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BUSINESS LAWYERING IN THE CROWDFUNDING ERA

JOAN MACLEOD HEMINWAY*

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INTRODUCTION

Crowdfunding is all the rage in conversations about small business finance. Yet, as with many other rapidly developing business innovations, practicing lawyers were, perhaps, secondary players in the development of business models for crowdfunding. The advent of crowdfunding (and crowdfund investing, in particular) has exposed fault lines in business lawyering. This short Article defines the crowdfunding era, highlights a few examples of observed lawyering lapses, and, in concluding, offers a brief, preliminary assessment of possible sources of these dislocations and

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best practices. The conclusion also expresses a related cautionary note about the need for lawyers to redouble their efforts at engaging in legal, ethical, and professional decision-making in an exciting and rapidly evolving business environment.

Crowdfunding, an Internet-based financing method for businesses and projects, arose (at least in part) out of a frustration with the complexity and cost of raising small business capital. The advent of crowdfunding was facilitated by technology—especially the Internet technology underlying and facilitating social networking. If you can ask people to be your "friend" online, why not just ask them for a small bit of capital to launch your business? Why not? Because the law may not allow that type of capital formation to be undertaken in the manner envisioned by the principals of the business.[1] This answer is annoying for some, especially in the wake of the passage of the Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act (the "CROWDFUND Act"), a part of the Jumpstart Our Business Startups Act (the "JOBS Act") that exempts crowdfunded securities offerings from various regulatory requirements, subject to the issuance of implementing regulations by the U.S. Securities and Exchange Commission ("SEC").[2]

An inspection of the process of advising businesses on the legal aspects of crowdfunding re-exposes a number of longstanding issues in business lawyering in a new context, offering the opportunity to review those issues and consider appropriate responses. Advances in technology and corporate finance interact with capital markets and the economy to create new and challenging avenues for a lawyer's exercise of his or her professional responsibility obligations. Throughout, the opacity of securities regulation contributes significantly to the struggles involved in lawyering in the crowdfunding era.

I. THE CROWDFUNDING ERA

Any rigorous discussion of a technology-driven business advance like crowdfunding requires the unpacking of some definitional background. Accordingly, this first part of the Article defines crowdfunding and the technological and legal contexts in which it has been created and conducted to date. The aggregate resulting depiction frames, for the purpose of this Article, the crowdfunding era.

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1. *See* Joan MacLeod Heminway & Shelden Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 907–21 (2011) (describing the impracticability of registration and the unavailability of any exemption from registration for offers and sales of securities in crowdfunded offerings under the Securities Act of 1933, as amended).

2. Pub. L. No. 112–106, §§ 301–305, 126 Stat. 306, 315–23 (2012).

A. Crowdfunding as a New Frontier in Financing Businesses and Projects

The definition of "crowdfunding" differs depending on the person defining the term. In its purest form, crowdfunding involves a democratization of capital—raising incrementally small amounts of capital from a large, undifferentiated mass of funders, most commonly through transactions carried out solely or principally on the Internet.[3] It is this definition of crowdfunding—in which the "crowd" is interpreted broadly and the Internet is employed to finance businesses and projects—that this Article uses. Popular published references to "Regulation D crowdfunding," "Rule 506 crowdfunding," "Title II crowdfunding," "accredited investor crowdfunding," "Regulation A crowdfunding," and "state crowdfunding exemptions," do not describe examples of crowdfunding under the definition employed in this Article. Each of these other types of financing sometimes labeled as crowdfunding may be made, or the offered securities must be sold, only to a restricted element of the crowd—restricted by number, status, or geography.[4] These other financing transactions interact with (and represent alternatives to), but are not part of, crowdfunding.

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3. *See, e.g.*, Edan Burkett, *A Crowdfunding Exemption? Online Investment Crowdfunding and U.S. Securities Regulation*, 13 TRANSACTIONS: TENN. J. BUS. L. 63, 66–68 (2011) (defining crowdfunding as "a many-to-one relationship between funders and recipients" with transactions made in "the presence of an intermediary, who serves as a matchmaker between promoters and funders."); Stuart R. Cohn, *The New Crowdfunding Registration Exemption: Good Idea, Bad Execution*, 64 FLA. L. REV. 1433, 1434 (2012) ("[Crowdfunding] has become synonymous with efforts to raise funds from numerous donors, usually in small amounts through internet sources.").

4. Securities offerings made under Regulation D, other than Rule 506(c) offerings (in which all sales are made only to accredited investors), *see* Eliminating the Prohibition Against General Solicitation and General Advertising, 78 Fed. Reg. 44,771, 44,776 (Jul. 24, 2013) (to be codified at 17 C.F.R. pt. 230), may not be made to the crowd because of prohibitions on general solicitation and advertising. *See* 17 C.F.R. § 230.502(c) (2013). Moreover, sales in Rule 505 and Rule 506(b) offerings may be made to "accredited investors"—those who control the firm or are deemed to have the ability to bear the financial risk of a loss of their entire investment—or to a limited number of non-accredited investors. *See id.* §§ 230.505, 230.506(b). Sales in Rule 506(c) offerings must be made only to accredited investors. *See id.*; 78 Fed. Reg. 44,771, 44,776. Regulation A offerings require compliance with state regulations that may restrict the nature of permitted offerees or purchasers or increase offering expenses, making them hard to use for a broad-based crowd. *See* Rutheford B Campbell, Jr., *Regulation A: Small Businesses' Search for "A Moderate Capital,"* 31 DEL. J. CORP. L. 77, 106–10 (2006). Finally, state crowdfunding exemptions adopted to date (in Georgia and Kansas) provide that offerings must comply with SEC Rule 147, which requires that offers and sales be made wholly to state residents. *See* GA. COMP. R. & REGS. 590-4-2-.08(1)(b) (2012), *available at* http://rules.sos.state.ga.us/docs/590/4/2/08.pdf; KAN. ADMIN. REGS. § 81-5-21(a)(2) (2011), *available at* http://www.securities.state.ks.us/index.aspx ?NID=175.

Crowdfunding may, but need not, involve the offer and sale of securities. Endemic to the crowdfunding era is the question of whether the privileges or benefits offered to those who provide money capital to a business or project through a crowdfunded offering (or other characteristics of the funding interests or offering) cause the crowdfunded offering to be classified as a securities offering. Crowdfunding involving the offering of financial instruments classified under federal or state law as securities is referred to as, among other things, securities crowdfunding,[5] investment crowdfunding,[6] or crowdfund investing.[7] While the business model for securities crowdfunding may look very similar to that for other forms of crowdfunding, securities crowdfunding is subject to securities regulation on a federal and state basis. This means that, among other things, the offering cannot be conducted unless it is registered under Section 5 of the Securities Act of 1933, as amended ("1933 Act"), or it is exempt from registration.[8] The CROWDFUND Act includes an exemption from this registration requirement.

Both businesses, including those formally organized as legal entities under state or, less commonly, federal entity law, and projects can be financed through crowdfunding. A sole proprietor or a corporation, limited liability company, partnership, or other form of business entity might turn to the crowd to finance his, her, or its overall operations. However, a sole proprietor or business entity also might seek funds from the crowd to finance a particular product or other limited scope venture (for example, building a cistern for a specific community in need or recording an album). The financing of businesses and projects may look the same to funders and other observers, but the financial and legal aspects of different funding opportunities may vary significantly.[9]

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5. *See, e.g.*, C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 49, 99; Andrew A. Schwartz, *Crowdfunding Securities*, 88 NOTRE DAME L. REV. 1457, 1457–59, 1478, 1489 (2013).

6. *See, e.g.*, Burkett, *supra* note 3, at 63–66, 71, 74–75, 77–79.

7. *See, e.g.*, Richard B. Levin et al., *The JOBS Act—Implications for Raising Capital and for Financial Intermediaries*, 26 J. TAX'N & REGULATION FIN. INSTITUTIONS 21, 25–28 (2013); Benjamin P. Siegel, Note, *Title III of the Jobs Act: Using Unsophisticated Wealth to Crowdfund Small Business Capital or Fraudsters' Bank Accounts?*, 41 HOFSTRA L. REV. 777, 796, 802 (2013).

8. *See* 15 U.S.C. § 77e (2012).

9. *See, e.g.*, Nicolas Suzor, *Access, Progress, and Fairness: Rethinking Exclusivity in Copyright*, 15 VAND. J. ENT. & TECH. L. 297, 336–37 (2013). Crowdfunding innovations logically will be customized, at least to some extent, to reflect these distinctive characteristics.

> [T]here is no reason to adopt a one-size-fits-all model that assumes that large-scale commercial producers share the same motivations as artistically

Crowdfunding, as a systematized form of business finance, dates back only about five to ten years. Early repeated references to the term trace back to 2008.[10] But for many followers of finance, the first time crowdfunding entered their conscious lives was in June 2011, when the SEC imposed a cease-and-desist order on two individuals who attempted to raise funds over the Internet for the acquisition of the Pabst Brewing Company.[11] The SEC found that the individual funders in that financing scheme were offered securities without registration or the protection of an available exemption.[12] This queued up a much more public discussion of crowdfunding, both inside and outside the finance community, and helped to catalyze congressional engagement and drafting.[13]

Eventually, congressional legislative efforts resulted in the adoption and enactment of the CROWDFUND Act as Title III of the JOBS Act in April

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> motivated authors, or that fans will voluntarily pay for access no more than will rational investors. The second avenue for future research that this Article presents is the need for better empirical examination of the extent to which nonscarce models are workable and scalable. This research should try to develop a substantially better understanding of the types of situations and projects that are amenable to crowdfunding and other nonscarce business models; the characteristics and experiences of authors with successful and unsuccessful experiments; and the complex web of factors that influence users to support or not support various projects.

Id.

10. *See, e.g.*, JEFF HOWE, CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING BUSINESS 281 (2008) ("Crowdfunding taps the collective pocketbook, allowing large groups of people to replace banks and other institutions as a source of funds."); *see also* Kristina Dell, *Crowdfunding*, TIME (Sept. 4, 2008), http://www.time.com/time/magazine/article/0,9171,1838768,00.html ("One part social networking and one part capital accumulation, crowdfunding websites seek to harness the enthusiasm—and pocket money—of virtual strangers, promising them a cut of the returns.").

11. *See* Migliozzi II, Securities Act Release No. 9216 (SEC June 8, 2011) [hereinafter BuyaBeerCompany.com Order], *available at* http://www.sec.gov/litigation/admin/2011/33-9216.pdf (releasing an order instituting cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933); *see also* Andrew Ackerman, *Fizzled Beer Deal Prompts 'Crowd-Funding' Hearing*, WALL ST. J. (Sept 14, 2011), http://online.wsj.com/article/SB10001424053111903927204576570614068591324.html.

12. *See* BuyaBeerCompany.com Order, *supra* note 11.

13. Congress held a highly publicized hearing focusing on crowdfunding in September 2011. *See Crowdfunding: Connecting Investors and Job Creators: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Government Reform*, 112th Cong. (2011), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg73612/html/CHRG-112hhrg73612.htm (exploring crowdfunding and mentioning, in the process, the Pabst Brewing Company incident).

2012.[14] This law permits investment crowdfunding to proceed without registration under the 1933 Act if conducted through a registered broker or funding portal and otherwise in compliance with the law and related SEC regulations. SEC rulemaking is required to enable the CROWDFUND Act.[15] Those rules were, under the CROWDFUND Act, due at the beginning of 2013. At this writing, more than a year after the CRWODFUND Act became law, final rules are still forthcoming. The SEC's proposed rules were published at the end of October 2013.[16]

Crowdfunding—especially securities crowdfunding—has generated both rabid supporters and strenuous objectors. "There are two completely different ways of looking at crowdfunding," one commentator writes.[17] "It is either a) the best thing to happen to start-ups since Red Bull; or b) while sometimes useful, it's no serious substitute for other sources of money, including family & friends."[18] Another commentator similarly offers:

> Crowd-funding . . . is an extension of that urge to be social, where people share their ideas and we share our money. This means . . . fraud and bad ideas can spread as easily as good ones. But whether you believe that crowd-funding is the vehicle for the next big thing or an effective way to bilk people out of their hard earned cash, its [sic] hard to deny that crowd-funding has made investing social.[19]

When it comes to investment crowdfunding, some think the CROWDFUND Act may go too far in granting an exemption from 1933 Act registration[20] because of, for instance, the capacity of crowdfunding to lead to fraud that causes significant damage to investors.[21] Others think the

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14. Pub. L. No. 112-106, §§ 301–305, 126 Stat. 306, 315–23 (2012).

15. *See Information Regarding the Use of the Crowdfunding Exemption in the JOBS Act*, SEC (Apr. 23, 2012), http://www.sec.gov/spotlight/jobsact/crowdfundingexemption.htm (last visited Aug. 17, 2013).

16. *See* Crowdfunding, Securities Act Release No. 9470 (SEC Oct. 23, 2013), *available at* http://www.sec.gov/rules/proposed/2013/33-9470.pdf.

17. Ari Zoldan, *3 Reasons Not to Crowdfund*, INC. (May 17, 2013), http://www.inc.com/ari-zoldan/3-reasons-not-to-crowdfund.html.

18. *Id.*

19. Rob Zorzi, *Crowd-funding and the Draw of Social Invention*, GOODBUGLY.COM (Feb. 28, 2013), http://www.goodbugly.com/2013/02/crowd-funding-and-draw-of-social.html.

20. 15 U.S.C. § 77e (2012).

21. *See* Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws - Why the Specially Tailored Exemption Must Be Conditioned on Meaningful Disclosure*, 90 N.C.L. REV. 1735, 1737–38 (2012) (questioning whether the CROWDFUND Act, as implemented through SEC regulations, will include the kind of meaningful disclosure regulation required to adequately protect investors).

CROWDFUND Act may not go far enough in helping small businesses raise capital because of, among other things, the limitations and costs it imposes on issuers.[22] These tensions—practical and legal—help define the crowdfunding era and will not be resolved until there is a track record for crowdfunding sufficient to enable researchers to conduct relevant studies.

B. Technology and Law in the Crowdfunding Context

Crowdfunding results from the application of innovative technology to the practice of business finance and the applicable law. As the introductory paragraphs of this Article suggest, technology that powers online social networking also fuels crowdfunding.[23] The Internet facilitates the efforts of businesses or their principals in reaching out to the crowd for business capital, just as they would reach out to the crowd for customers, employees, or "likes" for their Facebook page. That is the essence of crowdfunding.

The intersection of technology and finance that crowdfunding exemplifies fills a gap in the market for domestic small business capital, while also creating new markets for services, including financial and legal services.[24] "While, traditionally, there have been numerous barriers to raising investment capital, such as the limited number of individuals with large amounts of money to invest or an innovator's limited ability to find and contact those individuals, these barriers can be overcome through new crowdfunding models."[25] New service providers are emerging or are likely to emerge to support or participate in crowdfunding. Crowdfunding service providers may include industry associations, funding portals (for securities crowdfunding under the CROWDFUND Act), and other transactional intermediaries, as well as other agents (e.g., firms assisting in performing due diligence on prospective or actual crowdfunding issuers).[26] These

22. *See* Cohn, *supra* note 3, at 1445 ("Opportunity knocked, but what began as a relatively straightforward approach to assist small business capital-formation ended with a regulatory scheme laden with limitations, restrictions, obligations, transaction costs and innumerable liability traps.").

23. *See* KEVIN LAWTON & DAN MAROM, THE CROWDFUNDING REVOLUTION: SOCIAL NETWORKING MEETS VENTURE FINANCING 1 (2010) ("Crowdfunding describes the collective cooperation, attention and trust by people who network and pool their money and other resources together, usually via the Internet, to support efforts initiated by other people or organizations .... The crowdfunding space is quite diverse, comprised of many niches, and shares a lot of social networking's energy."); Dell, *supra* note 10.

24. *See, e.g.*, Miriam A. Cherry, *Cyber Commodification*, 72 MD. L. REV. 381, 415–17 (2013) (indicating that crowdfunding fills unmet needs for small business capital raising and suggesting that crowdfunding is "an excellent illustration of the forces of cyber commodification").

25. *Id.* at 415.

26. *See, e.g.*, CROWDCHECK, http://www.crowdcheck.com (last visited Sept. 13, 2013) (due diligence); CROWDFUND CAP. ADVISORS, http://www.crowdfundcapital

emergent players all need legal advisors, and some, such as funding portals, are regulated entities that will likely require specialized legal counsel.[27]

Business innovations spurred by technology have the capacity to transform social, political, economic, and legal institutions. For example, technology often disrupts the *status quo* by prompting or fostering changes in the way business is conducted or business participants behave.[28] These changes, in turn, may expose flaws or weaknesses in, or other undesirable attributes of, regulatory systems and the laws and rules that constitute them. Law reform may result, but it most often lags well behind the advances in business practices.

Technology has the ability to alter the practice of law and the behavior of lawyers.[29] Technology-driven forms-based work product, Internet counseling, legal weblogs, and virtual law firms exemplify this phenomenon.[30] Even something as simple as electronic mail has changed the provision of legal advice.[31]

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advisors.com (last visited Sept. 13, 2013) (advisory services); CROWDFUND INTERMEDIARY REG. ADVOCS., http://www.cfira.org (last visited Sept. 13, 2013) (industry association); NAT'L CROWDFUNDING ASS'N, http://www.nlcfa.org/main.html, (last visited Sept. 13, 2013) (industry association). For an informal list of crowdfunding service providers and others engaged with the emergent crowdfunding industry, see *Who's in the online crowdfunding community?*, CROWDCRUX (July 18, 2013), http://www.crowdcrux.com/ whos-in-the-online-crowdfunding-community.

27. Sections 302 (codified in Section 4A(a) of the 1933 Act) and 304 (codified in Sections 3(a)(81) and 3(h) of the Securities Exchange Act of 1934, as amended) of the JOBS Act contain the core legislative mandates regarding the regulation of funding portals. Pub. L. No. 112-106, §§ 302, 304, 126 Stat. 306 (2012). Registered brokers also may serve as intermediaries in securities crowdfunding after full implementation of the CROWDFUND Act. *See id.* § 302(b), 126 Stat. at 316 (codified at § 4A(a)(1) of the 1933 Act).

28. *See* LAWTON & MAROM, *supra* note 23, at 1, 3 (predicting that crowdfunding will change the way we allocate capital "[i]n the same way that social networking changed how we allocate our time . . . ."); *see generally* Constantinos Markides, *Disruptive Innovation: In Need of Better Theory*, 23 J. PROD. INNOV. MGMT. 19, 19–20 (2006) (describing this type of dislocation—"the discovery of a fundamentally different business model in an existing business"—as "business model innovation").

29. Law is not the only service profession wrestling with these issues. Medicine, for example, is facing similar challenges. *See, e.g.*, Joseph A. Diaz et al., *Patients' Use of the Internet for Medical Information*, 17 J. GEN. INTERNAL MED. 180 (2002); Margaret A. Winker et al., *Guidelines for Medical and Health Information Sites on the Internet: Principles Governing AMA Web Sites*, 283 J. AM. MED. ASS'N 1600 (2000).

30. *See, e.g.*, John M. Garon, *Legal Education in Disruption: The Headwinds and Tailwinds of Technology*, 45 CONN. L. REV. 1165, 1181–84 (2013) (describing the virtual law firm and law firm networks and their respective effects on legal services); Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 976–79 (2012) (describing virtual law offices and online legal research and their effects on the geographically focused nature of legal services and the regulation of lawyers); Jack A. Guttenberg, *Practicing Law in the Twenty-First*

More specifically, the centrality of the Internet in U.S life and law practice has seemingly irrevocably altered the behaviors of lawyers and clients. The Internet creates important dislocations in the practice of law that are relevant to a commentary on lawyering in the crowdfunding era.

> New technologies, particularly including computer software and the Internet, could fundamentally change the provision of legal advice. First, websites can convey large quantities of legal information directly to consumers. This reduces not only the need for legal advice, but also the information asymmetry between lawyer and client that provides the current rationale for state licensing.
>
> Second, Internet services and computer software blur the line between information provision and legal advice. This is partly because of the potential for interactivity, where information is provided based on the user's particular need or question, just as in a traditional lawyer-client setting.[32]

Both of these issues—the Internet's ability to convey large amounts of information to consumers and the Internet's tendency to confuse information provision and legal advice—are important pieces of the puzzle of lawyering in the crowdfunding era.

As a general matter, rapid technological change tends to leave lawyers behind.[33] Law is a profession that has historically been slow to change,

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Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has to Give, 2012 MICH. ST. L. REV. 415, 453–54 (describing effects of the Internet on law practice); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 780–82 (addressing technology's capacity to change legal services).

31. *See, e.g.*, Mass. Bar Ass'n, Ethics Op. No. 00-1 (2000), *available at* http://www.massbar.org/publications/ethics-opinions/2000-2009/2000/opinion-no-00-1/ (opining on the propriety of "[a] lawyer's use of unencrypted Internet e-mail to engage in confidential communications with his or her client" under Massachusetts Rule of Professional Conduct 1.6(a)); Andrew S. Friedberg, *The Electronic Lawyer: Traditional Transactions in a Virtual World*, 72 TEX. B.J. 534, 534 ("The advent of the Internet and concurrent explosion in the use of email as the primary mode of communication for lawyers and their clients has inevitably led to changes in everyday law practice."); Caroline D. Buddensick, *Risks Inherent in Online Peer Advice: Ethical Issues Posed by Requesting or Providing Advice via Professional Electronic Mailing Lists*, 22 GEO. J. LEGAL ETHICS 715, 715–16 (2009) ("The Internet and new technologies have transformed many facets of modern life, especially the ease and speed of communications. These pervasive changes affect lawyers personally as well as professionally.").

32. Larry E. Ribstein, *Lawyers As Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 324 (2004). It seems appropriate here to note the enormous role that Larry Ribstein played in analyzing and re-envisioning the legal profession in light of technology and other market forces. His voice is and will continue to be sorely missed.

33. *See generally* Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race to*

and lawyering in the crowdfunding era seems to follow this rule. Yet, in a time of ongoing technological transformation—like the crowdfunding era—a client often has a desperate need to have a lawyer or lawyers on the advisory team who can use theory, policy, and a strong knowledge of doctrine to apply outdated law and legal practice norms to new and changing facts. Lawyers who respond to the call of clients operating in new high-tech fields of endeavor face both opportunities and challenges.

C. An Instructive Dialogue

The interchange included below exemplifies the kind of Web-based colloquy that raises questions about lawyering in the crowdfunding era. Among other things, the interchange illustrates several possible bases for a potential claim that an entrepreneur (Jessica Jackley, one of the founders of ProFounder, an early crowdfunding website) or her crowdfunding website is engaged in the unauthorized practice of law.[34] Based solely on her online biography, Jessica earned an MBA degree, but does not have a law degree or law license. The other two respondents, Scott Edward Walker and Mike Prozan, are both (again, based solely on online biographies) licensed practicing lawyers. All three, labeled in the following excerpts by their first names only, are responding to the question: "Is ProFounder in violation of any securities laws with their crowdsourced model for funding startups?"

In the first excerpt, Scott frames the substantive securities regulation issues he sees, as a lawyer, with ProFounder's business model, as then in operation. In each case, he outlines the applicable rule of law in reasonable detail (in some cases citing to it) and relates it to the relevant facts as he knows them. He concludes that each is a potential securities regulation violation and asks for a response.

> Scott:
> Based upon my cursory review of the ProFounder website, there are three significant, potential securities-laws violations, as discussed below. . . .
>
> #1 - Offers/Sales to Non-"Accredited Investors"

Keep Up With Technological Change, 7 U. ILL. J.L. TECH. & POL'Y 239 (2007) (explaining why technological change generates legal problems and classifying the types of problems that arise).

34. *See infra* Part I.C. The interchange also includes questionable and incorrect (or at least incomplete) statements of applicable law. Accordingly, none of the statements of law in the excerpted transcript should be relied upon or assumed to be accurate or complete.

Whenever a startup offers or sells its securities – whether to founders, friends and family, angel investors – federal and state securities laws must be addressed. Unfortunately, these laws are complex and are a potential minefield for the unwary. Moreover, in light of the Madoff affair and other external pressures, the Securities and Exchange Commission (SEC) and State securities law commissions are significantly stepping-up enforcement of the securities laws.

The basic rule is that a startup may not offer or sell its securities unless (i) the securities have been registered with the SEC and registered/ qualified with applicable State securities commissions; or (ii) there is an exemption from registration. The most common exemption used by startups is the so-called "private placement" exemption. As the term implies, a private placement is a private offering to a small number of investors – like a few friends; however, there are different rules depending upon whether the investors are accredited or non-accredited.

If a startup sells securities only to accredited investors, compliance is much simpler and cheaper because it can rely on SEC Rule 506, which has two important advantages over other SEC rules. First, Rule 506 preempts or overrides State securities laws, which means that the startup doesn't have to deal with State securities regulators for compliance purposes, other than filing a brief notice known as a Form D (which is also filed with the SEC). Second, there is no written disclosure requirement under Rule 506 if the investors are accredited.

On the other hand, if one or more of the investors is not accredited (which is the case via ProFounder), it opens a Pandora's box of compliance and disclosure issues under both federal and state law. Yes, there are ways for a startup to structure an offer and sale of securities to non-accredited investors in compliance with applicable federal and state securities laws; however, the cost, risks and onerous disclosure requirements generally outweigh the benefit.

Indeed, I am unclear how ProFounder "guides you through all this" (as it provides on its website); however, I would strongly advise any startup utilizing this site to retain experienced securities counsel or risk serious adverse consequences, including a right of rescission for the securities holders (i.e., the right to get their money back, plus interest), injunctive relief, fines and penalties, and possible criminal prosecution.

#2 - "General Solicitation"

Under the Securities Act of 1933, as amended (the "Securities Act"), and

Regulation D adopted thereunder, startups and any persons acting on their behalf are generally prohibited from any form of "general solicitation" in connection with the offer or sale of securities. The term "general solicitation" is not defined in the Securities Act, but has been broadly construed in SEC no-action letters to include any solicitations via mail, e-mail or other electronic transmission, unless there is a "substantial and pre-existing relationship" between the issuer and/or its agent, on the one hand, and the prospective investor, on the other.

Indeed, that's the critical issue: whether the issuer and/or its agent can demonstrate that there is a "substantial and pre-existing relationship." Under SEC no-action letters, a relationship is "substantial" if it involves interaction such that the issuer and/or its agent has reliable knowledge of the offeree's investment goals and objectives. Moreover, the nature and quality of the relationship must be such that the issuer/agent can determine that the offeree would be a suitable investor. To be "pre-existing," the relationship must be in place prior to the offering. The SEC considers other factors as well, such as the number of offerees, the identity of offerees, etc.; however, the relationship is key.

ProFounder seems to have recognized this issue in connection with so-called "Private Rounds" and expressly notes on the site that: "In a Private Round, entrepreneurs raise money for their businesses from investors who are friends and family. A substantial, pre-existing relationship must exist between the entrepreneur and each potential investor."

Obviously, it would be prudent for ProFounder to explain (as I have above) what this means and the significant limitations relating thereto; otherwise, startups again risk serious adverse consequences, as discussed above.

Moreover, I am unclear why ProFounder distinguishes so-called "Public Rounds" and provides that: "In a Public Round, entrepreneurs raise money for their businesses from the general public. Entrepreneurs will have a Public Fundraising website and can use any sort of campaign they choose to share the link and spread the word to potential investors." I welcome ProFounder's explanation.

#3 - "Broker-Dealer"

Finally, there is a significant issue of whether ProFounder is acting as a

> "broker-dealer," which is broadly defined under the Securities Exchange Act of 1934 to mean "any person engaged in the business of effecting transactions in securities for the account of others."
>
> If a finder is receiving some form of commission or transaction-based compensation, it will generally be deemed a broker-dealer and thus will be required to be registered with the SEC and applicable state commissions. If it is not registered and offer/sells securities on behalf of an issuer, the private placement will not be valid (i.e., will not be exempt from registration), and the issuer will have violated applicable securities laws – and thus will be subject to the serious adverse consequences discussed above.[35]

Jessica then answers, thanking Scott for his "thoughts" and apologizing for the delay in replying (due to ProFounders launch). Note that her response explains how ProFounder "guides you through" the process of complying with securities law—by software programmed to perform legal compliance tasks. Also note how Jessica freely offers rejoinders to Scott's legal analysis on behalf of the firm.

> Jessica:
>
> . . .
>
> First, re: sales to unaccredited investors: Our compliance engine is based around Reg D 504, not 506, in our effort to facilitate use of an exemption that allows entrepreneurs to include as many unaccredited investors as possible. It's true, state laws do come into play with this exemption, and those laws are difficult to keep track of, which is precisely why our platform is so powerful - it manages the "Pandora's box" (as you appropriately called it) of compliance and disclosure issues relevant to each entrepreneur's unique offering and unique set of investors. For example, our compliance engine takes into account limitations on # of unaccredited investors allowed per state, among other factors. As each investor makes a pledge to invest, our site automatically recalculates and readjusts the # of unaccredited investors allowed (per state and nationally), so it can intelligently inform an entrepreneur what each investor's participation will mean. The power of this tool will make it easy for an entrepreneur to include anyone she wants to include as an investor, and to know the consequences associated with each new investor's inclusion to her fundraising strategy. You're right though;

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35. *Is ProFounder in Violation of Any Securities Laws with Their Crowdsourced Model for Funding Startups?*, QUORA (Dec. 1, 2010 – June 25, 2011), http://www.quora.com/ProFounder/Is-ProFounder-in-violation-of-any-securities-laws-with-their-crowdsourced-model-for-funding-startups.

> trying to calculate these types of factors manually for each state involved - let alone across every combination of states - is a huge task, and of course as you said, the costs DO generally outweigh the benefits. Making this kind of burden dramatically less is just one of many reasons we created ProFounder.
>
> Second, re: general solicitation, we do allow entrepreneurs to decide with whom they have a substantial, pre-existing relationship. While we've spent a significant amount of time with each of our first few entrepreneurs explaining this on the phone or in person, our plan is to provide more and more information - without providing legal advice, per se - on the site so that entrepreneurs have the best possible understanding of this concept and can act accordingly. This (general solicitation) is only a concern for the Private Raises on our platform, not for Public Raises, because while in a Private Raise the entrepreneur is offering securities, in a Public Raise they are not (so none of these rules apply). Instead, in a Public Raise, an entrepreneur is allowing "investors" to receive a share of revenues up until the pt at which they make their original investment amount back, but share of revenues above and beyond this amount goes to a nonprofit instead. Thus, because there is no financial gain for the "investor," and no securities are offered, general solicitation doesn't matter.
>
> Third, you brought up the broker-dealer issue. Our fees for a Private Raise are not transaction-contingent, and are not commission-based (entrepreneurs are charged $1K to use the platform, regardless of whether or not they succeed in their raise). Fees for a Public Raise are 5% of a successful raise, so are both transaction-contingent and commission-based, but again, this is irrelevant for the b-d issue because there is no official offering of securities in a Public Raise.
>
> Hope this helps, and thank you again for your interest and thoughtful comments. We take the complexity of these issues seriously, and believe that ProFounder can make raising investment capital for a start-up or small business something anyone can understand, afford, and pursue with confidence.[36]

Mike then responds to Jessica's post. Mike is not satisfied with Jessica's legal conclusions or the legal compliance of ProFounder's business model. He adds substantive law and practical challenges to the original list created by Scott. In addition, he expressly raises the question of whether Profounder is engaging in the unauthorized practice of law through the judgment calls the software makes about accredited investor status (under

36. *Id.*

federal securities regulation) and about security status (under federal and state securities laws) and because of ProFounder's drafting of legal documents for offerings. Note that Mike expressly disclaims representation of ProFounder at the end of his post.

> Mike:
> Did you get an SEC no action letter here?
>
> Also, for tech companies seek more growth capital and acquistion [sic] or IPO, have you considered what a revenue sharing model here could do to their valuations?
>
> I see both a good idea here with value but the legal and business issues do not seem as well flushed out as they need to be.
>
> Scott tends to be a lot more conservative than me, but on a lot of issues here, I tend to be with him with what info I could find.
>
> Some of this depends on who the target user is. If this is intended to provide angel funding for companies that are going to go on to seek venture funding, who in turn are going to use, large expensive, conservative law firms, they are going to raise a lot of these issues in legal due diligence to be addressed which could kill a venture funding.
>
> Thus, the service is more problematic for companies expecting to grow, get more funding, and be acquired or go public, is that a revenue sharing model is going to impede valuations. I don't know the details of the model, but can you imagine the value of facebook [sic] today if it had entered into a revenue sharing model with its first $500K of investor? A lot less.
>
> If it is intended to provide one time funding, that then you still need to focus on the pure legal issues.
>
> I think you do a good job of addressing the non accredited issue and that this is likely to be a major success of your platform. But, by offering this service are you practicing law with out [sic] a license? As an attorney, another issue is that if I have a client who uses this platform, I can't take the platform's word for it and have to independently verify anyway, which is duplication, but duplication that I do not see any way around.
>
> And what about the documents for the private and public raises? Boy, drafting those on behalf of a third party sure sounds like practicing law to me. I doubt you would be able to convince all 50 state bar associations that it isn't.

> One way to generate value is would be to simply get an accredited investor questionnaire (which an attorney can approve or not because the attorney gets to see it) and prepare a report for the attorney with the investor, address and status. Doing that alone could generate $1K in value of attorney time avoided and avoid the issue of whether you are practicing law by determining for the client who is accredited, what the maximums are in each state, etc.
>
> Re: general solicitation, I see continuing issues. I would need to know more about what is offered, but if it is a revenue sharing arrangement, my guess is that the SEC would take issue with the conclusion these are not securities. And again, aren't you practicing law without a license by reaching that conclusion for third party clients?
>
> Also, the platform seems to permit abuse here. I think you would be far less likely to cross state and federal regulators if you put in maximums on # of people who could be solicited . . . on the theory that one person only has so many real contacts etc. as a trigger to minimize this risk.
>
> Re: Broker dealer. See above re: the "public" offering. Though I am less knowledgeable in B/D stuff, I agree with Scott that transaction contingent fees are more likely to raise B/D issues, but the fact that you charge a flat fee does not mean, in and of itself, that you are not likely to be a B/D.
>
> In fact, there may be a position here that even if you take a percentage that you are not performing a broker dealer function but instead are providing a platform for others to use in the sale of securities.
>
> Good luck. Sounds like a worthwhile idea and a good effort, but I think you've got a rockier road ahead with state and federal regulators as well as state bar associations.
>
> Oh yeah, the standard. I am a lawyer but not your lawyer. I am far from versed in all the facts here. If you don't already have one, you should get one.[37]

This dialogue offers much food for thought and supplies the foundation for a discussion of lawyering issues as they relate to crowdfunding.

II. LAWYERING IN A CROWDFUNDING CONTEXT

"Lawyering" is not a well-defined term of art; it means many things and

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37. *Id.*

signifies different things to different people.[38] For the purpose of this Article, "lawyering" refers broadly to what lawyers do and should do. It comprises legal reasoning and analysis, legal ethics, and professionalism. It includes actions by lawyers in their professional capacities inside and outside an attorney-client relationship.[39]

This Article frames a story of lawyering conducted principally outside the advocacy and dispute resolution contexts.[40] Lawyering in the crowdfunding context is a tale of entity formation and governance and "transactional lawyering,"[41] even though some of the parties to the transactions at issue are individuals and not entities. These elements of law practice are not focused on, although they may involve, traditional adversarial engagement.[42]

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38. *See, e.g.*, Josiah M. Daniel, III, *A Proposed Definition of the Term "Lawyering,"* 101 LAW. LIBR. J. 207 (2009) (surveying existing definitions and offering a new, more comprehensive definition).

39. The existence of an attorney-client relationship is the foundation of a relationship of trust and confidence in legal advisory contexts founded in fiduciary duties and other obligations and, as a result, creates a basis for malpractice and other legal actions. *See* Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991) ("Normally, the identification of a lawyer-client relationship is a predicate to determining the lawyer's duties.").

> The lawyer-client relationship stands at the epicenter of our legal system. Part historical treasure, part myth, it is the subject of endless cultural fascination and rhetoric. In theory, the lawyer-client relationship approximates a sacred trust between a lawyer and a client. This relationship is characterized by open communication and complete confidentiality, which fosters the client's trust in the lawyer, and the lawyer's steadfast loyalty to the client.

Lindsay R. Goldstein, *A View from the Bench: Why Judges Fail to Protect Trust and Confidence in The Lawyer-Client Relationship - An Analysis and Proposal for Reform*, 73 FORDHAM L. REV. 2665, 2665 (2005). "[A] lawyer-client relationship may arise absent the lawyer's intent to form one." Frederick C. Moss, *"Is You Is, or Is You Ain't My [Client]?": A Law Professor's Cautionary Thoughts on Advising Students*, 42 S. TEX. L. REV. 519, 527 (2001).

40. This Article does not purport to be a formal study of lawyering in any context. Rather, it samples unscientifically from among the possible topics that could be covered in a more comprehensive work on being a lawyer in the age of crowdfunding. It does so as a means of raising issues and heightening awareness. Even the anecdotal sampling included here offers significant information to lawyers and lawyer-observers alike.

41. *See, e.g.*, Steven L. Schwarcz, *To Make or to Buy: In-House Lawyering and Value Creation*, J. CORP. L. 497, 499 (2008) (defining transactional lawyering as "the structuring, negotiating, contract drafting, advisory, and opinion-giving process leading to 'closing' a commercial, financing, or other business transaction").

42. Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 158–59 (1999).

Specifically, in the crowdfunding context, a lawyer's substantive tasks typically involve entity selection and organization, the legal aspects of business structuring, contract negotiation and drafting, and financial counseling and guidance (including advice on federal and state securities law compliance). Because crowdfunding is centered on bringing in funding for a business or project, financial considerations are central to the legal advisory context, putting securities law advice at a premium. The comments about substantive law set forth in the remainder of this Article relate primarily to the application of federal securities law in the crowdfunding context.

This Article's observations illustrate actual and potential areas of concern for lawyers practicing at the intersection of corporate finance and Internet-based social networking. The commentary is organized under relevant core principles of professional responsibility. Each principal (the unauthorized practice of law, competence, diligence, and public duties and obligations) identifies a different lawyering danger—a risk that lawyers assume—in the crowdfunding era.

A. The Unauthorized Practice of Law

The American Bar Association's House of Delegates has adopted the *Model Rules of Professional Conduct* (the "*Model Rules*"), which offer a structure and text for adoption on a state level and provide general guidance on the nature and extent of a lawyer's professional responsibility.[43] *Model Rule* 5.5 covers, among other things, the unauthorized practice of law. It provides, in relevant part, that:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

> Some lawyers represent entities, either from within or without, and must manage internal organizational "constituency" problems as a matter of advice and counsel, whether or not there are particular legal disputes with the outside world. Modern in-house counsel or ombudsman-like lawyers may deal as much with internal organizational issues and management than with outside disputes, calling for very different skills and approaches to legal problem solving. Other lawyers are engaged to help individuals or entities form organizations or partnerships, draft wills or contracts, and may or may not have "issues" or "adversaries" in the way the adversarial model of lawyering understands them.

Id.; *see also* Guttenberg, *supra* note 30, 429–38 (describing lawyering for organizational, individual, and small business clients).

43. *See generally* MODEL RULES OF PROF'L CONDUCT ix–xi (2013).

> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.[44]

This rule frames a lawyer's professional obligation to be licensed in any jurisdiction in which he or she practices law.

In many cases, the observations about questionable lawyering activities made in this Article cannot be traced to the actions of a specific, named lawyer. One might then dismiss those observations as merely reflecting the actions of an unlicensed layperson. This dismissal would, however, be premature (at least in some cases). Both licensed attorneys and others may violate applicable judicial and legislative rules relating to the unauthorized practice of law.

1. Licensed Attorneys

Jurisdictions that license attorneys to practice law protect their licensees and the licensure system—as well as those in the state who are receiving legal services—by providing for enforcement against people who engage in the unauthorized practice of law. A licensed attorney may violate these rules by practicing in a jurisdiction in which he or she is not licensed.[45] This can be particularly tricky in business contexts that cross borders. Business conducted over the Internet, and therefore crowdfunding, natively involves cross-border business and legal considerations. Legal counsel working with these businesses must take the cross-border nature of crowdfunding into account in his or her practice.

Those providing capital to businesses or projects in crowdfunded offerings may come from a variety of different jurisdictions—jurisdictions distinct from those that govern the activities of the crowdfunding websites with which they interact and the crowdfunded businesses and projects they finance. In crowdfunded offerings not involving the offer and sale of securities, a contractual choice of law often can effectively govern the funding transaction and related interactions.[46] Assuming the enforceability

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44. *Id.* R. 5.5.

45. *See id.* R. 5.5(a), (b); *see also* Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 814 (2002) ("[T]he issue of multijurisdictional practice also focuses on whether lawyers who provide legal advice or other services across state lines have engaged in unauthorized practice of law").

46. A court should give effect to the parties' choice of law if the parties have contracted validly for application of a law that is substantially related to the parties or

of this choice of law provision, a transactional lawyer authorized to practice in the chosen jurisdiction should have little reason to engage in the practice of law in any other jurisdiction in advising the client.[47] The governing law typically will be chosen by the crowdfunding website; funders and businesses or projects seeking funding who contract with the crowdfunding website therefore are best advised to seek legal advice from counsel licensed to practice in that same jurisdiction.

However, crowdfunded securities offerings raise other, more significant issues relating to the unauthorized practice of law. Unless state securities (Blue Sky) law is preempted, multiple state securities laws (as well as federal securities law) may apply to the same crowdfunded offering.[48] The

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the transaction or otherwise reasonable, absent a statutory or decisional law rule or public policy to the contrary. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1988). As applied in California to the validity of a choice of law provision in a valid and binding contract:

> [T]he proper approach under Restatement section 187, subdivision (2) is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a *fundamental* policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a 'materially greater interest than the chosen state in the determination of the particular issue . . . .' If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy.

Nedlloyd Lines B.V. v. Superior Court, 834 P.2d 1148, 1152 (Cal. 1992) (citation and footnotes omitted).

47. A lawyer may engage in temporary multijurisdictional practice under the American Bar Association's *Model Rules of Professional Conduct*, which have been adopted in some form by most states. Under the *Model Rules*:

> A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
> are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; . . . or
> (4) are not within paragraphs (c)(2) or (c)(3) [addressing legal representation related to pending or potential tribunal or alternative dispute resolution proceedings] and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

MODEL RULES OF PROF'L CONDUCT R. 5.5(c).

48. A recent federal trial court opinion summarized the law in this area:

applicable laws depend on the jurisdictions asserting to protect the crowdfunding offerees and purchasers (typically states in which those offerees and purchasers are resident or the securities offering is otherwise deemed to have been made).[49] A lawyer advising a crowdfunding website that desires to make offers and sales in multiple jurisdictions should ensure that she works with local counsel licensed in each of those jurisdictions to avoid allegations that she is engaging in the unauthorized practice of law in those jurisdictions in which he or she is not licensed to practice.[50]

In general, a lawyer providing services in the crowdfunding environment—a setting in which lawyering inherently crosses borders—must take care in ensuring compliance with rules of professional conduct that are, by their nature, rooted in distinct geographical territories. Professional responsibility rules on the unauthorized practice of law typically focus on where the lawyer is practicing law (e.g., where legal advisory activities take place or where the client is located) rather than the jurisdiction in which the legal rules were adopted.[51] In this context, it may

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> The growing weight of authority indicates that Blue Sky laws are additive rather than exclusive. These holdings are predicated on the notion that Blue Sky laws are designed to regulate securities transactions within (or impacting) a particular state. If a transaction touches multiple states, it follows that multiple Blue Sky laws may apply simultaneously.

Mass. Mut. Life Ins. Co. v. Countrywide Fin. Corp., Nos. 2:11-ML-02265-MRP (MANx), 2:11-CV-10414 (MANx), 2012 U.S. Dist. LEXIS 59620, at *10–11 (C.D. Cal. Apr. 16, 2012) (citations omitted).

49. The jurisdictional reach of state securities laws is generally circumscribed by the policies underlying those laws:

> State securities laws . . . specifically define key elements such as buy, sell, offer and acceptance and thereby direct determinations of whether a securities transaction took place within the state. This helps ensure that a satisfactory nexus exists with the state whose law is sought to be invoked. A court's thorough examination of whether alleged transactions fall under a state's well-defined securities law provisions will promote these goals . . . . [S]tate blue sky laws serve further interests as well. Many if not all such laws are written to protect purchasers of securities, regardless of the security's origin. Such statutes also seek to render liability on securities issuers whose activities within a given state fail to conform to that state's laws.

Klawans v. E. F. Hutton & Co., No. IP 83-680-C, 1989 U.S. Dist. LEXIS 18194, at *5–6 (S.D. Ind. Feb. 15, 1989).

50. This approach may provide legal counsel with the opportunity to engage in temporary multijurisdictional practice under the American Bar Association's *Model Rules of Professional Conduct*. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1).

51. *See supra* note 45. Having said that, advising a client on the law of a jurisdiction in which the lawyer is not licensed may be viewed as a potential

not be easy to determine exactly where law is being practiced, making for a very challenging professional responsibility milieu for lawyering in the crowdfunding era.[52]

2. Unlicensed Persons

Entrepreneurs and others in their firms who are not lawyers may also engage in the unauthorized practice of law by participating in activities that constitute law practice. For example, an entrepreneur or other agents of her firm may draft legal documents or offer advice on the legality of a particular action or practice of the venture. Advice on legal issues, even if caveated, may cross the line into legal advice. Those types of communications are situated squarely on the indistinct line between information provision and legal advice.

The Internet provides an environment in which the provision of law-related information by non-lawyers or unlicensed lawyers can look like, or in fact be, the unauthorized practice of law. Internet-based securities transactions involve certain specific legal perils in this regard because investors may come from many different jurisdictions, creating the need to evaluate unauthorized practice under the rules of multiple jurisdictions. The discourse among Scott, Jessica, and Mike excerpted *supra* Part I.C provides an apt illustration of the extent of the cause for concern.

Specifically, by mentioning the improbability of convincing "50 state bar associations" that certain activities do not constitute the unauthorized practice of law and in referencing a "rockier road ahead with . . . state bar associations," Mike highlights the fact that each jurisdiction has its own rules on the types of activities that constitute the unauthorized practice of law, although many states are concerned about legal advice purveyed over the Internet—and in particular, web-based legal document production and providers.[53] That is true for all of the rules of professional conduct applicable to lawyers. They vary from state to state, sometimes in substantive ways.

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incompetence issue for professional responsibility purposes (even if not the unauthorized practice of law in that jurisdiction). Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 672–674 (1995).

52. *See generally* Bruce A. Green, *The Need to Bring the Professional Regulation of Lawyers into the 21st Century*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice/mjp_bruce_green_report.html#Application (last visited Jan. 22, 2014) (outlining these challenges in Part III).

53. *See* Lanctot, *supra* note 45, at 849–53 (assessing the possibility that online document preparation and provision websites are engaged in the unauthorized practice of law).

What types of conduct may constitute the unauthorized practice of law under these state law rules? Under Tennessee law, for example, it is a misdemeanor to "engage in the practice of law or do law business, or both."[54] The statute confers both public and private enforcement rights.[55]

Is Jessica or ProFounder engaged in the unauthorized practice of law by conducting business operations under ProFounder's business model? As noted *supra* Part I.C, Mike raises a number of issues in this regard. Among them:

- whether ProFounder's system and practices for answering important threshold legal questions as to, e.g., the status of bundles of financial interests as securities and the classification of funders as accredited or non-accredited investors—constitutes the practice of law; and
- whether contract drafting services provided through ProFounder constitute law practice.

In addition, Jessica's remarks may be seen as statements of legal analysis or conclusions that may constitute the practice of law.

In evaluating a potential claim that ProFounder or Jessica engaged in the unauthorized practice of law, it is important to assess whether activities of these kinds constitute the practice of law under the laws and regulations in effect in every jurisdiction in which ProFounder or Jessica conducts those activities. Some broad guidance has been offered at the state level as to what might constitute the "practice of law."[56] Under Tennessee law, for

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54. TENN. CODE ANN. § 23-3-103(a) (2013). In addition, the Tennessee Supreme Court has adopted a licensure requirement to the same effect:

> No person shall engage in the "practice of law" or the "law business" in Tennessee, except pursuant to the authority of this Court, as evidenced by a license issued in accordance with this rule, or in accordance with the provisions of this rule governing special or limited practice.

TENN. SUP. CT. RULES R. 7, § 1.01 (2013).

55. TENN. CODE ANN. §§ 23-3-103(c)–(d), 23-3-112(a). The author is licensed to practice in Tennessee and has therefore chosen Tennessee examples to illustrate various points made in this Article.

56. For instance, the *Model Code of Professional Responsibility* provides that:

> Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of a lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client.

MODEL CODE OF PROF'L RESP. EC 3–5 (1986). Another commentator offers:

example:

> "Practice of law" means the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services . . . .[57]

It is unlikely that a court would find that ProFounder's systems and practices for resolving legal issues or drafting of offering documents or Jessica's commentary on legal issues constitute the practice of law. The definition of "practice of law" contemplates representation in advocacy or dispute resolution proceedings. These services were not being offered by ProFounder.

However, Tennessee law also prohibits doing "law business." Under Tennessee law:

> "Law business" means the advising or counseling for valuable consideration of any person as to any secular law, the drawing or the procuring of or assisting in the drawing for valuable consideration of any paper, document or instrument affecting or relating to secular rights, the doing of any act for valuable consideration in a representative capacity, obtaining or tending to secure for any person any property or property rights whatsoever, or the soliciting of clients directly or indirectly to provide such services . . . .[58]

This is where real arguments can be made that ProFounder or Jessica may be violating Tennessee's prohibitions on the unauthorized practice of law. Questions to be answered include the following:

> The definitions of "the practice of law" found in the case law and state statutes are astonishingly broad and varied. Essentially, they can be boiled down to the following: the practice of law is the application of legal knowledge, judgment, training, or skill in advising or otherwise assisting another to analyze or solve a particular legal problem or need.

Moss, *supra* note 39, at 522 (footnote omitted).

57. TENN. CODE ANN. § 23-3-101(3). Tennessee law also recognizes the guidance provided in MODEL CODE OF PROF'L RESP. EC 3–5. *See In Re* Burson, 909 S.W.2d 768, 776 (Tenn. 1995).

58. TENN. CODE ANN. § 23-3-101(1).

- Does ProFounder's determination that a particular bundle of investment interests is or is not a security under the 1933 Act or Securities Exchange Act of 1934, as amended, constitute doing law business in Tennessee because it is advising or counseling offerees and purchasers in Tennessee on securities law matters for valuable consideration (e.g., the share of the proceeds contributed by the investor that would inure to ProFounder's benefit)?
- Does ProFounder's determination that an investor is non-accredited for purposes of Regulation D under the 1933 Act constitute doing law business in Tennessee because it is advising or counseling offerees and purchasers in Tennessee on securities law matters for valuable consideration (same as above)?
- Does ProFounder's provision of contracts in connection with investment transactions made through its website constitute doing law business because it represents the procuring of or assisting in the drawing of any paper, document or instrument affecting or relating to a Tennessee investor's legal rights for valuable consideration (same as above)?
- Does Jessica's explanation of ProFounder's approach to various securities regulation issues constitute doing law business because it is advising or counseling offerees and purchasers in Tennessee on securities law matters for valuable consideration (same as above)?

There is no definitive answer to these questions under Tennessee decisional law. Moreover, Tennessee is just one among the many jurisdictions in which ProFounder's and Jessica's activities, conducted over the Internet, may be deemed to be conducted.

Given that each state defines and interprets the practice of law its own way and factual situations can be quite novel, individual questions in many jurisdictions are issues of first impression for regulators and courts. In most cases, relevant rules are expressed in broad standards that allow for significant interpretation—interpretation that is informed by all relevant factors, not a limited set of fixed, outcome-determinative guiding principles.[59] "[L]awyers have famously struggled for decades to define what it is that they do for a living, and it is the amorphous nature of the practice of law that makes inquiries into unauthorized practice principles so challenging."[60] Mike's questions about the unauthorized practice of law

59. Lanctot, *supra* note 45, at 812–13.

60. *Id.* at 811.

are good ones to ask, even if they cannot be definitively answered here.

It may be unlikely that an enforcement action would be brought under a statute prohibiting the unauthorized practice of law against a crowdfunding website or crowdfunded venture (or a principal or manager of either of them). Nevertheless, a risk of enforcement does exist if the manager drafts legal documents for signature by, or offers advice on legal issues to, funders or others. States like Tennessee have revised their statutes and stepped up enforcement efforts or made them more visible.[61] States also have introduced web-based complaint processes, making it relatively simple for a disgruntled funder or customer or employee to raise a question about the possible unauthorized practice of law.[62] As Scott and Mike suggest in their dialogue with Jessica, the laws governing crowdfunding (especially the federal and state securities laws) are complex enough that all participants should have independent legal counsel.

B. The Matter of Competence . . .

Having legal counsel licensed to practice in the appropriate jurisdictions may be necessary, but it certainly is not sufficient to assure compliance with relevant rules of professional conduct. Legal counsel engaged with participants in a crowdfunding venture should be well-versed in the laws governing the crowdfunding enterprise. The key (but by no means the only) laws relevant to crowdfunding are federal and state securities laws, state entity laws, and contract law, including principles of contract drafting. Crowdfunding also is likely to engage other areas of law, including intellectual property, tort, and agency law.

The *Model Rules* require that a lawyer "provide competent representation to a client."[63] Under the *Model Rules*, "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[64] A recent addition to the *Model Rules* comments incorporates expressly the need to keep abreast of technological innovation.[65] Competence is central to the

61. *See, e.g.*, William C. Bovender, *Treating the UPL Epidemic*, 42 TENN. B.J. 26, 27–28 (2006) (describing the Tennessee statute enacted in 2006 and the status of enforcement efforts at that time).

62. *See, e.g.*, *Prosecuting the Unauthorized Practice of Law (UPL)*, OFF. OF THE ATT'Y GEN. & REP. ROBERT E. COOPER JR., http://www.tn.gov/attorneygeneral/upl/upl.html (last visited Sept. 13, 2013).

63. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2013).

64. *Id.*

65. *Id.* R. 1.1 cmt. 8.

lawyer's task.[66] Among other things, a competent transactional lawyer may be able to reduce regulatory costs.[67]

Competent representation is critical to a venture's long-term success in the crowdfunding era. Yet, it may be hard to acquire for small businesses, including some crowdfunding websites and issuers. In particular, as indicated in the discourse among Scott, Jessica, and Mike excerpted *supra* Part I.C, securities regulation as applied in the crowdfunding context is specialized and complex. Experts in securities law—licensed practitioners who can accurately and completely apply federal and state doctrine to novel facts—often work in large law firms in major cities and bill out at relatively high rates, rates that may be unaffordable for small businesses.

In the year or two leading up to the passage of the JOBS Act, a number of crowdfunding websites and issuers were, by all outward signs, offering and selling investment contracts (an instrument recognized as a security under federal law, unless the context otherwise requires, that is also recognized as a security under state laws) to the public without registration or the availability of an applicable exemption.[68] These unregistered offers and sales violate Section 5 of the 1933 Act.[69] The web-based dialogue regarding ProFounder excerpted *supra* Part I.C references this issue.

That colloquy fails to expressly mention, however, that ProFounder, as the crowdfunding website, as well as the business or project being funded, may be deemed to be offering and selling securities without registration, since the statute includes a rather open definition of "offer" and the SEC interprets the word "offer" quite broadly.[70] Some crowdfunding websites continue to operate in a manner that raises questions about 1933 Act registration. For example, a crowdfunding website operating at the time this Article was written offers funders a share of the proceeds of the sale of a product in return for funding for the development or marketing of the product in a transaction structured to look like a wholesaling arrangement.

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66. *See* JAMES C. FREUND, LAWYERING: A REALISTIC APPROACH TO LEGAL PRACTICE 92–94 (1979).

67. *See, e.g.*, Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 500–02 (2007).

68. *See* Heminway & Hoffman, *supra* note 1, at 890–906 (analyzing crowdfunding interests with profit-sharing or revenue-sharing components under the *Howey* test and concluding that they are investment contracts and securities under federal securities law).

69. 15 U.S.C. § 77e (2012); *see also* Heminway & Hoffman, *supra* note 1, at 961 ("[C]rowdfunded ventures and crowdfunding websites that offer profit-sharing interests to funders violate Section 5 of the Securities Act when they offer or sell those interests without registration or compliance with an applicable exemption.").

70. *See* 15 U.S.C. § 77b(3); Heminway & Hoffman, *supra* note 1, at 922–27 (assessing the status of the crowdfunding website as, among other things, a co-issuer).

Scott's comments in the dialogue excerpted *supra* Part I.C also raise questions about whether ProFounder, as a crowdfunding website, is an unregistered broker dealer. This has been a concern of others when interests in a business or project being offered and sold through a website are securities under federal law.[71] At least one legal scholar specializing in small business finance concludes that crowdfunding websites offering securities outside the parameters of the CROWDFUND Act may be brokers.[72] The same scholar also raises questions about whether crowdfunding websites through which securities are offered and sold may be classified as exchanges or investment advisors, concluding that it is unlikely they are exchanges and unclear whether they are investment advisors.[73] Although the CROWDFUND Act addresses, expressly or implicitly, many of the substantive legal issues identified here, the identified crowdfunding activities have been taking place at a time when the CROWDFUND Act is not effective. Also, at least one crowdfunding website has been soliciting securities purchasers broadly on the Internet in what appears to be a non-compliant intrastate offering exemption.[74]

Several securities crowdfunding websites, including ProFounder, ceased operations in the months leading up to the adoption of the CROWDFUND Act.[75] ProFounder's principals stated, in their last post to the venture's weblog, that "the current regulatory environment prevents us from pursuing the innovations we feel would be most valuable to our customers, and we've made the decision to shut down the company."[76] Although causality cannot be presumed, the fact that the websites' business operations and plans contravened existing securities laws may have been a factor in the decision to shutter these businesses.

Competent representation may have avoided this result. Although there is public evidence that a number of the crowdfunding websites offering and selling securities (in the form of investment contracts) had legal counsel during the development of the website's business model or during its

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71. *See* Bradford, *supra* note 5, 52–67.

72. *See id.* at 67 (concluding that "[t]he crowdfunding sites' receipt of transaction-based compensation, continued involvement in the investor-entrepreneur relationship, public advertising, and for-profit status may cumulatively be too much to allow them to avoid broker status.").

73. *See id.* at 50–51 (regarding the status of crowdfunding websites as exchanges); *id.* at 67–80 (regarding the status of crowdfunding websites as investment advisors).

74. *See* 15 U.S.C. § 77c(a)(11); 17 C.F.R. § 230.147 (2013); *see also supra* note 4.

75. *See* Jessica Jackley, *Profounder Shutting Down*, PROFOUNDER, THE BLOG (Feb. 17. 2012), http://blog.profounder.come/2012/02/17/profounder-shutting-down/; *see also* Heminway & Hoffman, *supra* note 1, at 892 n.60 (noting that 33needs.com also took its site offline a few months earlier).

76. *ProFounder Shutting Down*, *supra* note 75.

operations, offers and sales of investment contracts proceeded under the watch of these lawyers in violation of federal securities law. The analysis of security status under federal law is straightforward, as is the registration/exemption analysis under Section 5 of the 1933 Act.[77] The analysis of broker and investment advisor status is less clear-cut.[78] But the legal peril in proceeding in the face of these risks is easily ascertained and significant.

C. A Lawyer's Diligence

Under the *Model Rules* and rules of professional conduct existing in the various states, lawyers must be diligent in addition to being competent. Specifically, the *Model Rules* provide that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[79] The comments to the diligence rule further provide that "[a] lawyer should . . . take whatever lawful and ethical measures . . . are required to vindicate a client's cause or endeavor"[80] and "must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[81]

The crowdfunding era has exposed potential diligence issues (in addition to competence issues) under federal securities law. For example, at least one crowdfunding website asserting compliance with the exemption from registration in Rule 506 under Regulation D[82] engaged in marketing activities that could be deemed to be general solicitation and advertising[83] after Title II of the JOBS Act was enacted but before Rule 506(c) was adopted by the SEC.[84] General solicitation and advertising invalidates a Rule 506 exemption conducted outside the scope of Rule 506(c). In fact, it was possible, at one time, to obtain a .pdf copy of the private placement memorandum for offerings being made on that website. (Private placement memoranda are marketing and disclosure documents for private placement

77. 15 U.S.C. § 77e.

78. *See* Bradford, *supra* note 5, at 52–80 (summarizing the analysis of broker and investment adviser status under federal securities law).

79. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2013).

80. *Id.* R. 1.3 cmt. 1.

81. *Id.*

82. *See* 17 C.F.R. § 230.506 (2013).

83. *Id.* § 230.502(c).

84. Title II of the JOBS Act provides for the removal of the restriction on general solicitation and advertising for Rule 506 offerings in which all sales are made to accredited investors. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201, 126 Stat. 306, 313–15 (2012). This provision is effectuated through Rule 506(c) under the 1933 Act, recently adopted by the SEC. *Id.*; *see also supra* note 4 and accompanying text (describing Regulation D private placement restrictions on general solicitation and advertising for offerings conducted without the benefit of Rule 506(c)).

transactions, including those conducted under Rule 506.) A visitor to the website merely had to click on a publicly available hypertext link—without pre-qualifying as an accredited investor or sophisticated offeree—to gain access to the private placement memorandum, further exacerbating the general solicitation and advertising problems on the site. Diligent lawyering by a competent lawyer should have prevented these lapses.[85]

The crowdfunding website that manifested these diligence issues included a web page that listed the principals of the firm, one of whom was a lawyer with experience in legal work and management in the financial services industry. It would be surprising if this lawyer did not have responsibility for securities compliance matters for the firm. However, it is important to note that a lawyer may be engaged by a firm for a specific matter, in which case "the relationship terminates when the matter has been resolved."[86] Regardless, a lack of diligent lawyering—or incompetence or even advice on the permissibility of engaging in activities that are unlawful (e.g., engaging in general solicitation and advertising before full implementation of Title II of the JOBS Act)—may have contributed to the legal compliance issues outlined here.

D. A Lawyer's Public Duties and Obligations

The preceding discussion of competence and diligence assumes the existence of a lawyer-client relationship. However, lawyers in the crowdfunding era also engage in professional activities that are outside the scope of their relationships with clients. Indeed, law is a public profession, and lawyers are, to some degree, public servants.[87] Lawyers engaging in these activities are not free from the constraints of professional responsibility rules.

For example, lawyers must be honest and truthful so as to uphold the integrity of the profession. Under the *Model Rules*, "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[88] This rule, unlike a similar proscription in *Model Rule* 4.1(a), does not require that the lawyer be

85. Diligence and competence sometimes are closely related, since competence requires that a lawyer use the means necessary to achieve the desired legal end. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.").

86. *Id.* R. 1.3 cmt. 4.

87. *See generally* Debra Lyn Bassett, *Redefining the "Public" Profession*, 36 RUTGERS L.J. 721 (2005) (describing the roots and decline of the public nature of the legal profession).

88. MODEL RULES OF PROF'L CONDUCT R. 8.4.

operating in the course of a lawyer-client relationship.[89]

Lawyers have offered faulty advice to colleagues and the public about and in connection with crowdfunding—especially in the blogosphere. Sadly, the examples are too numerous to cover in full in this brief Article, but they run the gamut from incorrect statements of the law (including the legal provisions in the JOBS Act), through inadequate understandings of the facts, incorrect legal analysis, and inapposite legal conclusions. In a number of cases, lawyers incorrectly conflate crowdfunding under Title III of the JOBS Act with the loosening of general solicitation and advertising restrictions under Title II of the JOBS Act or otherwise erroneously mash legal prescriptions and proscriptions under the JOBS Act.

Law blogs are a public good. The *Model Rules* recognize a public education function for lawyers in providing that "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."[90] This public education function is, however, presumably subject to the lawyer's responsibility to be honest and truthful under *Model Rule* 8.4(c) as well as additional professional conduct strictures that apply in other lawyering contexts, e.g., competence and diligence. In fact, the Preamble to the *Model Rules* generally provides that "[i]n all professional functions a lawyer should be competent, prompt and diligent."[91]

CONCLUSION

This Article highlights lawyering issues observed in the crowdfunding era. On the one hand, the challenges presented to legal counsel by crowdfunding are substantially the same as those observed in other transactional law contexts. As such, they are easily categorized based on tried-and-true rules of professional responsibility—the unauthorized practice of law, competence, diligence, and public duties and obligations. On the other hand, the nature and extent of the observed issues may relate in some ways to the unique context in which crowdfunding has developed

89. *See id.* R. 4.1(a) ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . . ."); *see also* Peter A. Joy & Kevin C. McMunigal, *Ethics Ethical Concerns of Internet Communication*, 27 CRIM. JUST. 45, 45 (2013) (noting that the prohibition in Rule 4.1(a) "contains no limitation to conduct in the course of representing a client" and adding that "it might reach false statements made by a lawyer on a blog about a case in which the lawyer is not participating").

90. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 6.

91. *Id.* pmbl. ¶ 4.

and is occurring.

Specifically, the unauthorized practice of law may be or may become more prevalent in the crowdfunding era due to the inherently multijurisdictional, Internet-driven nature of crowdfunding itself. Legal counsel to a crowdfunding website should be particularly careful to avoid engaging in law practice in a jurisdiction where he or she is unlicensed—including, as applicable under relevant law, by advising the client on the law of that other jurisdiction or by holding herself out or representing herself to others as a lawyer admitted to practice in that other jurisdiction. The business models for crowdfunding and the software that enables those business models also may be deemed to be providing legal advice by offering information to funders and the principals behind businesses and projects desiring funding.[92]

Competence issues in the crowdfunding era may be magnified by both the rarified (and sometimes nuanced) nature of U.S. securities regulation and the online nature of the communications that enable crowdfunding. Mistakes may be foundational—built into the core elements of certain crowdfunding business models (in particular, those for securities crowdfunding)—and, with the added transparency and reach of the Internet, may be highly visible. A lawyer not intending to give a crowdfunding client advice on securities regulation issues (or otherwise desiring to limit the scope of his or her engagement), whether for competence reasons or otherwise, should make this explicit in a valid engagement letter lest he or she be deemed to have created a lawyer-client relationship that includes representation on securities regulation matters.

Diligent representation also may be strained by attributes of the crowdfunding era. A lawyer working with any venture having an Internet presence must be vigilant in ensuring that the information conveyed on the firm's website is complete and accurate. Ideally, each web page should be reviewed by counsel; hypertext links should be identified, regularly tested, and, where broken, fixed; and content required by law or having legal substance should be evaluated through both compliance and professional responsibility lenses.

Technology plays a strong role in crowdfunding, including as a means of complying with law. Based on the provisions of the CROWDFUND Act, it can be expected that the role of technology in securities crowdfunding compliance will only grow after adoption of the SEC's enabling rules. Accordingly, a lawyer working with a crowdfunding participant—especially a participant in securities crowdfunding—must understand enough about the technology to be able to assure his or her client's

92. *See supra* note 32 and accompanying text.

compliance with law.

Lawyers also must remain cognizant of their duties and obligations to the public. Competence and diligence are at issue in this aspect of the lawyer's role as well as in lawyer-client relationships, especially in light of a lawyer's overall obligation to refrain from fraud, deceit, and misrepresentations. While potentially laudatory as a means of public education, the provision of legal advice over the Internet through websites and weblogs is an ethical trap for the unwary. The medical profession, which contends with online patient advice in a professional environment somewhat analogous to the legal advisory environment,[93] has directly addressed the provision of information through medical information websites in an opinion included in the American Medical Association's Code of Medical Ethics.[94] Perhaps the legal profession should engage this issue in a similarly direct manner.

Finally, the relatively long lag between the date that the President signed the JOBS Act into law and the adoption by the SEC of the rules enabling crowdfunded offerings under the CROWDFUND Act, together with the novelty and nature of crowdfunding, has created opportunities for gun-jumping and regulatory arbitrage, some of which undoubtedly is occurring with (rather than in spite of) the advice of counsel. A lawyer's ardent pursuit of a client's business ends must be lawful and compliant with applicable rules of professional responsibility. In this regard, a comment to *Model Rule* 1.3 provides that:

> A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.[95]

Blind advocacy of a client's desired business model is not contemplated by the *Model Rules* and is inconsistent with a lawyer's overall fiduciary duty to the client.[96] Novel, sexy business models (which, for some, may include

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93. *See supra* note 29.

94. *See* Am. Med. Ass'n, AMA Code of Med. Ethics, Op. 5.027 - Use of Health-Related Online Sites (2003), *available at* http://www.ama-assn.org//ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion5027.page.

95. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1.

96. *See generally* Paula Schaefer, *Harming Business Clients with Zealous*

crowdfunding), urged on legal counsel by exciting, passionate clients with compelling urgency, may present a lawyer with challenges that require a calm, dispassionate return to those fiduciary principles and general notions of ethics and professionalism.

We can learn many lessons about pitfalls to avoid as business lawyers by looking at and analyzing examples of business lawyering gone awry. This Article takes a limited step in that direction as a means of providing guidance to transactional counsel and others. The issues presented and observations made here are not unique, but the context in which they arise—a potent combination of rapidly evolving social media technology and creative corporate finance—is a new one that may be here to stay. By appreciating these issues and observations and focusing on, among other values, attorney licensure, competence, and diligence, as well as fiduciary duties, ethics and the integrity of the legal profession as a public profession, legal counsel should be better able to engage in productive, valued lawyering in the crowdfunding era and beyond.

Advocacy: Rethinking the Attorney Advisor's Touchstone, 38 FLA. ST. U. L. REV. 251 (2011) (arguing, among other things, that the "[p]rofessional conduct rules should introduce all lawyers to fiduciary duty as a new mantra for decisionmaking").