

Opinion 661

Municipal Prosecutor Conditioning Plea Bargain Upon Defendant's Execution of Civil Release Form

The inquirer asks whether it is ethical for a municipal prosecutor to require, as a condition precedent to a plea bargain, that a defendant in a criminal, quasi-criminal or motor vehicle matter sign a form in which the defendant agrees that there existed probable cause to arrest, that no excessive force was used in effectuating the arrest, and that any right to sue the arresting officer for a violation of civil rights is waived. Specifically, in order to have a plea bargain accepted, any defendant must answer the following questions - which are on the plea-bargaining form - affirmatively:

Do you agree that the police officer(s) who arrested you and detained you had probable cause to arrest you and to charge you with all of the offenses listed in response to question one?

Do you acknowledge that the police officer(s) who arrested you exercised only the force that was reasonable and necessary to arrest you?

Do you realize that by signing this document you are giving up the right to sue the police officer who arrested you, any police officer involved in the arrest and the City of based upon any of the circumstances surrounding your arrest, the filing of the charges and your detention?

In the factual context recited by the inquirer, the prosecutor demanded affirmative responses to these three questions in a situation in which probable cause did not exist. When there is no probable cause, the introduction of RPC 3.8(a) unequivocally applies:

The prosecutor in a criminal case shall:
(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause[.]
Requiring a defendant to acknowledge the existence of probable cause in no way vitiates the obligation of the prosecutor not to prosecute when probable cause does

not exist. That duty is absolute and unconditional. A defendant's uninformed - or informed - view on probable cause cannot relieve the prosecutor of the duty to assure that probable cause is present.

Even if there exists probable cause in the subjective opinion of the prosecutor, it is improper for the prosecutor to insist upon a defendant's acknowledgment of the existence of probable cause. A defendant's acknowledgment of the existence of probable cause is irrelevant to both the purpose and the propriety of a plea bargain. The true purpose for such a question can only be to enhance law enforcement's position unfairly or to relieve the prosecutor improperly of the obligation to ascertain the existence of probable cause. Requiring an affirmative answer to this first question is thus improper.

The issues of whether it is proper for a prosecutor to demand an acknowledgment that excessive force was not used and to require waiver or release of civil rights claims are separate and distinct from the issue of waiving probable cause. We start with the well- established obligation of the prosecutor:

The primary duty of a prosecutor is not to obtain convictions but to see that justice [be] done. State v. Farrell, 61 N.J. 99, 104(1972). Thus, "[I]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. at 105 (quoting Beyer vs. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321(1935)). See State vs. Marshall, 123 N.J. 1, 152-153(1991).

R.P.C. 3.8 expands upon a prosecutor's "Special Responsibilities" and details certain active steps a prosecutor must take to ensure fair treatment of defendants. In the spirit of RPC 3.8, we note that neither fairness nor logic dictates that a defendant should be bound by his untutored perception of whether "reasonable and necessary force" was used, as this form requires. Just as in the case of requiring acknowledgment of probable cause, asking a defendant to acknowledge affirmatively the existence of the legally ephemeral concept of "reasonable and necessary force" is the antithesis of ensuring that justice is done and it is a default of the State's affirmative obligation. A prosecutor thus may not demand an affirmative answer to this question as a precondition to a plea bargain.

The required waiver of civil rights requires analysis under an additional rule. R.P.C. 3.4(g) mandates that a lawyer shall not "present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter." In the situation presented, the defendant was in court under threat of quasi-criminal charges for which no probable cause existed. Because probable cause was absent, proceeding with trial would have been a violation of the

prosecutor's obligation under R.P.C. 3.8(a). Despite this lack of probable cause, and attendant possible violation of R.P.C. 3.8(a), trial was to be held unless certain substantive rights were waived. The element of *quid pro quo* forbidden by R.P.C. 3.4(g) is present: unless the defendant waived certain of his constitutional and civil rights (a clear civil advantage to both the police officers and the municipality involved), he would be prosecuted in violation of R.P.C. 3.8(a).

We hasten to acknowledge the tension created by these three conditions precedent as they relate to the question of voluntariness of the plea. It may be that requiring affirmative answers to these questions is also inherently coercive, in addition to being unethical. We are not reaching that issue, because we perceive that the practice described here is unethical, as opposed to illegal. In reaching our conclusion, we acknowledge that a similar practice has been held to be not invalid or illegal *per se.* In Newton vs. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed. 2d 405(1987), decided by a sharply divided 4-1-4 Court, the United States Supreme Court held that on the specific facts of that case, an agreement to dismiss premised upon release of rights under 42 U.S.C. § 1983 could be enforced. Throughout the plurality opinion, the Court emphasized that the peculiar facts of the case - which included the defendant's early representation by an attorney, his sophistication and the victim's desire not to testify in an unpleasant sexual assault case - allowed him to validly waive what § 1983 rights he may have had.

Because Newton is explicitly fact-sensitive, it cannot be read as endorsing wholesale waivers without regard to actual facts, as the State seeks to do here. While the three questions here may be able to pass muster under *Newton* in certain factual settings, we believe that a bright-line prophylactic rule forbidding conditions precedent such as those required here is more in keeping with the ethical obligations of the prosecutor. As an additional benefit, it will have the ancillary effect of sparing the criminal justice system from the unseemly spectacle of Newton-based attacks on the integrity of prosecutors and, incidentally, from attacks on the validity of the waivers themselves.

Opinion 714

Conditioning Entry of a Plea or Entry into Pretrial Intervention on Defendant's Release from Civil Liability and Hold-Harmless Agreement

Inquirer asked whether a prosecutor may, consistent with the Rules of Professional Conduct and prior Opinions of this Committee, condition entry of a plea or entry into pretrial intervention in a criminal, quasi-criminal, or motor vehicle matter on the defendant's release from civil liability and agreement to hold harmless any person or entity such as the police, the prosecutor, or a governmental entity.

Rule of Professional Conduct 3.4(g) provides that a lawyer shall not "present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter." Threatening to or presenting criminal charges for this purpose is a form of intimidation and harassment that threatens the integrity of the civil process and is prejudicial to the administration of justice.

The Committee has previously decided that this Rule not only prohibits a lawyer handling a civil case from threatening to present criminal charges but also extends to conduct by prosecutors who seek an advantage in a potential civil case by coercing criminal defendants to waive civil causes of action in connection with plea bargains. Advisory Committee on Professional Ethics Opinion 661, 131 N.J.L.J. 170, 1 N.J.L. 740 (May 18, 1992). In Opinion 661, the Committee found that a municipal prosecutor may not condition a plea bargain on an agreement by the defendant that probable cause to arrest existed, that the charges filed were supported by probable cause, that no excessive force was used in the course of the arrest, and that any cause of action for violation of civil rights would be relinquished. Ibid. While the focus of the Opinion was on the general responsibility of a prosecutor to "see that justice [be] done," the Committee also specifically found that R.P.C. 3.4(g) prohibits prosecutors from seeking an advantage in a potential civil action while negotiating a plea bargain with criminal defendants. Ibid. The Committee stated: "In effect, the threat of continuation of prosecution is being used to extract an admission that will provide protection against a civil suit, in violation of R.P.C. 3.4(g)." Ibid.

The facts presented in Opinion 661 differed from those in Opinion 565, 116 N.J.L.J. 225 (August 15, 1985). In Opinion 565, the Committee found that an attorney defending security guards accused of simple assault, where cross-complaints had been filed against the guards' accusers, may require execution of civil liability releases as a condition of mutual dismissal of the complaints and the cross-complaints. Both the complainants and the defendants sought to dismiss their respective charges, the civil claim release accompanied mutual dismissals of claims benefiting both parties, and both parties were on relatively equal footing. The element of intimidation or coercion that can arise when a prosecutor is negotiating a plea bargain with a criminal defendant was not present.

Accordingly, in response to the inquiry, the Committee confirms that R.P.C. 3.4(g) prohibits a prosecutor from conditioning entry of a plea or entry into pretrial intervention in a criminal, quasi-criminal, or motor vehicle matter on the defendant's release from civil liability and agreement to hold harmless any person or entity such as the police, the prosecutor, or a governmental entity. The prohibition applies in all situations, including when the defendant's release from liability and agreement to hold harmless is initially offered by defense counsel.

Opinion 721

Agreement as Condition of Settlement That Client Refrain From Filing an Attorney Ethics Grievance or Withdraw a Grievance Already Filed

The Advisory Committee on Professional Ethics received an inquiry asking whether an attorney may seek or agree, as a condition of settlement of an underlying dispute, that the client not file an ethics grievance with regard to conduct of the attorney in the matter. The Committee finds that such an agreement is prejudicial to the administration of justice and, accordingly, violates Rule of Professional Conduct 8.4(d). An agreement conditioned on the withdrawal of a grievance already filed similarly would violate Rule of Professional Conduct 8.4(d).

Attorney discipline is not a private cause of action or private remedy for misconduct that can be negotiated between an attorney and the aggrieved party. The discipline process furthers public, not private interests: it is not intended to punish the attorney or vindicate the aggrieved party but, rather, "to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general." In re Wilson, 81 N.J. 451, 456(1979).

Rule of Professional Conduct 8.4(d) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." A demand, as a condition of settlement of an underlying dispute, that the client refrain from filing an ethics grievance or withdraw a grievance already filed is prejudicial to the administration of justice because it thwarts the disciplinary system from serving its principal purpose of preserving the confidence of the public in the integrity and trustworthiness of attorneys. Such agreements are also against public policy and, presumably, are unenforceable.

Inquirer suggested that Rule of Professional Conduct 1.8(h) may be relevant to the analysis. Rule of Professional Conduct 1.8(h) prohibits an attorney from settling a claim for legal malpractice with a client who is not represented by counsel and has not been advised to obtain independent counsel. The attorney negotiating disposition of a malpractice claim with a client is settling a purely private matter. As noted above, disciplinary charges concern public, not private, interests. Discipline may not be the subject of private negotiation between the attorney and client, even when the client is represented in the negotiation by independent counsel.

Accordingly, an attorney may not seek or agree, as a condition of settlement of an underlying dispute, that the client does not file an ethics grievance with regard to

conduct of the attorney in the matter or withdraw a grievance already filed. Such an agreement is prejudicial to the administration of justice and, accordingly, violates Rule of Professional Conduct 8.4(d).

Opinion 735

Lawyer's Use of Internet Search Engine Keyword Advertising

The Advisory Committee on Professional Ethics received an inquiry asking whether a lawyer may, consistent with the rules governing attorney ethics, purchase a Google Ad-word℠ or keyword that is a competitor lawyer's name, in order to display the lawyer's own law firm website in the search results when a person searches for the competitor lawyer by name. Internet search engine advertising programs permit businesses to purchase certain keywords or phrases; when a person searching on the internet uses those words in the search, the websites of purchasers of the keywords will appear in the search results, ordinarily presented as paid or "sponsored" ads. The same keywords or phrases usually can be purchased by more than one business.

Inquirer further asked whether, consistent with the rules governing attorney ethics, a lawyer may insert, or pay the internet search engine company to insert, a hyperlink on the name of a competitor lawyer that will divert the user from the searched-for website to the lawyer's own law firm website. Assuming (without finding) that internet search engine advertising programs can generally operate in this manner, the Committee considers the inquiry presented: may a lawyer insert, or pay an internet search engine company to insert, a hyperlink on the name of a competitor lawyer that will divert the user from the searched-for website to the lawyer's own law firm website.

The inquiry was also docketed with the Committee on Attorney Advertising. That Committee found that purchasing a competitor lawyer's name as a keyword does not violate the rules governing attorney advertising. Attorney advertising rules apply to lawyers' "communications." R.P.C. 7.1. The keyword purchase of a competitor lawyer's name is not, in itself, a "communication."

The Advisory Committee on Professional Ethics considered whether this conduct violates Rule of Professional Ethics 1.4 ("Communication"). Rule of Professional Conduct 1.4 provides that a lawyer shall inform a prospective client of how, when and where the client may communicate with the lawyer. There is no interaction, much less communication, between the lawyer who purchases a competitor lawyer's name as a keyword and the person searching on the internet. Rule of Professional Conduct 1.4 does not apply in this situation.

The Committee also considered whether purchasing a keyword of a competitor lawyer's name violates Rule of Professional Conduct 8.4 ("Misconduct"). This Rule states that it is "professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [or] engage in conduct that is prejudicial to the administration of justice . . . ." R.P.C. 8.4(c) and (d).

There has been some disagreement among other jurisdictions on this issue. The Texas State Bar Professional Ethics Committee found that, "given the general use by all sorts of businesses of names of competing businesses as keywords in search-engine advertising, such use by Texas lawyers in their advertising is neither dishonest nor fraudulent nor deceitful and does not involve misrepresentation." State Bar of Texas Professional Ethics Committee Opinion No. 661 (July 2016). See also Habush vs. Cannon, 828 N.W.2d 876, 881-82(Wisc.App.Ct.2013) (a lawyer's purchase of competitor lawyers' names as keywords in internet search engines does not violate the Wisconsin right of privacy statute because the "use" of the competitors' names is not visible to the consumer). But see North Carolina State Bar 2010 Formal Ethics Opinion 14 (April 27, 2012) (purchasing another lawyer's name as keyword for internet search is dishonest conduct in violation of R.P.C. 8.4(c)).

The Committee concurs with the approach of Texas and Wisconsin and finds that purchasing keywords of a competitor lawyer's name is not conduct that involves dishonesty, fraud, deceit, or misrepresentation. The websites of the keyword purchaser's law firm and the competitor's law firm will, presumably, both appear in the resulting search. The keyword purchaser's website ordinarily will appear as a paid or "sponsored" website, while the competitor lawyer's website will appear in the organic results (unless the competitor has purchased the same keyword, in which case it will also appear as a paid or "sponsored" website). The user can choose which website to select and the search engine ordinarily will mark the keyword-purchased website as paid or "sponsored." This is not deceptive, fraudulent, or dishonest conduct within the meaning of Rule of Professional Conduct 8.4(c).

The Committee further finds that purchasing keywords of a competitor lawyer's name is not conduct prejudicial to the administration of justice. The standard for conduct prejudicial to the administration of justice is high; this Rule applies to "particularly egregious conduct," or conduct that "flagrantly violat[es] . . . accepted professional norms." In re Helmer, 237 N.J. 70, 83(2019) (quoting In re Hinds, 90 N.J. 604, 632(1982)). Purchasing keywords that are the name of a competitor lawyer is not egregious or flagrant conduct.

Inquirer also asked whether a lawyer may pay Google to insert a hyperlink on a competitor lawyer's name that diverts the user to the first lawyer's website. The Committee finds that surreptitiously redirecting a user from the competitor's website to the lawyer's own website is purposeful conduct intended to deceive the searcher for the other lawyer's website. Such deceitful conduct violates Rule of Professional Conduct 8.4(c).

Accordingly, a lawyer may, consistent with the rules governing attorney ethics, purchase an internet search engine advertising keyword that is a competitor lawyer's name, in order to display the lawyer's own law firm website in the search results when a person searches for the competitor lawyer by name. This conduct does not involve dishonesty, fraud, deceit, or misrepresentation, and is not conduct prejudicial to the administration of justice. Therefore, it does not violate Rule of Professional Conduct 8.4(c) or (d).

A lawyer may not, however, consistent with the rules governing attorney ethics, insert, or pay the internet search engine company to insert, a hyperlink on the name or website URL of a competitor lawyer that will divert the user from the searched-for website to the lawyer's own law firm website. Redirecting a user from the competitor's website to the lawyer's own website is purposeful conduct intended to deceive the searcher for the other lawyer's website. Such deceitful conduct violates Rule of Professional Conduct 8.4(c).

Opinion 736

Lawyer May Concurrently Serve as Municipal Prosecutor and Planning Board Attorney in Same Municipality; Superseding Opinions 452 and 366

The Advisory Committee on Professional Ethics received an inquiry asking whether a lawyer may concurrently serve as municipal prosecutor and planning board attorney in the same borough. The Committee decided that there is no per se prohibition against serving in both positions, though the lawyer must consider case-by-case conflicts under Rules of Professional Conduct 1.8(k) and 1.7.

This Opinion supersedes Opinion 452 (1980) and Opinion 366 (1977). In Opinion 366, the Committee reasoned that a municipal prosecutor should be treated the same, for conflict-of-interest purposes, as a municipal attorney because the lawyer "represents the municipality in prosecutorial functions." In Opinion 452, the Committee found that a municipal prosecutor should be treated the same, for conflict-of-interest purposes, as a municipal attorney because the prosecutor "is a creature of the municipal government body which makes the appointment and

determines the salary." Both Opinions rely on the appearance of impropriety and the related "member of the municipal family" doctrine. The appearance of impropriety doctrine, however, was removed from the Rules of Professional Conduct in 2004.

When considering conflicts of interest in the local government setting, the Committee previously focused on the municipality's budgetary and decision-making control over the agency represented by the lawyer. This led to the precedent that an attorney who represents a municipality or any of its agencies has as his or her client the entire municipality. Therefore, a lawyer could not represent one part of the municipal client while concurrently representing a private client before or against another part of the municipality.

The New Jersey Supreme Court, in 2006, overturned this precedent. In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 188 N.J. 549, 564-66(2006). In its stead, the Court set forth three tiers of per se conflicts. It held that an attorney who "plenarily represents a municipal governing body" is "barred from representing private clients before that governmental entity's governing body and all of its subsidiary boards and agencies, including its courts." Id. at 569. In contrast, an attorney who "plenarily represents an agency subsidiary to the governmental entity's governing body" is "barred from representing private clients before that subsidiary agency only." Ibid. Lastly, "if the scope of an attorney's engagement by a governmental entity is limited and not plenary," the attorney may not represent a private client before or against the governing body but may represent a private client before the boards, agencies, or municipal court of the municipality. Id. at 567-69. Of course, an attorney who represents a subsidiary agency, or the municipality in a limited scope, must still comply with the provisions of Rules of Professional Conduct 1.8(k) and 1.7. Id. at 566-68.

The Court thus differentiated between municipal attorneys, attorneys for subsidiary boards and agencies, and attorneys serving the municipality in a limited scope, when determining whether the attorney has a conflict of interest. The relevant factor in this analysis is the breadth and scope of the attorney's official duties. The municipal attorney, whose duties span the entire municipality, has the broadest restrictions on outside practice. The attorney for a subsidiary board or agency, whose duties extend only to matters before or against that board or agency, is subject to practice restrictions only with regard to that board or agency. The attorney who is retained by the municipality in a limited scope, such as bond counsel, tax counsel, or the like, has closely defined duties in a specific legal area and is subject to the general restriction of not representing a private client before or against the governmental body itself.

The Committee hereby finds that a municipal prosecutor practices in a manner that is limited in scope and not plenary. The municipal prosecutor has authority only to prosecute cases in municipal court in the name of the municipality or the State; the prosecutor does not represent the municipality generally ("plenarily"). In contrast, the duties of the municipal attorney encompass all matters affecting the municipality. Municipal prosecutors and other limited-scope counsel are retained by the municipality and the municipality sets the salary but as discussed above, this fact no longer results in a finding of a broad, per se conflict.

The Court, in Opinion 697, decided that while limited-scope lawyers may not represent a private client before or against the governing body, they have no other per se prohibitions on their practice. Id. at 569. Accordingly, a municipal prosecutor is not flatly prohibited from appearing before boards or agencies of that municipality on behalf of private clients but is precluded from representing a private party in a matter before or against the governing body itself. Further, by Court Rule, municipal prosecutors may not represent private clients in any municipal court in the county or in criminal matters in that county's Superior Court. R. 1:15-3(b).

If a municipal prosecutor may represent private clients in matters before an agency subsidiary to the municipality's governing body, it follows that the municipal prosecutor may also concurrently serve as attorney for a subsidiary board or agency, subject to case-by-case restrictions under the Rules of Professional Conduct. Specifically, Rule of Professional Conduct 1.7(a)(2) provides that a lawyer may not represent a client if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." In addition, lawyers should consider Rule of Professional Conduct 1.8(k), which provides that a lawyer who is employed by a municipality shall not undertake representation of a client if there is a substantial risk that the lawyer's responsibilities to the municipality would limit the lawyer's ability to provide independent advice or diligent and competent representation to the client.

As the Court noted in Opinion 697, the "member of the municipal family" doctrine, which was grounded in principles of appearance of impropriety, now applies only to attorneys who plenarily represent the municipality. Id. at 564-65. Attorneys providing legal services to municipalities in lesser roles are no longer subject to broad, per se restrictions on their practice. Accordingly, subject to case-by-case conflicts of interest, an attorney who serves as counsel to a municipal planning board may concurrently serve as municipal prosecutor in the same municipality.

Opinion 729

Lawyers May Not Threaten Sanctions for Noncompliance When Sending a Subpoena *Duces Tecum* by Mail

The Advisory Committee on Professional Ethics received an inquiry from a lawyer who asked whether, consistent with the Rules of Professional Conduct, he may include language threatening sanctions for noncompliance when he sends a subpoena *duces tecum* by mail. As sanctions may only be imposed when the subpoena is served personally, and not by mail, Inquirer suggested that such a threat may be "a false statement of material fact or law to a third person" in violation of Rule of Professional Conduct 4.1(a)(1). The Committee agrees that subpoenas sent by mail should not include language threatening sanctions. The Committee declines to find that such language is, in all cases, a "false statement" but it warns lawyers that including this threat in subpoenas that are mailed is, at a minimum, inaccurate and misleading.

A subpoena for taking of depositions and/or the production of documents in a civil action must be issued and served "as prescribed by Rule 1:9." Rule 4:14-7(a). Rule 1:9-3 requires that subpoenas be served personally. Failure to obey a subpoena is deemed contempt of court. Rule 1:9-4. When a subpoena is sent by ordinary mail instead of being served personally, a recipient who fails to obey the subpoena cannot be deemed in contempt of court as the court lacks personal jurisdiction over the recipient.

Parties and witnesses may reach an agreement regarding mailed subpoenas. Such an agreement, however, does not provide a court with contempt power for failure to comply with a mailed subpoena. "The service of document subpoenas by mail may be an effective way of conducting discovery when all involved are willing to cooperate . . . [but] [m]ail service is not an effective manner of serving a subpoena on an unwilling non-party under the New Jersey Rules of Court . . . ." NJ Cure vs. Estate of Robert Hamilton, 407 N.J.Super 247, 250(App.Div.2009).

The Committee is aware that it has become common and longstanding practice for lawyers to include language in a subpoena stating that the recipient can be considered in contempt of court and face sanctions if he or she does not comply. Such language is accurate when the subpoena is served personally. If the subpoena is mailed, failure to comply does not subject the recipient to sanctions since the sender would need to take an interim step – personally serve the subpoena – prior to seeking sanctions.

The Committee does not find that the threat is a "false statement" under Rule of Professional Conduct 4.1(a), but it hereby provides notice to the bar that the language misstates what the immediate consequences are for the recipient of a mailed subpoena. Going forward, lawyers who intentionally include such language in mailed subpoenas, threatening the recipient with sanctions for noncompliance, may be violating Rule of Professional Conduct 8.4(c) (conduct involving misrepresentation).

Opinion 723

Selling Law Firm Accounts Receivable to a Third Party or Retaining a Collection Agency For Collection of Fees Payable by Former Clients

The Advisory Committee on Professional Ethics received an inquiry asking whether a law firm may sell some of its delinquent accounts receivable to a third party for collection of fees payable by its former clients. Similar issues arise when a law firm retains a collection agency. Provided that only such information reasonably necessary to establish the claim for monies is released, and subject to further conditions set forth below, the Committee finds that a sale of accounts receivable to a third party or retention of a collection agency is permissible.

Rule of Professional Conduct 1.6(a) states that "information relating to representation of a client" is confidential and may not be disclosed by the lawyer. Rule of Professional Conduct 1.6(d)(2), however, provides that a lawyer "may reveal such information to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . ." A lawyer entitled to a fee from a former client has a claim in a controversy between the lawyer and the client and may reveal confidential information to the extent the lawyer believes it reasonably necessary to establish such claim and collect the fee. As Comment 11 to *Model* Rule of Professional Conduct 1.6 states: "This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary."

Prior to any sale of accounts receivable or retention of a collection agency, lawyers should first try to resolve disputes directly with the client. Lawyers may not initiate collection action against current clients. Lawyers should not circumvent the fee arbitration process and, before referring a matter to a collection agency or selling the accounts receivable, lawyers should first send the client an arbitration notice pursuant to Rule 1:20A-6. Lawyers should make reasonable efforts to satisfy themselves that the collection agency or purchaser of accounts receivable is reputable and will not take improper or illegal measures to collect the debt. Lastly,

lawyers may not reveal information about the client or the legal services provided beyond what is reasonably necessary for the agency or purchaser to collect the debt. Subject to these conditions, the Committee finds that a sale of accounts receivable to a third party or retention of a collection agency is permissible.

Opinion 718

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

and

OPINION 41

COMMITTEE ON ATTORNEY ADVERTISING

The *Bona Fide* Office Requirement and Listing of Offices on Letterhead, Websites, or Other Advertisements

The Advisory Committee on Professional Ethics (ACPE) received an inquiry about whether a home office or a "virtual office" can qualify as a *bona fide* office for the practice of law under Rule 1:21-1(a). The Committee on Attorney Advertising (CAA) also received several grievances regarding listing of office locations on letterhead. This Joint Opinion of the ACPE and the CAA addresses the requirements of Rule 1:21-1(a) and the propriety of listing certain locations as law offices on attorney letterhead, websites, or other advertisements.

1) Bona Fide Office

Rule 1:21-1(a) requires that a New Jersey attorney maintain a *bona fide* office for the practice of law.

> For the purpose of this section, a *bona fide* office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time.

The purpose of the *bona fide* office rule is to ensure that attorneys are available and can be found by clients, courts, and adversaries. See Committee on Attorney Advertising Opinion 19, 138 N.J.L.J. 286, 3 N.J.L. 1821(September 19, 1994).

A so-called "virtual office" does not qualify as a *bona fide* office. A "virtual office" refers to a type of time-share arrangement whereby one leases the right to reserve space in an office building on an hourly or daily basis. Accordingly, an attorney's use of a "virtual office" is by appointment only. The office building ordinarily has a receptionist with a list of all lessees who directs visitors to the appropriate room at the appointed time. Depending on the terms of the lease, the receptionist may also receive and forward mail addressed to lessees or receive and forward telephone calls to lessees.

As noted above, a *bona fide* office is, in part, a place where "the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries . . . ." Rule 1:21-1(a). A "virtual office" cannot be a *bona fide* office since the attorney generally is not present during normal business hours but will only be present when he or she has reserved the space. Moreover, the receptionist at a "virtual office" does not qualify as a "responsible person acting on the attorney's behalf" who can "answer questions posed by the courts, clients or adversaries." Presumably, the receptionist can redirect a telephone call to the attorney lessee of the "virtual office" much like an answering service but would not be privy to legal matters being handled by the attorney and so would be unable to "act[] on the attorney's behalf" in any matter.

The ACPE notes that, in general, an attorney should not permit the receptionist of a "virtual office" to field telephone calls to the attorney. Prospective clients calling an attorney or law firm assume that they are reaching an employee and may disclose confidential and sensitive information. The "virtual office" receptionist is not an employee of the attorney's law firm and should not be entrusted with confidential client information.

There is no prohibition on use of a home as a *bona fide* office for the practice of law provided that the home office meets the requirements of the Rule. An attorney who practices law from a home office should take appropriate steps to preserve confidentiality of client information. Accordingly, client meetings must be in private, files should be secure, and the attorney's computer, telephone, answering machine, fax machine, and the like should not be accessible to persons not associated with the law practice so that there is no inadvertent disclosure of confidential information.

Rule 1:21-1(a) does not prohibit an attorney from meeting clients in a location other than the office. Attorneys are permitted, for example, to meet clients at the clients' homes or offices, or at another location that may be more convenient to the client. As long as the *bona fide* law office is in fact the place where the attorney can be found, and clients *could* be met there, an attorney's decision to meet clients at a location outside that office does not render the office noncompliant with Rule 1:21-1(a).

The ACPE recognizes that many solo practitioners do not have support staff and so when they are in court, meeting clients, filing papers, or otherwise not in the office, no one is there during normal business hours. Attorneys who are out of their offices generally are accessible by telephone, as calls to the office can readily be routed to a cell phone or other hand-held device. But Rule 1:21-1(a) also requires regular physical presence by the attorney at the office during business hours. An attorney who is out of the office during normal business hours does not violate the *bona fide* office rule provided the absence from the office is occasional and the attorney is otherwise reachable by telephone, email, or the like. If the attorney is regularly out of the office during normal business hours, then a responsible person must be present at the office.

2) Listing of Offices on Letterhead, Websites, or Other Advertisements

As noted above, the Committee on Attorney Advertising (CAA) received several grievances regarding listing of office locations on letterhead. Communications on letterhead, websites, or other advertisements, including the listing of office locations, must be accurate and not misleading. R.P.C. 7.1(a). An attorney must

have at least one *bona fide* office but may also list satellite office locations on letterhead, websites, and other advertisements provided the listing of such office locations is accurate and not misleading.

a. "Virtual Offices"

An attorney who has a *bona fide* office may also have a satellite office that is a "virtual office." The attorney may list that "virtual office" satellite location on attorney or law firm letterhead, websites, or other advertisements, but the communication must state that the "virtual office" location is "by appointment only."

A "virtual office" location is not a place where a client can meet with the attorney unannounced. An attorney is not routinely found at a "virtual office" location and would need to make arrangements to reserve the space. Accordingly, while "virtual office" locations may be listed on attorney or law firm letterhead, websites, or other advertisements, the communication must state that the location is "by appointment only."

3) Law Offices of Attorneys With Separate Law Practices Who Are "Of Counsel" to a Firm

The CAA reviewed letterhead that lists an office for the law firm that is, in actuality, the office location of a separate law firm with which the attorney has an "of counsel" relationship. An attorney may have a law practice at one firm and also be "of counsel" to a different firm. Committee on Attorney Advertising Opinion 21, 147 N.J.L.J. 979, 6 N.J.L. 475(February 24, 1997). To be "of counsel" to a law firm, an attorney must have a "relationship with a law firm [that] is close, ongoing, and involves frequent contact for the purpose of providing consultation and advice . ." *Id.* The attorney designated as "of counsel" "will have hands-on responsibility for, or will frequently render advice on, a law firm's matters." *Id.* If these requirements are met, the attorney may be referred to as "of counsel" to a firm. *Id.*

If an attorney has a law practice at one firm and wants to list on that firm's letterhead, websites, or other advertisements the office location of the separate firm with which he or she serves as "of counsel," additional information must be provided. It is misleading merely to list that different law firm office on an attorney's letterhead as if it were an office for his or her own firm. Therefore, the office location on the letterhead, websites, or other advertisements must include the name of the other law firm and the fact that the attorneys have an "of counsel" relationship.

For example, two solo practitioners, Samuel Smith and Judith Johnson, have officially affiliated as "of counsel" to each other's firms in accordance with the principles in Opinion 21 but also maintain their separate law practices in separate office locations. Samuel Smith wants to list Judith Johnson's law firm office location on his own letterhead. The office location of Judith Johnson's firm may be listed on Samuel Smith's letterhead but additional language is required to identify the office location as that of a different law firm with whom Samuel Smith has an "of counsel" relationship. Samuel Smith's letterhead must state, next to the address for Judith Johnson's law firm, the name of Ms. Johnson's law firm and the fact that the attorneys have an "of counsel" relationship.

4) Law Offices of an Attorney, Not "Of Counsel" to the Firm, Who Merely Permits the Attorney to Meet Clients at the Office Location

The CAA has reviewed letterhead that lists, as one of the attorney's offices for the practice of law, an office of a separate law firm whose principal attorney merely agreed to permit his or her conference room or other office space to be used by the other attorney on an "as-needed basis." The CAA finds that it is inaccurate to present this office location as if it were an attorney's own law firm office. This office location may not be listed on the attorney's letterhead, websites, or other advertisements.

d. Office Space at a Nonlegal Business

The CAA reviewed letterhead that lists, as one of the attorney's offices for the practice of law, an office at a nonlegal business, such as a real estate office, whose business owner permits the lawyer to use the office space on an "as-needed basis." While an attorney or a law firm may share office space with another, nonlegal business, the two businesses must "maintain the separate practices and identities of the businesses and professions involved." Advisory Committee on Professional Ethics Opinion 498, 109 N.J.L.J. 425(May 20, 1982). Therefore, a law firm may not practice law from an office that is embedded within a non-legal business office. That arrangement does not preserve the required "separate practices and identities" of the two businesses and does not ensure client confidentiality.

Because a law firm cannot have its own office for the practice of law embedded within a nonlegal business office, this office location may not be presented on an attorney's law firm letterhead, websites, or other advertisements. Accordingly, a home office can qualify as a *bona fide* office for the practice of law under Rule 1:21-1(a), but a "virtual office" does not. The listing of office locations on law firm letterhead, websites, or other advertisements must be accurate and not misleading.

Opinion 703

Advisory Committee on Professional Ethics Conduct Prejudicial to the Administration of Justice: Contacting Lawyers for Representation on Pretextual Basis to Disqualify Potential Adversary Counsel.

An inquirer raised concern about a practice under which a client was advised to contact other lawyers for representation essentially on a pretextual [sic] basis, in order to disqualify those lawyers from representation of an adversary. The example given involved matrimonial cases. It appears that a lawyer or firm engaged to represent the party may be advising clients to take this step in order to disqualify potential adversary counsel.

The inquirer asks whether such a practice by a firm would run afoul of the Rules of Professional Conduct. It is the opinion of the Committee that any such advice by a lawyer to a client plainly would constitute prohibited "conduct prejudicial to the administration of justice" under R.P.C. 8.4(d), in that it would impede a litigant's effective access to counsel of choice and should cease immediately.

Opinion 701

Electronic Storage and 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.

In Opinion 692, we set forth our interpretation of the term "property of the client" for purposes of R.P.C. 1.15, which then triggers the obligation of a lawyer to safeguard that property for the client. "Original wills, trusts, deeds, executed contracts, corporate bylaws and minutes are but a few examples of documents which constitute client property." 163 N.J.L.J. 220, 221(January 15, 2001) and 10 N.J.L. 154(January 22, 2001). Such documents cannot be preserved within the meaning of *RPC* 1.15 merely by digitizing them in electronic form, and we do not understand the inquirer to suggest otherwise, since he acknowledges his obligation to maintain the originals of such documents in a separate file.

On the other hand, we also noted in Opinion 692 that a client file will likely contain other documents, such as correspondence, pleadings, memoranda, and briefs, that are not "property of the client" within the meaning of R.P.C. 1.15, but that a lawyer is nevertheless required to maintain at least for some period of time in order to discharge the duties contained in R.P.C. 1.1 (Competence) and R.P.C. 1.4 (Communication), among others. While traditionally a client file has been maintained through paper records, there is nothing in the R.P.C.'s that mandates a particular medium of archiving such documents. The paramount consideration is the ability to represent the client competently, and given the advances of technology, a lawyer's ability to discharge those duties may very well be enhanced by having client documents available in an electronic form that can be transmitted to him instantaneously through the Internet. We also note the recent phenomenon of making client documents available to the client through a secure website. This also has the potential of enhancing communications between lawyer and client, and promotes the values embraced in R.P.C. 1.4.

With the exception of "property of the client" within the meaning of R.P.C. 1.15, therefore, and with the important caveat we express below regarding confidentiality, we believe that nothing in the R.P.C.'s 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 R.P.C. 1.6.

The obligation to preserve client confidences extends beyond merely prohibiting an attorney from himself making disclosure of confidential information without client consent (except under such circumstances described in R.P.C. 1.6). It also requires that the attorney take reasonable affirmative steps to guard against the risk of inadvertent disclosure. Thus, in Opinion 692, we stated that even when a closed client file is destroyed (as permitted after seven years), "[s]imply placing the files in the trash would not suffice. Appropriate steps must be taken to ensure that

confidential and privileged information remains protected and not available to third parties." 163 N.J.L.J. 220, 221 (January 15, 2001) and 10 N.J.L 154 (January 22, 2001). Similarly, in ACPE Opinion 694 and CAA Opinion 28 (joint opinion), we joined with the Committee on Attorney Advertising in finding that two separate firms could not maintain shared facilities where "the pervasive sharing of facilities by the two separate firms as described in the Agreement gives rise to a serious risk of a breach of confidentiality that their respective clients are entitled to." 174 N.J.L.J. 460 and 12 N.J.L. 2134 (November 3, 2003).

And in Opinion 515, we permitted two firms to share word processing and computer facilities without becoming "office associates" within the meaning of Rule 1:15-5(b), but only after noting that "the material relating to individual cases of each attorney is maintained on separate `data' disks used only by their respective secretaries and stored (while not in use) in each of their separate offices." 111 N.J.L.J. 392 (April 14, 1983).

We stress that whenever attorneys enter into arrangement as outlined herein, the attorneys must exercise reasonable care to prevent the attorney's employees and associates, as well as others whose services are utilized by the attorney, from disclosing or using confidences or secrets of a client.

The attorneys should be particularly sensitive to this requirement and establish office procedures that will assure that confidences or secrets [be] maintained.

The critical requirement under R.P.C. 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 guarantee 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.

What the term "reasonable care" means in a particular context is not capable of sweeping characterizations or broad pronouncements. But it certainly may be informed by the technology reasonably available at the time to secure data against unintentional disclosure. Obviously, in this area, changes in technology occur at a rapid pace. In 1983, for instance, when Opinion 515 was published, the personal computer was still somewhat of a novelty, and the individual floppy disk was the prevailing data storage device. The "state of the art" in maintaining electronic

security was not very developed, but the ability to prevent unauthorized access by physically securing the floppy disk itself satisfied us that confidentiality could be maintained. By implication, at the time we were less accepting of data stored on a shared hard drive, even one that was partitioned to provide for individual private space for use by different firms, because of the risk of breach of confidentiality under prevailing technology.

We are of course aware that floppy disks have now become obsolete, and that it is exceedingly unlikely in this day and age that different law firms would attempt to share hard drive space on a conventional desktop computer, given the small cost of such computers in today's market. New scenarios have arisen, however. It is very possible that a firm might seek to store client sensitive data on a larger file server or a web server provided by an outside Internet Service Provider (and shared with other clients of the ISP) in order to make such information available to clients, where access to that server may not be exclusively controlled by the firm's own personnel. And in the context originally raised by the inquirer, it is almost always the case that a law firm will not have its own exclusive email network that reaches beyond its offices, and thus a document sent by email will very likely pass through an email provider that is not under the control of the attorney.

We are reluctant to render a specific interpretation of R.P.C. 1.6 or impose a requirement that is tied to a specific understanding of technology that may very well be obsolete tomorrow. Thus, for instance, we do not read R.P.C. 1.6 or Opinion 515 as imposing a *per se* requirement that, where data is available on a secure web server, the server must be subject to the exclusive command and control of the firm through its own employees, a rule that would categorically forbid use of an outside ISP. The very nature of the Internet makes the location of the physical equipment somewhat irrelevant since it can be accessed remotely from any other Internet address. Such a requirement would work to the disadvantage of smaller firms for which such a dedicated IT staff is not practical and deprive them and their clients of the potential advantages in enhanced communication as a result.

Moreover, it is not necessarily the case that safeguards against unauthorized disclosure are inherently stronger when a law firm uses its own staff to maintain a server. Providing security on the Internet against hacking and other forms of unauthorized use has become a specialized and complex facet of the industry, and it is certainly possible that an independent ISP may more efficiently and effectively implement such security precautions.

We do think, however, that when client confidential information is entrusted in unprotected form, even temporarily, to someone outside the firm, it must be under a circumstance in which the outside party is aware of the lawyer's obligation of

confidentiality, and is itself obligated, whether by contract, professional standards, or otherwise, to assist in preserving it. Lawyers typically use messengers, delivery services, document warehouses, or other outside vendors, in which physical custody of client sensitive documents is entrusted to them even though they are not employed by the firm. The touchstone in using "reasonable care" against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment, he has satisfied both these criteria, then "reasonable care" will have been exercised.

In the specific context presented by the inquirer, where a document is transmitted to him by email over the Internet, the lawyer should password a confidential document (as is now possible in all common electronic form.)