LAW IN THE DIGITAL AGE:
TECHNOLOGY'S IMPACT ON ATTORNEYS AND LAW OFFICES

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I. LEGAL TECHNOLOGY SURVEY

SECTION I.A. Cloud Computing[1]

1. Cloud Computing

Cloud computing is the practice of using a network of remote servers hosted on the internet to store, manage, and process data, rather than a local server. “Cloud Computing” encompasses several similar types of services under different names and brands, some of which overlap, including: web-based e-mail (e.g. Gmail, Yahoo), online data storage (e.g. Google Drive, OneDrive (formerly SkyDrive), DropBox), software-as-a-service (“SaaS”) (e.g. Microsoft 365, Clio, Rocket Matter), platform-as-a-service (“PaaS”)(e.g. Facebook), and infrastructure-as-a-service (“IaaS”), (“Amazon EC2”).

The general ethical duty to safeguard client information applies to cloud computing (Virginia Rule 1.6). There have been several ethics opinions in other jurisdictions; in fact the ABA has a chart listing jurisdictions that have opinions on cloud computing, SaaS, or share similar technology (such as online backup of information): http://goo.gl/JnLlT. As of January, 2016, this includes 20 states. All jurisdictions end up with a "reasonable care" standard, with varying detail of considerations and information.

Virginia’s LEO 1872 [See Appendix] contains a paragraph dealing with cloud computing. It recites Rule 1.6’s “reasonable care” standard for protecting client confidences. Then, it goes on to admonish a lawyer to:

> exercise care in the selection of the vendor, have a reasonable expectation that the vendor will keep the data confidential and inaccessible to others, and instruct the vendor to preserve the confidentiality of the information. The lawyer will have to examine the third party provider’s use of technology and terms of service in order to know whether it adequately safeguards client information, and if the lawyer is not able to make this assessment on her own, she will have to consult with someone qualified to make that determination.

[1] My thanks to Jim McCauley, Ethics Counsel for the Virginia State Bar, who has collaborated with me on several CLEs since 2013 and from which some of the source material for this presentation was derived.

Counsel must consider all of those factors before selecting a cloud-based provider. Consultation of the cloud-based provider's policies is a must.

Moreover, Rule 1.6 was recently amended, taking effect March 1, 2016 to further flesh out the concept of "reasonable care" and what that means for protecting client data. The new Rule adds subsection (d), which states "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule." Also, added comment [19] reads:

> [19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g. by making a device or important piece of software excessively difficult to use).
>
> 19[a] Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of this Rule.

When considering the proposed Rule change, the Supreme Court wanted additional clarifications added beyond subsection (d) and Comment [19] and after working with the Virginia State Bar, came up with Comments [20] and [21]:

> [20] Paragraph (d) makes clear that a lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information. Perfect online

security and data protection is not attainable. Even large businesses and government organizations with sophisticated data security systems have suffered data breaches. Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms. Lawyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data. What is "reasonable" will be determined in part by the size of the firm. *See* Rules 5.1 (a)-(b) and 5.3(a)-(b). The sheer amount of personal, medical and financial information of clients kept by lawyers and law firms requires reasonable care in the communication and storage of such information. A lawyer or law firm complies with paragraph (d) if they have acted reasonably to safeguard client information by employing appropriate data protection measures for any devices used to communicate or store client confidential information.

To comply with this Rule, a lawyer does not need to have all the required technology competencies. The lawyer can and more likely must tum to the expertise of staff or an outside technology professional. Because threats and technology both change, lawyers should periodically review both and enhance their security as needed; steps that are reasonable measures when adopted may become outdated as well.

[21] Because of evolving technology, and associated evolving risks, law firms should keep abreast on an ongoing basis of reasonable methods for protecting client confidential information, addressing such practices as:

(a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;

(b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;

(c) Procedures addressing security measures for access of third parties to stored information;

(d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;

(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and

(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.

Counsel must choose carefully when they pick a data provider to ensure not only that information stored in it does not inadvertently leak, but also that information is not accessible by others outside the lawyer's employ, even inadvertently. With new Rule 1.6 coming into effect, lawyers have a better roadmap of their responsibilities.

2. Questions to Consider

As a practical matter, a summary of questions that need answers by counsel considering Cloud Computing are:

1. Where will users be located?
2. Where will data be processed?
3. Where will data be stored?
4. Where is the disaster-recovery and backup site located?
5. Where are the data subjects located?
6. Where will support services be based?
7. Will support have access to sensitive data?
8. Will subcontractors or outsourced personnel be used for functions having access to sensitive data?
9. Does the customer have the right to approve in advance any transfer of data to another state or country?
10. Who will have access to the data?
11. Will there be different access levels?
12. Who will supervise the project?
13. Will there be monitoring and auditing of policies & procedures?

SECTION I.B. Best Practices for Cloud Computing Vendors

1. **Transparency:** Cloud computing platforms should explain their information handling practices and disclose the performance and reliability of their services on their public web sites.
2. **Use limitation:** A cloud provider should claim no ownership rights in customer data and should use customer data only as its customers instruct, or to fulfill contractual or legal obligations.
3. **Disclosure:** A cloud provider should disclose customer data only if required by law and should provide affected customers prior notice of any compelled disclosure.
4. **Security management system:** A cloud provider should maintain a robust security management system that is based on an internationally accepted security framework (such as ISO 27001) to protect customer data.
5. **Customer security features:** A cloud provider should provide customers with configurable security features to implement in their usage of the cloud computing services.
6. **Data location:** A cloud provider should tell customers the countries in which customer data is hosted.
7. **Breach notification:** A cloud provider should notify customers of known security breaches that affect confidentiality or security of customer data.
8. **Audit:** A cloud provider should use third-party auditors to ensure compliance with its security management system.
9. **Data portability:** A cloud provider should make available to customers their data in an industry-standard, downloadable format.

10. Accountability: A cloud provider should work with customers to designate appropriate roles for privacy and security accountability

Resources: (i) Article by Jim McCauley - "Cloud Computing – A Silver Lining or Ethical Thunderstorm of Lawyers?" 59 Va. Lawyer 49 (February 2011); (ii) Article by Robert E. Dean - “Moving to the Cloud - Is It Ethical?” 63 Va. Lawyer 33 (August 2014).

SECTION I.C. Virtual Law Offices

1. Definition

Virtual law practice is a form of eLawyering. A VLO is a practice where legal services are provided online and thus accessible anywhere. It may be a component to a brick and mortar traditional firm or could be an entirely online enterprise.

2. LEO 1872

►**Background**:

Virginia LEOs previously stated that one can operate a paperless office, storing and providing client files in electronic form only (LEO 1818), and that an in-person or face-to-face meeting with a client is not required (LEO 1791). [Both in Appendix]

►**LEO 1872**:

LEO 1872 addresses ethical issues involved in using a VLO, including cloud computing and executive office suites. The LEO addresses the various components which come into play with a VLO - (a) Cloud computing and the need for security (Rule 1.6); (b) Adequate communication with the client since the communication will be electronic only (Rule 1.4); and (c) Supervision of remote staff (Rule 5.3).

It also addresses, as a separate matter, the issue of executive office/suites or any other kind of shared, non-exclusive space. It states: "A non-exclusive office space or virtual law office that is advertised as a location of the firm must be an office where the lawyer provides legal services."

The LEO holds that, "[d]epending on facts and circumstances, it may be improper" for a lawyer to list or hold out rented office space as his or her "law office" in public communications." Importantly, this differs considerably from the language in the proposed opinion.

Factors considered in determining whether to list a location as a law office include (1) the frequency the lawyer uses the space, (2) whether a non-lawyer uses the space, and (3) whether signage indicates the space is a law office. Moreover, the lawyer may not list alternate locations or rented locations in an effort to mislead clients into believing that the lawyer has a more geographically diverse practice area or has more resources than is the case.

►**Recent Removal of other Requirements**:

Before amendments to Rule 1A:1 of the Rules of the Virginia Supreme Court became effective on the February, 1, 2014, counsel licensed to practice in Virginia by motion rather than by bar exam were required to maintain an office in Virginia where clients could be seen on premises and a VLO or shared occupancy did not qualify. The amendments removed the language requiring certification that the lawyer seeking to waive into Virginia must "[intend] to practice full time as a member of the Virginia State Bar" and now it states clearly that "[a]n attorney admitted to practice law in this Commonwealth without examination under prior versions of this Rule is no longer subject to the requirement that he or she intends to practice law full time as a member of the Virginia State Bar."

It is important to review the rules of any jurisdiction where you may be soliciting, as the requirement of a physical presence in the state differs depending on the jurisdiction.

► **Resource for a VLO:** http://virtuallawpractice.org/

II. <u>TECHNOLOGY'S IMPACT ON LEGAL ETHICS</u>

SECTION I. General Duty of Competence

Section I.A. Overview

The American Bar Association ("ABA") made a formal statement on the duty of competence with technology with its August, 2012 Amendment to Comment 8 to Model Rule ("MR") 1.1 on general competence: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology,* engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." (emphasis added)

The accompanying Report states: "[T]he proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent." This accompanying statement indicates the ABA's intent was not to add new obligations to attorneys, but rather to at least bring technology into counsel's field of vision as they consider their ethical duty of competence. It is arguably irresponsible, and perhaps even towing the line of unethical, to overlook the available technological resources when representing your clients.

The Virginia State Bar had proposed a change to Virginia Rule 1.1 in late 2014 that would have adopted a duty of Virginia lawyers to educate themselves about technology much like the ABA comment; however, there was substantial pushback by the membership and it was substantially watered down when voted on by the VSB on February 15, 2015. The Supreme Court recently approved a modification to Rule 1.1 that goes into effect on March 1, 2016; however, the approved change, as it pertains to the duty of competence with technology, merely adds a sentence to Comment [6] that "[a]ttention should be paid to the benefits and risks associated with relevant technology." The first VSB-proposed change would have added to the Rule itself the clause “including the benefits and risks associated with technology relevant to the lawyer’s practice” onto a lawyer’s duty to “maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education…” The final approved Rule change reflects a pushback and concern from the Virginia Bar about what is perceived, rightly or wrongly, as a mandate to adopt modern technology into the legal profession.

Section I.B: Examples

1. Munster v. Groce, 829 N.E.2d 52 (Ind. App. 2005)[See Appendix]

A lawyer was chastised for not using technology in attempting service of process. The court declined to find that due diligence had been used to locate a non-resident defendant after Plaintiff's counsel had filed a Long Arm Affidavit stating that the defendant's address could not be found. The court, in finding that no real effort was made, noted "[i]n fact, we discovered, upon entering 'Joe Groce Indiana' into the Google search engine, an address for Groce that differed from either address used in this case, as well an apparent obituary for Groce's mother that listed numerous surviving relatives who might have known his whereabouts." Id. at 62.

2. Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010, *en banc*) [See Appendix]

The court allowed a new trial based on a juror's nondisclosure of his litigation history. It noted, however, that Plaintiff's counsel discovered the information using Missouri's automated case record service after the trial. Acknowledging a lack of a Supreme Court rule governing this area, the court imposed an affirmative duty on attorneys to make online investigation of potential juror’s prior litigation history a key part of their jury selection process “in light of advances in technology allowing greater access to information.” Id. at 558-559.

3. Griffin v. Maryland, 192 Md. App. 518 (2010) [See Appendix]

The court cited with approval a statement found in the law review article *The Legal Implications of Social Networking*[2] that it is a "matter of professional competence" that lawyers should investigate social networking sites." Id. at 535.

4. Use of Social Networking as Evidence

Attorneys are increasingly using the internet in their legal practice, as evidenced by an American Academy of Matrimonial Lawyers ("AAML") survey from 2010. It found that 81% of its membership had seen an increase in the number of cases using information obtained from social networking as evidence from 2005-2010. Facebook was the primary source according to 66% of those responding, MySpace (R.I.P.) at 15%, Twitter at 5%, and the rest at 14%.[3]

A recent 2015 survey conducted by the same organization showed that 97% of respondents cited an increase in the number of cases using evidence taken from smart phones and other wireless devices. 67% cited an increase in the number of cases using evidence taken from Apps in the preceding three years. The top three Apps were Facebook (41%), Twitter (17%) and Instagram (16%).[4]

SECTION II: SOCIAL MEDIA

SECTION II.A: Introduction To Social Media

1. Blogging:

A blog is a web site where a writer posts writings that are organized chronologically. Blogs are popular outside the legal context and have gained popularity in the legal field over the last ten

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[2] Sharon D. Nelson, et al., 22 Regent U.L.Rev. 1 (2009/2010)

[3] http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey-

[4] http://www.aaml.org/about-the-academy/press/press-releases/divorce/huge-increase-texts-and-app-evidence-divorces-say-nat

to fifteen years. Legal blogs exist on almost every subject. Lawyers blog *en masse* as an economical way to show expertise in their practice areas and craft a presence on the internet. LexBlog's 2015 annual State of AmLaw 200 Blogosphere reported that 82% of the 200 largest law firms in the United States were blogging.[5] This is up from 19.5% in August, 2007 when the first LexBlog report was released, and from 78% in 2012. The number of blogs published by lawyers in firms of all sizes are too numerous to count. It is clearly a business tool and an effective way of communicating to the public that is here to stay.

Resource: See Appendix for more complete article by Jim McCauley - "Blogging and Social Networking for Lawyers: Ethical Pitfalls," 58 Va. Lawyer 24 (February 2010).

► ***Some Blogs to Check Out from the 2014 ABA Journal Blawg 100***

[list at http://www.abajournal.com/blawg100]

Divorce Discourse:	http://www.divorcediscourse.com
The Droid Lawyer:	http://www.thedroidlawyer.com
iPhone J.D. (2014 Hall of Fame)	http://www.iphonejd.com

2. LinkedIn:

LinkedIn is a professional networking Web site with humble beginnings: co-founder Reid Hoffman created it in his living room in 2002 and it launched a year later on May 5, 2003. LinkedIn functions like an internet-based Rolodex, but more powerful. Users create profiles which have job descriptions, contact information, and sometimes professional references. Members exchange their profiles with other members of their professional network ("linking in" to one another) so that when each user enters the site, that user can see the profile of everyone in the

[5] http://amlaw200.lexblog.com - site to download 2015 Report.

members' network. Creating a profile and using LinkedIn is free and easy, so lawyers flocked to join.

Growth started dramatically: in April 2008, 118,000 lawyers used LinkedIn. Two months later that number almost doubled to 216,000. The growth curve continues to rise. In 2011, LinkedIn had more than 100 million registered users; 770,000 were in the legal field, making it the fifth largest user group on the website.[6] As of November, 2015, LinkedIn had more than 400 million registered members.

3. Facebook:

February 2004 saw the birth of Facebook as a website for Harvard students to connect with one another. It is now the most well-known social networking site in existence, even spawning a movie about its creation in 2010. Facebook has 1.41 billion active users as of March, 2015 and reported revenue of $12.47 billion in the full year of 2014, up 58% from 2013. One can make individual user accounts, fan pages, and group pages that are all connected through networks of "friends."

Law firms and bar associations have created presences on Facebook for employees, clients, and other parties to connect and follow what's going on. Using Facebook is free and requires little technological know-how. However, even with privacy settings, lawyers must be cautious using Facebook or other networking sites in a personal capacity or as a marketing or professional platform.

[6] Dennis Kennedy & Allison Shields, *LinkedIn: How to grow, nurture your network and obtain results*, Your ABA Newsletter (May 2012).

4. Twitter:

Twitter is a social media platform where messages of 140 characters or less, known as "tweets," are shared. Designed in March of 2006, Twitter's social networking site launched that July. It quickly grew and as of first quarter of 2015 has over 300 million active users, generating an average of 500 million tweets a day. Like Facebook, lawyers started using Twitter and often share informative tweets regarding their practice area.

5. Pinterest:

Probably less known than the platforms discussed above, Pinterest is a pin board-style photo sharing website. Originally used mainly to share and circulate wedding pictures and recipes, users now create theme-based image collections which other users can browse and even "re-pin" to their sites. Pinterest started as a closed beta program in March of 2010. In August of 2011, Time magazine listed it as one of the 50 best websites of 2011. As of September, 2015, there were 100 million active users. Lawyers are starting to use this unique social media platform to share information relevant to their practice, such as infographics. They can use it to add personality to their practice by sharing interests or topical information.

6. Newer Social Networks & Trends

Social networks continue to appear and evolve. One trend, with Pinterest being a prime example, is a shift towards photograph driven network sites. A site that takes that idea and develops it more is Learni.st, which allows postings of videos, text-based content, and other content in a similar manner.

Another trend can be seen with disappearing social media, such as Snapchat, which allows users to send disappearing photos to one another. Other trends include crowdsourcing (Thumb.it), location based media (Chirp), and social networks that allow users to charge subscriptions to access their posted content (Pheed). Thumb.it allows users to canvass other users for their opinions about a post, Chirp sends messages or photographs to other users who are nearby, and Pheed allows users to share texts, photos, and videos while charging a subscription fee. Whether lawyers use these sites *en masse* remains to be seen; however, the rules governing communications and advertising will apply to lawyers' use of these sites just as they do to everything else.

Resource: <u>See</u> Appendix for an Infographic on Social Media use in the Legal Sector compiled for 2012, courtesy of Vizibility Inc./LexisNexis.

Section II.B: Ethical Concerns with Social Media

Overview: Regardless of your practice area, online connections carry the same ethical pitfalls as in-person interaction with potential clients and others. The volume of communication made possible by social networking sites magnifies these ethical risks. The following are some of those potentially risky behaviors:

i. Commenting on pending trials or revealing specific case results without a required disclaimer.
ii. Recklessly criticizing judges or other attorneys, or giving that impression.
iii. Revealing privileged or confidential information.
iv. Exposing law firm to claims of defamation or harassment.
v. Sending messages that appear to be legal advice, which can create unintended attorney-client relationships.
vi. Violating ethics rules against solicitation of legal work.
vii. Practicing law in a jurisdiction where you are not licensed.
viii. Receiving messages containing malware or illegal materials.

1. Commenting on Pending Trials

►Juries & Virginia Rule 3.6:

On August 11, 2010, a suburban Detroit juror, Hadley Jons, wrote on Facebook that the defendant in her resisting arrest trial was guilty. The only problem was that the trial wasn't over; in fact, the defense hadn't even presented its case. Nonetheless, Jons, 20, announced that it was "gonna be fun to tell the defendant they're guilty."

The post was discovered by the defense lawyer, Saleema Sheikh's, son while checking jurors' names on the Internet. Jons was removed from the jury and charged with contempt. What's more, Sheikh asked for jail time: "nothing major, a few hours or overnight," she said. "This is the jury system. People need to know how important it is." Instead, Macomb County Circuit Judge Diane Druzinski gave the juror a writing assignment: a five-page essay on the Constitutional right to a fair trial under the Sixth Amendment, plus a $250 fine for violating her oath.

Virginia Rule 3.6 - Trial Publicity

(a) A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury.

(b) A lawyer shall exercise reasonable care to prevent employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this Rule.

In Detroit, a lawyer discovered a juror's online comments about a pending trial. The opposite is equally alarming: an attorney simply cannot discuss an ongoing matter when jurors can so easily discover and be influenced by such comments. A March, 2009 New York Times article title by John Schwartz says it all: "As Jurors Turn to the Web, Mistrials are Popping Up."

Rule 3.6 specifically prohibits statements "disseminated by means of public communication that…will have a substantial likelihood of interfering with the fairness of the trial by a jury." Blogs posts, tweets, and Facebook status updates are just such means of public communication. Lawyers and jurors alike have become increasingly savvy Internet users - there is no doubt that if a lawyer posts it, the jury will find it.

►The Judge might be checking up on you…

Susan Criss, a Galveston County, Texas trial court judge who spoke about social networking mishaps at the American Bar Association's annual conference in 2009, used social networking to connect with voters…and to keep tabs on the attorneys who appear before her.

She reports that once a prosecutor was granted a weeklong continuance to attend a funeral, but that Judge Criss checked the lawyer's Facebook page. Criss found pictures of the lawyer drinking and partying throughout the week. When the prosecutor returned, Judge Criss called her on this behavior. Not surprisingly, a second request—this time for a month's continuance—was denied. For her part, the prosecutor saw fit to "defriend" the judge.

Criss also reported that another prosecutor posted crime scene photos on her Facebook page, along with commentary from law enforcement about the crime. Criss was baffled: "Y'all are not thinking one bit about the fact that when you're asked to provide discovery to the other side in litigation…this is going to count."

Criss reported to the ABA: “I see a lot of venting about judges. I see a lot of personal information being posted, like, ‘Let's go get drunk tonight’ or ‘Let’s go meet at the bar.’…You see these things and say, ‘What are you thinking?’” The upside, she says, is that “I’m starting to see a lot more lawyers using common sense…They’re reading about people getting caught, and they’re seeing the consequences.”

Keep in mind, too, that with judges, lawyers, and jurors all using the same social networking forums, the risk of *ex parte* communications, intentional or otherwise, becomes especially acute. Casual or not, *ex parte* communications about a pending case may well violate ethics rules.

Virginia Rule 3.5 - Impartiality And Decorum Of The Tribunal

(a) A lawyer shall not:

(1) before or during the trial of a case, directly or indirectly, communicate with a juror or anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case, except as permitted by law;

(2) after discharge of the jury from further consideration of a case:

(i) ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror’s actions in future jury service;

(ii) communicate with a member of that jury if the communication is prohibited by law or court order; or

(iii) communicate with a member of that jury if the juror has made known to the lawyer a desire not to communicate; or

(3) conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a juror or a member of a venire.

(b) All restrictions imposed by paragraph (a) upon a lawyer also apply to communications with or investigations of members of the immediate family or household of a juror or a member of a venire.

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(e) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending…

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2. Pretexting

► **Virginia Rule 8.4 - Misconduct**:

It is professional misconduct for a lawyer to:

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

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law.

Before jury trials, many attorneys research the jury panel on social networking sites. Probation officers now check their probationers’ web pages for drug and alcohol violations. However, diligent research becomes unethical when the passive gathering of readily-accessible information leads to active online investigations. A defense attorney or investigator, for example, cannot “friend” a prosecution witnesses just to gather impeachment evidence.

Virginia Rule 8.4(c) prohibits the “dishonesty, fraud, deceit or misrepresentation” required to “friend” someone online as a pretext to get information that helps a client or hurts the opposition. Additionally, a lawyer cannot use an agent to go around the Rules. Rule 8.4(a). Thus, paralegals and investigators must follow the same rules that govern their attorney employers.

►**Cautionary Example**:

The Philadelphia Bar Association’s ethics committee declared a lawyer’s plan to collect information about an adverse litigation witness by hiring an investigator to gain access to the witness’s personal online social networking profiles to be unethical.[7] The committee opined that hiring a third party to befriend an adversarial witness via an online social network to access the witness’s personal pages is a clear and unethical deception. This is because the plan involved concealing “the highly material fact” that information collected from those pages would be used against the witness. The committee concluded that the conduct would violate Pennsylvania Rules of Professional Conduct 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), 4.1(a) (knowingly making false statements of material fact to third person) and 8.4(a) (violating Rules through acts of another). The attorney was held accountable for the investigator’s conduct under Rule 5.3(c)(1), which makes lawyers responsible for behavior the lawyer “orders” or “ratifies.”

A New York Ethics Opinion reached the conclusion that the purpose or reason for making the “friend request” need not be disclosed. New York City LEO 2010-2 (9/2010) ("A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent."; "[W]e address the narrow question of whether a lawyer, acting either alone or

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[7] Philadelphia Bar Ass’n Professional Guidance Comm., Op. 2009-02, March 2009

through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively 'deceptive' behavior to 'friend' potential witnesses. . . . <u>[W]e conclude that an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request. While there are ethical boundaries to such 'friending,' in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements.</u>" (footnote omitted) (emphasis added)

►**Relation to Other Rules**:

When communicating online, whether informally and friendly or after appropriate disclosures, attorneys must follow Virginia Rules 4.2 and 4.3 for dealing with those represented by counsel or with unrepresented persons. For example, San Diego LEO 2011-2 (5/24/11) (holding that a lawyer may not make a "friend request" to either an upper level executive of a corporate adversary (because even the request is a "communication" about the subject matter of the representation), or even to an unrepresented person; "A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A)."

3. Criticism of Judges

►**Virginia Rule 8.2 Judicial Officials**:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer.

►**Online Social Networking and the Rule**:

Social networking online provides a casual, conversational setting for social interactions. Online, you can find an old friend with a quick search, look at less-than-flattering photos of a coworker's escapades, or blast your opinions on a topic for the whole world to see.

However, the Rules of Professional Conduct apply to an attorney's online shenanigans just as they would to any other form of communication or action. Reckless criticism of judges and courts "unfairly undermine[s] public confidence in the administration of justice." Virginia Rule 1.6, Comment [1]. Additionally, the Virginia Rules of Professional Conduct preamble describes lawyers as "public citizen[s] having special responsibility for the quality of justice." A lawyer is just as visible online as he/she is anywhere else. Thus, if he/she posts unethical comments on social networking sites then the posts will reach more people than any other medium and will affect the most damage to public confidence in the judicial system. Finally, comments that go too far could make lawyers, and their firms, liable for defamation.

►**First Amendment Concerns**

Michigan:

The Michigan Bar disciplined Geoffrey N. Fieger for violating Michigan's rules requiring lawyers to conduct themselves with courtesy and civility. During 1999 radio broadcasts, Fieger called several state appellate judges "jackasses" for overturning a $15 million malpractice verdict. Feiger then compared them to Nazis. Finally, he said the judges deserved to be sodomized and invited them to "kiss [his] ass."

Fieger's rant broke several Michigan Rules of Professional Conduct, such as Rule 3.5(c), that banned undignified or discourteous conduct toward a court, and Rule 6.5(a), which mandates that attorneys are to treat anybody involved in the legal process with courtesy and respect. Fieger did not fight the findings and agreed to a public reprimand. As part of his agreement, he was permitted to appeal the applicability and constitutionality of the Rules.

Michigan's Supreme Court upheld the sanction and held that Fieger's rampage brought disrepute on the legal system and was not entitled to First Amendment protection. Grievance Adm'r v. Fieger, 719 N.W.2d 123, 22 Law. Man. Prof. Conduct 387 (Mich. 2006).

Florida:

Sean Conway blogged about a judge being "an evil, unfair witch." The Florida Bar then disciplined Conway for his remarks. Florida's Supreme Court held that the First Amendment did not protect Conway's remarks in upholding the discipline. Fla. Bar v. Conway, 996 So. 2d 213 (Fla. 2008).

Do Not Be Too Friendly:

Being too friendly with a judge can also implicate ethical concerns. It is misconduct for a lawyer to "state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." Virginia Rule 8.4(d). Can one be "friends" with a judge, magistrate, or legislator without crossing that line?

4. Confidentiality

►**Virginia Rule 1.6(a)**:

> "A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c)."

Lawyers must ensure online postings do not breach confidentiality without client consent. Additionally, lawyers must remind their non-lawyer staff that confidentiality is expected of them as well. Furthermore, hypothetical or anonymous postings by an attorney do not necessarily preclude discipline. Finally, even if the lawyer has consent to comment, it is potentially unethical to post the information if it is not in the client's best interest.

Even the fact that a person is your client may potentially be confidential under Rule 1.6 if disclosing that relationship would embarrass the client or violate your client's wishes. Client consent or the reasonable belief that a disclosure is "impliedly authorized" to perform your duties are required to advertise or disclose that you represent a particular client. Finally, neither advertising nor marketing are required to carry out the representation; thus neither allows you to disclose who you represent.

► **Illinois Case**:

The Illinois bar disciplined Public Defender Kristine A. Peshek for revealing client confidences related to pending matters on her blog, "The Bardd [sic] Before the Bar – Irreverent Adventures in Life, Law, and Indigent Defense" from 2007-2008. Peshek also lost her job of 19 years. Some of the posts may be found here:

> #127409 (the client's jail identification number) This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense…Dennis, the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.

5. Unintended Relationships

Lawyers must consider if informational advice given over the internet creates an impression of giving legal advice upon which a website visitor will rely. Lawyers must also consider the broad reach of online postings. People from Virginia and beyond will visit your website; thus giving advice online to people in states where you do not have a license could be the unauthorized practice of law. A lawyer should always ask him/herself whether the online resource they create creates client expectations. Clear disclaimers can resolve this problem.

Stumbling into confidentiality and conflict of interest issues is equally disconcerting. First, the Rules of Professional Conduct govern communications with web site users the same as they would any other communication with potential clients. LEO 1842 [See Appendix] discusses a hypothetical where a law firm's "passive website" posts the firm's attorneys' contact information, and one of the firm's domestic attorneys reads an unsolicited email from a woman detailing the breakdown of her marriage and confessing to an affair with another man. The domestic attorney already represents her spouse in the divorce; what can the attorney do with the information she has learned from this email? Does she owe any duty to keep the wife's secret?

According to the committee, the attorney does not owe a duty to the wife because her email was unsolicited and because she used "mere contact information provided by the law firm on its website." That information, held the committee, fails to create a "reasonable expectation that the information…in the email will be kept confidential."

The analysis has two parts: (1) whether a firm's website "creates a reasonable belief that the law firm is specifically inviting or soliciting the communication of confidential information" and (2) "whether it is reasonable for the person providing the information to expect that it will be maintained as confidential."

The Opinion's subsequent hypothetical details a firm that fails this test by putting a form on its website that asks potential clients to give details of their claims for a case evaluation. Even when the firm declines representation, Rule 1.6 imposes a duty of confidentiality on any information learned from the form in this hypothetical.

A lawyer must protect the confidential information of prospective clients who submit information online just the same as the lawyer would protect other confidences. Moreover, Rule 1.7(a)(2) imputes a material conflict of interest on the lawyer, who thus cannot represent parties adverse to the potential client.

The Committee proposed a "click-through" disclaimer to solve the problem in the above hypothetical. The "click-through" disclaimer requires website visitors to agree to terms before submitting information through an online form. A lawyer must inform online visitors that no attorney-client relationship occurs from this submission, and that the lawyer will not guarantee that information shared will be kept confidential.

6. Case Study - Hunter v. VSB, 285 Va. 485 (2013):

Hunter published a blog on his firm's website entitled *This Week in Richmond Criminal Defense*. The blog, which was not interactive, contained posts discussing a myriad of legal issues and cases, the majority of which were posts about cases in which Hunter obtained favorable results for his clients. The VSB told Hunter he needed to use the required disclaimer if he was posting specific case results, telling the reader that each case has different and unique circumstances and past results do not assure similar future outcomes. After a VSB investigation, Hunter offered to post a disclaimer on one page of his website:

> "This Week in Richmond Criminal Defense is not an advertisement[;] it is a blog. The views and opinions on this blog are solely those of attorney Horace F. Hunter. The purpose of these articles is to inform the public regarding various issues involving the criminal justice system and should not be construed to suggest a similar outcome in any other case."

The negotiations with the VSB did not resolve and no disclaimers were posted at that time. Hunter ultimately claimed his blog was neither advertising nor commercial speech and objected to using the disclaimer the VSB was mandating on those grounds.

Some of the posts on Hunter's blog disclosed information about clients' matters that mentioned the client by name, were posted without his clients' consent, and some of his clients felt that the postings were detrimental and embarrassing.

On March 24, 2011, the VSB charged Hunter with violating Rules 7.1, 7.2, 7.5, and 1.6 by his posts. Hunter had a hearing before the District Committee on October 18, 2011 wherein it upheld the violations of Rules 7.1, 7.2, and 1.6. The Committee found that his blog was commercial speech, and that the lawyer advertising rules, including the disclaimer requirement of former Rule 7.2(a)(3) [current Rule 7.1(b)], applied to his blog. The Committee also found Hunter in violation of Rule 1.6 by posting embarrassing information about clients without their consent. Hunter claimed that his posts were protected by the First Amendment and that the revelation of client case information in an open public proceeding excluded that information from protection under Rule 1.6.

Hunter appealed to a three-judge panel which upheld the finding that Hunter's blog required a specific case results disclaimer. However, the court held that the bar's application of Rule 1.6 to Hunter was unconstitutional and dismissed that violation. It imposed a public admonition and required Hunter to post the disclaimer: "Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case." Hunter appealed to the Supreme Court of Virginia. The Bar also appealed, assigning cross-error on the court's dismissal of Rule 1.6's application to Hunter.

On February 28, 2013, the Supreme Court decided the case. The Court agreed with the panel that Hunter's blog, while containing some political commentary, was commercial speech. The Court cited that while some of the posts concerned general legal issues, the majority addressed Hunter's victories in court. The Court also noted that the blog was on his commercial website, rather than an independent site dedicated to the blog; that the blog did not allow discourse about the cases; and that the blog invited the reader to "contact us" the same way someone seeking to hire Hunter would do. Once the Court determined that the speech was commercial in nature, the analysis of the speech is protected by the First Amendment is (1) whether it concerns lawful activity and not be misleading; then (2) whether the asserted governmental interest is substantial. If both of these yield positive answers, then the Court must determine if the regulation directly advances the governmental interest asserted and whether it is not more extensive than necessary to serve that interest. 285 Va. at 499.

The Court found that Hunter's posts concerned lawful activity and were not inherently misleading but that, in the aggregate, they were potentially so. It further determined that the VSB had a substantial governmental interest in regulating the posts and that the VSB's regulation directly advanced this interest. The Court lastly found that the disclaimers required by the VSB were not more extensive than necessary to serve the interest. Therefore Virginia's Rules 7.1 and 7.2 did not violate the First Amendment.

The Supreme Court also upheld the panel's dismissal of the Rule 1.6 violation because lawyers have as much right as anyone else to report what has occurred in a courtroom (once the case is concluded). The information Hunter's blog posted was all public information, and the First Amendment trumps any potential embarrassment of a client in this context.

The Court remanded the case for imposition of a full disclaimer that complies with the Bar's regulations, rather than the disclaimer ordered by the panel of judges below (which did not conform to the full Rule disclaimer).

Hunter petitioned to the United States Supreme Court for *certiorari*, however that petition was not granted.

<u>Section III: MARKETING</u>

► **Virginia Advertising Rules**

Rule 7.1 Communications Concerning A Lawyer's Services

Rule 7.2 Deleted

Rule 7.3 Direct Contact With Prospective Clients And Recommendation Of Professional Employment

Rule 7.4 Communication Of Fields Of Practice And Certification

Rule 7.5 Firm Names And Letterheads

Rule 7.6 (ABA Model Rule not adopted)

Section III.A: Advertising Generally

Lawyers should review Virginia Rules 7.1 through 7.5 to ensure all statements or claims they make comply with the Rules, regardless of whether the statements are online, in print, or verbal. Also consider consulting Virginia LEO 1750 [See Appendix], which is a compendium opinion on advertising issues**.** Internet media used to promote legal services that contain celebrity endorsements, client testimonials, specific case results, specialization claims, or comparative statements all still fall under the Rules.

Former Rule 7.2, some provisions of which now reside in Rules 7.1 and 7.3, gave comprehensive guidelines for advertising materials. While the old Rule specifically included references to "electronic communications," "electronic media advertisement," and "e-mail communication;" the new Rules were re-written generally to cover all "communications," regardless of form. Any communication that "[solicits] professional employment from a potential client…" for example, must include the identification "ADVERTISING MATERIAL," either on the outside envelope (if there is one) AND at the beginning and ending of any recording or electronic communication unless one of the three exceptions applies.

Importantly, under former Rule 7.2(e) (now rule 7.1(c)) all advertising "shall include the full name and office address of an attorney licensed to practice in Virginia who is responsible for its content." This poses no problem when designing a firm website, blog page, or traditional advertisement but could severely limit a lawyer's ability to use applications like Twitter, which supports short, casual messages of up to 140 characters. However, Rule 7.1(c) currently allows a lawyer to file a current written statement identifying the attorney responsible for the communication and the attorney's address (also requiring the law firm to promptly update the written statement if they change their address). This alternate method of disclosure would allow shorter messages. However, it still does not remove the specific disclaimer requirement of 7.1(b) for case results, so these should not be done in short-form.

Because law practice is increasingly multi-jurisdictional, lawyers that advertise their practices in multiple states must consult other states' advertising rules. Consider whether any of the following activities would violate the advertising or solicitation rules in Virginia or another state: (1) Excited after a string of courtroom victories, a lawyer hastily posts on Facebook or Twitter: "Just won another motion to dismiss! Looks like I'm on a roll"; (2) A friend, wishing to be supportive and perhaps hoping for reciprocation, posts a glowing recommendation of a lawyer's legal services on LinkedIn; (3) An attorney who principally practices in the field of Intellectual Property is endorsed by a colleague as having skills and *expertise* in that area; (4) A lawyer retweets the following tweet from one of her clients without comment: "my lawyer just got me a huge settlement. She's the best lawyer in town!"(5) A landlord-tenant lawyer posting a response to a question in a chat room devoted to tenants' rights issues adds: "feel free to e -mail me directly if you have more questions about this issue or are looking for representation."(6) A personal injury lawyer searches on Twitter for tweets by victims of a recent mass disaster and tweets back "I have represented other victims of similar disasters. Contact me if you need a lawyer."

Each of these examples will likely run afoul of either Virginia's or another state's regulation of lawyer advertising. Example (1) raises the question of whether a specific case result disclaimer is required. See Virginia Rule 7.1(b). Example (2) triggers the issue of whether a lawyer may publish truthful statements made by third parties which the lawyer may be prohibited from making. See LEO 1750, Pt.(G)(lawyer cannot use client testimonials or endorsements that are misleading or false). Example (3) might be prohibited if a state's lawyer advertising rules prohibit or restrict a lawyer from holding out as an "expert." Virginia's Rule 7.4 would allow this because the statement or claim is not asserting that the lawyer is "certified" as a specialist in the field. Several jurisdictions prohibit attorneys from using words such as "specialist," "certified," or "expert" unless they possess specific qualifications. See, e.g., N.Y. Rules of Prof'l Conduct, R. 7.4(a) (2011); Az. Comm. on Ethics & Prof'l Resp. ("Az.") Informal Op. 97-04 (1997) (lawyer may not state in an online chat that he "specializes" in an area of law unless he is certified by the state bar in that practice area). Example (4) is problematic because a specific case result must include the disclaimer required by Virginia Rule 7.1(b). Example (5) is a form of "in-person" solicitation that may be prohibited by some states' rules but not Virginia's. Example (6) is an "in-person" solicitation in a matter involving personal injury or wrongful death. The 2013 amendments to the Virginia rules removed the *per se* ban on in-person solicitation. Most states' solicitation rules would prohibit this communication, unless the recipient was a former or current client or had some other prior relationship with the tweeter.

Section III.B: Endorsements

Virginia Rules 7.1 through 7.5 regulate endorsements and testimonials about the lawyer's services. LinkedIn lets users ask for and provide "endorsements"– short statements about another user or his work that can be posted on that user's page as a referral. These comments may be "recommendations" regulated by Rules 7.1 and 7.3.

A client or colleague who gushes, "[h]e's the best in Virginia Beach!" has actually posted "false or misleading information" per Rule 7.1(a) as it may create " a substantial likelihood that…a reasonable person [would] formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation" that comment [3] to Rule 7.1 prohibits. A post, such as "[h]e never loses!" may actually advertise "specific or cumulative case results, without a disclaimer," which are forbidden by Rule 7.1(c). A lawyer must remember that whether or not he or she creates content, it is his or her responsibility to monitor and edit online posts. Comment [6] to Rule 7.1 cautions lawyers that "[s]tatements or claims made by others about the lawyer's services are governed by this rule if the lawyer adopts them in his or her communications." Lawyers may be responsible for ensuring that third party content complies with the relevant advertising rules, particularly where the lawyer either controls the content or relies on it in some way. See, e.g., S.C. Op. 09-10.

Section III.C: Direct Solicitation

Previously, Virginia Rule 7.3 regulated direct communication with prospective clients and stated "[i]n person communication means face-to-face communication and telephonic communication." Thus, invitations from a lawyer to a prospective client into the lawyer's LinkedIn or Facebook page did not fall under the Rule. However, the 2013 amendments to the Rules eliminated that sentence. The analysis is now whether the communication from the lawyer is "soliciting professional employment from a potential client known to be in need of legal services in a particular manner." Rule 7.3(c). Comment [1] further defines a "solicitation" as "a targeted communication initiated by the lawyer that is directed to a specific potential client and that offers to provide, or can reasonably be understood as offering to provide, legal services." This Comment states that typically communications directed to the general public, such as via a website, do not trigger this Rule. Also Rule 7.3(c) excludes lawyers, those persons that have a familial, personal, prior relationship with the lawyer, or have had prior contact with the lawyer. Under this analysis, a lawyer would presumably only violate Rule 7.3(c) if he/she invited to connect with a non-lawyer stranger via Facebook or LinkedIn <u>and</u> that invitation was to provide, or reasonably be understood as offering to provide legal services. Unless all of these criteria are met, it does not appear the Rule would be violated.

Section III.D: Referrals

Lawyers are forbidden by Rule 7.3(b) to give anything of value to a person or organization for recommending them. Additionally, Virginia lawyers cannot participate in a lead-sharing organization that bases membership on a commitment to provide referrals. <u>See</u> LEO 1846 [See Appendix]. The committee found that participation in such an organization not only involves de facto payment for referrals, but also creates potential conflicts of interests and threatens a lawyer's professional independence.

Section III.E: Specialization

Lawyers may hold themselves out as specialists or experts in a certain field of law only if the claim is factually substantiated. Virginia Rule 7.4. Rule 7.4(d) warns against advertising oneself as a *certified* specialist unless the communication includes a disclaimer saying that Virginia does not have procedures for approving or certifying specializations. (emphasis added) For example, the simple statement, "Sure, I can help you with that. I'm certified in XYZ claims" will violate the Rules, where the statement "I've worked in the XYZ field for 25 years—that's all I do," has no problems.

Section III.F: Letterhead

Virginia Rules 7.4 and 7.5 focus on professional notices, letterheads, offices, and signs. They also apply to Internet communications including the firm name, lists of its members, or listings of areas of "expertise."   Websites must be carefully scrutinized for compliance with these Rules in the same way as printed brochures, letterhead, and business cards. For example, when a firm employs attorneys who are licensed in multiple jurisdictions, the firm's letterhead and website must state the limitations on each lawyer's authority to practice.

Section III.G: Newer forms of Marketing

►AVVO

AVVO was formed in 2006 and is a website whose stated goal is to "empower consumers by rating lawyers, and having these real lawyers answer their questions." The site sets up profiles for licensed lawyers that may be claimed by counsel to maintain (or leave relatively blank). The site tracks state disciplinary reporting and other public information. If a lawyer claims the profile, he or she may set up more detailed information such as practice areas, a detailed résumé, and client endorsements. Once set up, counsel can then answer questions posted by the public on whatever practice area he or she wishes.

As for all dealings with the public, the general ethical rules apply. The rules concerning client testimonials are implicated, as is the caution of advising the public.

►Coupons (e.g. Groupon)

Online "deal-of-the-day" advertising through websites like Groupon seem to be an inexpensive and ingenious way to advertise, but implicate several ethical concerns. Instead of charging a flat fee for advertising, "deal-of-the-day" websites collect the purchase price directly from the purchasers and subsequently take a fixed ratio of the purchase price. Thus, what the lawyer pays for the advertising directly relates to how many clients purchase the deal and comes out of what is marked as a fee for the attorney. That payment method violates Rule 5.4(a), which bars sharing legal fees with a non-lawyer. <u>See</u> Virginia LEO 1438 [See Appendix].

Additionally, "deal-of-the-day" advertising raises a trust accounting issue. Namely, the client pays a fee to the service, which retains the fee before passing along the lawyer's share to the lawyer. Notably, all unearned legal fees must be deposited directly into a lawyer's trust account and cannot be held by a third party. Thus, a lawyer can only use these services if the customer paid the funds directly into the lawyer's trust account.

HYPOTHETICAL 1: ADVERTISING AND THE INTERNET

Having just received your bar license and opened your own firm, you want to start advertising to attract clients. You are taking bids to create a website and are looking into adding your site to an internet referral service that lists lawyers practicing in specific areas of law.

QUESTIONS

1. How is your website treated by the Virginia Rules of Professional Responsibility? Is it advertising? What rules apply?

2. Are internet referral services permissible? Does it matter how they work and if and how they charge?

   References: Rules of Professional Conduct 7.1 & 7.3; Legal Ethics Opinions 1348 & 1751; Lawyer Advertising Opinion A-0110

ANALYSIS

Question 1

Virginia's Rules of Professional Conduct apply to lawyer advertising and solicitation on the internet. Legal Advertising Opinion A-0110. Effective July 1, 2013, Rules 7.1 through 7.5 were re-written. Rule 7.2 was deleted, but several of its provisions now reside in Rules 7.1 and 7.3. Under the new Rules, whether parts of a website are treated as advertising depends on the content of communications and not the fact that they are online.

Comment [1] to Rule 7.1 enunciates Virginia's policy regarding the applicability of the rules to internet sites: "[t]his Rule governs **all** communications about a lawyer's services, including advertising." (emphasis added) Comment [1] indicates that the Rule regulates communications about a lawyer's services and only exempts from applicability "non-commercial speech by lawyers such as political or religious commentary." Because of the strong dissent, the

Hunter case suggests that reasonable minds can disagree over where the line should be drawn between commercial and non-commercial speech. Although ethics committees have long held that law firm websites constitute attorney advertising, the issue may be less clear when it comes to posting on social media. The test should be based on the content of the post. A California ethics opinion issued in late 2012 analyzed five social media posts by an attorney to determine whether they violated the state's advertising rules. Under the California rules, a communication qualifies as advertising if it concerns the lawyer's "availability for professional employment." Applying that standard, the Committee concluded that a post stating "Case finally over. Unanimous verdict! Celebrating tonight." did not constitute a regulated "communication" under California's advertising rules. Cal. Formal Op. 2012-186, available at :

http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202012-186%20%2812-21-12%29.pdf. However, by adding the phrase "Who wants to be next?" to a similar post transformed it into a regulated "communication," because it suggested the attorney's "availability for professional employment." *Id.* at p.4.

Rule 7.1(a) admonishes lawyers to be truthful in their communications to others, and that rule should apply in full force to websites or other internet-based communications. Furthermore, that rule cautions lawyers to include all necessary facts in their communications so as not to create a materially false statement by omission.

Rule 7.1(b) deals with advertising case results. It requires a disclaimer that comes before case results. The disclaimer must:

> (i) [put] the case results in a context that is not misleading; (ii) [state] that case results depend upon a variety of factors unique to each case; and (iii) further [state] that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer.

Rule 7.1(c) requires any advertising to include the name and office address of a responsible lawyer for the content, or, alternatively, the entirety of the communication must be put on file with the state bar along with a statement identifying the lawyer responsible for the communication and their office address.

Rule 7.3(c) governs whether a communication must contain the words "Advertising Material." The analysis is whether the communication from the lawyer is "soliciting professional employment from a potential client known to be in need of legal services in a particular manner." Comment [1] further defines a "solicitation" as "a targeted communication initiated by the lawyer that is directed to a specific potential client and that offers to provide, or can reasonably be understood as offering to provide, legal services." This Comment states that typically communications directed to the general public, such as via a website, do not trigger this Rule. Also Rule 7.3(c) excludes lawyers, those persons that have a familial, personal, prior relationship with the lawyer, or have had prior contact with the lawyer.

Question 2

As to internet referral services, Virginia prohibits lawyers from participating in for-profit referral services. Virginia Rule 7.3(b) states:

> A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may: (1) pay the reasonable costs of advertisements or communications permitted by this Rule and Rule 7.1; (2) pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service; (3) pay for a law practice in accordance with Rule 1.17; and (4) give nominal gifts of gratitude that are neither intended nor reasonably expected to be a form of compensation for recommending the lawyer's services.

There is no prohibition against participating in non-profit referral services; however, the rules for paying a not-for-profit referral service can be tricky. There are two legal ethics opinions that address these situations.

In 1990, Virginia LEO 1348 dealt with a lawyer referral service. In the referenced hypothetical, a not-for-profit company maintained a lawyer referral service in several states and would refer an injured party to the number of a participating law firm. There were 20-30 openings per Virginia locality, and the law firm paid a one-time start-up fee along with production and monthly fees. The opinion held that no ethical violation occurred "presuming that (a) the advertising fees as stated are not in any manner contingent upon either the number of referrals to a particular lawyer or the value of any specific case; (b) the referrals are made in strict rotation and the corporation's telephone operators/corporate agents have no discretion as to the rotation; and (c) the operators make no evaluation of the merits of any case presented, no recommendations regarding legal action, and do not mislead the callers as to the operator's function."

In 2001, LEO 1751 dealt with whether a local bar association's not-for-profit referral service could charge a fee based on the percentage of the attorney's collected fee. The opinion said that "the lawyer referral program of the local bar association may properly impose a percentage fee upon the participating attorneys." The opinion went on to rule that the maximum percentage of the fee and several other parameters would have to be determined by a "usual and reasonable" standard. LEO 1751 cited <u>Emmons, Williams, Mires, and Lech v. State Bar of California</u>, 6 Cal. App. 3d. 565, 574 (1970) for the proposition that a bar association that operated a non-profit referral service did not seek to profit an attorney but instead sought to make legal services more accessible to the public. LEO 1751 also quoted <u>Emmons</u> and said that "with a local bar association's referral service, there is 'no risk of collision with the objectives of the [prohibition against] fee-splitting and lay interposition.'" Finally, LEO 1751 stated that LEO 1348 "is, in pertinent part, superseded" to the extent it conflicts with LEO 1751.

LEO 1751 seems to indicate that a local bar association's non-profit referral service may be given a bit more latitude with how it charges fees than a corporate service. Moreover, whether a "hit" to an attorney's webpage from a referral services site is a referral in the legal context depends on the layout of the referral services webpage. If the webpage only held out a list of attorneys where a person could select one at will, a "hit" may not be a referral. However, the layout of the list, or whether there is a click-through selection process, may make a "hit" a referral. The best answer regarding the internet referral service, unfortunately, is "maybe" in regards to paying it based on the number of hits.

<u>**BEST ANSWERS: (1)**</u> The rules will apply in full force to your website based on the content of the communications but not necessarily the medium of them; <u>**(2)**</u> You **may not** participate in for-profit referral services; however, you **may** participate in not-for-profit referral services as outlined above.

HYPOTHETICAL 2: GROUPON & INTERNET BASED ADVERTISING

Your wife bought a "Groupon" for a discount at an Italian restaurant in Newport News. Clueless as to what a "Groupon" is, you ask her to explain them to you. Initially, that sounds like a wonderful way to advertise and promote your burgeoning law firm. However, you are a prudent practitioner and want to weigh the ethical implications first.

QUESTIONS

1. Can you use "Groupon" or a similar advertising method for your firm?
2. Could you use banner advertisements in web based applications like Yahoo! email or Facebook's messenger?

   References: Rule 5.4(a); Rule 7.1; Rule 7.3; LEO 1438

ANALYSIS

Question 1

This hypothetical was addressed in the outline. Online "deal-of-the-day" advertising through websites like Groupon are fraught with ethical issues. Instead of assessing a flat fee to the party advertising their services, "deal-of-the-day" websites collect the purchase price directly from buyers and subsequently take a fraction of that price. Thus, what the lawyer pays for the advertising directly relates to how many clients purchase the deal and comes out of money marked as the attorney's fee. That payment method violates Rule 5.4(a), which bars sharing legal fees with a non-lawyer. See Virginia LEO 1438.

Additionally, "deal-of-the-day" advertising raises a trust accounting issue. Namely, the client pays a fee to the service, which retains the fee before passing along the lawyer's share to the lawyer. Notably, all unearned legal fees must be deposited directly into a lawyer's trust account and bars them from being held by a third party. A lawyer could use these services if the customer paid directly into the lawyer's trust account. Moreover, a lawyer must return the fee if she conflicted out of representation.

<u>Question 2</u>

Rewritten rule 7.3 applies to all direct contact with potential clients. With the exception of section (c), all of the provisions are method-neutral; section (c) specifies methods of communication in order to specify the type of required notice and how it should be communicated. Accordingly, it is probably not unethical to use banner advertisements in web-based applications, like Google mail, to people provided that all of the applicable professional rules are followed with regards to attorney communications and advertising.

As has been discussed in the outline, the triggering language for requirements of Rule 7.3(c) is that the communication from the lawyer is "soliciting professional employment from a potential client known to be in need of legal services in a particular manner." Comment [1] further defines a "solicitation" as "a targeted communication initiated by the lawyer that is directed to a specific potential client and that offers to provide, or can reasonably be understood as offering to provide, legal services." This Comment states that "a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website, or television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches."

It is important that any banner advertising not be misleading, deceptive, or otherwise violate another ethical rule, such as paying for advertising out of attorneys' fees.

<u>BEST ANSWER</u> (1) PROBABLY NOT; (2) YES if all the rules governing attorney communications and payment are followed.

HYPOTHETICAL 3: ADVERTISING, GIFTS & SOCIAL MEDIA

You fetch the mail when you get home from work and rifle through the coupons, looking for ways to save a few cents so you can afford to catch a movie at the theater as opposed to Redbox. You notice a plethora of pitches for products and outlandish offers and wonder if you could use some of those strategies to promote your practice.

QUESTIONS

1. May you offer a prize to "like" your firm on Facebook?

2. May you offer a prize for people to "re-pin" a promotional photograph of your firm on Pinterest?

   References: Rule 7.3(b); Rule 7.3(c)

ANALYSIS

Question 1

The controlling legal authority for this hypothetical is Rule 7.3(b), which prohibits paying someone for a recommendation. First, giving a prize to someone to "like" your page is likely to be construed as compensating that person for doing what you asked. Second, "liking" your page on Facebook would probably be viewed as a form of endorsement by another party. Whether that endorsement is a "recommendation" is an issue that has not been decided in any Virginia ethics opinion. As it very well may be considered a recommendation by another, the safest course of action is not to do it. This was the subject of a New York ethics opinion, which concluded that offering a prize may constitute an "advertisement" if the "primary purpose of the prize offer is the retention of the attorney." NYSBA Op. 873. If the offer is targeted to specific recipients and if a significant motive is pecuniary gain, it will also constitute a "solicitation" and be subject to additional requirements. Id. One could just as easily argue that "liking" a lawyer's page on FaceBook is merely expressing a desire to "connect" with that lawyer's FaceBook page in order to receive further communications from the lawyer, rather than an endorsement or recommendation.

Question 2

The same authority from Question 1 governs this question. However, "Pinning" a photograph on Pinterest differs from "liking" an entity on Facebook. "Pinning" merely involves re-posting a photograph; while "liking" involves declaring that you "like" something. Thus, the dispositive issue in this hypothetical would be whether re-posting a promotional photograph of your firm is a form of advertising, a form of referral, or both. While the professional responsibility rules permit attorneys to pay for advertising, they do not permit attorneys to pay another for a recommendation. If the promotional photograph contained appropriate disclaimers and notices, such as that posting the photo was not a recommendation, this form of a gift may be permissible as a payment for advertising.

BEST ANSWERS (1)MAYBE; (2) MAYBE.

HYPOTHETICAL 4: SOCIAL MEDIA & ADVERTISING—CASE RESULTS

You have fought long and hard for two years and won your first jury trial after an epic, two-week long, courtroom battle royale that included a Tom-Cruise-in-A-Few-Good-Men-esque cross examination of the opposing party, who did, in fact, order a "Code Red." You want to let the entire country, no, the world know the extent of your indefatigable legal prowess. You want to tell folks that this win makes you the next Clarence Darrow.

QUESTIONS

1. Can you tweet about this case on Twitter?
2. Can you post a public status update on Facebook about this great win?
3. Can you post a public status update on Facebook with a link to a local newspaper article about your underdog win?
4. Do the analyses in (2) and (3) change if you make the post accessible only to a list of your close friends, assuming you have personal relationships with all of them?
5. Can you "pin" a photo of you taken by a reporter mid-closing?

References: Rule 7.1; Rule 7.3

Question 1

Generally, you can publish case results if they are truthful and placed in a context that is not misleading. Rule 7.1(b)(i). Comments [3] through [5] all address putting a statement in context that relates its truthfulness. An attorney should be wary of posting successful case results without giving other facts to place them in context, lest the attorney create a potentially misleading impression about the results a potential client could expect to receive. Hunter v. Virginia State Bar held that Rules 7.1 and former 7.2 applied to a blog that discussed an attorney's case results on the internet. 285 Va. 485, 492 (2013). Specifically, the Supreme Court found it to be advertising, thus rendering it commercial speech and not subject to "strict scrutiny" First Amendment protection applicable to political speech A fact that the Court repeated several times in finding the blog to be potentially misleading was that the blog only listed the successes of the attorney when it discussed case results. However, a dissenting opinion by now Chief Justice Lemons took the view that Hunter's postings were core political speech and, applying a "strict scrutiny" test, concluded that the bar had not met its burden to support the required disclaimer.

This case differs from the situation in Hunter because you are posting about only one case. Remember that the required disclaimers must be used, and a label of "advertising material" may have to be used. See Rules 7.1(b)(ii); 7.1(b)(iii); 7.3 (c); Hunter v. Virginia State Bar, 285 Va. 485 (2013) (case results that omit disclaimer are "potentially misleading" and subject to regulation and discipline). Whether the tweet is potentially misleading will be a fact-intensive question considering all the factors. It is unlikely that the requisite disclaimers and facts necessary to place a tweet into context could be properly enunciated in 140 characters are less.

Question 2

The same analysis for Question 1 governs this question, except that you have more space to post something on Facebook. Thus, it is possible to give enough facts to place the case in context and to include the requisite disclaimers. Accordingly, it seems possible for you to do this ethically so long as you meet all the requirements of the rules regarding truthfulness in communications.

Question 3

A similar analysis for Questions 1 and 2 governs this hypothetical, except that the post contains a link to the communications of another. Comment [6] to rule 7.1 controls here; it says "[s]tatements or claims made by others about the lawyer's services are governed by this rule if the lawyer adopts them in his or her communications." Thus, the attorney should screen the article to ensure that it places the case in context to avoid being potentially misleading.

Question 4

This situation differs factually in that it implicates two different issues. First, the exception in Rule 7.3(c)(2) to the "advertising material" label applies to these facts. Second, and more importantly, this fact pattern may not involve advertising at all. This type of restricted communication may not be construed as advertising and solicitation, but rather an attorney informing their close friends of their success due to the nature of the post's closed audience (close friends). However, the content of the post would likely be closely scrutinized for any solicitations for recommendations or other pitches for advertising, so the safest answer would be to anticipate this sort of communication being classified as advertising.

Question 5

The answer to this question depends, in part, in what you post along with the photo. If it has nothing to do with the case, or if you post no text with the photo, then the photo may not be an advertisement. If there is text posted with it, or has any links to outside sources, then the analyses from the answers above apply.

BEST ANSWER (1) PROBABLY NOT (2) MAYBE (3) MAYBE;(4) MAYBE; (5) PROBABLY

HYPOTHETICAL 5: SOCIAL MEDIA & CONTACT WITH PARTIES

Your son asks you about a case you are handling. Curious as to how your son knew so many details about the case, you ask him where he heard all of the information, and he tells you that someone tweeted about it. You discover that the opposing party, who is represented by counsel, posted publicly-accessible "tweets" about how your client was a "scumbag," was "lying" about the claims he asserts in his lawsuit regarding an embarrassing slip and fall injury and subsequent fracture of his tailbone, how the jury is going to think he is a liar, and how he wants to talk to you (the attorney) to give you a "piece of his mind."

QUESTIONS

1. Can you take to Twitter and "tweet" in your client's defense?
2. Can you call the opposing party so he can give you a "piece of his mind?"
3. (a) Does the analysis change for the first question above if the opposing party was a defendant in a felony criminal case you were prosecuting, called **you** a "scumbag," and said that you and the victim were lying about him deliberately hosing down a floor with a caustic, industrial grade lubricant to cause slip and chemical burn injuries in order to ratchet up your convictions for the upcoming election next month? (b) Does the analysis change for the second question above under this fact pattern?

   References: Rules of Professional Conduct, Rule 4.2, Comment 3; Rule 8.4(a); Rule 1.6; Rule 3.6; Rule 3.8

ANALYSIS

Question 1

This scenario implicates several ethical rules. Even if your client has not requested that you keep information about his case private, Rule 1.6(a) protects non-privileged information if disclosure would be "embarrassing or detrimental" to the client. Thus, you cannot reveal information about his case if it would be "embarrassing or detrimental" in any way to him. The VSB has in the past held that the fact information may be publicly available did not alter the analysis because Rule 1.6 lacks an exception permitting disclosure of previously disclosed or publicly available information (e.g. LEO 1347 - even information that is public or known by third parties is "secret" pursuant to DR 4-101 if the lawyer knows disclosing it would be embarrass the client or cause detriment to his case; LEO 1643 - a lawyer from a past divorce case could not tell a bankruptcy court about assets that his past client omitted from disclosure to the court even when the assets were in a publically-available separation agreement incorporated into a final decree; LEO 1270 - lawyer lacks obligation to reveal identity of personal injury client being held in jail under assumed name unless fraud occurs; LEO 1300 - identifying data of legal aid client is secret because disclosure of receiving services from legal aid may embarrass the client). The answer is not so black and white after the Virginia Supreme Court's holding in Hunter v. Virginia State Bar, which found that the VSB's finding of a violation of 1.6 to be in contradiction of the First Amendment. Hunter seems to permit a lawyer to disclose (1) past client information (2) revealed in open court (3) after the case concludes; however, it does not authorize an attorney to comment on pending cases. Secondly, Hunter does not address whether client information contained in other public records may be used by the lawyer to the detriment or embarrassment of a current or former client. Thirdly, the decision fails to address publicly accessible internet records.

Thus, whether you tweet and what you tweet should be carefully analyzed under the auspices of Rule 1.6 and the ruling of Hunter to ensure all bases are covered. Moreover, Rule 4.1's requirement that all communications to others be truthful must always be satisfied.

Question 2

Rule 4.2 provides that: "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Since the opposing party is soliciting the ability to comment to you about the pending case, any response by you to the opposing party would concern the "subject of the representation." Even though a tweet may be directed or mostly open-ended, if it covers the "subject of the representation" it may violate this rule.

Moreover, it makes no difference who starts the conversation or even that the represented person *wants* to communicate directly with you. Comment 3 to Rule 4.2 states: "[t]he Rule applies even though the represented person initiates or consents to the communication." Moreover, as comment 3 indicates, the prohibition against an *ex parte* contact with a represented person cannot be waived by the represented person—only their attorney can do that.

<u>Question 3 (a)</u>

A different ethics approach applies to public communications in criminal cases. Rule 3.6 governs what prosecutors and defense attorneys can say publicly about a pending criminal case. Section (a) of that rule states:

> A lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury.

Thus, while you may be able to take to Twitter to defend the victim in the case, you must very closely evaluate what you say so as to avoid creating a substantial likelihood of interfering with the fairness of the trial by a jury. A close evaluation will probably limit what you can say over a tweet. Statements that recite what the defendant is charged with and when the trial is set will probably not create a likelihood of interfering with the jury. However, anything beyond that may create a risk of jury taint, especially if it defends the victim in light of the defendant's statements. You cannot have your staff or friends do it either. Rule 3.8(e).

A Supreme Court case may give you the ability to factually respond to another party in a criminal case to refute information from another party in order to stop or prevent jury taint. Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991). The Nevada State Bar disciplined Dominic Gentile for holding a press conference the day after the prosecution held one in order to refute information presented by the prosecutor and the police a day earlier. Gentile accused the other side of using his client as a "scapegoat" for missing evidence from the police department. The Supreme Court declared Nevada's rule unconstitutional, and the ABA placed a "safe harbor" for an attorney faced with Mr. Gentile's plight. That safe harbor reads:

> a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Unfortunately, that "safe harbor" does not exist in Virginia's rule. Moreover, the fact pattern here involves a defendant releasing information to the press instead of a prosecutor and police. However, a proponent could challenge Virginia's rule on constitutional grounds under the auspices of the Gentile case if a disciplinary action arose in this fact hypothetical. Whether a court would find for the attorney is entirely speculative.

Question 3(b)

The same Rule 4.2 analysis from above applies to speaking to unrepresented defendants and should guide you to the same result. Rule 3.8(b) is also implicated. It mandates that prosecutors "not knowingly take advantage of an unrepresented defendant." Comment [1b] cautions prosecutors against using tactics that are calculated to get a defendant to act against his best interest, and tweeting or otherwise contacting the defendant to let him give you a “piece of his mind” may qualify.

BEST ANSWERS: **(1) YES**, but guard well what you say—it must comply with the rules of ethics regarding communications (Rules 4.2; 7.1-7.5); **(2) NO**; **(3)(a) YES**, but there is not much you can say under Rule 3.6 that is not prejudicial, and it is unclear if *Gentile* applies to prosecutors; **(3)(b) NO**—do **not** contact the opposing party.

HYPOTHETICAL 6: SOCIAL MEDIA - UNINTENDED RELATIONSHIPS

You envision yourself as the premier expert on federal litigation and write profusely about legal matters on social networks. One day, you write general information on how to avoid harming a potential ERISA case from the start on your Facebook "feed," which is open to the public. Your email address, however, is not posted openly on your Facebook account, and the ability to message you directly from your "feed" does not exist. Your email address is, however, posted on your employer's website. Later, a person from Schenectady, NY emails you and says that they have taken your "advice," done several things you recommended, and gives you a detailed and heart wrenching description of their employment-related defenestration and ensuing ERISA case.

QUESTIONS

1. Has this person become your client?
2. Can you represent the insurance company if they hire you to represent them in the same case?

References: Rule 1.6(a), Rule 1.7(a)(2), Legal Ethics Opinions 1842 and 629, Rule 1.18

ANALYSIS

Question 1

Whether this person became your client depends on the facts of the case. If a lawyer gives legal information as opposed to advice, a client-lawyer relationship will not form. Whether you are conflicted from representing the insurance company (adverse party) in the same case, the answer again depends on the specific facts of the case.

A lawyer can freely give "legal information" instead of "legal advice" when interacting with people - giving "legal information" differs from giving "advice," and that giving "information" is not practicing law. *See* LEO 1577 (1995); Va. UPL Op. 185 (1995) (a bankruptcy legal information hotline staffed by non-lawyers did not “[practice] law;” recommended use of a disclaimer that information provided was “not legal advice.”); Va. UPL Op. 131 (1989) (non-attorneys can give general information about legal matters (i.e. religious freedom) to the general public through seminars, publications, responses to letters, and telephone inquiries); Va. UPL Op. 104 (1987) (an attorney licensed in a foreign jurisdiction may publish articles with general legal information in a Virginia newspaper while disclaiming "general legal information is distinguished from specific legal advice to specific clients with regard to their respective problems."); Va. LEO 1368 (1990) (lawyer-mediator who gives legal information, but not legal advice, to parties is not practicing law); see also, Va. UPL Op. 73 (1985) (Preparing form documents, e.g., wills, leases, power-of-attorney, and bills of sale, for sale for the public, is not practicing law; however, assisting public completing those forms or giving advice about completion of the forms is practicing law.)

A D.C. Bar ethics opinion described the difference between “legal information” and “legal advice:

> Providing legal information involves discussion of legal principles, trends, and considerations - the kind of information one might give in a speech or newspaper article, for example. Providing legal advice, on the other hand, involves offering recommendations tailored to the unique facts of a particular person’s circumstances. Thus, in discussing legal information, lawyers should be careful to emphasize that it is intended as general information only, which may or may not be applicable to an individual’s specific situation.

D.C. Ethics Op. 316 (2002).

Lawyers risk creating an unintended attorney-client relationship if they fail to use disclaimers. LEO 1842 recommends using disclaimers to disavow the creation of an attorney-client relationship and explain that information the lawyer gets from someone will not be kept confidential and will not stop the lawyer from representing a potential foe. The best practice is to have a "click-through" requirement where the person submitting information acknowledges having read the disclaimer. Attorneys who engage in social networking may inadvertently create prospective or actual attorney-client relationships. By doing so, these attorneys unwittingly assume duties of loyalty, confidentiality, and competence towards virtual strangers. Of course, similar risks have existed for as long as lawyers have attended cocktail parties or other social events, where casual conversations may lead to discussions about personal legal issues. *See* LEO 452(1982)(It is improper for an attorney to represent a husband in a divorce when the attorney had previously and gratuitously discussed in detail with the wife her marital situation at a social gathering and when such conversation was initiated by the attorney prior to employment by the husband.)

Whether an attorney-client relationship exists is a question of law and may be implied. In LEO 1697(1997), the VSB Ethics Committee observed:

> An agreement to employ an attorney may be expressed or implied, but there must be some indication that the advice and assistance of an attorney was sought and received in order to create an attorney-client relationship. *Nicholson v. Shockey*, 192 Va. 270, 277, 64 S.E.2d 813, 817 (1951). The committee has previously opined that the attorney-client relationship is a contractual one which is entered into after a consultation with a lawyer and mutual agreement as to its existence and scope. LE Op. 1193. On occasion, the committee has recognized that there may be particular circumstances where a person may have an expectation of confidentiality in their consultations with a lawyer even though the attorney does not undertake to represent that person. *See*, LE Op. 1453, LE Op. 1456 and LE Op. 1638.

Courts analyze if a person reasonably believed that a lawyer was acting as their lawyer even if no express agreement was made or no payment was given. For this hypothetical, the fact that legal information posted by the lawyer was to the general public via social media and that the person contacted the lawyer unsolicited, all tends to support that no attorney-client relationship was created.

Question 2

When a person consults or communicates with a lawyer to discuss the possibility of hiring the lawyer, that person becomes a “prospective client” under Rule 1.18(a). That rule imposes a duty of confidentiality to that person even if no attorney-client relationship develops. Thus, a lawyer communicating with a prospective client cannot use or divulge information they get against the prospective client. Moreover, the lawyer may not disclose that information to others except as permitted by Rule 1.9.

If a lawyer gets “significantly harmful” information from a prospective client, the lawyer will be personally disqualified from representing an adverse party in the case. Rule 1.18(b). Fortunately, the disqualification does not impute to other lawyers in a firm if a prospective client consents and waives the conflict, or if the conflicted lawyer is “screened” from the matter and the prospective client is promptly notified of the screen.

However, an unsolicited communication by someone to the lawyer providing information does not create a reasonable expectation of confidentiality on the part of the person giving the information and, in effect, does not make the person a "prospective client." LEO 1842. The analysis looks to if the lawyer did or said anything to create an impression that there was an invitation of information or merely publishing information or contact details. There is no way for an attorney to screen the information coming in without solicitation. This is the fact pattern presented in this Hypothetical.

<u>BEST ANSWERS</u>: (1) PROBABLY NOT; (2) PROBABLY NOT

HYPOTHETICAL 7: WORKING AWAY FROM HOME

You are taking a long-awaited Honeymoon cruise to the Bahamas that you have delayed for a year to save the money to pay for it. However, you don't want to come back to piles of files or a full e-mail box. You want to make the most of your layover time at the airport and "dead-time" on the plane, so you take your trusty Macbook.

Miraculously, you clear security in only five minutes without having to run your flip flops through the x-ray machine. To make matters even better, the airport has free Wi-Fi!

QUESTIONS

1. Can you use the public Wi-Fi connection while accessing confidential client files from your firm's server and for sending confidential emails?
2. Does the answer change if the Wi-Fi network is a "hotspot" from your iPhone?
3. Does the answer change if your data is encrypted?
4. Does the answer change if you are working from your home with your home's wireless Wi-Fi router attached to your internet provider? What should you do to make this permissible?

   References: Rule 1.6

ANALYSIS

Question 1

A "reasonable care" standard for protecting client confidences lies in Rule 1.6(b)(6). That rule reads:

> (b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:…(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information bill be kept confidential.

Several issues arise in this hypothetical. First, a lawyer must determine if transmitting information over public Wi-Fi reveals client information. If it does then an attorney must follow the guidelines found in Rule 1.6(b)(6). When one sends materials over the internet, they are placing them into the stream of communications. Thus, if the transmitted information contains confidential information, is reasonably susceptible to interception, and is easily decipherable, the attorney has probably not exercised reasonable care. Given the ability of a third party to easily access and read informational traffic on a public Wi-Fi connection, using public Wi-Fi to transmit or access confidential information that is not encrypted probably violates a lawyer's duty under Rule 1.6. If the information is encrypted, using an "industry standard" form of encryption should meet the standard of care required under the rule.

<u>Question 2</u>

The use of a private, mobile phone "hotspot" that transmits your data over a secure line probably uses reasonable care provided your line is secure. This assumes, of course, that your mobile services carrier does not "snoop" (read) your data.

<u>Question 3</u>

Furthermore, the use of encryption should qualify as exercising reasonable care in protecting client information because encryption prevents a third party from deciphering the information provided that the encryption is strong enough to resist reasonable efforts to defeat it.

<u>Question 4</u>

Using your home internet connection with a wireless router poses one additional wrinkle to the mobile phone "hotspot" assumption in question 2, and that is a wireless access point. Using this should be permissible if you **password-protect** access to your wireless router, **encrypt** your communications, or do both. This assumes, as in the response to Question 2, that your internet service provider does not "snoop" your data.

BEST ANSWERS: (1) PROBABLY NOT; (2) YES; (3) YES; (4) Yes—if you password protect your Wi-Fi access or encrypt your data.