13TH ANNUAL ETHICS PRESENTATION
October 17, 2012
9:00am – 11:00am

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 13th 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]

2. Brief overview of current cyber privacy and security issues (10 minutes)

   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:

   a. Law firms' and attorneys' use of cloud computing for storing clients' data and documents.

      Cloud computing is different from traditional methods of storing clients' data and documents because it uses third parties to store information on servers that are not owned or operated by the attorney or firm. Recently, lawyers have questioned whether use of such services violates ethics rules requiring attorneys to take reasonable measures to make sure client information does not come into the hands of unintended recipients. Another concern is whether attorneys and firms will have uninterrupted access to the information as needed to meet their clients' needs while using cloud computing.[2]

   b. Google, social media, and smartphone applications storing users' personal data.

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[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.

[2] *See* Pat Murphy, Ethics panel approves lawyer's use of cloud computing, Lawyers USA Online, 11/4/2011.

Last year, I discussed trends in the use of social media and practice of law. Recently, news stories have surfaced that Google, social media companies, and various smartphone applications have been collecting and storing users' personal data without their knowledge. For instance, Twitter has admitted that its smartphone app has copied entire address books from users' phones and stored them on their servers. Facebook, FourSquare, Instagram, Foodspotting and Yelp have also reportedly accessed users' address books.[3] Google, who last year was facing criminal penalties for its "Street View" operations, is now combining user's data from all of their Google services to use in directing user-specific advertisements.[4]

Additionally, the European Union has recently enacted "Right to Be Forgotten" laws requiring social media companies like Facebook and Twitter to delete all user data at the user's request. Companies will be charged up to 2% of their global turnover for failure to comply with these laws.[5] We may see similar laws enacted in the U.S. in the future.

c. 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 are having 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]

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, hacking has become a serious threat to the security of millions of Americans. For instance, the CIA was hacked earlier this year resulting in their website going offline.[7] And hacking threats are not confined to just the government. Recently, two law firms were hacked. One law firm, located in Texas, was hacked and had confidential emails posted on YouTube.[8] Another Virginia-based law firm was hacked and had all of its emails wiped from the server. The firm believed the hackers were trying

[3] *See* Social apps 'harvest smartphone contacts,' BBC News, 2/15/2012.
[4] *See* Jim Calloway, Beware as Google peeks – legally – at your personal info, Virginia Lawyers Weekly, 2/15/2012.
[5] *See* Matt Warman, Digital 'right to be forgotten' will be made EU law, The Telegraph, 1/25/2012.
[6] *See* Deborah Elkins, It's just Google! Keeping offline to stay in line, Virginia Lawyers Weekly, 5/18/2012.
[7] *See* Anonymous says attack put CIA website offline, BBC News, 2/10/2a012.
[8] *See* Martha Neil, Law Firm, Police Hit By Hack Attacks; Lawyer Cell Phone Records Reportedly Accessed, American Bar Association, 2/6/2012.

to access information regarding a high-profile criminal defendant that it was representing.[9]

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.[10]

3. Cyber security / privacy and how it applies to the practice of law (40 minutes)
   a. The ethical rules and how they relate to your duties to your clients
      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…"

The leaders of the Department of Defense and the FBI have expressed concern over the increasing number of cyberattacks, and have claimed that, in the not-too-distant future, cyberthreats will pose the number one threat to our country. The government has seen that hackers are no longer seeking information for political power, but rather hack information and sell it to the highest bidder, because it turns a high profit with lower probability of being caught. Our own defense secretary has said that there is technology out there that could literally cripple businesses, and the director of the FBI stated that he believes there are only two types of companies: those that have been hacked and those that will be.[11]

The US opened the door to cyber warfare in its "Olympic Games" attack against the Iranian nuclear establishment[12]. Already Iran has begun to

[9] *See* Martha Neil, Unaware 'Anonymous' Existed Until Friday, Partner of Hacked Law Firm Is Now Fielding FBI Phone Calls, American Bar Association, 2/6/2012.
[10] *See* Twitter resists U.S. court's demand for Occupy tweets, BBC News, 5/9/2012.
[11] *See* Michael Cooney, FBI: Cyberattacks May Soon Be No. 1 Threat to U.S., Network World, 3/3/2012.
[12] *See* DAVID E. SANGER, Obama Order Sped Up Wave of Cyberattacks Against Iran, 6/1/2012, http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html?pagewanted=all&_r=0

retaliate with its own cyber attacks against other oil producing countries and the US is concerned about attacks against its critical infrastructure[13].

As I mentioned above, hackers have already started targeting law firms for the purposes of obtaining personal client information.[14] However, there are steps that you can – and, probably should – take to ensure the safety of your client's personal information. Taking such actions could prevent you from facing ethics questions if your firm's servers were attacked, and it were found that you did not take reasonable steps to ensure the safety and confidentiality of your clients' information and data.

It is important to assess what your firm's security issues really are, because in doing so, you can reasonably take steps to address the specific risks you have rather than worry about the dangers. One of the best methods of doing so is to hire professional "good guy" hackers to do "vulnerability testing." Basically, you pay them to hack into your servers the way that real hackers might, find your security weaknesses, and recommend ways to protect them going forward. I should also note that this is not something that only big firms should consider. Often even small family firms who represent clients in the midst of bitter divorce settlements need to worry about someone hacking a system for sensitive information. And at the end of the day, data breaches are time-consuming, costly, and can severely hurt your business.[15]

In addition, lawyer malpractice insurance firms, including the Virginia State Bar endorsed malpractice carrier, ALPS, are now selling data breach insurance which can cover the firm for the damage to its own assets and to clients resulting from a cyber attack[16].

It is important for me to note, however, that making sure that your business is safe from hackers is not the only step you should take the ensure the safety and confidentiality of you clients' data and information. There are much simpler, basic, day-to-day steps that you should encourage all attorneys and staff in your firm to take. For instance, imagine you're connected to the free Wi-Fi at your local coffee shop or at your hotel while on vacation, and you log into your web-based email account. Using simple and widely-available tools, other users on that network may be able to "sniff" out the username and password you used to log in. They can

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13 *See* Associated Press, Official: US blames Iran hackers for cyberattacks, 10/11/2012, http://online.wsj.com/article/AP9616681158ab477e8ecf2f770eae62dd.html.

14 *See* Martha Neil, Law Firm, Police Hit By Hack Attacks; Lawyer Cell Phone Records Reportedly Accessed, American Bar Association, 2/6/2012; Anonymous says attack put CIA website offline, BBC News, 2/10/2012.

15 *See* Dennis Kenned, Are You Vulnerable? Sometimes a Good Hack Can Help, American Bar Association Journal, 7/1/2012.

16 See ALPS "Cyber Response" policies at http://protectionplus.alpsnet.com/cyber/

then use those credentials to hijack your accounts and access your sensitive, client files. This will most certainly raise professional responsibility concerns. However, there are a couple steps you can take to prevent this from happening:

(1) Only send sensitive information if it is encrypted. One sign of an encrypted connection is an "https" at the beginning of the web address. You may also see a lock icon somewhere on the screen with such connections.
(2) Use virtual private networks. If you work at a firm with in-house IT support, you likely already have VPN technology available. For those without such support, you can obtain subscription VPN.[17]

ii. 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**."

E-discovery and other legal technologies are now so common in the practice of law that it may be an ethical violation to not understand how to use such tools competently in providing legal services to your clients. For some attorneys, becoming well-versed in such technology can be a daunting task. At the same time, it is difficult to claim legal, ethical competence if you do not understand basic legal technologies that the majority of firms and agencies will use in the course of their dealings with you and your clients. Soon, old-fashioned methods of discovery will become obsolete.

Without a basic understanding of these tools, you will not be able to provide adequate legal representation to your clients in the future. In fact, recently, AOL's assistant general counsel issued a statement that completely automated document review is in the not-so-distant future, and that lawyers who do not understand how to use these technologies may no longer be able to ethically provide competent legal service to their clients.

If you happen to be an attorney who needs to learn how to use e-discovery tools, there are services that can help you. One such services is called the eDJ Tech Matrix, which is an online forum that discusses every significant e-discovery tool currently on the market, offering product descriptions and techniques on these applications. Attorneys can make candid remarks about their experiences using these tools, and the site also allows attorneys to search for the e-discovery product that is the best fit for their business.

[17] *See* Public Wi-Fi and the cost of "free," Your ABA, December 2011.

If you are an attorney or firm in need to e-discovery technology, that may be a good place for you to start looking.[18]

iii. Rule 1.3: Diligence
"(a) A lawyer **shall act with reasonable diligence** and promptness in representing a client."

Some attorneys and law firms have chosen to start using "software as a service," or "cloud computing," as a means for storing client data and documents. Basically, this means that an attorney or firm uses a third party vendor to store client information on servers that are not owned or operated by the law firm, and that are not stored on-site.

There are ethics rules stating that lawyers must act with reasonable precaution and diligence to prevent confidential client information from coming into the hands of unintended recipients in the course of their representation of the client. The concern with cloud computing was that, because an attorney or firm do not own or operate the server, that attorney or firm may not have unrestricted access to the client data, and the attorney or firm cannot control the extent to which the data is protected.

However, it is not necessarily an ethics violation to use cloud computing, so long as an attorney or firm does their due diligence in ensuring that they will have unrestricted access to the client information, and that there is an adequate degree of protection.[19] According to a recent ABA CLE presentation, generally, broad discretion is given for the use of cloud computing provided the attorney takes reasonable steps to safeguard the confidentiality of client data, and no jurisdictions have outright banned cloud computing. If you are an attorney or firm looking to use cloud computing in your practice, here are some things to consider in conducting your due diligence to ensure the safety of your clients' information:

(1) Review the terms and conditions with caution; make sure that the data belongs to you.
(2) Make sure that the data will be up and running when you need it (i.e., make sure there are backup servers).
(3) Make sure the data is encrypted on both ends and during transmission.
(4) Always back up your data.
(5) Install firewalls.
(6) Avoid inadvertent disclosure of client information.
(7) Know who has authorized access to your data.
(8) Have a plan for if there is a breach of client confidentiality.

[18] *See* Joe Dysart, A Discovery: Study Tech-Aided Review Before It's an Ethics Issue, American Bar Association Journal, 7/1/2012.
[19] *See* Pat Murphy, Ethics panel approves lawyer's use of cloud computing, Lawyers USA Online, 11/4/2011.

(9) Always inform your clients if you are using cloud computing.

(10) Verify that the servers are in the US and not in other countries.[20]

In reviewing software as a service (SaaS) providers of law practice management software, we discovered that several firms were not based in the US or had servers outside the US and yet were marketing their products to US based law firms. Diligent review of the product is necessary before handing over your confidential client information to a third party vendor.

iv. Rule 1.15: Safekeeping Property

"(a)(1) All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses **shall be deposited in one or more identifiable trust accounts or placed in a safe deposit box or other place of safekeeping as soon as practicable**…

"(b) A lawyer shall:

"(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 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."

Rule 8.4: Misconduct

"It is professional misconduct for a lawyer to:

"...(b) **commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness** or fitness to practice law;

[20] *See* Cloud Computing: The Impact of Practicing Law, American Bar Association CLE Premier Speaker Series Program, 5/21/2012.

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

Rule 5.1: Responsibilities of Partners and Supervisory Lawyers
"…(b) A lawyer having direct supervisory authority over another lawyer **shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct**."

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants
"With respect to a nonlawyer employed or retained by or associated with a lawyer:
"…(b) a lawyer having direct supervisory authority over the nonlawyer **shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer**."

In October 2011, a former Virginia Beach lawyer was sentenced for 5 years in prison for stealing more than $390,000 from a deceased client's estate and using it to buy a home in Florida and two Harley Davidson motorcycles. Needless to say, this was not only illegal but a significant violation of Virginia's ethics rules. The attorney was convicted of mail and wire fraud, false statements, and unlawful monetary transactions.[21]

Lawyers are frequently trusted as fiduciaries of cash and securities. As such, it is most important to note that, for lawyers, honest mistakes and errors in judgment can produce the appearance of impropriety, every bit as much as outright theft can. There are various factors that make law firms susceptible to fraud-related problems. The first is inattentive management. Because most firms use the billable hour, attorneys have an incentive to work longer amounts of time on projects to increase their own billable hours. However, this poses ethical dilemmas with clients, and those with managerial authority must take reasonable measures to ensure that all attorneys within their firm are following the Rules of Professional Conduct.

The second is poor trust accounting. Ethics rules dictate that client funds must be deposited into a client trust account. If this rule is not strictly followed, a firm may be found guilty of comingling personal and client funds. Within the trust accounts themselves, record keeping must be accurate and precise. This can best be done by either using accounting software or an outside accountant all together. Failure to do so will likely invite error, state bar inquiry, and trouble.[22] Additionally, with respect to all accounting practices within a firm, it is important for attorneys to

[21] *See* Former Virginia Beach lawyer sentenced for fraud, Associated Press, 1/25/2012.
[22] *See* Edward Poll, The faces of law firm financial impropriety, Virginia Lawyers Weekly, 12/20/2011.

remember that they are not only ethically responsible for themselves, but also for any other lawyers or nonlawyers that they supervise within their practice. Therefore, lawyers in supervisory roles should be overseeing anyone under them to ensure that those individuals are properly and ethically following accounting protocols when it comes to client funds.

Attorneys should pay special attention to the 2011 revisions to Rule 1.15 dealing with trust accounting. The new rule both clarifies the required procedures for law firms, and sets out several reports and reconciliations that must take place on a monthly or quarterly basis. In addition to adhering to the ethical standard, these steps help supervising attorneys ensure that client trust funds are properly tracked and would help to quickly identify any mistakes or malfeasance.

Because online banking and digital wire transactions make fraud harder to detect, attorneys should keep the following general practices in mind, as dictated by the ethics rules:

(1) Take care to deposit client assets into identifiable trust accounts or other places of safe-keeping.
(2) Keep accurate records of each clients' assets.
(3) Refrain from disbursing or distributing any of the assets without the consent of the client or a court.

b. How to remain ethical and professional in the digital age
   i. 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**…"

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**:

"(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."

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."

Rule 1.7: Conflict of Interest: General Rule

"(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 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 each affected client consents after consultation, and:

"(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) the consent from the client is memorialized in writing."

Using a group coupon website, like Groupon, likely does not violate ethics rules. First, the money paid to the website does not constitute a referral fee. Bar associations have considered such services to be advertising so

long as the fees associated constitute a reasonable payment for that type of advertising.

Second, lawyers may advertise through group coupon websites so long as the advertisement is not false, deceptive or misleading and clearly states that the attorney-client relationship will not be created until after a conflicts check and when the attorney has accepted the consumer as a client. If the consumer is not accepted, he or she must be given a full refund.

Finally, if an attorney or law firm chooses to use this method of advertising, it must verify that the website and the advertisement comply with Rule 7.3 regarding solicitation.[23]

ii. Rule 4.2: Communication with Persons Represented by Counsel

"In representing a client, a lawyer **shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer** in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

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

[23] *See* Debra Cassens Weiss, May Lawyers Offer Groupon Deals? New York Ethics Opinion Allows It, with Caveats, American Bar Association, 1/26/2012.

the immediate family or household of a juror or a member of a venire."

Attorneys must be careful when using the Internet to research both opposing parties and sitting jurors. While ethics committees have held that it is acceptable for attorneys to conduct research on opposing parties and sitting jurors via social media, it is imperative to ensure that there is no communication with that party whatsoever, even if it is inadvertent or unintended.

"Friending" such parties on social networking sites certainly constitutes a communication, and is thus an ethics violation. Attorneys should also note that some social networking sites alert a party that their profile has been viewed (i.e., via an automated message that a potential contact has viewed their profile). Alerting a party that you have viewed their social media profile constitutes communication, and thus attorneys should not research an opposing party or sitting juror via social media unless they are certain that it will not result in a communication. As a general rule, it is therefore advisable that attorneys avoid researching opposing parties and sitting jurors through social media. Some social media sites, including LinkedIn and Avvo, allow individuals to see who is viewing their profile. However, if an attorney chooses to do so, they should only conduct research if they have a strong familiarity with that social media service's functionality, and proceed with great caution.

Finally, it should be noted that if an attorney uses social media to research a juror, and they learn of juror misconduct, they are required to promptly notify the court.[24]

iii. Rule 1.4: Communication

"(a) **A lawyer shall keep a client reasonably informed about the status of a matter** and promptly comply with reasonable requests for information.

"(b) **A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions** regarding the representation.

"(c) **A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter**."

Rule 1.5: Fees

"(a) **A lawyer's fee shall be reasonable.** The factors to be considered in determining the reasonableness of a fee include the following:

[24] *See* Debra Cassens Weiss, Ethics Opinion Warns Lawyers About Perils of Unintentional Juror Contact During Online Research, American Bar Association Journal, 6/5/2012.

> "(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 lawyer's fee shall be adequately explained to the client.** When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."

In the world of social media, it is now possible for solo practitioners and lawyers in small firms to literally reach a world of prospective client, and communicate with instantaneously them via email, text messaging, and video chat. These technological developments are now allowing attorneys to create virtual businesses, in which lawyers and their stuff conduct a legal practice for clients over the Internet.

Conducting business over the Internet has practical benefits in terms of cost savings on office space and communication efficiency. However, it is imperative that attorneys conducting their law practice over the Internet understand the ethical requirements associated with doing so.

First, the value of legal services is determined by the client. Therefore, it is imperative that attorneys explain to their clients how the virtual representation will work, and how the attorney will be able to adequately represent the client over the Internet. Clients must feel comfortable with this type of representation, and attorneys must be diligent in ensuring that they are not perceived as inaccessible to clients. Without face-to-face interaction, attorneys must put in extra effort to maintain an adequate level of contact with clients and ensure that they are properly communicating the progress of a client's legal issue. If clients feel that it is easy to get in touch with their attorney, they are less likely to be off-put by a virtual practice.

Attorneys must also be upfront about their legal fees, as well as the cost savings and convenience to the client. Any miscommunication or misunderstanding related to services and fees could result in an ethics disciplinary proceeding or malpractice suit.[25]

iv. Rule 7.1: Communications Regarding 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**. For example, a communication violates this Rule if it:

"(1) contains false or misleading information; or

"(2) states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits; or

"(3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

"(4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

"(b) Public communication means all communication other than "in-person" communication as defined by Rule 7.3."

Here are some tips for communicating about or advertising yourself or your firm in an ethical way:

(1) You should note awards that you or other attorneys in your firm have achieved on your website or other marketing materials. However, make sure the descriptions of the awards are accurate and not misleading. For instance, if you were listed as one of the "Best Lawyers in America" in 2005, but not since then, be sure to specify this caveat. Moreover, avoid listing awards that were given internally by your firm, or by groups that bar leaders would not find legitimate (such as local networking groups you belong to).

(2) You should not make announcements about winning a case without a disclaimer. This disclaimer must: (1) state the case results in a non-misleading context; (2) state that case results depend on a variety of factors that are unique to each case; (3) state that case results do not guarantee or predict a similar

[25] *See* Edward Poll, Could your practice be a virtual success?, Virginia Lawyers Weekly, 6/7/2012; Laura A. Calloway, Five Billing Tweaks to Keep Good Clients, Law Practice Magazine Volume 38, Number 3,

result in any future case undertaken by the lawyer. Thus, *case results should not be posted on social media websites such as Twitter and other similar websites, because these disclaimers cannot fit into the 140-character limit*.

If you are publicizing case results in an advertisement, you should follow these procedures: any disclaimers must precede the case results and should be in bold type face, uppercase letters, in a font size that is at least as large as the largest font size in the advertisement, and in a color that is the same as the rest of the advertisement.

(3) A good recommendation from a former client can be the most effective form of advertising, but a lawyer using a blog or recommendations page (such as through LinkedIn) must monitor for and delete recommendations containing comparative statements that can't be substantiated or any other comments that may create unjustified expectations (such as: "She's the best corporate lawyer in town!").[26]

4. 2011 – 2012 Virginia Legal Ethics Opinions (25 minutes)
   a. **LEO 1856**: To what extent may a lawyer not licensed in Virginia engage in the practice of law in Virginia?[27]
      i. Rule 5.5: Unauthorized Practice of Law / Multijurisdictional Practice of Law

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

"(d)(1) "Foreign Lawyer" is a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia, or a foreign nation, but is **neither licensed by the Supreme Court of Virginia or authorized under its rules to practice law generally in the Commonwealth of Virginia, nor disbarred or suspended from practice in any jurisdiction**.

"(d)(2) A Foreign Lawyer shall not, except as authorized by these rules or other law:

"(i) **establish an office or other systematic and continuous presence in Virginia for the practice of law**, which may occur even if the Foreign Lawyer is not physically present in Virginia; or

[26] *See* Did You Know? Web Marketing and Social Media Usage — Test Your Knowledge of Ethical Dos and Don'ts, Virginia Continuous Legal Education, 12/9/2011.
[27] Virginia Bar LEO 1856.

"(ii) **hold out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia**.

"(d)(3) A Foreign Lawyer shall inform the client and interested third parties in writing:

"(i) that the lawyer is not admitted to practice law in Virginia;

"(ii) the jurisdiction(s) in which the lawyer is licensed to practice; and

"(iii) the lawyer's office address in the foreign jurisdiction

"(d)(4) A Foreign Lawyer may, after informing the client as required in 3(i)-(iii) above, **provide legal services on a temporary and occasional basis in Virginia that**:

"(i) are undertaken in association with a lawyer who is admitted to practice without limitation in Virginia or admitted under Part I of Rule 1A:5 of this Court and who actively participates in the matter.

"(ii) are in or reasonably related to a pending or potential proceeding before a tribunal in Virginia or another jurisdiction, if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is **authorized by law or order to appear in such proceeding or reasonably expects to be so authorized**.

"(iii) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Virginia or another jurisdiction, **if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission**; or

"(iv) are not within paragraphs (4)(ii) or (4)(iii) and arise out of or are reasonably related to the representation of a client by the Foreign Lawyer in a jurisdiction in which the Foreign Lawyer is admitted to practice or, subject to the foregoing limitations, are governed primarily by international law.

"(Comment [4] to Rule 5.5): …Despite the foregoing general prohibition, a Foreign Lawyer may establish an office or other systematic and continuous presence in Virginia ***if the Foreign Lawyer's practice is limited to areas which by state or federal law*** **do not require admission to the Virginia State Bar**."

This would, in effect, allow a foreign lawyer licensed to practice in another jurisdiction to practice law in Virginia if their practice is limited to the law of the jurisdiction(s) where they are licensed, to federal law not involving Virginia law, or to temporary and occasional practice as authorized by Rule 5.5(d)(4)(i-iii).

Foreign lawyers who practice exclusively federal law need not be licensed in Virginia to maintain an office in Virginia. (This applies, for instance, to immigration or military lawyers, and lawyers who practice before the IRS, the US Tax Court, or the USPTO.)

ii. Rule 8.5: Disciplinary Authority; Choice of Law
"(a) **A lawyer not admitted in Virginia is also subject to the disciplinary authority of Virginia if the lawyer provides, holds himself out as providing, or offers to provide legal services in Virginia**."

b. **LEO 1857**: May a prosecutor offer, and may a criminal defense lawyer advise a client to accept, a plea agreement that requires a waiver of the right to later claim ineffective assistance of counsel?[28]

i. Rule 1.7: Conflict of Interest, General Rule
"(a)(2) …a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:…there is **significant risk that the representation of one or more clients will be materially limited by…a personal interest of the lawyer**."

Defense counsel may not ethically counsel his client to accept such a provision, because defense counsel undoubtedly has a personal interest in the issue of whether he has been constitutionally ineffective.

ii. Rule 1.3: Diligence
"(c) A lawyer **shall not intentionally prejudice or damage a client** during the course of the professional relationship."

A client has a constitutional right to the effective assistance of counsel and the defense lawyer's recommendation to bargain that right away prejudices the client.

iii. Rule 8.4: Misconduct
"(a) It is professional misconduct for a lawyer to 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."

[28] Virginia Bar LEO 1857.

If a prosecutor refuses to offer a plea agreement that does not include such a provision, he is implicitly requesting that the defense lawyer counsel his client to accept this provision, which is an inducement to the defense lawyer to violate Rules 1.3(c) and 1.7.

c. **LEO 1858**: May a lawyer agree to indemnify an insurance company as a condition of settlement?[29]

   i. Rule 1.8: Conflict of Interest: Prohibited Transactions
   "(e) A lawyer **shall not provide financial assistance to a client in connection with pending or contemplated litigation**."

An agreement for a lawyer to indemnify an insurance company as a condition of settlement would obligate the lawyer to pay the client's debts, and this would constitute improper financial assistance to the client. The expenses are the subject of the lawsuit, and therefore are undoubtedly connected to the pending litigation.

   ii. Rule 1.7: Conflict of Interest, General Rule
   "(a)(2) …a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:…**there is significant risk that the representation of one or more clients will be materially limited by…a personal interest of the lawyer**."

There is a conflict of interest because the lawyer's personal interest in avoiding liability for the debts of his client may be at odds with his client's desire to settle the case.

   iii. Rule 8.4: Misconduct
   "(a) It is professional misconduct for a lawyer to 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."

If an insurer's lawyer includes this provision in a settlement agreement, it is inducement to the plaintiff's lawyer to violate Rules 1.7(a) and 1.8(e).

d. **LEO 1859**: May a criminal defense lawyer disclose information to a government lawyer after a former client makes a claim of ineffective assistance of counsel?[30]

   i. Rule 1.6: Confidentiality of Information
   "(a) **A lawyer shall not reveal information protected by the attorney-client privilege** under applicable law or other

[29] Virginia Bar LEO 1858.
[30] Virginia Bar LEO 1859.

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, and **except as stated in paragraphs (b)** and (c). "(b) To the extent a lawyer reasonably believes necessary, **the lawyer may reveal…**

"(2) such information 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.**"

An attorney generally has a duty to maintain the confidentiality of information learned during the representation of a client, even after representation has concluded. However, there are exceptions to this rule, such as in Rule 1.6(b)(2).

Hypothetically, a criminal defense lawyer has been contacted by a government lawyer who is responsible for handling a petition for habeus corpus filed by the defense lawyer's former client. The petition alleges that the defense lawyer provided ineffective assistance of counsel. The government lawyer is requesting information concerning the defense lawyer's representation to prepare a response to the petition. May the defense lawyer do so?

Rule 1.6(b)(2) permits a lawyer to reveal information ***only*** to the extent reasonably necessary to defend against claims such as these. With petitions for habeus corpus, most are dismissed right away for being legally and procedurally sufficient. Thus, early in the process, it is not reasonably necessary for a lawyer to disclose confidential information, and a lawyer should wait to disclose information until ***after*** the pre-litigation stage. A lawyer may, however, disclose this information with written consent from his client.

e. **LEO 1861**: May a lawyer serving as a bankruptcy trustee communicate with the debtor without consent by the debtor's lawyer?[31]
   i. Rule 4.2: Communication With Persons Represented By Counsel
   "In representing a client, **a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the**

[31] Virginia Bar LEO 1861.

matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

Even though the lawyer in this case acts as a fiduciary, he may be disciplined for actions taken in that role if the same actions would have warranted discipline if the relationship had been a traditional attorney-client relationship. Because a lawyer/trustee may be in a position to take advantage of a debtor if he is permitted to communicate with the debtor without the presence of the debtor's counsel, he may not do so unless the debtor's lawyer consents or law authorizes the communication.

f. **LEO 1862**: "Timely disclosure" of exculpatory evidence and duties to disclose information in plea negotiations.[32]

   i. Rule 3.8 Additional Responsibilities Of A Prosecutor
   "(d) A lawyer engaged in a prosecutorial function shall **make timely disclosure** to counsel for the defendant, or to the defendant if he has no counsel, **of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment**, except when disclosure is precluded or modified by order of a court."

In general, "timely" is defined as "occurring at a suitable or opportune time" or "coming early or at the right time." Thus, **a timely disclosure is one that is made as soon as practicable considering all the facts and circumstances of the case**; the prosecutor has complied with the legal disclosure requirement if the evidence is disclosed in the midst of trial **so long as the defendant has an opportunity to put on the relevant evidence**. As for the evidence, Rule 3.8 is not limited to "material" evidence, but rather **applies to all evidence that has some exculpatory effect on the defendant's guilt or sentence**. Further, Rule 3.8 only requires disclosure when the prosecutor has **actual knowledge of the evidence and its exculpatory nature**.

   ii. Rule 3.3 Candor Toward the Tribunal
   "(a)(1) A lawyer shall not knowingly make a false statement of fact or law to a tribunal."

Rule 3.3(a)(1) specifically forbids any false statement of fact or law to a tribunal, which includes any statements made in the course of presenting a plea agreement to the court for approval and entry of the guilty plea. Accordingly, the prosecutor may not make a false statement about the availability of the witness, regardless of whether the unavailability of the witness is evidence that must be timely disclosed pursuant to Rule 3.8(d),

[32] Virginia Bar LEO 1862.

either to the opposing lawyer during negotiations or to the court when the plea is entered.

iii. Rule 4.1 Truthfulness In Statements To Others

"(a) In the course of representing a client a lawyer shall not knowingly make a false statement of fact or law; or

"(b) In the course of representing a client a lawyer shall not knowingly fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."

Rule 4.1(a) generally prohibits making a false statement of fact or law, and would apply to any misrepresentation or false statement made in the course of plea negotiations with the defendant/his lawyer.

iv. Rule 8.4 Misconduct

"(c) It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law."

Rule 8.4(c) specifically forbids any misrepresentation that "reflects adversely on the lawyer's fitness to practice law," and would apply to any misrepresentation or false statement made in the course of plea negotiations with the defendant/his lawyer.

g. **LEO 1866**: "Of Counsel Relationship"[33]

i. The Term "Of Counsel," Generally

The "of counsel" relationship is defined as a close, continuing, and personal relationship between a lawyer and a firm that is not the relationship of a partner, associate, or outside consultant. **The relationship must involve some element of the practice of law**, and cannot be limited to a pure business affiliation; **the "of counsel" may not simply be a forwarder or receiver of legal business to or from the firm**.

Therefore, it is not permissible to describe the relationship between a lawyer or firm and a national law firm that solicits cases throughout the country and then makes geographically-based referrals to its designated lawyer or firm in each state.

ii. Rule 1.10: Imputed Disqualification: General Rule

"(a) **While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them**

[33] Virginia Bar LEO 1866.

practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e)."

This means that a lawyer who is truly "of counsel" to a firm is associated with that firm for the purposes of conflict of interest rules. Therefore, *when a lawyer becomes of counsel to a firm, all conflicts are imputed from the lawyer to the firm and vice versa*. This **cannot** be avoided by screening the lawyer from other cases in the firm or otherwise limiting the information available to him.

iii. Rule 1.5: Fees
"(e) **A division of a fee between lawyers who are not in the same firm may be made only if**:
"(i) the client is advised of and consents to the participation of all the lawyers involved;
"(ii) the terms of the division of the fee are disclosed to the client and the client consents thereto;
"(iii) the total fee is reasonable; and
"(iv) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing."

Thus, a lawyer and firm may **either** have an occasional relationship in which conflicts are not imputed beyond specific cases and **fee-sharing must be done in accordance with Rule 1.5(e)**, or the lawyer may become of counsel to the firm, which would impute all conflicts of the firm to the lawyer. The lawyer would only work on specific matters in which the firm's clients require his specialized skills with each client's consent to the lawyer's participation at the outset of the representation.

iv. Rule 7.5: Firm Names and Letterheads
"(d) Lawyers may state or imply that they practice in a partnership or organization **only when that is the fact**."

If a lawyer holds himself out to potential clients as being closely associated with the firm, or if he in fact is closely and regularly associated with the firm, then conflicts will be imputed to him regardless of the title he uses.

h. **LEO 1863 (Draft)**: May a lawyer communicate with an insurance adjuster when the insured is represented by a lawyer provided by the insurer?[34] **This is a DRAFT opinion and is subject to revision or withdrawal until finalized by the Ethics Committee.**

[34] Virginia Bar LEO 1863.

i. Rule 4.2 Communication With Persons Represented By Counsel
"In representing a client, **a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter**, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

The question of whether an attorney-client relationship exists in a specific case is a question of law and fact. Therefore, unless a lawyer is aware that the insured's lawyer also represents the insurer, a lawyer may communicate with the insurance adjuster or other employees of the insurer without consent from the insured's lawyer.

i. **LEO 1864 (Draft)**: May a criminal defense lawyer agree that he will not give certain discovery materials to his client during the course of the representation, and that he will remove certain materials from his file prior to the end of the representation?[35] **This is a DRAFT opinion and is subject to revision or withdrawal until finalized by the Ethics Committee.**
   i. Rule 1.4 Communication
   "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

   "(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

   "(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter."

   ii. Rule 1.16 Declining or Terminating Representation
   "(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, **upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer.** If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the

[35] Virginia Bar LEO 1864.

> lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

Any request for a copy of a particular document in the file must be considered in light of the duty to promptly comply with reasonable requests for information, but Rule 1.4 does not conclude that a lawyer must provide a document because the client has requested it. So long as the lawyer explains all pertinent facts to his client and complies with requests for information by meeting with the client to discuss and view the materials, the lawyer does not have to provide a copy to the client.

On the other hand, upon termination, any document in the lawyer's files is subject to being provided to the client. To avoid having to give a copy to the client, the lawyer should not make the document a part of his file and return the sensitive items to the prosecution. If the lawyer is unexpectedly terminated and doesn't have a chance to return the materials, the client would have a right to the document under Rule 1.16(e). To prevent this occurrence, the defense lawyer should seek informed consent from his client before agreeing to this restriction on the client's access to information upon termination of the representation.

5. 2011 – 2012 Adopted Virginia Rule Changes (5 minutes)
   a. <u>Rule 13-6(A): Procedure for Disciplining, Suspending, and Disbarring Attorneys; Disciplinary Board; Appointment of Members</u>

Addition: The word "active" was added to the first sentence. Members must be more than just members of the Bar, they must be ***active*** members of the Bar:

"This Court shall appoint, upon recommendation of Council, 20 members of the Board, 16 of whom shall be ***active*** members of the Bar and four of whom shall be nonlawyers."

6. 2011 – 2012 Proposed Virginia Rule Changes (25 minutes)
   a. Rule 1.11(d): Special Conflicts of Interest for Former and Current Government Officers and Employees
   Addition: The terms "or unless the private client and the appropriate government agency consent after consultation" were added to (d)(1). This provides that a conflict created by a move from private to public employment can be cured with the consent of both the private client and the appropriate government agency. Currently, a lawyer may represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public employee with the consent of the private client and the government agency, but the reverse conflict cannot be cured with consent from both affected clients. The Committee proposes to address this disparity by providing for waiver of the conflict in both situations.

   "Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not: (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter ***or unless the private client and the appropriate government agency consent after consultation***…"

   b. Rule 1.15(a): Safekeeping Property
   Addition: The terms "all other property held on behalf of a client should be" were added to (a)(1). This is to clarify that all funds held by a lawyer on behalf of others must be held in a trust account, while other property should be held in a safe deposit box or other place of safekeeping.

   "All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses shall be deposited in one or more identifiable trust accounts; ***all other property held on behalf of a client should be*** ~~***or***~~ placed in a safe deposit box or other place of safekeeping as soon as practicable."

   c. Rule 7.1 – 7.5: Information About Legal Services; Advertising
   The Committee has made changes to each of these rules. Overall, the

Committee's proposed amendments make these rules more general in their application by removing the specific examples of lawyer advertising statements or claims from the body of the rules to the comment section. A brief overview of the changes to each rule is below:

Rule 7.1: Deletes the terms "fraudulent" and "deceptive." If a lawyer's advertising is "fraudulent" or "deceptive" it would therefore be "false" or "misleading."

Rule 7.2: Deletes Rule 7.2 because it is largely redundant of Rules 7.1 and 7.3.

Rule 7.3: Broadens the scope of the prohibition against in-person solicitation by applying the rule to cover all types of matters, not only personal injury and wrongful death cases. Also limits the scope of the prohibition against in person solicitation to solicitations involving harassment, coercion, duress, compulsion, intimidation, threats, or unwarranted promises of benefits. Maintains the requirement that targeted advertisements to a potential client be labeled "ADVERTISING MATERIAL," but clarifies and expands the exceptions to that requirement, including a new subsection which provides that a communication from a lawyer to a recipient who had prior contact with the lawyer is exempt from the labeling requirement.

Rule 7.4: Deletes Rule 7.4 because it is largely redundant.

Rule 7.5: Adds a new Comment [3] clarifying that lawyers should practice using the official name under which the lawyer is licensed or seek an appropriate and legal change of name from the Supreme Court of Virginia.

d. Rule 13-1: Definitions; "Bar Counsel"
"Bar Counsel" means the Attorney who is appointed as such by Council and who is approved by the Attorney General pursuant to Va. Code §~~2.1-122(c)~~ 2.2-510, and such deputies, assistants, and Investigators as may be necessary to carry out the duties of the office, except where the duties must specifically be performed by the individual appointed pursuant to Va. Code §~~2.1-122(c)~~ 2.2-510.

e. Rule 13-26(A): Appeal From Board Determinations
Addition: As a matter of right any Respondent may appeal to this Court from an order of Admonition, Public Reprimand, Suspension, or Disbarment imposed by the Board ***using the procedures outlined in Rule 5:21(b) of the Rules of the Supreme Court of Virginia***. An appeal shall lie once the Memorandum Order described in this Paragraph has been served on the Respondent. No appeal shall lie from a Summary Order. ***If a Respondent appeals to the Supreme Court, then the Bar may file***

assignments of cross-error pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia.

Deleted: Section (B) Notice of Appeal; Section (C) Further Proceedings; Section (F) Stay Pending Appeal.

7. Questions & Answers (15 minutes)