

11TH ANNUAL ETHICS PRESENTATION
OCTOBER 13, 2010
9:00 – 11:00 a.m.

Red Flags: Identity Theft, Data Security, Communications & Advertising Online

4. Extending Credit & Collecting: FTC's Red Flags

- a. The Federal Trade Commission (FTC) has promulgated new "Red Flags" rules which are designed to protect consumer personal identification information against identity theft. These new rules apply to businesses that qualify as a "financial institutions" and any business who is a "creditor" of a "covered account."¹ For law firms and their clients, this translates into any business that provides credit or trade terms to its clients for payment. While the "Red Flags" rules require a formal plan to be created, lawyers already have duties under the ethics rules to maintain the confidentiality of their client information, including the client's payment and personal identification information, and to secure any of the client's property, including funds held in trust or escrow. Furthermore, the Virginia Code provides that a breach of personal identification information held by any entity must be disclosed.
 - i. Virginia RPC 1.6(a): Confidentiality of Information
"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 ..." (emphasis added)
 - ii. Virginia RPC 1.15(a): Safekeeping Property
"All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein ..."
 - iii. Va. Code §18.2-186.6: Breach of personal information notification.
 1. "Entity" includes "any [] legal entity"
 2. "Personal Information" consists of first name or first initial and last name and (a) SSN; (b) Driver's License Number; (c) Financial account information and PIN or password; unless redacted or encrypted.

¹ <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt050.shtm>

3. Duty to notify Virginia Office of Attorney General and all affected parties.
- b. Law firms often extend credit to clients by allowing them to pay for services after they are rendered. Almost any scenario in which the client has not paid up front by a retainer that is larger than the final amount of services rendered would constitute extending credit under the "Red Flags" rule. However, the FTC has indicated that "[a]ccepting credit cards as a form of payment does not in and of itself make an entity a creditor."²
 - i. Virginia Legal Ethics Opinion 186-A (June 18, 1981) and Virginia Legal Ethics Opinion 999 (November 13, 1987)
Law firms may bill legal fees to their clients' credit cards.
 - ii. Virginia Legal Ethics Opinion 1247 (June 13, 1989)
Law firms may charge a late fee on past due payments by clients, so long as the client has the opportunity to prepay at any time with no penalty.
 - iii. Virginia Legal Ethics Opinion 1848 (April 14, 2009)
Law firms may pass along the credit card processing fees to their clients with informed written consent.
 - c. Each business that is covered by the "Red Flags" rules is required to have a plan that is tailored to the size and risk of that business. The FTC has an online plan creator for small, low-risk businesses³, and more complex plans can be created by businesses or their legal counsel depending upon the complexity of the business. The main elements that a risk plan must contain are:
 - i. "alerts, notifications, or warnings from a consumer reporting agency;
 - ii. "suspicious documents;
 - iii. "suspicious personally identifying information, such as a suspicious address;
 - iv. "unusual use of – or suspicious activity relating to – a covered account; and
 - v. "notices from customers, victims of identity theft, law enforcement authorities, or other businesses about possible identity theft in connection with covered accounts."⁴
 - d. Enforcement of the "Red Flags" rules has been delayed several times, most recently to December 31, 2010⁵. The American Bar Association has been

² <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt050.shtm>

³ <http://www.ftc.gov/bcp/edu/microsites/redflagsrule/diy-template.shtm>

⁴ <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt050.shtm>

⁵ <http://www.ftc.gov/opa/2010/05/redflags.shtm>

lobbying and litigating against the application of the Red Flags Rule to attorneys⁶ and at this point enforcement of the rules for attorneys and law firms is on hold. However, these rules may be applied to law firms in the near future if the ABA action is not successful, and the rules will definitely be applied to other types of businesses on January 1, 2011 if the enforcement start date is not extended.

5. Billing Clients and Collecting Fees

a. Communications issues with billing for legal services.

Billing for fees and collecting from clients is perhaps the most exasperating part of being a lawyer, or of operating any business for that matter. In addition to the business considerations of collecting payment for services rendered and meeting the cash flow needs of a law practice, several ethics rules inform our dealings with clients with respect to fees:

i. Virginia RPC 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. Virginia RPC 1.5: Fees.

"(a) A lawyer's fee shall be reasonable. ...

"(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."

Setting expectations for the client with respect to fees is essential, and the best place to start is in a written engagement letter.⁷ While Virginia does not require a written engagement letter, it is recommended from an ethical standpoint⁸, and to facilitate and provide a record of communications⁹. From a practical standpoint malpractice insurance carriers will require the use of

⁶ <http://www.abanet.org/poladv/priorities/redflagrule/>

⁷ "Eleven things that annoy clients the most," Your ABA, April 2010.

⁸ Virginia RPC 1.5(b).

⁹ "Billing problems due to communication issues," VA Lawyers Weekly, 8/2/10.

written engagement letters, or will charge higher fees due to the increased risk.

As the engagement progresses, lawyers have a duty to keep their client informed as to the progress of their matter and this duty includes keeping the client apprised of the fees involved if they differ from the initial estimates in the engagement letter¹⁰. Doing so both allows the lawyer to comply with her ethical obligations, and helps to set expectations appropriately so that when the client receives the bill for services rendered they will not be surprised.

b. Alternative Billing Update

One way to ensure that the client's expectations match the bill for legal services is to use a fixed fee. Each year these "alternative billing" arrangements have received more press¹¹ as the legal community begins to adopt options other than the billable hour.

The Virginia ethics rules provide many factors for determining the reasonableness of a fee, and fixed fees are by no means discouraged:

i. Virginia RPC 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:**

- (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.**" (emphasis added)

Fixed fees can be useful in routine matters where the attorney can predict the average amount of time involved, and where sufficient quantity of matters are handled to ensure that the cases that take more or less time can balance each

¹⁰ Virginia RPC 1.4(a).

¹¹ "Alternative Billing Gains Traction for Solos, Small Firms", ABA Techshow, March 27, 2010.

other out. However, some firms are finding success in setting fixed fees even in non-routine cases by estimating the time involved and the value that the client perceives for the case. When the client's perceived value is the same as the fee charged, the client is more likely to appreciate the services provided by the lawyer instead of having the quality of services overshadowed by a difference in perceived value.

When charging a fixed fee, the attorney will generally deposit the fee into the client trust account until the matter is concluded. Some jurisdictions, including the District of Columbia¹² have specific rules on when fixed fees may be withdrawn. In Virginia, the fee *may not be* withdrawn from the client trust account until it is earned, and when it is earned it *must be* withdrawn from the client trust account.

ii. Virginia RPC 1.15(a): Safekeeping Property.

"All funds received or held by a lawyer or law firm on behalf of a client, other than reimbursement of advances for costs and expenses, shall be deposited in one or more identifiable escrow accounts maintained at a financial institution in the state in which the law office is situated and **no funds belonging to the lawyer or law firm shall be deposited therein except as follows:**

...

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and **the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due** unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved." (emphasis added)

With hourly fees, the attorney can easily compute the amount of fee which has been earned at any given time and make the appropriate transfer from the client trust account to the operating account. With a fixed fee, waiting until the entire matter is concluded may violate the rule of withdrawing fees as they are earned, and can also cause a cash flow problem for attorneys. The solution for larger fixed fee cases is to detail in the engagement letter how the fixed fee is earned and what events cause what portion of the fee to be earned.

For example, with a \$10,000 fee for a criminal defense case, the lawyer specifies that \$5,000 is earned when the pre-trial motions are complete, and the remaining \$5,000 is earned when the trial is complete, and an additional fixed fee would be charged, or additional fees would be negotiated if an

¹² DC RPC 1.15(e),

http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/rule_one/rule01_15.cfm

appeal was necessary.

c. Reasonableness of Fees Paid on Behalf of the Client.

While Virginia RPC 1.5(a), *supra*, gives many factors that may be used to determine the reasonableness of a fee, not all fees are reasonable.

The ABA issued a Formal Opinion 93-379, "Billing for Professional Fees" on December 6, 1993¹³ including the practice of marking up fees from vendors.

More recently, an ABA Article in March 2010 of the YourABA publication entitled "Should attorneys pass on discounts from vendors to their clients, and who gets the frequent flier miles?" revisited Formal Opinion 93-379 on the topic of vendor fees and discounts.¹⁴

The ABA applied ABA Model Rules 1.5, Safekeeping Property, and 1.4, Communications, which Virginia's RPCs closely mirror, to argue that vendor fees should not be marked up, and vendor discounts should be passed along to clients, unless a contrary arrangement is communicated to the client in advance. In the absence of prior communications, the "[c]lients quite properly could view these practices as an attempt to create additional undisclosed profit centers when the client had been told he would be billed for disbursements."

As with the other fee related questions discussed *supra*, setting the client's expectations through a written engagement letter or other communication is essential to complying with a lawyer's ethical obligations and ensuring that the client is satisfied with the resulting invoice for services.

6. Security of Electronic Client Data and Communications

a. Data Security in "the Cloud"¹⁵

Professor Costello discussed the ethical implications of cloud computing in Part I of this CLE, including Virginia RPCs 1.1, 1.3, 1.6, 1.7, 5.1, 5.3, 5.4, 5.5 and 8.5.

This section of the lecture will deal with some of the practical matters of using cloud computing should you or your firm choose to utilize cloud computing resources (if you haven't done so already).

¹³ ABA Formal Opinion 93-379 Billing for Professional Fees., December 6, 1993.
http://www.abanet.org/cpr/nosearch/93_379.pdf

¹⁴ "Frequent flyer miles, gifts, discounts and rebates from third party providers," YourABA, March, 2010.

¹⁵ "Get Your Head in the Cloud", ABA Journal, April 1, 2010.

i. Cloud Computing Terms of Service, Privacy Policy and Service Level Agreements

When selecting a cloud computing provider, it is essential to select a provider whose Terms of Service (ToS), Privacy Policy and Service Level Agreement (SLA) provide the best possible protection to your clients' data. The ethical obligations placed upon lawyers are informed by a determination of what would be reasonable under the situation. As we have discussed in prior years, this reasonableness standard requires additional care the more sensitive the client information involved.

For comparison, we will review some of the salient points in the Terms of Service, Privacy Policy and Service Level Agreements of three cloud computing service providers.

Provider	Service Level Agreement (SLA)
Google Apps ¹⁶	99.9% uptime guaranteed (so ~ 43 minutes per 30 day period of downtime is permitted with no refund). Credits of 3, 7 or 15 days of additional service per calendar year are given if service level agreement not met, and if client proactively requests the credit.
Rackspace.com ¹⁷	100% uptime guarantee for network, data center and virtual servers. If a server is down it will be repaired within 1 hour. Credits are given if downtime occurs, quickly adding up to the total monthly fee (not just a pro-ration of time not available).
VPS.net ¹⁸	100% uptime guarantee, except for scheduled maintenance and migrations. Credits are given if downtime occurs, quickly adding up to the total monthly fee (not just a pro-ration of time not available).

Provider	Terms of Service (ToS)
Google Apps ¹⁹	Each party owns is own confidential information, but Google may disclose your confidential information "when required by law but only after it, if legally permissible: (a) uses commercially reasonable efforts to notify the other party; and (b)

¹⁶ <http://www.google.com/apps/intl/en/terms/sla.html>

¹⁷ <http://www.rackspacecloud.com/legal/sla>

¹⁸ <http://www.vps.net/legal/terms-of-service#sla>

¹⁹ http://www.google.com/apps/intl/en/terms/premier_terms.html

	<p>gives the other party the chance to challenge the disclosure."</p> <p>No "high risk" activities, and all warranties disclaimed.</p> <p>Damages limited to twelve (12) months of fees paid by customer to Google.</p>
Rackspace.com ²⁰	High risk use not permitted. Confidential information the property of each party. No access to data if you are in breach of the agreement.
VPS.net ²¹	<p>Damages limited to three (3) months service fees.</p> <p>Keep your own backup copies of data: "Customer agrees to maintain a current copy of all content hosted by VPS.NET notwithstanding any agreement by VPS.NET to provide back up services."</p> <p>Disclaimer of warranties: "VPS.NET DOES NOT WARRANT OR REPRESENT THAT THE SERVICES WILL BE UNINTERRUPTED, ERROR-FREE, OR COMPLETELY SECURE. TO THE EXTENT PERMITTED BY APPLICABLE LAW VPS.NET DISCLAIMS ANY AND ALL WARRANTIES INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT. TO THE EXTENT PERMITTED BY APPLICABLE LAW, ALL SERVICES ARE PROVIDED ON AN 'AS IS' BASIS."</p>

Provider	Privacy Policy
Google Apps ²²	<p>The "domain administrator" has almost unlimited access to the company's data.</p> <p>Google keeps and can use any "User communications – When you send email or other communications to Google, we may retain those communications in order to process your inquiries, respond to your requests and improve our services."</p>

²⁰ <http://www.rackspacecloud.com/legal>

²¹ <http://www.vps.net/legal/terms-of-service>

²² http://www.google.com/apps/intl/en/terms/user_privacy.html

<http://www.google.com/privacypolicy.html>

	So all communication between you and your clients is kept by Google and used to target your advertisements.
Rackspace.com ²³	"We do not promise that the Services will be uninterrupted, error-free, or completely secure. You acknowledge that there are risks inherent in Internet connectivity that could result in the loss of your privacy, Confidential Information, and property. Rackspace has no obligation to provide security other than as stated in this Agreement."
VPS.net ²⁴	"We will not provide any personally identifiable information about you to any other person other than: * a law enforcement or regulatory agency at their request; ... * as otherwise needed to protect or enforce or rights or the rights of others." "We may share aggregate statistical data about our customers with third parties, such as advertisers or suppliers. This aggregate statistical data will not identify you personally."

ii. The "Private Cloud" Option.

Even with a good Privacy Policy, Service Level Agreement and Terms of Service, is it really worth risking your clients' data²⁵, and potentially exposing you or your clients to jurisdiction in the location(s) where your data is held²⁶?

One option which is within reach of government agencies and medium to large law firms and corporations is a "private cloud." With a "private cloud" the same concept of a shared pool of resources that make cloud computing economical and powerful is in play, only that pool of resources is shared within the organization rather than between

²³ <http://www.rackspacecloud.com/legal>

²⁴ <http://www.vps.net/legal/privacy>

²⁵ "Security Glitch Results in Posting of Blippy User Credit Card Numbers Online," ABA Journal, 4/23/10.

²⁶ *U.S. v. Johnson* (4th Cir. 2007) (VLW 007-2-176), holding that jurisdiction was proper in the Eastern District of Virginia for cases arising due to a filing on the Securities & Exchange Commission's online E.D.G.A.R. filing system where the E.D.G.A.R. computer servers were located in the Eastern District of Virginia.

multiple organizations.

In a typical scenario, a medium sized law firm could purchase and maintain their own computing equipment organized into its own "private cloud" and run all of the firm's computing tasks in that small "private cloud" without commingling firm or client data with other cloud computing users. Alternatively a cloud computing provider can be engaged to provide and maintain the "private cloud" for the organization, again giving the economies of scale that make cloud computing useful, while allowing the law firm to specify where their data is physically held and ensure that their data is physically segregated from other cloud computing users, as well as provide encryption and security features to ensure that data passing between the law firm's users and the firm's "private cloud" remains protected.

b. Wireless Internet Security at the Office and on the Road

The duty to protect client information in Virginia RPC 1.6 becomes increasingly difficult to meet when lawyers are traveling and connecting with clients and the office electronically. Wireless communications have allowed attorneys to work more outside the office and stay in touch when traveling or when at home, but lawyers must take reasonable precautions when connecting wirelessly.

Google's "Street View" system in Google Maps allows users to see street level photographs of many cities around the USA and the globe. This was made possible by specially equipped cars that had cameras and radio equipment and that Google employees drove up and down each street to populate the database of information.

In order to assist in determining the location of a user when they accessed Google's services, the radio equipment on Google "Street View" vehicles was designed to listen to Wireless Internet (WiFi) signals as it drove by, primarily intended for finding WiFi network names and associating them with geographic coordinates. In addition to capturing network names, a few overzealous engineers at Google decided to keep a dump of all information that was "overheard" while Google "Street View" vehicles drove along. When this information came to light, Google was accused of criminal intent²⁷.

This story brings to light two concerns for attorneys using WiFi and other wireless connections. First, WiFi without encryption is not secure. If Google's "Street View" drove past your office and you have an open WiFi network, Google may have some of your client's confidential data in their

²⁷ "Google accused of criminal intent over StreetView data," BBC News, June 9, 2010. <http://www.bbc.co.uk/news/10278068>

possession. Second, if you were at a public Internet hot spot, such as a coffee shop, using your laptop and WiFi when Google drove by, any unencrypted communications between your laptop and the rest of the Internet may be stored on Google's computers.

Attorneys can meet their Virginia RPC 1.6 obligations by encrypting their office WiFi networks with a strong encryption key, and by using a Virtual Private Network (VPN) to encrypt their communications with the office when they are out using public WiFi hot spots. In Germany, the top criminal court has gone as far to require WiFi encryption on every network²⁸, holding that the network operator will be responsible for any malfeasance, including copyright infringement, if an unencrypted WiFi network is used for malicious purposes.

When using public hot spots, attorneys should avoid free WiFi connections that may be "too good to be true."²⁹ Make sure that you're not connecting to an "ad hoc" network, and that all your e-mail and file transfer services are using encryption, or that you're using a Virtual Private Network (VPN) to communicate with your office.

c. Keeping Electronic Client Information Safe and Confidential

As discussed *supra*, Virginia RPC 1.6 imposes a duty of confidentiality, and RPC 1.15 requires that an attorney keep a client's property safe. Though Virginia RPC 1.15 delves extensively into the operation of trust accounts, it applies to any client property, including electronic property that is in the possession of a lawyer.

A few of the hot topics with respect to confidentiality and safekeeping of electronic client data include:

- i. Metadata Scrubbing. As discussed in prior years, jurisdictions are split on the handling of metadata in lawyer communications and Virginia has yet to promulgate clear rules on metadata. Many lawyers will take the step of turning documents into Adobe's Portable Document Format (PDF) prior to sending information to opposing counsel, for example, but making a PDF isn't enough to clean out metadata.³⁰ Attorneys who are concerned about leaking client information in metadata should use a metadata scrubber program on all attachments prior to sending them

²⁸ "Wardriving police: password protect your wireless, or face a fine", Dancho Danchev, ZDNet, May 14, 2010. http://www.zdnet.com/blog/security/wardriving-police-password-protect-your-wireless-or-face-a-fine/6438?tag=mantle_skin;content

²⁹ "Whacking, Joyriding And War-Driving: Roaming Use Of Wi-Fi And The Law," CIPerati, Volume 2, Issue 4, December 2005.

³⁰ "Document security tips to protect you and your clients," YourABA, February 2010.

out. As with the other rules discussed, a standard of reasonableness will apply, so a metadata scrubber may not be required in all situations, but could be required in situations where the potential metadata to be disclosed could make or break the case.

- ii. Data Backups. One law firm in St. John's, Newfoundland, was able to rise from the ashes after a fire burned down its law offices in June, 2010. The attorneys were able to recover their computer hard drives so that they could continue practicing until their office was rebuilt³¹. But what if their hard drives had not been salvageable? Likewise, what if some of their client information was only in paper format.

Clearly lawyers can see a benefit from keeping electronic copies of client information as a backup. Some have gone as far as creating the "no staff, paperless" law firm³². However, keeping electronic copies of client information creates its own risks of handling that information, and of backing up the newly created electronic information.

The St. John's, Newfoundland law firm that fell victim to fire could have protected themselves much better by using an encrypted off-site backup solution. Encrypting the data prior to sending it off-site ensures compliance with Virginia RPC 1.6, and storing it off-site ensures compliance with Virginia RPC 1.15.

d. Cyber Insurance.

With the increasing reliance on electronic communications and storage of client data, for better or for worse, law firms may be worried about the increased risk. Some insurance brokers have begun providing "cyber insurance"³³ which would insure against breaches of security, loss of information, etc. While this is no substitute for good security, even the best security is not infallible and purchasing "cyber insurance" may be a cost effective way for lawyers to mitigate the damages that could arise if their clients' information was not kept safely as required by Virginia RPC 1.15.

7. Connecting With Your Clients: Lawyer Advertising and e-Lawyering

In our increasingly connected and online world, lawyers will need to adapt to new methods of client communication in order to stay current with the times and attract

³¹ "Law Firm Destroyed by Fire Has Hard Drive, Will Practice in Unknown New Location," ABA Journal, 6/14/10.

³² "Inspired by Richard Susskind, Lawyers Form 'No-Staff, Paperless' Firm," ABA Journal, 4/14/10.

³³ "Cyber insurance increasingly important for law firms," VA Lawyers Weekly, 8/9/10.

new clients. While "e-Lawyering" may be essential to the success of the profession³⁴, attorneys must abide by the ethics rules currently in place, many of which were designed for a prior era of written and telephonic communications.

Attracting, obtaining and serving clients electronically can enhance any law practice. While a few states such as New Jersey have requirements that attorneys maintain a physical office³⁵, most states currently allow or have yet to prohibit attorneys working from a "virtual" office. Several ethical rules are implicated:

- a. Virginia RPC 1.3: Diligence.
"(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

"(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

"(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3."
- b. Virginia RPC 1.4: Communications, supra.
- c. Virginia RPC 1.6: Confidentiality of Information, supra.
- d. Virginia RPC 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."
- e. Virginia RPC 1.9: Conflict of Interest: Former Client.
"(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 both the present and former client consent after consultation."

³⁴ "e-Lawyering: A Must for Today's Lawyers," ABA Around The Bar, 8/6/10.

³⁵ "Virtual Offices May Violate Ethics Rules, New Jersey Opinion Says," ABA Journal 4/6/10.

- f. Virginia RPC 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."
- g. Virginia RPC 4.3: Dealing with Unrepresented Persons.
"(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

"(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client."
- h. Virginia RPC 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. 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."
- i. Virginia RPC 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. ..."
- j. Virginia RPC 7.3: Direct Contact With Prospective Clients And Recommendation Of Professional Employment
"(a) **A lawyer shall not, by in-person communication, solicit employment**

as a private practitioner for the lawyer, a partner, or associate or any other lawyer affiliated with the lawyer or the firm from a non-lawyer who has not sought advice regarding employment of a lawyer if:

(1) such communication contains a false, fraudulent, misleading, or deceptive statement or claim; or

(2) such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over persuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made.

"(f) Notwithstanding any other provisions of this Rule, **a lawyer shall not initiate in-person solicitation of professional employment for compensation in a personal injury or wrongful death claim** of a prospective client with whom the lawyer has no family or prior professional relationship. **In-person solicitation means face-to-face communication and telephone communication.**" (emphasis added)

k. Virginia RPC 7.4: Communication Of Fields Of Practice And Certification

"Lawyers may state, announce or hold themselves out as limiting their practice in a particular area or field of law so long as the communication of such limitation of practice is in accordance with the standards of this Rule, Rule 7.1, Rule 7.2, and Rule 7.3, as appropriate."

l. Virginia RPC 7.5: Firm Names And Letterheads

"(a) **A lawyer or law firm may use** or participate in the use of a professional card, professional announcement card, office sign, letterheads, telephone directory listing, law list, legal directory listing, **website**, or a similar professional notice or device **unless it includes a statement or claim that is false, fraudulent, misleading, or deceptive.**" (emphasis added)

Applying these ethical considerations, we will discuss several aspects of "e-Lawyering":

m. Video Conferencing

Connecting with clients remotely can reduce expenses and time spent traveling, and a "face-to-face" communication doesn't have to be sacrificed in the process.³⁶ By using video conferencing, attorneys can work remotely from their clients and can better maintain a working relationship with their clients. However, when using video conferencing to attract new clients, attorneys have to be aware of Virginia RPC 7.3, which restricts the content and context

³⁶ "Inexpensive Web Tools and Straight Talk Help Build Client Relationships," ABA Techshow, March 26, 2010.

of in person solicitations, which are defined in both 7.3(a) and 7.3(f) to include telephonic and "face-to-face" communications. The Virginia State Bar is currently considering proposed changes to in person solicitation rules³⁷ to prohibit them in all cases, not just wrongful death and personal injury. In comparison, the District of Columbia bar allows in-person solicitation in all cases, even wrongful death and personal injury³⁸.

Furthermore, video conferencing can be subject to the same information security concerns that lead us to discuss Virginia RPC 1.6 with regards to other forms of electronic communications with the client. Using an encrypted video conferencing system can greatly reduce the concerns of privileged information leaking into the wrong hands.

n. Blogging, Twitter & Social Networking.

Many attorneys now maintain blogs, post on Twitter and use Social Networking sites such as FaceBook, LinkedIn and Avvo to attract clients.³⁹ By providing some legal information for free, attorneys can make it easier for clients to find them in search engines and can portray themselves as experts in a specific field.

If your blog, Twitter post⁴⁰ or your social network profile provide more than your name and contact information, you need to carefully review Virginia RPCs 7.1 through 7.5 regarding advertising. Holding yourself out as certified in a specific field of practice has to be handled carefully under RPC 7.4. Information about your firm and jurisdictions in which each attorney is licensed must be clearly communicated under RPC 7.5. And all advertising must be truthful and not misleading under RPCs 7.1 and 7.2.

The Virginia State Bar now has a routine practice of proactively checking on attorney advertising, including online advertising.⁴¹ In most cases the warning letters from the VSB regarding advertising are settled quickly and privately by a change in the advertising content, but no attorney wants to receive such a warning letter.

Is blogging worth it, and can you provide legal information without providing

³⁷ "VSB takes second pass at in-person solicitation," VA Lawyers Weekly, May 10, 2010.

³⁸ The District of Columbia did not adopt ABA Model Rules 7.2, 7.3 or 7.4.

³⁹ "Social networking: Like a Rotary meeting on steroids," YourABA, April 2010.

⁴⁰ "Web 2.0 Spins Out Some Tough Marketing Ethics Questions," ABA Techshow, March 26, 2010.

⁴¹ "VSB: A 'proactive' approach reduces advertising problems", VA Lawyers Weekly, 8/9/10.

legal advice?⁴² When communicating with unrepresented persons, lawyers have to be wary of conflicts and of giving legal advice under RPC 4.3. And the duties of confidentiality under RPC 1.6 and conflicts under RPC 1.7 are implicated even with *prospective clients*, not just clients that have been retained by the firm.

o. Web-Based Legal Options.

Clients want to connect with their attorney online, and are continuing to turn to other service providers when they can't have their legal needs addressed electronically.⁴³ Attorneys who engage with clients electronically should follow the same procedures with respect to conflicts checks under RPC 1.7, 1.8 and 1.9, written engagement letters, confidentiality under RPC 1.6 and diligence under RPC 1.3.

p. Potential Pitfalls of Dealing with Clients Virtually.

Last month I received the virtual client who was too good to be true. An out of state corporation was seeking local counsel to negotiate a settlement with a Virginia debtor. I was contacted by the out of state "client" and asked to assist in negotiating and collecting the settlement. I tried calling this "client" but got voicemail, so I checked out the web sites of the "client" and the purported Virginia debtor and both looked like legitimate businesses. So I responded over e-mail and the next day the "client" wrote back regarding the terms of the engagement. I sent an engagement letter and asked for that to be returned with a signature and a retainer deposit made by check or credit card.

A few days later a cashier's check for nearly \$300,000 made out to my firm arrived in the mail at my office from the purported debtor. I had yet to speak with the debtor or their counsel, let alone negotiate a settlement. Shortly after the letter arrived I received an e-mail back from my "client" with the signed engagement letter scanned and attached, but with no retainer deposit.

At this point I tried again to call my "client." Rather than using the phone number supplied by the client, I used the phone number on the web site that I found for the "client." This time I got in touch with a human who told me that his identity had been stolen and that he had not had any communication with me, but that someone else was using his name and his company's name.

My next phone call was to the FBI to whom I turned over the matter.

⁴² "Lawyer Warns of Blogging Burden, Even as Top Law Firms Embrace It," ABA Journal, 3/15/10.

⁴³ "Clients prefer Web-based legal options, find non-lawyer vendors fill the bill," YourABA, February, 2010.

While doing business virtually may have its advantages, attorneys have to be diligent in ensuring that they do not facilitate identity theft, money laundering or become a victim of those crimes themselves. On some level there is still no substitute with the face to face relationship between an attorney and her client.

8. E-Discovery & Jury Research Update

In prior years we focused on electronic discovery and discussed the case of *Qualcomm Inc. v. Broadcom Corp.* which has been working its way through the California courts. As you may recall, in 2007 the magistrate judge issued an "Order to Show Cause Why Sanctions Should Not Be Imposed" against several attorneys who had turned a blind eye to their clients' destruction of electronic materials that were the subject of a discovery order. The original order alleged that the attorneys had violated Rule 3.3 "Candor Toward The Tribunal" and Rule 3.4 "Fairness To Opposing Party And Counsel."

Earlier this year the California court found that there was no bad faith by the attorneys and lifted the sanctions against them.⁴⁴ However, the *Qualcomm* case still left its mark on the world of electronic discovery and created a framework for other judges to enforce sanctions in cases where bad faith is found. Furthermore, the scope of what electronic data is discoverable still expanding⁴⁵ making electronic discovery a moving target. In order to meet the obligations of competence in RPC 1.1 and diligence in RPC 1.3, attorneys need to keep abreast of electronic discovery obligations, or associate with other attorneys or service providers who have expertise in this area.

Finally, tying together our discussions of wireless electronic communications, social media and cloud computing, the ABA Magazine had an interesting article in July, 2010 dealing with jury research. An enterprising law firm brought in additional attorneys and paralegals during a *voir dire* to do online research of the jury pool⁴⁶. Using wireless internet connections, the firm was able to search popular social networking sites, most of which run on cloud computing platforms, to find out relevant information about each potential juror so that they could use the information in jury selection. Hopefully they were smart enough to use encrypted wireless communications or a Virtual Private Network to keep opposing counsel from overhearing their electronic research communications. Thankfully Virginia attorneys are exempt from jury duty⁴⁷, but the rise in social media and cloud computing show us just how much information we make available to the public, and how much privacy we are sacrificing in the process.

⁴⁴ "Judge Finds No Bad Faith by Qualcomm Lawyers, Lifts Discovery Sanctions," ABA Journal, 4/7/10.

⁴⁵ "Judge's Latest E-Discovery Ruling Is 'Wake-up Call to Litigants'", ABA Journal, 2/23/10.

⁴⁶ "Tech Check: Lawyer uses Web to sort through jury pool," ABA Magazine, 7/1/10.

⁴⁷ Virginia Code §8.01-341(5)