**George Mason University School of Law**
**14TH ANNUAL ETHICS UPDATE**
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Fulfilling Client Needs and Ethical Responsibilities in the Digital Age

1. Introduction (2 minutes)

   My name is Ryan Brown, and I would like to welcome you to the 14th Annual Ethics Presentation. As you may already know, as of November 1, 2011, the MCLE board changed the MCLE Requirement to 12 CLE hours including 2 hours in ethics/professionalism and 4 hours from live, interactive programs by October 31, 2012. The new regulations recognize the advantages of modern technology in continuing legal education while balancing the benefits of professional interaction, which is on par with the theme of today's presentation.[1]

   First, I would like to thank Professor Emeritus John L. Costello for starting this CLE series, for inviting me to get involved several years ago, and for entrusting its continuation to me. I would also like to thank Dana Fallon, Direct of Alumni Services, for her tireless efforts coordinating the event. Finally, I would like to thank my interns, Jana Seidl, Kristen Petrillo, and Chris Carter, all second year students here at GMU Law, for their work in transforming my notes into a coherent presentation today.

2. Brief overview of current cyber privacy and security issues (10 minutes)
   *Rules 1.1, 1.3, 1.4 and 1.6*

   Each year, attorneys and law firms are faced with the challenge of keeping up to date with the multitude of changes and advances in technology, and how those changes will affect not only their day-to-day business operations, but also their duties to and interactions with prospective and existing clients. In this year's CLE Ethics presentation, I will be addressing some of those technological changes, and discussing not only your ongoing ethical duties to your clients, but also how to remain professional and successful in light of the changes. I would like to begin by mentioning some of the things that will affect both your clients and your business in the coming year:

[1] *See* Virginia State Bar, FAQs about the 2012 MCLE Regulation Changes, *available at* http://www.vsb.org/site/members/faqs-2012-mcle-reg-changes.

a. Smartphone applications storing and/or accessing user's private data
Last year I briefly touched upon this subject in connection to Twitter, Google, Facebook, and the like. These companies have in the past admitted to accessing, copying, and even storing their users' personal data such as their address books. [2] With technological advances such as the recent iPhone 5s reliance on biometric data instead of a usual password, consumer's privacy is brought to the forefront of news more frequently. For example, Senator Al Franken, chairman of the Senate Judiciary Subcommittee on Privacy, Technology, and the Law, has drawn attention to the potential privacy implications of Apple storing a user's fingerprint and using it to unlock the user's phone.[3] What is troubling is that some executives acknowledge that there are always ways to reverse engineer technology products to access supposedly protected or deleted files such as Snapchat pictures and video but have not aggressively responded to enact security measures.[4] In fact, a study carried out by scientists on Google Play store's most popular applications showed that almost 8% of the 13,500 Android applications tested did not adequately protect bank account and social media login credentials.[5]

b. Jurors are increasingly using smartphones to conduct their own research during trials.
More and more, when jurors have questions during the course of a trial, they feel compelled to search for answers on Google from their smart phones. As a result, judges and attorneys have to provide more than one or two warnings not to consult outside sources during courtroom proceedings. While often jurors search Google to obtain answers in good faith, such conduct can result in a mistrial, contempt, fines, or even jail time.[6] Courts have also caught jurors communicating with either each other or other members of the court through social media during the trial. Because the verdicts of these trials could obviously be influenced by these communications, judges and lawyers have been instructing the jurors to turn off their cell phones and other electronic devices during the trials, and keeping that subject out of their internet correspondences.[7]

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[2] *See Google Fined Over Illegal WiFi Data Capture in Germany*, BBC NEWS (Apr. 22, 2013), available at http://www.bbc.co.uk/news/technology-22252506; *Whatsapp Rebuked Over Stored Contacts Privacy Policy*, BBC NEWS (Jan. 29, 2013).
[3] *See Apple Fingerprint Tech Raises "Privacy Questions,"* BBC NEWS (Sept. 20, 2013) available at http://www.bbc.co.uk/news/technology-24177851.
[4] *See Bug Reveals Deleted Snapchat Videos*, BBC NEWS (Dec. 28, 2012).
[5] *Android Apps "Leak" Personal Details*, BBC NEWS (Oct. 22, 2012).
[6] *See* Deborah Elkins, It's just Google! Keeping offline to stay in line, Virginia Lawyers Weekly, 5/18/2012.
[7] David Aaronson and Sydney Patterson, *Modernizing Jury Instructions in the Age of Social Media,* Digital Commons @ American University Washington College of Law

c. Technology Has Allowed New Forms of Bullying or Cyberstalking
Technology has allowed greater access to victims and witnesses of crimes. Smartphone applications designed to run in the background, impervious to the phone's user, can be utilized to stalk and exert control over victims and witnesses.[8]

d. Hackers are now targeting law firms.
Last year, I discussed cyber security and how the government is dealing with cyber attacks on RSA, Lockheed Martin, and Google. Recently, hackers became serious threats to the security of millions of Americans. Firms are not the only targets, the CIA was hacked earlier this year resulting in their website going offline.[9] These hacking threats reach to large law firms as well, not just to the government. Very recently and very close to home, a Virginia- based military law firm suffered an attack and lost its entire store of emails.[10] Another law firm, located in Texas, was hacked and had confidential emails posted on YouTube.[11]

e. Law enforcement officials are increasingly using technology to find and monitor suspects.
More and more, law enforcement officials have been trying to use technology and various social media to track, find and monitor criminal suspects. For example, recently, a New York court requested that Twitter release information on one of its users who was active in the Occupy Wall Street movement last year. The controversy centers around whether Twitter or the user actually "owns" the content of the user's tweets, and civil rights groups have argued that allowing law enforcement to access such data infringes upon users' privacy.[12]

3. Cyber security / privacy, social media and electronic evidence and how it applies to the practice of law (40 minutes)

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(2013) available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1233&context=facsch_lawrev.

[8] Richard Lardner, *Senate Goes After Secret Cyberstalking Apps*, ASSOCIATED PRESS (Dec. 13, 2012).

[9] *See* Anonymous says attack put CIA website offline, BBC News, 2/10/2012.

[10] *See Law Firms Need to Rethink How They Protect Confidential Digital,* Firmex Blog (March 5, 2012) available at http://www.firmex.com/blog/law-firms-need-to-rethink-how-they-protect-confidential-digital-assets/.

[11] *See* Martha Neil, Law Firm, Police Hit By Hack Attacks; Lawyer Cell Phone Records Reportedly Accessed, American Bar Association, 2/6/2012.

[12] *See* Twitter resists U.S. court's demand for Occupy tweets, BBC News, 5/9/2012.

a. The ethical rules of virtual offices, lawyer advertisements, and blog and social media posts by attorneys
*Rules 1.4, 1.6, 1.7, 1.9, and 7.1 – 7.6*

i. Rule 1.6: Confidentiality
"(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 be likely to 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…"

ii. Rule 7.1: Communications Concerning A Lawyer's Services
"(a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication **if such communication contains a false, fraudulent, misleading, or deceptive statement or claim**…"

a. LinkedIn Endorsements Issues Under rule 7.1: There are ethical concerns with third parties with no personal knowledge of the lawyer in question endorsing them for specific skills. This endorsement could then be seen as the lawyer communicating false accounts of his or herself to all LinkedIn members who then view the profile. However it should be noted that one can hide all endorsements. [13] Recently, New York ruled in an ethics opinion that only certified lawyers could list their endorsements as specialties and also that law firms could not list certifications.[14]

iii. Rule 7.2: Advertising
"(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through **written, recorded, or electronic communications, including public media**. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein…
"(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that **a lawyer may**:

[13] Rachel M. Zahorsky, *Do LinkedIn Endorsements Violate Legal Ethics Rules?,* ABA Journal, May 21, 2013, available at http://www.abajournal.com/news/article/do_linkedin_endorsements_violate_legal_ethics.
[14] Debra Cassens Weiss, Law Firms Can't Describe Specialties on LinkedIn New York Ethics Opinion Says, ABA Journal, August 16, 2013 available at http://www.abajournal.com/news/article/law_firms_cant_describe_specialties_on_linkedin_new_york_ethics_opinion_say.

"(1) **pay the reasonable costs of advertisements or communications permitted by this Rule**…

"(e) Advertising made pursuant to this Rule shall include the full name and office address of an attorney licensed to practice in Virginia who is responsible for its content or, in the alternative, a law firm may file with the Virginia State Bar a current written statement identifying the responsible attorney for the law firm's advertising and its office address, and the firm shall promptly notify the Virginia State Bar in writing of any change in status."

a. Recently there have been decisions on the permissible advertisements and coupons that can be utilized by attorneys when attempting to gain more business. The ABA issued Resolution 105B which outlined the permissible online solicitations. Along with regulations about giving a potential client a list of warnings before asking about circumstances of their claim, the resolution outlined what lead generation services lawyers are permitted to utilize online. These included Legal Match, Groupon, Total Attorneys and Martindale- Hubbell's Lawyers.com.[15]

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

"(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that **the lawyer may pay for public communications permitted by Rule 7.1 and 7.2** and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rule 7.1 and 7.2, as appropriate."

v. Virtual Offices: Concerns and Best Practices.

1. What is a virtual office[16]? A virtual office is one that provides legal services to clients entirely online. A firm or business, such as LegalZoom, which handles its clients' legal matters through a secure online portal is said to be a

[15] Debra Cassens Weiss, *Online Marketing, Including Lead Generation, Is Addressed in Changes to ABA Ethics Rules*, ABA Journal, (August 6, 2012) available at http://www.abajournal.com/news/article/online_marketing_including_lead_generation_is_addressed/.

[16] Wendy Inge, Virtual Law Office: What is it?, ALPS 411 Blog (August 24, 2012), http://www.alps411.com/blog/wendy-inges-blog/virtual-law-office-what-is-it

VLO or virtual law office. VLOs do not include lawyers who work from home and just simply do not have an office. VLOs often provide "unbundled" legal services, which are simply limited legal services that come with a wide variety of ethical issues.

2. Accepting credit cards and passing on transaction fees.[17] Recently, commercial vendors have been able to pass the credit card fee on to their consumers by simply raising their prices. However, lawyers face ethic issues when considering whether or not this is the appropriate way to charge their clients. There are two sets of opinions; one advices lawyers to not nickel and dime their consumers but rather to charge a reasonable overall fee, whereas the other asserts that if the client is being charged the fee, they must be warned of the fact prior to their payment. This latter side condones the practice of including such a notice in your engagement letters and even having the client sign the margin of that particular section. In Virginia, according to LEO 1848, a lawyer is allowed to pass on fees from credit card swipes to their clients as long as they are altered to the fee, and consent in writing. Typically this consent would be part of the attorney's engagement letter.
3. Rules for allowing employees to use personal computers, tablets and smartphones
    a. Some firms allow employees access to social networking sites, recognizing their value as marketing resources.[18] Some managers have held meetings on the appropriate privacy settings and protocol surrounding the use of social media in the workplace in order to forestall employees accidently revealing confidential information. The social media movement is so powerful, that banning it completely may not be a viable solution.
    b. Other firms choose to ban access to social media sites, viewing them as unproductive and potentially risky. [19] Some lawyers' use of technology at work might justify this view, as one Kentucy lawyer has

[17]Correy E. Stephenson, *Accept the Plastic, but Forget the Fee*, VA Lawyers Weekly (August 30, 2012) (citing LEO 1848 (2009), which approved VA lawyers passing merchant fees along to clients as long as the processing fee is explained to the client).
[18] Martha Newman, *Social Media at the Law Firm—Embrace it or Ban it?,* Top Lawyer Coach (2013).
[19] *Id.*

recently demonstrated. [20] Matthew Finley was disciplined for using his personal computer during his break to answer questions on JustAnswer.com for extra money. He also used the government agency's subscription to Westlaw to answer these questions, so this issue may not have been entirely about his use of the personal computer and more about his use of the subscription.

vi. Lawyer Advertisement Rules
    1. Rule 3.5 Impartiality And Decorum Of The Tribunal A lawyer shall not:
       (a) **seek to influence a judge, juror, prospective juror or other official by means prohibited by law**
       (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
       (c) communicate with a juror or prospective juror after discharge of the jury if:(1) the communication is prohibited by law or court order;(2) the juror has made known to the lawyer a desire not to communicate; or(3) the communication involves misrepresentation, coercion, duress or harassment; or
       (d) engage in conduct intended to disrupt a tribunal
    2. Rules regarding deceptive social media advertising
        a. Posts concerning division of settlement in class-action case might get you fined extensively, as one Michigan lawyer found out.[21] When Majed Moughni posted a copy of a settlement in a class action suit against McDonald's he was asked to take it down and provide the court with all the contact information of those who had liked his post. Also his post on his own community page about the settlement, Judge Kathleen Macdonald called his post "abusive conduct" that would influence the members of the community.

vii. Attorneys and Social Media Sites
    1. Social media becoming more commonplace in the legal field, for instance, a U.S. Attorney's office, Tim Heaply has embraced Twitter and Facebook to publish news releases about cases and communicate with the community. [22]

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[20] Martha Neil, *Lawyer Disciplined for Using Personal Laptop at Work to Earn Extra Bucks from JustAnswer.com* , ABA Journal (October 1, 2012).
[21] Martha Neil, *Lawyer Ordered to Delete Facebook Posts Involving McDonald's Settlement*, ABA Journal (February 13, 2013).
[22] "U.S. Attorney Adopts Social Media", The VLW Blog (August 20, 2012).

2. 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).

   a. LinkedIn: There do exist some networking risks, however. The connections or ‘links’ you make with individuals on LinkedIn should be made with caution. [23] If you are unsure about the person you should always do background research of their profile and online presence. If you still are not sure simply ask for an email explaining how they know

[23] Social Media: To Link or Not to Link – VA Lawyers Weekly.pdf

you. If the person does not respond, that is a bad sign and you should probably not expose yourself or your current connections to them.

b. Best practices for online posts[24]
For starters, while posting online a lawyer should take care to be very mindful about the rules regarding speaking about pending cases, when a client- attorney relationship begins, recommendations, and commenting on your clients. Specifically, the ABA amended the Ethics Policies and added to several sections. In Rule 1.1 they added that lawyers should stay on top of certain technological changes in the practice of law. In Rule 1.4 concerning communication, lawyers are now required to return client calls in any electronic means. The rule for the confidentiality of information was amended to lessen the standard and demanded only that the attorney take reasonable precautions. Rule 4.4 requires that the attorney respond promptly to the sender of inadvertent information if they should reasonably know that it was a mistake. In addition to being cautious, you may wish to use social networking to advertise. You should keep in mind on Twitter at least, that you potential clients are reading a ton of information. You must make it readily accessible, interesting and more than just a simple one line endorsement.

3. Blog posts
    a. The use of "ghost bloggers" could be considered deceit or dishonesty under the Rules of Professional Conduct.[25] If you do hire a ghost blogger to upload posts intended to draw business, you should at minimum announce the fact that the blog writing it not your own. You also may wish to consider if putting these writings out into the cyber world do a disservice to your potential customer by initiating a relationship based on trust with a representation that is not your own.

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[24] Paul Fletcher, *How to Stay Ethical on Social Media*, Publisher's Notebook (August 8, 2012); Sean Doherty, *ABA Adopts Ethics Policy on Lawyers' Use of Technology* (August 8, 2012); Sarah Rodriguez, *Look before you Tweet: Some best practices for Twitter*, VA Lawyers Weekly (September 6, 2012).

[25] *Lawyers cautioned: No hiding behind ghost bloggers*, The VLW Blog (August 8, 2013).

b. Lawyers' blog posts can open them up to ethics complaints.[26] When a Chicago patent and trademark lawyer was disqualified by the court when she attempted to represent her client and the client's mother. She later blogged that the court was corrupt and "sleazy." The court charged her with an ethics complaint and claimed that her comment undermined the administration of justice.

4. Social networking
   a. 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;(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;(d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
   b. Lawyers personal posts on social media sites can open them up to liability for defamation.[27] When a lawyer in Virginia Beach posted about a competitor jesting about how bad a lawyer the competitor was, the competitor filed a defamation suit against him. The attorney claimed that the post was only in jest, however, the competing attorney claims that the statement hurt his reputation.

b. Social Media and Electronic Evidence
   i. Jury Instructions on Social Media:
      As alluded to last year, jurors are increasingly using smartphones to conduct their own research during trials. More and more, when jurors have questions during the course of a trial, they feel compelled to search for answers on Google from their smart phones. As a result, judges and attorneys have to provide more

[26] Debra Cassens Weiss, *Lawyer's blog posts about 'sleazy world of probate' bring ethics complaints* , ABA Journal (February 4, 2013).
[27] *Lawyer's Facebook post leads to defamation suit*, The VLW Blog (July 5, 2013).

than one or two warnings not to consult outside sources during courtroom proceedings. While often jurors search Google to obtain answers in good faith, such conduct can result in a mistrial, contempt, fines, or even jail time.[28] This trend of jurors turning to social media and popular search engines for information has prompted many jurisdictions to introduce new jury instructions. There are now some new rules concerning when jurors can go online during a trial. These rules generally require the juror to be completely unplugged during a trial.[29] They also sometimes require the fellow jurors to report the misconduct of their peers to the court. [30]

*Rules 3.3, 3.4, 3.5, 3.6 & 8.4*

ii. Issues with Judges and Social Media[31]

1. Rule 7.6: *Political Contributions To Obtain Legal Engagements Or Appointments By Judges*
   A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.
2. A recent ABA Ethics Opinion has cautioned judges to be judicious if they participate in electronic social media (ESM). While using ESM a judge should always keep in mind the ABA Model Code of Judicial Conduct. They should know that any connections they make or information they post may be made public and might indicate impropriety if the ESM is not used properly. If they make a connection with any witnesses, jury members or lawyers participating in a case they should consider whether or not that needs to be disclosed. In some cases the judge should even recluse him or herself. Judges should also refrain from making connections with groups or individuals that may be seen as asserting undue influence on their decisions. Making contacts with political groups

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[28] *See* Deborah Elkins, It's just Google! Keeping offline to stay in line, Virginia Lawyers Weekly, 5/18/2012.

[29] NPR Staff, *For Modern Jurors, Being on a Case Means Being Offline*, NPR All Tech Considered (June 24th, 2013) available at http://www.npr.org/blogs/alltechconsidered/2013/06/24/195172476/JURORS-AND-SOCIAL-MEDIA?sc=17&f=1001

[30] Martha Neil, *New Model Jury Instructions Tell Jurors to Turn in Others Who Flout Social Media Ban*, ABA Journal-Trails and Litigation (Aug. 23, 2013).

[31] Debra Cassens Weiss, *Should judges disclose Facebook friends*?, ABA Journal (February 26, 2013).

should also be avoided, including even pressing the like button on a post. Information on the judge's personal page should be filtered by him or her for material that may be embarrassing in the future and undermine the public confidence in their opinions.
*Rules 1.12, 3.5, 7.6*

iii. Social Media as Evidence

i. When social media is requested as evidence the production of ESI under Virginia Rule 4:8 requires that ESI must "be made available in a reasonably usable form or forms"[32] Virginia Rule 4:9 mirrors provisions found in FRCP 34; also allows for requests from non-parties through a subpoena duces tecum.[33] Also, according to the District Court for the Southern District of New York, the federal government must include metadata in FOIA productions, as "certain key metadata fields are an integral part of public records."[34] Judge Scheindlin found that a simple key-word search was not enough to satisfy the FOIA, and that the government had to conduct searches that were adequate and then log the details of their efforts with "reasonable specificity."

1. Social Media in Trials:

ii. Emails and Facebook posts can all be used as evidence. When a school official used his computer to email his wife, the spousal correspondence exception to discovery was waived.[35] He was convicted of federal bribery and extortion and has appealed this ruling on the basis that those emails should not have been allowed as evidence. However, when sending emails always remember that they could be used as evidence and filter accordingly.

Also be wary when posting on Facebook or dating profiles. The American Academy of Matrimonial

[32] "What are the Virginia Discovery Rules Regarding Electronically Stored Information?", Virginia CLE Memo (2013) *available at* www.magnetmail.net/actions/email_web_version.cfm?recipient_id=740354459&message_id=2842290&user_id=VACLE&group_id=1086338&jobid=14602527.

[33] "Web Marketing and Social Media Usage — Test Your Knowledge of Ethical *Do*s and *Don't*s.", Virginia CLE, http://www.vacle.org/pub_didyouknow-pg154.aspx

[34] Ralph Losey, *New Opinion by Judge Scheindlin on FOIA, Metadata, and Cooperation* (February 7, 2011).

[35] Todd Allen Wilson, *Emails focus of Hamilton's appeal to bribery, extortion conviction*, Dailypress.com (October 25, 2012).

Lawyers issued a press statement recently warning that lying on a dating site can be costly during a divorce. If you say you are single with no kids when you are still technically married with children, the evidence against you in court can look negative.[36] A mother who killed her daughter by shaking her, led the police to her brother who eventually pleaded guilty and spent time in jail. Two years later the mother admitted to the murder on Facebook and authorities arrested her.[37]

Even your Smartphone data (incl. voicemail, call logs, contacts, downloaded documents, information stored by applications, photos, GPS information) can be used as evidence.[38] Since smartphones can now store documents, GPS locators and other media, the DOJ and others have been moving towards demanding more and more of this information during discovery.

4. 2012 – 2013 Virginia Legal Ethics Opinions (25 minutes)

   a. **LEO 1865:** Obligations of a Lawyer in Handling Settlement Funds When a Third Party Claim or Lien is Asserted[39]

      i. Rule 1.15(b): The LEO advises that the applicable rule in such a scenario is 1.15(b), which requires a lawyer to:

         "(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;
         (2) identify and label securities and properties of a client, or those held by a lawyer as a fiduciary, promptly upon receipt;
         (3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them;
         **(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other**

[36] Martha Neil, *Lying in an online dating profile could be costly in a divorce*, ABA Journal (February 12, 2013).
[37] Sarah Hutchins, *Mother to serve 15 years for child abuse, death*, PilotOnline.com (January 9, 2013).
[38] Correy E. Stephenson, *Smartphone Data More Important in Litigation*, VA Lawyers Weekly (July 24, 2012).
[39] Virginia Bar LEO 1865.

**properties in the possession of the lawyer that such person is entitled to receive; and**
**(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.**"

The Committee also turns to comment 4 to Rule 1.15(b) to answer two main questions.

ii. When is a Third Party Entitled to Funds Held by a Lawyer?
    a. "Although Rule 1.15 (b) does not make the third party a "client" of the lawyer, the lawyer's duty with respect to funds to which the third party is entitled is the same as if the person were a client."
    b. When the claim is in dispute the lawyer must be careful not to unilaterally arbitrate

iii. Does Rule 1.15(b) Require that the Lawyer Have Actual Knowledge of a Third Party's Lien or Claim to the Funds Held by the Lawyer?
    a. Opinions indicate that the lawyer must have **actual knowledge** of the third party's **lawful** interest in funds held by the lawyer – this would give the attorney a duty to secure any funds he or she maybe holding for the client that are claimed by the third party
    b. **In some situations under federal and state law it is sufficient that the lawyer have knowledge that the client received services**, e.g., medical treatment. (The effect of such state and federal law is beyond the scope of the LEO and the attorney must understand the law him or herself and how it applies.)

The lawyer has options such as specifying in an engagement letter how the funds would be handled in such a situation (e.g., stipulating that "medical liens will be protected and paid out of the settlement proceeds or recovery") or holding the funds in trust for a reasonable amount of time or interpleading the funds into court.

Comment [4]: Paragraphs (b)(4) and (b)(5) do not impose an obligation upon the lawyer to protect funds on behalf of the client's general creditors who have no valid claim to an interest in the specific funds or property in the lawyer's possession. However, a lawyer may be in possession of property or funds claimed both by the lawyer's client and a third person; for example, a previous lawyer of the client claiming a lien on the client's recovery or a person claiming that the property deposited with the lawyer was taken or withheld unlawfully from that person. Additionally**, a lawyer**

**may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client**. For example, if a lawyer has actual knowledge of a third party's lawful claim to an interest in the specific funds held on behalf of a client, then by virtue of a statutory lien (e.g., medical, workers' compensation, attorneys' lien, a valid assignment executed by the client, or a lien on the subject property created by a recorded deed of trust) the lawyer has a duty to secure the funds claimed by the third party. Under the above described circumstances, paragraphs (b)(4) and (b)(5) require the lawyer either to deliver the funds or property to the third party or, if a dispute to the third party's claim exists, to safeguard the contested property or funds until the dispute is resolved. If the client has a non-frivolous dispute with the third party's claim, then the lawyer cannot release those funds without the agreement of all parties involved or a court determination of who is entitled to receive them, such as an interpleader action. **A lawyer does not violate paragraphs (b)(4) and (b)(5) if he has acted reasonably and in good faith to determine the validity of a third-party's claim or lien.**

b. **LEO 1867:** Is it ethical for a prosecutor to enter into an agreement with a criminal defendant to dismiss criminal charges in exchange for the defendant's release of any civil claims arising out of the defendant's arrest, prosecution, and/or conviction?[40]

   i. Rule 3.4(i) Fairness to Opposing Party and Counsel: an attorney **cannot:**
   **(i) present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.**

   (So an attorney cannot coerce a defendant; there must be probable cause to maintain the charges)

   ii. Rule 3.8(a) Additional Responsibilities of a Prosecutor: a lawyer engaged in a prosecutorial function **shall:**
   **1. not file or maintain a charge that the prosecutor knows is not supported by probable cause.**

   iii. "A release-dismissal agreement is an agreement between a prosecutor and a criminal defendant to dismiss criminal charges in return for a release of some entity from civil liability" – The Supreme Court found such an agreement valid in *Town of Newton v. Rumery*, 480 U.S. 386 (1987). The Committee notes that while there is no reason to put a per se ban on these release-dismissal

[40] Virginia Bar LEO 1867.

agreements, these types of agreements will be subject to intense scrutiny both legally and ethically.

c. **LEO 1869:** Assisting Pro Se Litigants – Courthouse Assistance Program[41]
   i. There has been such an increase in the amount of litigants representing themselves that lawyers are discussing ethics ways in which to represent these individuals in a limited aspect.
   ii. Rule 1.2(b) allows for a lawyer to limit the objectives of the legal representation.
      1. Comment six to that rule states that the lawyer's services to the client may be limited with an agreement or by the terms the services was provided by.
   ii. Rule 6.5: Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation**. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation**. See, e.g., Rules 1.7, 1.9 and 1.10.
   iii. Lawyers can still get into trouble if they represent adverse parties under Rule 1.9(a). Ex: A lawyer may not represent the mother and the father in the same custody hearing.
   iv. If the facilitator is a paralegal and not a lawyer then there are additional functions the paralegal cannot perform. *See* LEO 1792, Rule 5.5(c).
   v. The lawyer should also consider having the marginally-represented individuals sign a waiver acknowledging the extent of their representation. It should make clear the following:
      (1) the scope of the representation is limited to that provided in the session or center
      (2) the relationship does not continue after the session or center assistance is concluded and
      (3) the pro se litigant should obtain further assistance if needed from another lawyer outside the center or session.

[41] Virginia Bar LEO 1869.

d. **LEO 1871 (replaces LEO 1702 to some extent)**: What are a lawyer's ethical obligations upon inadvertently receiving privileged information during the pre-trial discovery phase of litigation?[42]

i. In the past, i.e., from 1997 onwards, the lawyer's duty was clear to send the privileged information back or follow the sender's instructions about what to do with it. The attorney was ethically foreclosed from using it to help his or her client. The requirements were laid out in Legal Ethics Opinion 1702.

ii. Supreme Court of Virginia Rule 4.1(b)(6)(ii)
If a party believes that a document or electronically stored information that has already been produced is privileged or its confidentiality is otherwise protected **the producing party may notify any other party of such claim and the basis for the claimed privilege or protection. Upon receiving such notice, any party holding a copy of the designated material shall sequester or destroy its copies thereof, and shall not duplicate or disseminate such material pending disposition of the claim of privilege or protection by agreement, or upon motion by any party.** If a receiving party has disclosed the information before being notified of the claim of privilege or other protection, that party must **take reasonable steps to retrieve the designated material.** The producing party must preserve the information until the claim of privilege or other protection is resolved. See also Fed. R. Civ. P. 26(b)(5)(B).

**iii.** Rule of Professional Conduct 3.4: Fairness to Opposing Party and Counsel – A lawyer shall **not:**
**(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal** made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

iv. "There is no longer an obligation to send the stuff back to the Other Side, even if they ask for it," says the VSB's Standing Committee on Legal Ethics.

v. **The new approach under LEO 1871** is: A lawyer who receives confidential information by mistake during discovery:
**(1) may review it to determine his obligations,**
**(2) must notify the sender,**
**(3) is not ethically obligated to ship it back, and**

[42] Virginia Bar LEO 1871.

**(4) may sequester the information to see what the judge says about whether it can be used.**

Outside of the discovery process, the requirements of LEO 1702 still apply.

e. **LEO 1872:** Virtual Law Office and Use of Executive Office Suits[43]
   i. This LEO examines the ethics behind serving the client through purely electronic means.
   ii. Rule 1.6: Which requires that the lawyer act with "reasonable care" in protecting the client's confidential data means that although it might be more difficult to guarantee that the information stored electronically will not be compromised, it is still ethical to use electronic means to protect and store client data.
   iii. Another consideration lawyers must keep in mind when using a virtual office is the duty imposed by Rule 1.4 to explain legal matters fully so that the client is able to make an informed decision. However the duties of this rule imply more than a mere email to the client detailing out the legal matter. The lawyer must in some way insure that the client has received and understands his or her own legal issue.
   iv. The last issued raised by having a virtual office is the physical location that the lawyer or firm advertises as their "law office." Under Rule 7.1 the lawyer must take into consideration several factors before representing that an office space is his or her law office:
   (1) How often the space is used by that lawyer; and
   (2) How often it is used by other non-lawyers; and
   (3) The signage for the office.

   The lawyer specifically cannot use the office to give a perspective client the impression that the lawyer's legal practice is more geographically diverse than it is in reality. Also for lawyers admitted to the Virginia bar under a motion and not the bar exam should first determine whether or not the office arrangement complies with Regulation 7 before needing to consider the above.

f. **LEO 1875:** Conflict Issues when a Government Lawyer is Furloughed From Employment and Asked to Continue Representing the Agency[44]

   i. Rule of Professional Conduct 1.2(b): A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

[43] Virginia Bar LEO 1872.
[44] Virginia Bar LEO 1875.

ii. Rule of Professional Conduct 1.6(b)(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.

iii. Rule of Professional Conduct 1.7: (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

iv. Rule of Professional Conduct 1.9(a) & (c):
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

g. Of additional note is that **the VSB Panel withdrew two LEOs from the 1990s (1313 and 1339)** out of fear they might lead lawyers astray in matters involving powers of attorney.[45]

i. The issue was that the LEOs 1313 and 1399 assumed that a law firm hired to prepare a power of attorney is representing the attorney in fact that sought the service, which is not always the case.

ii. Since this was problematic as it defined the attorney client relationship (the holder of a power of attorney is not always the client) and the Committee found that such a definite statement is outside its purview, the Committee decided to withdraw the opinions as a "housekeeping matter."

h. Lawyer Discipline Appeals Summary: Legal Ethics Cases at the Supreme Court of Virginia.[46] A case in Virginia that caused many lawyers to wonder what they would have done in the same situation was the Zaug case, which reached the Supreme Court of Virginia. When the plaintiff of a case Heather Zaug was serving as defense counsel for contacted her. After an extremely short conversation, in which Zaug discovered it was the plaintiff on the line, Zaug told the plaintiff she could not speak with her. Once Zaug notified the opposing counsel, they filed a bar complaint against her. Although the bar settled for the lowest possible sentence, Zaug will still have to answer that she was disciplined on any questionnaire she fills out in the future. The take away from her situation is never answer phone calls yourself and have your assistant, paralegal or law clerk screen your calls.

5. 2012 – 2013 Adopted Virginia Rule Changes (5 minutes)
   a. Rules 7.1 – 7.5: Information About Legal Services; Advertising[47]
      i. The terms "fraudulent" and "deceptive" are removed from Rule 7.1. A communication that is "false or misleading" violates the rule.
      ii. The disclaimer required for advertising specific or cumulative case results has been removed from Rule 7.2—which has been eliminated in its entirety—and is now Rule 7.1(b). The disclaimer shall: (a) put the case results in a context that is not misleading; (b) state that case results depend upon a variety of factors unique to each case; and (c) further state that case results do not

[45] VSB Ethics Panel Scratches 2 LEOs, The VLW Blog (November 16, 2012).
[46] Paul Fletcher, *One Minute Phone Call Didn't Warrant Discipline,* Virginia Lawyer's Weekly (February 28, 2013).
[47] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/amendments-to-rules-7.1-7.5-041513

guarantee or predict a similar result in any future case undertaken by the lawyer.

iii. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results. Other than specific or cumulative case results, examples of statements or claims considered to be "false or misleading" have been taken out of Rule 7.1 and placed in the comments. Former subparagraphs (1)-(4) were deleted.

iv. Comment [1] to Rule 7.1 was substantially rewritten to describe the types of communications subject to regulation under Rule 7.1and to exclude other forms of non-commercial speech.

v. Rule 7.2 was eliminated in its entirety, although the specific and cumulative case results disclaimer requirement is now Rule 7.1(b) and provisions in Rule 7.2 regulating written solicitation and paying others to recommend a lawyer have been incorporated within Rule 7.3.

vi. Rule 7.3 addresses in-person and written solicitation of potential clients. The amendments to Rule 7.3 remove the current per se prohibition of in-person solicitation in personal injury and wrongful death cases.

vii. Effective July 1, 2013, in-person and written solicitation will be improper only if: (a) the potential client has made known to the lawyer a desire not to be solicited by the lawyer; or (b) the solicitation involves harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits.

viii. Rule 7.3 also regulates payment or rewards to persons for recommending employment, prohibiting a lawyer from giving anything of value to a referral source except that the lawyer may: (a) pay the reasonable costs of advertisements or communications permitted by this Rule and Rule 7.1; (b) pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service (note that the lawyer referral service must be a non-profit entity); (c) pay for a law practice in accordance with Rule 1.17; and (d) give nominal gifts of gratitude that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

ix. Rule 7.3's regulation of written solicitations has been simplified with regard to the "ADVERTISING MATERIAL" labeling requirement.

x. Rule 7.4 regulates claims of specialization and expertise and the current rule is substantially unchanged by the amendments.

xi. Rule 7.5 is substantially unchanged with the exception of a new **Comment [3] that states that lawyers should practice using the official name under which they are licensed or seek an appropriate and legal change of name from the Supreme Court of Virginia**. The lawyer's use of a name other than the lawyer's name on record with the Virginia State Bar may be a misleading communication about the lawyer's services to the public in violation of Rule 7.1.

b. Paragraph 13-16: Procedure for Disciplining, Suspending, and Disbarring Attorneys; District Committee Proceedings[48]

i. Reconsideration of a charge of misconduct that has been dismissed by the District Committee should be reconsidered only if a majority of the panel votes that material evidence was not presented or if there is a unanimous vote from the panel that heard the matter originally.

ii. No member of the Panel should vote that the matter should be reconsidered unless they think that reconsideration is necessary for the prevention of injustice.

c. Paragraph 13-6: Procedure for Disciplining, Suspending, and Disbarring Attorneys; Disciplinary Board[49]

i. This section details out how the Board will be chosen and who will serve on it. The Board will be 20 members, 16 lawyers, 4 nonlawyers. One attorney will be the chair, and two the vice chairs.

ii. Before nominating someone to the Board the members must determine that the potential member has served on the district committee, and that they are willing to serve on the Board. They shall get this in writing from the potential member.

iii. They shall also submit a waiver of their Disciplinary Record and any pending complaints, as well as an authorization for the Bar to conduct a check for any criminal history.

6. 2012 – 2013 Proposed Virginia Rule Changes (25 minutes)

a. Rule 1.11: Client-Lawyer Relationship; Special Conflicts of Interest for Former and Current Government Officers and Employees[50]

i. Allows for conflict to be waived by the consent of the private party being represented.

ii. This applies not only to situations where the lawyer is representing a client but also to situations where the lawyer is participating in any legal matter prior to him or her leaving the government.

[48] http://www.vsb.org/docs/SCV-order-re13-16DD-121412.pdf
[49] http://www.vsb.org/docs/13-6-SCV-order-041312.pdf
[50] http://www.vsb.org/docs/prop-1.11-1.15-5.4-062413.pdf

b. Rule 1.15: Client-Lawyer Relationship; Safekeeping Property[51]
    i. Money held by a lawyer for a client must be held in a trust account and other property placed in a safety deposit box.
c. Rule 5.4: Law Firms and Associations; Professional Independence of a Lawyer[52]
    i. Amends the rule to allow for a lawyer to practice with a law firm that has a nonlawyer serving as the corporate officer.
d. Comment 5 and 13 of Rule 5.5: Law Firms and Associations; Unauthorized Practice of Law; Multijurisdictional Practice of Law[53]
    a. This is an amendment to the comments: Stating that a law form may not hire a lawyer whose license has been suspended or revoked.
    b. A lawyer cannot practice in a jurisdiction where he or she does not satisfy the requirements of the bar.
    c. A foreign lawyer is allowed to practice law in Virginia in a very limited manner. (i) they cannot establish permanent offices to practice out of (ii) they cannot represent that they are licensed to practice in VA (iii) must give the party they represent notice that they are not licensed in VA, what area they are licensed in, and the address of that office where they practice out of
    d. Then that foreign lawyer may practice occasionally in VA
    e. **THE ACTUAL AMENDMENT to comment 13 removes the requirement that a foreign lawyer is only a lawyer from another country.**
e. Paragraph 13-13: Procedure for Disciplining, Suspending, and Disbarring Attorneys; Participation and Disqualification of Counsel[54]
    f. These procedural rules for representing lawyers in disciplinary hearings were amended to allow for more lawyer to take part by limiting the restrictions involving imputation of conflicts of interest.

7. Questions & Answers (15 minutes)

[51] http://www.vsb.org/docs/prop-1.11-1.15-5.4-062413.pdf
[52] http://www.vsb.org/docs/prop-1.11-1.15-5.4-062413.pdf
[53] http://www.vsb.org/docs/Rule5-5_proposal.pdf
[54] http://www.vsb.org/docs/prop-para13-13-062013.pdf