TOP TEN TIPS ABOUT PREMISES LIABILITY FROM SIGN-UP TO FILING THE COMPLAINT

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A. INTRODUCTION

These tips address premises liability at private businesses and will focus on cases against owners and operators of commercial establishments such as restaurants, hotels, shopping malls, and stores rather than injuries in residences. Additionally, I write from the perspective of a Virginia lawyer who works exclusively on the plaintiff's side of injury cases. Finally, this discussion focuses on the beginning of the claim through lawsuit, as other strong articles previously published in the VTLA *Journal* have dealt with issues like discovery in a premises case.

B. TIPS ABOUT CASE SELECTION

1. Size Matters!

Over twenty-five years, I have learned that only serious injuries like traumatic brain injury, broken bones, permanent injuries, and injuries requiring surgery are practical to pursue as premises cases. Connective tissue injuries like a sprain offer insufficient upside to litigate. When screening cases, I first ask about the extent of injury. Litigating premises liability, involving medical and liability experts, can cost thousands of dollars, if not much more, through a jury trial. The good news is that, if you have a big injury, commercial insurance policies usually provide enough coverage to satisfy most any settlement or verdict.

2. Conceive a Viable Theory of Liability.

The injured person ideally can explain what they think the store did wrong that caused them to get hurt. Develop a plausible liability theory from the inception. Businesses must use ordinary care to keep the premises reasonably safe for customers.[1] Liability for foreign substances on the floor requires actual or constructive notice to the business of the danger with enough time to have cleaned it up or warned of the same.[2] In a typical slip and fall case caused by water or some foreign substance on the floor, the injured claimant must show that the water remained long enough prior to the injury for the establishment to find it. Often the new client will not know the substance he slipped on, how it got there, or how long it had been there. In these cases finding an independent witness like another customer with such information is essential. If statements about notice or prior similar incidents were made at the scene by employees of the business, such party admissions can often fill in the gaps to prove liability.

In some premises cases, the business is charged with constructive notice when the danger was affirmatively created by the business itself and not by anyone else like another customer.[3] For example, the improper stacking of inventory in an area where customers do not have access that results in merchandise falling onto someone poses a case with easier proof of liability as the danger was likely created by defendant's employee or method of doing business.

Assess liability contemplating the general rules of safety that the business has a duty to inspect and identify safety risks, as well as to eliminate, reduce or warn about those risks. Be able to answer the question, "What should the defendant have done differently?" A legally sufficient liability theory is essential early on in a case because without a path to surviving summary judgment your case may be stillborn.

3. Look Out for "Open and Obvious" Reasons to Decline the Case.

If jurors think that the injured person's actions contributed to cause their own accident, you will have a hard time ever winning the case. Determining whether the danger was so open and obvious as to be clear to the person who got hurt is an important aspect of contributory negligence in premises liability.[4] Almost every danger can be argued by the defense to be open and obvious. The plaintiff's lawyer must formulate reasonable explanations for the plaintiff's failure to perceive the danger prior to getting hurt. Remember, not all "open" hazards are necessarily "obvious" hazards.[5] Circumstances like inadequate lighting, the hidden placement of the danger along the path that the customer is walking, or unexpected distractions can rebut contributory negligence. Focus on "human factors" analysis to find the visibility and expectation issues that put the plaintiff's action in context. However, early on in the case you need to make sure that the plaintiff was not drunk, wearing six inch high heels, or running at the time they were hurt.

In Virginia contributory negligence is a complete bar to recovery so the plaintiff's lawyer has to be diligent at finding the potential weaknesses in their own case. Anticipate what the experienced claims representative will ask in a statement, what the clever defense lawyer will ask in depositions, and what the judge will think about the facts at a summary judgment hearing or motion to strike. As contributory negligence presents a stumbling block in every premises case, the claimant's lawyer must prepare to help others past the idea that any contributory negligence was a proximate cause of the injury.

C. TIPS ABOUT CASE INVESTIGATION

4. Force the Store to Secure the Surveillance Tape.

A spoliation warning letter, requesting the business to keep evidence, directs the defendant to gather essential materials. After getting your preservation letter, the defendant will likely not discard, lose or destroy information about your case. Appendix Item A is a sample spoliation letter in a premises case. Note that you need to send the correspondence to a particular individual so that you can trace receipt back to that person. Typically, I go to the State Corporation Commission website and find out the name of the chief executive officer or call the business and ask for the name of the general manager. You want to have a certified mail, green card signed by a particular person who later can be held responsible if the preservation of evidence does not take place, stopping the business from simply saying, "Oh, we never got that." Try to keep the language in the preservation letter simple so that the defendant knows exactly what they need to keep. I suggest sending it simultaneously to the insurance company representative so that they also are aware of your request. Some defendants will demand reciprocal preservation by the plaintiff. Remember to secure evidence on your side too, like the claimant's shoes.

5. Use Smart Phones For High Speed Information Collection.

Immediate investigation facilitates success in premises liability. Get photographs and necessary measurements of any key aspects of the scene because the commercial environment can quickly change after an incident. A court ordered inspection in discovery reveals more about subsequent remedial measures if you have contemporaneous data from the scene to compare. Locate surveillance cameras in the store to determine what video should be available. Use public resources like Google Earth to obtain the layout of outdoor areas like parking lots. Demand a

copy of any report or statement filled out by your client from the business. Conduct interviews of any key witnesses and be able to locate these folks in the future if they move.

6. Got Med Pay?

Med Pay (medical payments coverage) to pay medical bills regardless of fault should not be overlooked. Unlike an automobile case where the at-fault driver's insurance is normally different from the first-party Med Pay insurer, in premises liability cases against businesses, any Med Pay will come from the same insurance policy as the one providing liability coverage. If you do not ask the adjuster about Med Pay, they will often "forget" to tell you about it. Like Med Pay in the automobile arena, Med Pay is optional for businesses. Ask the insurer to put the amount of Med Pay in writing. Typical commercial Med Pay may only cover bills incurred and submitted within one year from the date of the injury. Determine and calendar these deadlines early in the case.

7. Befriend Premises Experts.

The use of liability experts is unavoidable in premises liability cases. You should keep a good rolodex of experts that you trust for premises liability cases in fields such as BOCA building codes, construction practices, ASTM standards, building maintenance and similar fields. Get your expert involved as early as possible. They may alert you to an unexplored theory of liability. It is always helpful to have someone on your side evaluating the case to decide what is necessary to build a strong liability case. If you do not have an appropriate expert handy, you can contact other plaintiff's lawyers on the VTLA listserve who generously share information or contact a reputable expert locator service.

D. TIPS ABOUT THE PREMISES LIABILITY LAWSUIT

8. Know Whom to Sue.

Developing a complete list of potential defendants poses challenges. Consider the landowner, parties to any lease, the business owner/operator, the property management company, construction firms, vendors to the landowner or occupier who provide services, like a landscaping company, and potentially individual managers if there was active negligence by a particular employee. One tricky part of the search for the right defendants is getting the corporate names correct. Use of local city or county tax records and other sources of public information helps confirm that you have the right entity. File suit well before the statute of limitations runs to verify that you have the right defendants through discovery. Realize that the residence or state of incorporation of the parties defendant effects the right to remove the case to federal court. In federal court with the initial freezing of discovery, there can be delays in verifying whether the right parties have been named.

Realize that Virginia has a statute of repose which prevents you from suing people involved in the construction of a building more than five years after they finish their work.[6] You can still sue the business owner for a defect left by the people they hired to do the construction, but this law does prevent you from suing the construction company itself after the deadline. Moving as expeditiously as possible can help you avoid pitfalls in making sure you have the right defendants.

9. Choose the Correct Court.

Venue selection may alter the value of the premises liability lawsuit. Often there are several choices, like a grocery chain in neighboring cities. Before filing the complaint, decide where you want to litigate and where you think you can keep the case when faced with a *forum*

non conveniens motion.[7] Recent changes to the venue statutes in Virginia reconfirmed that there must be some "practical nexus" between the jurisdiction and the case, for permissive venue based on where the defendant does business.[8] However, the accident need not have occurred in the jurisdiction where you file suit if the defendant regularly conducts substantial business there and a sufficient number of witnesses, like healthcare providers, hail from the chosen jurisdiction.

10. Define the Defendant's Duty.

Differential legal obligations based on the level of the "invitation" from the defendant to the injured claimant still obtain in Virginia. Although some more modern restatements of the law move away from the distinction between invitees, licensees, and trespassers, Virginia lives up to its nickname as the Old Dominion in this regard. Pay attention as you move into suit about the nuances of duties for a customer of the store as an invitee compared to a licensee who is there for his own purposes, like a person delivering goods for a vendor of the business. The minimal duties typically owed to a trespasser were reiterated in a statute which the railroads and other defense lobbyists had put into Va. Code § 8.01-219.1 recently. Essentially, the new language in 2013 froze in place the law in effect at the time. Although Virginia has not adopted the theory of attractive nuisance, there can be special duties owed to trespassing children when dangerous instrumentalities cause harm.[9]

E. CONCLUSION

Premises liability litigation for injured consumers demands a brave lawyer. However, the rewards are high when the seriously injured person makes a full and fair recovery against a large commercial entity in cases where the liability can be proved.

[1] *Austin v. Shoney's, Inc.*, 254 Va. 134, 486 S.E.2d 285 (1997).
[2] *Id.*
[3] *Id.*, 486 S.E.2d at 288.
[4] *See Fultz v. Delhaize America, Inc., D/B/A Food Lion, Inc.*, 278 Va. 84, 677 S.E.2d 272 (2009).
[5] *See Crocker v. WTAR Radio Corp.*, 194 Va. 572, 575, 74 S.E.2d 51, 53 (1953) ("Thus, while the situation was 'open' to
the plaintiff, in the sense that there was no obstruction between her and the step, it was not necessarily 'obvious' to her.")
[6] Va. Code § 8.01-250.
[7] *See* Va. Code § 8.01-265.
[8] Va. Code § 8.01-262 (3).
[9] *Va. Electric & Power Co. v. Dungee*, 258 Va. 235, 520 S.E. 2d 164 (1999).

Appendix Item A

COOPER HURLEY
INJURY LAWYERS

Peer Review Rated
For Ethical Standards and Legal Ability 2013
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Client Meeting Locations in Chesapeake, Hampton, Newport News, and Virginia Beach

January 7, 2014

Sent via Certified Mail #7007 2560 0001 9918 0616 & 1st Class Mail

Mr. , President
Construction Company
Street
Raleigh, NC 27603

Re: Date of Injury: September 26, 2013
My Client/Your Guest: Ms.
Property:

Dear Mr. :

Please be advised that this law firm represents in a claim against Construction Company for personal injuries sustained when she was caused to trip and fall due to negligence by your employees including creating a dangerous condition regarding construction flooring materials that were improperly fastened down, near , at located at , Virginia (hereinafter referred to as "the Premises") on September 26, 2013.

In addition, this letter is to demand that the following information and data be preserved by Construction Company. This information will be requested in pretrial discovery and Construction Company's failure to honor this request will lead to an allegation of spoliation of evidence.

1. All maintenance records for the Premises from January 1, 2013 through October 1, 2013;

2. Investigative reports, memoranda and statements concerning this incident;

3. Contracts, agreements, invoices, receipts or other similar documentation concerning all maintenance and repairs at the Premises for the past two years;

4. Witness statements concerning the incident;

Appendix
Item A

5. Preserve and maintain and do not destroy, modify, alter or change in any manner the surveillance or video tapes from 24 hours before this incident through and including 24 hours after this incident for all cameras operating at the Premises;

6. Policies and procedures for inspections, repairs and maintenance of the Premises related to public walkways, egresses and ingresses for the past three years;

7. Reports, forms, logs, printouts or other documents concerning complaints about trips, slips, and falls at the Premises for the past three years;

8. Citations from any governmental entity at the Premises for the past three years;

9. Warnings present at or around the Premises at the time of the incident, if any, related to tripping hazards;

10. Photographs of the area or the injuries;

11. Incident reports for any other injuries occurring at the Premises for the past three years;

12. E-mails, spreadsheets, computer files or electronic data concerning injuries occurring at the Premises for the past three years.

We specifically request that Construction Company make no changes, repairs or alterations to the area where my client's injury occurred without permitting reasonable arrangements where our office and appropriate experts can view or analyze such area before the evidence is irretrievably altered or changed. A number of court decisions have permitted court sanctions or "destruction of evidence" lawsuits where a party permanently alters important evidence after receiving written notice of a claim which also requests preservation of evidence. Unless we have your written explanation to the contrary, in writing, within five business days from the date of this letter, we will presume you will strictly abide by all requests to preserve outlined.

Please be advised we claim an attorney's lien against any and all sums to which our client may be entitled. Any negotiations, settlement or contact with our client must be handled exclusively through our office. Your kind and prompt attention to this matter is requested and will be appreciated.

Very truly yours,

John M. Cooper

JMC/sda

Basic Discovery In A Premises Liability Case

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Editor's Note (by John Cooper): This paper was orgininally published in VTLA's *Journal* and is reprinted with permission of the author and VTLA. Scott Bucci of Richmond, VA has extensive experience for both sides in premises cases.

In most premises liability cases, the plaintiff has limited information prior to filing suit. Accordingly, the discovery process is usually critical to developing your case to find sufficient evidence to both survive a motion to strike and win before a jury. Further, a lack of information of the facts surrounding the accident on the defendant's part almost always benefits the defendant. Many defendants (and many defense lawyers) do not thoroughly investigate an accident, or balk at discovery requests they view as overly broad fishing expeditions. But all discovery is a fishing expedition to some extent. In my experience, most judges will permit in-depth discovery in a premises liability case, as long as the discovery requests are tailored to the facts of your case. On the other hand, most judges are hesitant to permit discovery on overly broad requests that do not appeared to be tied to the facts specific to the case. The following are some standard discovery requests that can be amended and revised on a case by case basis.

Identify the individual referred to as John Doe in Plaintiff's Complaint. If you contend that you do not know the identity of John Doe, then list all facts you rely on in contending that you made a duly diligent and good faith effort to respond to this interrogatory and discover the identity of John Doe. If you suspect that a particular individual is the individual referred to as John Doe in Plaintiff's Complaint, identify this person or persons and state all facts why you suspect this person to be John Doe

Comment: Many premises liability cases are removable to federal court because the store is not considered a citizen of Virginia. You can defeat diversity jurisdiction by joining a store employee (who is a citizen of Virginia) as a defendant. You typically need to show "active" conduct by the store employee (e.g., the employee hit the plaintiff with a shopping cart) in order to have a viable claim against the employee, and not merely "passive" conduct (e.g., the employee failed to clean up a spill). However, often you do not know the name of the store employee who had a hand in the accident, which this interrogatory seeks to discover.

State whether it is your contention that you are not the owner, occupant, and/or operator of the location of the alleged occurrence on [DATE]. If you so contend, state the basis for this contention and identify who you contend is the owner, occupier, and/or

operator of the location on [DATE], and all facts you are aware of in support of this contention.

Comment: It is often difficult to sort out who the correct owner-occupant-operator of the premises is, and this interrogatory seeks to resolve that. Issues regarding wrong parties and misnomers often arise in premises liability cases. I recommend filing and serving discovery at least 6 months in advance of any statute of limitations to avoid such issues.

Identify all persons who either knew of or attempted to mop, clean, apply an absorbent, or otherwise attempted to fix and/or warn of the liquid substance that caused Plaintiff to slip, ***prior*** *to Plaintiff's accident, on [DATE]. Include a brief summary of that person's knowledge, how and when the person obtained such knowledge, and any actions taken by the person in response to obtaining such knowledge.*

Identify all persons who either knew of or attempted to mop, clean, apply absorbant or otherwise attempted to fix and/or warn of the liquid substance that caused Plaintiff to slip, ***subsequent*** *to Plaintiff's accident, on [DATE]. Include a brief summary of that person's knowledge and any efforts undertaken by that person to fix and/or warn of the condition.*

State all facts you are aware of that indicate how and when the liquid substance Plaintiff slipped on at Defendant's premises on [DATE], came to be on the floor, and all facts that indicate how and when any person became aware of the presence of the liquid substance Plaintiff slipped on at Defendant's premises on [DATE]. Identify all individuals who are aware of such facts.

Describe all warnings and efforts employed by anyone from Defendant or Defendant's Contractors to either remove or warn of the wet floor on the date of the incident, before and after Plaintiff's fall. Include a brief summary of who performed such warnings and efforts and when they occurred.

Comment: These interrogatories are aimed at learning information regarding notice and all actions taken by the defendant in response to learning of a dangerous condition.

State how you contend the incident occurred, and identify all individuals with personal knowledge of the incident, and all individuals who were present in the area where the incident occurred for the 5 hours prior to the accident and 2 hours after the incident, and all individuals who were scheduled to work in the area where the incident occurred for the 5 hours prior to the accident and 2 hours after the incident, and note what times such individual(s) were present.

Identify (by name, address, phone number and position) any and all employees and/or independent contractors that were responsible for the inspection, maintenance, upkeep, security and clean-up of the premises at issue on [DATE], and separately identify those that were responsible for the inspection, maintenance, upkeep, security and clean up in [area of store where accident occurred] for the 5 hours prior and one

hour subsequent to the accident at issue. Identify whether each such employee or independent contractor is still employed or contracted by you or your company.

Identify and produce all time cards or other work records for [DATE] of any person who worked at the subject store, whose responsibility included the maintenance and safety the store, and produce all time cards or other work records for [DATE] of anyone working in [area or department where accident occurred].

State whether you have interviewed any of the individuals identified in Interrogatories ___, ___, and ___, and identify the substance of their knowledge.

Comment: These requests attempt to discover all relevant witnesses. Remember, lack of information is almost always better for the defense, as it is the plaintiff's burden to prove that the defendant knew or should have known of a dangerous condition. Defendants often make only a cursory investigation as to who may have been present prior to the accident, and regrettably, many defense lawyers rely on employees or managers as the store level to tell them who was present in the area. Often, a defendant will only identify employees who responded after an accident and claim they have no way of knowing who may have been present prior to the accident. Frequently it is up to the plaintiff's lawyer to dig deeper and do the legwork to try to find potential witnesses. Under Rule 4:6 there is no limit to the number of depositions that can be taken, so do not be afraid to depose any and all employees the defendant identifies.

For each claim made or lawsuit filed in the 5 years before the accident against Defendant, wherein a person claimed [list details similar to your plaintiff's accident and/or area where accident occurred] state the name, address and phone number of each claimant and give a description of the claim or lawsuit, including the location or jurisdiction where any such claim was made or suit was filed, the case number (if any), and the names, addresses and telephone numbers of the claimant's counsel (if any).

For any claim or lawsuit that Defendant identified in response to Interrogatory No. ___ that Defendant contends is ***not*** *substantially similar to Plaintiff's accident, produce for each such claim:*

a. The accident report;
b. Any recorded statements;
c. Any Defendant, Insurance Carrier, or Third Party Administrator claims notes that reflect statements or conversations by individuals with personal knowledge as to how the claim allegedly occurred.

Comment: These requests seek to discover evidence of prior substantially similar accidents. Evidence of prior substantially similar accident is admissible to prove notice. In my experience, the more specific you can be in your request, while still being broad enough to make a straight faced argument that a prior accident qualifies as being "substantially similar" to your client's accident, the more likely a judge will be to allow this discovery (e.g., discovery concerning a customer who slipped on a water near a refrigerated display in the grocery section vs. a customer who slipped on a random

puddle of water in the middle of an aisle). These requests also put the onus on the defendant to identify which accidents they contend are not substantially similar. It is may also be advisable to follow up with a corporate designee deposition on the details of prior accidents.

Identify each person who has given or made a statement (oral or written) concerning the incident which is the subject of this action, and for each such statement state the date the statement was made or given, the identity of the person to whom the statement was made or given, and whether the statement was recorded, transcribed, oral or signed by the person making or giving the statement. This interrogatory includes identification and production of any claims notes that summarize or refer to statements made by any witness.

Produce the entire claims file created by any insurance company, third party administrator, Defendant, or its agents regarding the subject accident.

Any and all documents, electronic or otherwise, written, created, modified, or viewed by any insurance agent, third party administrator, adjuster, Defendant or representative who participated in the investigation or supervision of any claims arising from the accident.

Produce all emails you are aware of which reference or pertain to the incident at issue, including but not limited to any emails from any witness or insurance adjuster(s) or third-party administrators, or Defendant or its agents.

All documents (including any transcripts) constituting, containing, or relating to statements taken from or made by any party, eyewitness, or other person regarding or related to the incident, including any handwritten or computerized notes generated by someone who spoke with any person regarding the conversation.

Comment: These requests seek discovery of statements and investigation materials from the defendant. Obviously, a defendant is not going to turn over their entire insurance claims file. The key here is forcing the defendant to produce a detailed privilege log. At a minimum, the privilege log should identify, for each claims note, the date, the author, the identity of each recipient including their job titles at the pertinent time, and the claimed basis for its protection, and any other information that is necessary to permit you to assess the claim of privilege or protection. Frequently adjusters or third party administrators will interview store witnesses in the days or weeks after an accident. Many times these claims notes show the "unfiltered" version of what really happened, as they are interviews conducted by non-lawyers soon after the accident.

In my experience there are a variety of factors that courts will consider in determining whether to order the defendant to turn over claims notes, such as how close in time the statement was made after the accident, had the claimant requested that the adjuster pay their medical bills, or has the witness left the employ of the defendant and no one

knows where he or she is. However, the first step is obtaining a complete privilege log so you know which witnesses were talked to by the adjuster and what claims notes exist regarding potential statements.

Insisting on a detailed privilege log also forces the defendant to identify when they "reasonably anticipated litigation." Many overzealous defense attorneys will claim that they reasonably anticipated litigation the moment after the accident occurred, and therefore any claims note or other investigation material is protected. However, a party is under a duty to preserve evidence if they reasonably anticipate litigation, and this may open the door to arguments that the defendant admittedly anticipated litigation but failed to preserve existing, relevant evidence (e.g., surveillance videos).

When do you contend precipitation last fell, and what type of precipitation fell, prior to Plaintiff's accident? Identify all facts you rely on in support of this contention.

Describe all warnings and efforts utilized by anyone employed or acting on behalf of the defendant to either remove or warn of any unsafe conditions on the exterior of the defendant's premises, including but not limited to the [area where the accident occurred], on [date of accident], before and after Plaintiff's fall. Include a brief summary of who performed such warnings and efforts and when they occurred.

Identify (by name, address, phone number and position) any and all employees and/or independent contractors that were responsible for the inspection, maintenance, upkeep, clean-up, cleaning or clearing of the exterior of the defendant's premises, including but not limited to the [area where the accident occurred], for the three days prior to Plaintiff's accident. Identify whether each such employee or independent contractor is still employed or contracted by you or your company, and explain what each employee's or independent contractor's role was with regard to the inspection, maintenance, upkeep, clean-up, cleaning or clearing of the exterior of the defendant's, including but not limited to the [area where the accident occurred].

Comment: These are basic discovery requests for a snow and ice case.

Produce all documents constituting or setting forth the rules, regulations, policies, training, programs, practice, procedures, manuals, instructions, directives, and cautionary statements provided to or used by Defendant's employees regarding liquids on the floor that were in effect on the date of the accident.

Produce all documents constituting or setting forth the rules, regulations, policies, training, programs, practice, procedures, manuals, instructions, directives, and cautionary statements provided to or used by Defendant's employees regarding slip and fall accidents that were in effect on the date of the accident.

Comment: These requests seek policies and procedures of the defendant. A plaintiff cannot admit a defendant's internal policies and procedures to set the standard of care. However, most judges will allow discovery of policies and procedures, and if you can

convince a judge that you are not using the policies to set a standard of care, they may be admissible. For example, a plaintiff may have been struck by a ladder that was left standing against a shelving unit. The store's policies advise employees not to leave ladders on the sales floor unattended. These policies may be admissible not to set a standard of car, but to show that the defendant was aware that an unattended ladder on the sales floor was a dangerous condition.

All documents and things constituting, containing, or relating to any photograph, sketch, measurements, inspection, map, motion picture, diagram, drawing, schematic, videotape, illustration, simulation, animation, test, experiment, study, recreation, reconstruction, visualization, or other visual depiction or description of or relating to the subject incident.

Comment: It is always helpful to have a floor plan or other diagram of the store.

Every video, security, and/or surveillance tape in the possession of you or your counsel which relates to and/or shows the accident, or shows the area where the accident occurred on [date of accident].

Identify whether the store had any surveillance cameras inside the store on [the date of the accident], and whether any employee or representative of Defendant checked the tapes to see how the accident occurred or the condition of the area where the accident occurred prior to the accident, and if not, why not. If any surveillance tapes of the store were taped over prior to being checked or preserved, identify how and when this occurred.

Identify whether any adjuster, third party administrator, or representative of the defendant requested that store surveillance video be reviewed or preserved. Identify all individuals involved in this request, and when it occurred, and what was done in response.

Comment: These requests seek discovery of surveillance video. Most stores have surveillance video on a "loop," where the video is taped over after a period of days or months, and not all stores think to check the surveillance video after an accident. However, as noted above, many defendants take the position that they reasonably anticipated litigation immediately after the accident, which can trigger a duty to preserve relevant evidence in the defendant's possession. I have found judges to be receptive to allowing depositions of adjusters or corporate designees on the issue of preservation of surveillance tapes to support a potential spoliation inference.

ETHICS and MODERN MARKETING FOR THE MONSTER CASE:
CAPTAIN JOHN "AHAB" COOPER ON LANDING THE GREAT GREEN WHALE
(WITHOUT LOSING YOUR LICENSE OR LEG)

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ETHICS AND MODERN MARKETING FOR THE MONSTER CASE: CAPTAIN JOHN "AHAB" COOPER ON LANDING THE GREAT GREEN WHALE (WITHOUT LOSING YOUR LICENSE OR LEG)

BY JOHN M. COOPER, COOPER HURLEY INJURY LAWYERS
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INTRODUCTION

This article is intended to help fellow injury lawyers get a chance to harpoon the biggest of accident cases in today's competitive marketplace but to do so ethically. The term "modern" reflects that the current legal marketing and ethics regimes now include referral fees and internet blogging that were not on the horizon at the beginning of my practice 25 years ago. However, some of the best methods for case acquisition still are traditional tools updated for the electronic era law firm. The use of the metaphor of a whale is not intended to objectify the clients but rather to recognize that the magnitude of the stakes in some cases have the potential to be life changing for catastrophically injured persons and their lawyers. In this sense the largest cases are worthy of being treated with the same respect and awe that Captain Ahab had for his nemesis in Herman Melville's novel *Moby Dick.*

I apologize in advance for any mistakes I make in my nautical references as I am but a land-lubber lawyer. My ignorance of the sea stipulated; here are ten cetacea-sized ideas for effective and ethical marketing to land cases involving severe injuries and deep-pocketed defendant:

1. RUNNING A TIGHT SHIP

This marketing suggestion seems quaint but still rings true today. If you follow the ethical requirement of diligence in the practice of law under Rule 1.3 *(see Appendix A for all rules cited)* of the Virginia State Bar Rules of Professional Conduct (hereinafter "Ethics Rules") you will be well on your way to attracting the clients that you want. Ethics Rule 1.3(a) requires that a "lawyer shall act with reasonable diligence and promptness in representing a client." That simple injunction to do a good job without delay is the hallmark of being a well-respected professional. Not only must we all try to live up to this standard, but we should try to go well beyond it to do the best possible work we can for each of our clients and to be as efficient as we can be on every case.

When you do excellent work in a timely manner, people will notice, including other attorneys, your clients and judges. Your reputation will grow with the number of successful outcomes and happy clients you have. You may garner accolades like Superlawyers recognition, high ratings on Martindale Hubbell, the original lawyer rating service, and AVVO, the internet attorney reputation evaluator. Additionally, having past satisfied clients and other lawyers post on these internet sites with positive reviews of your work can greatly impress prospective clients as the modern consumer seeks out these recommendations to validate you as an attorney they want to hire for their case.

2. SPECIALIZED BAIT FOR PARTICULAR CATCH

The contemporary economics of law require specialization as the big firms become more national and compartmentalized, and small law groups tend to be most successful as boutique firms focused on a particular area of practice. Even concentrating on personal injury is not as

marketable as being known for a subspecialty within injury work like motorcycle or trucking cases.

Ethics Rule 7.4 prohibits a lawyer from implying that he is a certified or recognized specialist in a particular area of law as generally such specialties are not recognized in Virginia. Exceptions exist for patent attorneys, admiralty proctors, and certified mediators. Lawyers can communicate that they have been certified as a specialist in a field of law by a particular named organization provided that they also indicate that no procedure exists in the Commonwealth of Virginia for approving certifying organizations. Some attorneys will use a designation from an organization as for example an expert "civil litigator" specialist but must include on their letterhead the caveat warning the designation is not recognized as official in Virginia. Ethics Rule 7.4(d).

However, it is permitted under Rule 7.4 to communicate that the lawyer limits their practice to a particular area or field of law, if true. Verbs are safer than nouns, so that it is better to talk about a lawyer as "concentrating in, focusing on, or devoted to" personal injury law as long as the statement is correct.

Within the ethical constraints, being able to hold yourself out as an expert in personal injury or a particular subset of such cases is a great asset for an attorney. Whether in railroad crossing cases, traumatic brain injury or wrongful death, the lawyer who can honestly say that they have extensive experience in a particular kind of big case will have a better chance of getting folks to hire him for that type of matter and getting referrals from other attorneys.

The first part of becoming an expert is to actually gain the knowledge by attending seminars, reading the law, and participating in cases. Next an attorney seeking recognition for particular expertise would do well to share his knowledge with other attorneys and the public

through presentations at CLEs, writing for publication and establishing a record of good outcomes to establish their *bona fides* as a leader in a particular area of law. Once you have expertise in an area of practice that can generate big cases make sure that others know about it through your web site, advertising, and other methods of getting the word out. If you are trying to attract tractor trailer cases and believe you can hold yourself out as an expert in that field, then your web site and firm promotional materials should reflect that. Branding yourself and your firm as associated with that field of law is the goal.

3. TARGETED BLOGGING - LONG TAIL TROLLING FOR THE BIG CASES

Your website is a communication line with the public dangling a lure to attract clients, but also has the capacity to get you tangled up with the State Bar. The Virginia State Bar is more likely to warn you about problems on your website and ask you to take them down, than they are to immediately sanction you assuming the offense is not too egregious. However, you need to know where the channel runs for internet blogging to avoid a snag.

Ethics Rule 7.1(a) and (c) are among the rules that govern attorney communications including websites. The overarching standard in Rule 7.1(a) is to not make any false or misleading statements about the attorney or the attorney's services. Under this rule "a communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact when omission of such fact makes the statement materially false or misleading as a whole." So, when putting information up on the website, including any blogs, an attorney needs to be careful that whatever is said does not contain deceptive or incorrect information. Under Rule 7.1(c) one particular attorney must be responsible for any advertising and this is often accomplished by having a written statement filed with the State Bar indicating the one lawyer at

the firm responsible for all of the firm's marketing. If your name is on that form or on a particular blog, you need to be careful that you have reviewed all content for anything that could be deemed improper under the rule.

To stay within the ethical guidelines, be careful not to imply levels of experience which you do not legitimately have. Do not misdescribe past results in a way that would be misleading. Always maintain your authenticity and your own voice. Be sure that what is written is something that you would be proud to say in court, as in addition to potential clients, the blog may be read by potential jurors.

Other than broadly forbidding dishonest statements, the ethics rules allow great latitude for commenting on current events and the law in a legal blog. Although it takes a bit of discipline to regularly publish meaningful content on your website it can be a constructive way of engaging the public and potential clients. Write about subjects that you can passionately and competently speak to, but also address the kinds of cases that you want. If you are looking for tractor trailer cases, you want to spend some significant percentage of your blog time talking about the trucking industry and the Federal Motor Carrier Safety Regulations. As the trial advocacy guru David Ball has said, "A play is about what it spends the most time talking about." Likewise your website is about what it is that you spend the most pages discussing.

Remember, content is like chum (bloody bits of fish to excite sharks) for search engines. Google looks for sites and pages that provide real information in an authoritative manner. Make videos and imbed them in your blogs to increase their effectiveness. Have a professional shoot the video for you or invest in good equipment and an editing program for your firm. The use of targeted blogging is a way to have lots of lines in the water with a chance of being noticed by the exact species you are seeking.

4. FISH WHERE THE FISH ARE

Some friends are in a better position to help send you clients than others. You need to identify folks who are able and willing to send cases to you or tell you about folks who may need your assistance with a big case. Look to fellow professionals and people who are in a position to know about persons who have been injured and suggest that they call you. Sources include medical professionals like orthopedic doctors, family doctors or physical therapists or people involved in traffic accidents like police, first responders, or tow truck drivers. Insurance sales agents and brokers are among the first people to talk to an injured person after a wreck and may be in a position to suggest you as counsel for their customers under the right circumstances. All of us have persons whose services we use in these various fields, but a great rainmaker finds ways try to discuss the possibility of referrals at an appropriate time.

One ethics rule to keep in mind regarding non-lawyer referrals is Rule 7.3(b) which reads, "a lawyer shall not give anything of value to a person for recommending the lawyer's services" with limited exceptions. Since you cannot pay a non-lawyer for sending a case to you, you need to find other ways to express your appreciation to others who help you sign cases. The "nominal gifts of gratitude" listed as a *de minimus* exception to Ethics Rule 7.3(b) is a good starting point as it is the thought that counts. Whether a fruit basket or gourmet peanuts, these consumable recognitions together with personal thank you notes are key to maintaining such referral relationships with non-attorneys.

In our Facebook society, traditional groups that congregate in-person become even more favored for their intimacy. Activity or leadership in religious, civic, or charitable organizations allow for developing deep relationships that foster the trust which folks need to have with a

lawyer to feel comfortable recommending clients. The Virginia Brain Injury Association, Mothers Against Drunk Driving, or other service organizations tied to particular constituents can be a good outlet for charitable impulses and getting your name out in a community. However, the only way to have this volunteerism work as a marketing tool is for you to have a genuine interest in the group's mission and a long-term commitment to participate.

5. FORM A FLEET THROUGH ATTORNEY REFERRAL

The adoption of Ethics Rule 1.5 a number of years ago revolutionized the way lawyers can split fee on personal injury cases. Current Ethics Rule 1.5 (e) facilitates referrals among attorneys. You can divide fees between lawyers who are not in the same firm under the following conditions:

- The client is advised of and consents to the participation of the lawyers involved;
- The terms of the division of the fee are disclosed to the client and agreed to;
- The total fee is reasonable; and
- The division of fee and consent is obtained in advance of the rendering of legal services, preferably in writing.

This fee split rule allows a less experienced or less specialized attorney to send a big case to you to handle while still getting significant benefit from the fee generated. Different levels of involvement, responsibility for costs, and fee splits can be negotiated as appropriate in different circumstances, and ultimately the client benefits by getting a team of lawyers for the price of one. When I sign up a new case which has been referred to me by another attorney, I will immediately get client consent verbally and confirm the same in writing. Although documenting the fee split in writing is not required by the Virginia Ethics Rules, it is by far the better practice.

I believe clarifying the roles and fee distribution early also prevents any later misunderstandings among co-counsel.

Some of the best results in my career came from combining forces with other attorneys and law firms. Different attorneys have different strengths and finding the right team for any big case involves looking hard at prior experience, fields of specialization, geographic issues and access to experts. Also, resources for bearing the burden of the high costs of the largest cases and having sufficient staff to work the file can make co-counseling a great option to provide the client with the best chance for a full recovery. When a lawyer choses to affiliate other lawyers for a big case, he may end up getting better results for the client and himself than if he held onto the case and worked it alone. *Virginia Lawyers Weekly* and its annual lists of top results show how often great results are obtained by lawyers from two firms helping on the case. Whalers normally needed crews in several boats to take down their enormous prey.

6. NEW LOOSER RULE ON DIRECT SOLICITATION PROVIDES ENOUGH ROPE TO HAUL IN A CITATION OR TO STRING YOURSELF UP FROM THE YARDARM

Under a recently revised Ethics Rule 7.3, the ethical limits for direct communication (in person or by phone) with potential clients have blurred. Previously, there was a blanket prohibition against a lawyer initiating contact with a person with whom he did not already have an existing relationship. The current rule only prevents solicitation if the potential client expresses a desire not to be solicited by the lawyer or the "solicitation involves harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits." Ethics Rule 7.3(a). So, an attorney may contact someone with whom he has no prior professional or personal relationship to ask to represent them in a case, but he must stop

immediately if the potential client says do not bother me. Further, to the extent, that the contact seems to cross the fuzzy line into undue influence, then it may be subject to sanction. It is not entirely clear that this rule would prohibit all cold calls on persons in the hospital or on the day of the funeral. The stereotype of lawyers or their representatives ghoulishly hanging out an emergency room or at a house of mourning should trouble all of us.

Despite the risks of seeming an ambulance chaser, there are fairness and policy reasons why lawyers should be allowed to advise consumers of their rights soon after a tragedy, given the insurers are immediately on the scene trying to advance their interests, often without any ethical constraints. However, just because an attorney can contact someone who they do not previously know to ask to help them in a personal injury or wrongful death case does not mean they should. Realize that whatever is done has to be able to hold up to scrutiny in an ethics investigation, and meet your own moral compass. No big case is worth your law license and career.

The comments to Ethics Rule 7.3(a) indicate that the propriety of any communication will be judged by the totality of the circumstances including "the potential client's sophistication and physical, emotional and mental state, the nature and characterization of the legal matter, the party's previous relationship, the lawyer's conduct and the words spoken." Moreover, if the potential client does not respond to an initial communication, any continued repeated efforts to communicate may well constitute harassment. My sense is that direct communication without a prior relationship is risky proposition best left to special situations where you offer the client a unique value proposition.

In a similar vein, Rule 7.3(c) restricts the form of written communications including email that can be sent to a potential client unless the recipient is a lawyer, a person who the

lawyer already has an existing relationship with, or a person who has contacted the lawyer first. Various technical requirements apply such as that the envelope conspicuously display the words "ADVERTISING MATERIAL" on the outside or at the beginning and ending of any electronic communication. In an appropriate case, a thoughtful letter meeting the criteria of the rule could be beneficial to advise of the lawyer's expertise in handling a particular kind of case that the potential client faces. However, prudence requires that such communication be carefully worded to avoid violating the letter or spirit of the rule. Hitting the right tone to get a favorable response and not get lost in the pile of similar mail is a long shot. If you are seeking a big case through a direct communication, I suggest going with an impressive offering, like a firm video or custom made presentation of "why hire us" materials.

7. DEVELOP A SCHOOL AND STAY CLOSE

The old fashioned paper newsletter or today's digital version can keep you in front of past clients and persons in a position to refer you a big case. The goal is top of the mind awareness. If someone has not heard from you in a while they are much less likely to remember that you want them to give your name and number to someone they know has been hurt in a truck accident. You might think that all of your past clients will remember you forever, but it is not so. Many people go to a different lawyer for a second accident case because they cannot even remember the name of the lawyer they used before, even if they were satisfied clients. Using eblasts or e-newslatters reduces costs and increases your options for making sure to have more frequent communication with your referral sources.

The list of your friends of the firm or contacts who get your communications constitutes one of your main marketing assets. Treat this database as the gold that it is. Update it, add to it,

and protect it. Regular contact with your database of potential referral sources is fundamental. Letting them know about your big successes gives them more confidence that you are in a position to help someone they may know in a similar case.

One central question in newsletter production is how much of it should be business content rather than fun or human interest content. If your newsletter is nothing but hard law information, it may be trashed immediately as boring and therefore be a waste of time and money. Some social engagement is necessary to have a newsletter with a greater shelf life. The trick is to balance information about the successes of the firm and developments in the law and entertainment or items about community or personal activities. The newsletter for your "school" to feel closer to you and to remind them what you hope they will do for you.

One ethical duty that comes up in the context of newsletters and any communication about prior case results is confidentiality. Under Ethics Rule 1.6, the attorney must keep in confidence not only the actual secrets of his current and past clients, but also information that would be embarrassing or detrimental to the client if disclosed to others. When publishing a report of a recent big case in a newsletter, you must have the client's consent if you want to use their name or specific identifying facts. My suggested policy is to err on the side of discretion and not use names or anything identifying especially with big results even if the case went to verdict in open court. The disclosure that a particular client got a lot of money from a case could be problematic for them in their relationships with friends and family members. Certainly anything negative about the client that may have affected case value should be left out of any description, so that the client upon reading your newsletter will not think that you are disparaging them in any way.

8. DIVERSIFICATION OF HAUL: CASTING A WIDE NET

Obviously the more kinds of major litigation that you handle the more likely you are to always have some big cases to work on. In a perfect world you would have the firm resources to competently handle several types of large case whether tractor-trailer accidents, railroad accidents or other potential areas from admiralty to aviation to products liability to medical malpractice. The more poles you have in the water, the more likely it is that you are going to continue to have chances for big recoveries. When trying to enter waters that are uncharted for you, you must consider is the very first ethics rule, 1.1 Competence. This rule requires that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Competence is a fairly high threshold in my opinion. Unfortunately, sometimes in our desire to work on a big case or break into a new area of law, we might be tempted to stretch the limits of our competence.

If you do not possess the necessary competence to handle a new case, you should involve other attorneys who already have that expertise and use it as an opportunity to learn more and to develop the knowledge, skill and other assets necessary to be confident in your ability to competently represent someone in that kind of case. I think that clients understand and appreciate the frankness of an attorney who says I want to bring in this other law firm who has greater experience in this particular field and it will not cost you anything additional as we are going to share the fee previously agreed to with you.

Other ways to obtain the skills and knowledge necessary to be competent in a new field include VTLA and AAJ seminars. There are list-serves and litigation groups that can be joined to increase access to information and experts. The main thing is to make sure that the client is getting the competent representation that they deserve and you are not getting in over your head.

In today's world there are always new opportunities for big cases in different aspects of automobile accidents or other aspects of injury work. Vehicle recalls and product liability claims seem to be on the rise. Stay informed about trends in the law and identify places where you may be able to add to your toolkit and complementary income streams for your firm.

9. AMPLIFY YOUR FOGHORN THROUGH THE PRESS

Get your name in the local paper for free publicity. I suggest you befriend some local TV and newspaper reporters. You can be a resource for them to comment on legal issues going on in the community. By establishing yourself as a reliable source of information and expertise you give yourself a chance to regularly get free press and reach a broader audience. The communication will open the door to get your newsworthy cases noticed.

There can be ethical implications, though, of talking to the media particularly related to criminal matters. Under Rule 3.6, Trial Publicity, an attorney has to be careful in what they say to the press so that it does not seem that they are in any way trying to interfere with the fairness of a criminal trial. One interesting application of this ethics rule is when there is a civil case arising out of the same subject matter as a criminal prosecution. Typically, the plaintiff's counsel in the civil case would be well served to take a low profile position while the criminal case unfolds. A tactical reason for this is so that the defendant's attorney in the criminal case cannot paint the victim of the crime (and civil claimant) as being more interested in the money damages than in telling the truth. The civil attorney also should avoid any statements to reporters that might run afoul of Ethics Rule 3.6.

I think that generally the press does not understand the legal system terribly well, particularly the civil side of law. Explaining to the press the justice implications of what we do

would help them do a better job in their coverage, and also could improve our reputation with the public. Meanwhile, any time you get your name on the local TV station news at 6:00 p.m. or in the local paper, you are going to get noticed and have a better chance of landing your next big case.

10. UNLIKE OLD SALTS, OUR FISH STORIES MUST BE TRUE

The potential big case client needs to know that you have been there before and gotten strong results in cases like theirs. That experience in similar files is one of the key questions on the mind of any prospective client with a traumatic brain injury case or wrongful death involving a tractor-trailer. One way that you can show a customer shopping for a lawyer that you do have the right experience is to have posted case results on your website and in other firm literature. In this regard, the rich do get richer in that most clients would prefer to go with a lawyer who has a proven track record, rather than risk hiring one less experienced in the client's particular kind of case.

Warnings must accompany any advertising of past results. Ethics Rule 7.1(b). This rule sets forth that you cannot communicate "specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that the case results depend upon a variety of factors unique to each case; and (iii) further states the case results do not guarantee or predict a similar result in any future case undertaken by the lawyer." You cannot just write, "I got $5 million for a client in a tractor-trailer case" without the caveat that each case is different and that results depend upon the facts. Additionally, the rule goes on to say that the disclaimer has to come *before* the communication of the case results which should mean directly before it, but might be interpreted by the state bar on the internet to mean that as long as

this disclaimer is on the first page of the results at the top it is "before" the result. Ethics Rule 7.1 also specifies some formatting details, like bold typeface and upper case letters in a size that is at least as large as the largest text used to describe the results. This rule is one of the more technical ones related to advertising and communication in that you have to follow all the particulars including color and font as set forth.

Most importantly however, you cannot be misleading to the public about case results. So simply saying "millions of dollars obtained for clients" is inappropriate because there is no context. Additionally a statement of a past result could be misleading if it omits key facts like that the big verdict was uncollectible or that the verdict was overturned on appeal. It never ceases to amaze me how many attorneys seem to advertise specific and cumulative results in violation of this ethics rule.

There are other ways to make clear to clients and fellow lawyers that you know your way around a big file. One way is to have the designation of the Multi-Million Dollar Advocates Roundtable if you meet the criteria for that organization and are willing to pay their fees. Additionally the *Virginia Lawyers Weekly* section for trial reports is a great way to publicize big results.

11. BONUS BLUBBER – INTAKE (GETTING THE FRESH PRODUCT ON ICE)

Just like a fisherman needs to get his catch over the gunwhale, on to the deck and then flash freeze it, the personal injury attorney needs to make sure to immediately reel in the potential new customer after contact is made. This is only more urgent in the context of a really big case. Thus, intake or the process of answering the phone and handling potential new clients is probably among the most important things in completing the marketing process. You need to

make sure that your staff fully understands what the stakes are in identifying when someone calls with a new matter and distributing that call to the appropriate person as quickly as possible. If you do not help the customer immediately, they will go on to the next lawyer. Also, the keys to intake are easy to say but hard to master. The phone answering team needs to be prompt and welcoming to make sure to have the lead turn into a converted new case.

Just like in fishing, you may have to throw back some catch that you do not want in the process of finding the client that really fits the criteria for the near-perfect case. You need to handle each of those calls well to be sure not to miss the hidden keeper. Also, each of those callers you reject today could be in a catastrophic accident tomorrow. I suggest spending lots of time going over intake with your staff until the procedures are automatic.

An aspect of ethical intake answering has to do with the unauthorized practice of law. Make sure that your non-lawyers know not to give legal advice nor to appear to do so. Even basic concepts like contributory negligence and issues about insurance law in Virginia, which your paralegal may know just as well as you do, should be always couched in language such as "I am not an attorney but I believe that Mr. Cooper would say that...but I would need to ask him."

The callers that you politely turn down can be added to your newsletter database after you get their consent. That way you maximize the benefit of having gotten the person to contact you even if you are not able to help them with that particular matter that day. All rejections should be confirmed in writing in some form of a non-representation letter which also serves the ethical purpose of clarifying that you do not have a misunderstanding with someone where they mistakenly think that you have agreed to take their case when you have not.

CONCLUSION

The approach I have for trying to get big cases is an "all of the above" approach. I think marketing today requires as much creativity and effort as an attorney is willing to bring to the job. You need everything from the newest website technologies to the oldest personal touches of a firm handshake and handwritten letters. The attorneys who systematically work on marketing are in a favorable position to keep a stream of catastrophic cases coming their way. Once you are able to successfully conclude a number of large cases, getting the next one seems easier. However, like sharks, we must constantly keep moving forward or our practices may die.

Appendix-A

Ethics Rules Referenced in Order of Appearance

(Full version of the rules with comments below)

Rule 1.3: Diligence
Page 2

Client-Lawyer Relationship

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Client-Lawyer Relationship

Rule 1.3 Diligence - Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each

client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Rule 7.4: Communication of Fields of Practice & Specialization
Page 3

Information About Legal Services

Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

Information About Legal Services

Rule 7.4 Communication Of Fields Of Practice - Comment

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify

lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Rule 7.1: Communication Concerning a Lawyer's Services
Page 4, 12, 14

Information About Legal Services

Rule 7.1 Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Information About Legal Services

Rule 7.1 Communications Concerning A Lawyer's Services – Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.3: Direct Contact with Prospective Clients
Page 6, 8, 9

Information About Legal Services
Rule 7.3 Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Information About Legal Services
Rule 7.3 Solicitation of Clients - Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, 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 a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular,

communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person's judgment.

[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

Rule 1.5: Fees
Page 7

Client-Lawyer Relationship

Rule 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Client-Lawyer Relationship
Rule 1.5 Fees - Comment
Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by

charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Rule 1.6: Confidentiality of Information
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Client-Lawyer Relationship

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

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

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Client-Lawyer Relationship

Rule 1.6 Confidentiality Of Information - Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the

client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure

should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require

disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client 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, information relating to the representation of a client does not constitute a violation of paragraph (c) 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 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). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, 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 these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Rule 1.1: Competence

Client-Lawyer Relationship

Rule 1.1 Competence

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

Client-Lawyer Relationship

Rule 1.1 Competence - Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] 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.

Rule 3.6: Trial Publicity
Page 13

Advocate

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), 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.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Advocate

Rule 3.6 Trial Publicity - Comment

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and

the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive

statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

MODERN LEGAL MARKETING:
COLORING INSIDE THE ETHICAL LINES

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Section I.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 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 2012 annual State of AmLaw 200 Blogosphere reported that 78% of the 200 largest law firms in the United States were blogging.[1] This is up from 19.5% in August, 2007 when the first LexBlog report was released. 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.	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.

[1] http://amlaw200.lexblog.com

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 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.[2] Currently, LinkedIn has more than 380 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

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

cautious using Facebook or other networking sites in a personal capacity or as a marketing or professional platform.

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 April, 2015, there were 72.8 million unique 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: See 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.

...

(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.[3] 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."

►Relation to Other Rules:

When communicating online, whether informally and friendly or after appropriate

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

disclosures, attorneys must follow Virginia Rules 4.2 and 4.3 for dealing with those represented by counsel or with unrepresented persons.

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.

Section III: Marketing

► **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.

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."

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 and 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. See 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. See 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."

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 Emmons, Williams, Mires, and Lech v. State Bar of California, 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 Emmons 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.

BEST ANSWERS: (1) The rules will apply in full force to your website based on the content of the communications but not necessarily the medium of them; **(2)** 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.

Question 2

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.

BEST ANSWER (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.

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) PROBABLY NOT; (2) MAYBE.

HYPOTHETICAL 4: SOCIAL MEDIA AND 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 heightened First Amendment protection. 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.

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 - 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 (adopted by the Supreme Court of Virginia on July 1, 2011)

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.)

Lawyers risk creating an 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.

Whether an attorney-client relationship exists is a question of law and may be implied. 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.

BEST ANSWERS: (1) PROBABLY NOT; (2) PROBABLY NOT

JOHN M. COOPER Biographical Notes

John M. Cooper is a founding partner at Cooper Hurley Injury Lawyers which has client meeting locations throughout Hampton Roads, including in Virginia Beach. John practices in all areas of personal injury for plaintiffs only, with an emphasis on automobile accidents, trucking litigation, and premises liability. Mr. Cooper earned his B.A. in Anthropology from the University of California at Berkeley (1985)where he was inducted in to the Phi Beta Kappa academic honor society. John earned his J.D. from the University of Virginia, School of Law (1988). He was law clerk to The Honorable Rebecca Smith, U.S. District Court, Eastern District of Virginia, Norfolk Division. Mr. Cooper is licensed in Virginia, North Carolina and West Virginia. He has been re-elected for three terms as a District Governor for the Virginia Beach and Norfolk area to the Board of the Virginia Trial Lawyers Association. John was born and raised in the Norfolk/Virginia Beach area and has been a member of the Virginia Beach Bar Association since 1989.

JAMES G. HURLEY, JR. Biographical Blurb

James G. Hurley, Jr. is a founding parent at Cooper Hurley Injury Lawyers whose main office is in Norfolk, Virginia with client meeting locations throughout Hampton Roads. Jim practices in all areas of personal injury for plaintiffs only, with an emphasis on car, motorcycle and truck accidents. Jim earned his B.A. from the University of Arizona (1982) and his J.D. from Thomas M. Cooley Law School (1990) in Michigan. Mr. Hurley is licensed in Virginia and Florida. Jim was born and raised in Buffalo, New York and has been a member of the Virginia Beach Bar Association since 2010.

Biography

Kellam T. Parks is a managing member of Parks Zeigler, PLLC in Virginia Beach, which is a paperless, technologically-driven law practice. He is co-chair of the Technology and the Practice of Law Special Committee of the Virginia State Bar and frequently writes and speaks on the topic of the use of technology in the practice of law.

Kellam focuses his practice on Credit Reporting, Personal Injury, and Domestic Relations matters.

JUDGE LOUIS SHERMAN BIOGRAPHY

The Honorable Louis A. Sherman served as a judge of the Norfolk General District Court and the Norfolk Circuit Court from 1995 through 2012. Previously he was a partner in the Norfolk law firm of Gould & Sherman. He previously served as a staff attorney at Neighborhood Legal Aid Society in Richmond and then as Executive Director of Tidewater Legal Aid Society (now Eastern Virginia Legal Aid Society). Judge Sherman graduated with a J.D. degree from the University of Virginia School of law in 1971, and then served as a law clerk for The Honorable Joseph H. Young of the United States District Court for the District of Maryland. He currently serves as a retired/recalled judge for the Supreme Court of Virginia and provides mediation services through Juridical Solutions. He is married to Carol Sherman.