12TH ANNUAL ETHICS PRESENTATION
OCTOBER 12, 2011
9:00 – 11:00 a.m.

The Ethics of Social Media

1. Current trends in the use of social media and practice of law (15 minutes)
   a. The expansion of social media into the legal profession.
   Reports show that use of social media by attorneys and judges is increasing, but that judges in particular are proceeding with caution. The Conference of Court Public Information Officers in collaboration with The National Center of State Courts in Williamsburg, VA, and the E.W. Scripps School of journalism at Ohio University, just released their three year survey study in August.[1] 731 judges, magistrates, and court officers responded to the survey. The summarized findings are as follows:

   MAJOR CONCLUSIONS
   Several major conclusions can be drawn from the 2011 data:
   - While more judges report using social media profile sites than last year, they still cautiously approach their use of social media profile sites in their professional lives in order to avoid compromising professional codes of ethics.
   - Judges also appear to recognize that the surge of social media use is permeating every aspect of citizens' lives. An increasing number of judges report verbalizing routine juror instructions that include some component about digital media use during trials.
   - It also appears that the institutional use of social media profile sites is gaining acceptance. The survey shows a 7.6 percent increase in the number of respondents who agree that courts as institutions can maintain a social media profile site without compromising ethics.
   - In addition, there was a concurrent 5.1 percent increase of those who report working at a court that maintains such a site.[2]

   b. The growth of online or virtual law firms
   Virtual law firms, which rely on twitter, Facebook, blogging and other social media, are expanding. Lawyers appreciate the ability to work from home, lower overhead costs, and reduced hours.[3] These lawyers are also finding that they can keep a greater proportion of the amount that they bill, allowing them to spend more time with clients and less tie working overall.[4] The use of social media allows lawyers to market themselves through blogs and other

[1] *See* Conference of Court Public Information Officers, 2011 CCPIO New Media Survey, *available online at http://www.ccpio.org*.
[2] *Id*.
[3] *See* Debra Cassens Weiss, Another Virtual Law Firm Allows Lawyers to Work Less, Earn More, ABA Journal News, 10/7/2010.
[4] *Id*.

postings. Technology continues to play a major role for law firms, especially in the current market.[5] Traditional law firm jobs are scarcer than ever, and many firms are turning towards outsourcing and working from home options.[6]

c. New Customer Expectations

Customers are demanding value for services. According to recent surveys, a majority of customers expect law firms to offer their services online.[7] Access to low-cost online legal advice and information has increased competition among lawyers, and firms that want business are expected to provide certain services online. Online portals can be an effective way of attracting customers.[8] Clients also appreciate fixed fee arrangements, unless those arrangements are thinly disguised hourly arrangements, calculated solely on the "average" amount of time without some greater discount incentive.[9] However, any such arrangement must meet the requirements of Rule 1.5:

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)

Social media can play a powerful role in providing service and in marketing law firms.[10] However, as I will discuss in section 2, these trends bring up numerous ethics issues, especially those dealing with Communications, Advertising, and Confidentiality.

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[5] Paul Fletcher, Technological Strategies for the Future, Virginia Lawyers Weekly, 5/23/2011.
[6] *See* Heather Timmons, Outsourcing Firms Are Creating U.S. Jobs for Lawyers, NYTimes, 6/2/2011.
[7] Gain a Competitive Edge With Elawyering; ABA News for Members, Oct 2010.
[8] *Id*.
[9] *See* Patrick J. Lamb, Avoiding 'Wolf in Sheep's Clothing', Disguised Hourly Fees, ABA Journal News, 10/10/2010; Patrick J. Lamb, Does Every Hour Provide the Same Value, ABA Journal News, 11/3/2010.
[10] Deborah Elkins, Done Right, Social Media a Powerful Tool for Lawyers, Virginia Lawyers Weekly, 3/25/2011.

Online interactions also have their business and legal risks, not just ethical risks.

Online interaction and social media can be a boon to business. However, 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 for the traditional face to face relationship between an attorney and her client.

d. Lastly in this section, I'd like to follow up on trends and issues from previous CLEs, including the red flag rule, credit cards pitfalls and principles, the ongoing concern with cyber security.
    i. FTC Red Flags Rules
    Last year I discussed how the FTC had promulgated "Red Flags Rule," which applied to any business that extends credit to its clients. Because many attorneys provide services for customers before being paid, they would have been included in the rules. The ABA sued to keep the FTC out of the regulation of the practice of law in 2009, and won a decision in D.C. Circuit Court.[11] Congress vindicated and simultaneously mooted the decision in December 2010, when it passed a law exempting lawyers from the rules.[12]

    ii. Credit Card Pitfalls and Principles
    I have discussed in the past attorneys' acceptance of credit cards and how this is viewed by the FTC as not making the attorney a "creditor." Accepting credit cards poses a lot of obvious benefits for attorneys. Clients are familiar with them from other transactions, they provide convenience and may increase business. There are, however, a few traps to avoid.[13]

        A. In some states, it is okay for attorneys to accept credit cards for payment of legal fees, even those in advance, but not for court costs.[14] In D.C. and Virginia, lawyers may accept credit cards for both earned and advanced legal fees as well as court costs, provided that any advanced fees are immediately placed in a client trust account.[15]
        B. Another pitfall are the merchant processing fees, which are not altogether insubstantial. Attorneys may try to recoup these fees by increasing costs across the board for all

[11] Martha Neil, "ABA Battles FTC in DC Appeals Court: Does Red Flags Rule Apply to Lawyers?" – Business of Law, ABA- Nov 15, 2010
[12] Martha Neil, congress Votes to Exempt Lawyers from the Red Flags Rule, ABA Joural, Dec 7 2010.
[13] Edward Poll, The Plusses and Pitfalls of Accepting Plastic as Payment, Virginia Lawyers Weekly, 6/14/2011.
[14] Id.
[15] *See* Virgina Bar LEO 999, 1510, 1848; DC Bar Opinion 348.

clients, or by charging an administrative fee for credit card transactions. In Virginia, passing along the credit card charge as an administrative fee is permissive, but has to be explained in writing, to which the client must give informed consent[16].

C. Lastly, lawyers can avoid fee disputes from credit card companies by drafting language in their client agreements that prohibits clients from going through the credit card company and having the dispute resolved between the client and attorney. A lawyer would be wise to confirm the language with the creditor to ensure it will be honored.

iii. Cyber Security

A. WiFi encryption and Google Street View update

Last year I discussed How Google may be facing criminal penalties for its "Street View" operations. Essentially, Google drove cars equipped with cameras and radio equipment all over the country, gathering information on homes, addresses, and the various WiFi networks associated with them. All of the information was stored on Google's computers.

In July of this year, US District Court Judge James Ware of San Francisco, California decided that Google's actions may have violated federal wiretapping laws, and that a class action suit against the company could proceed.[17]

The story poses concerns for attorneys who used WiFi and other wireless connections, particularly at Internet hotspots, without adequate encryption. Confidential client data may have been scooped up by these cars as they drove by, which would likely violate Rule 1.6. Attorneys can avoid violating Rule 1.6 by encrypting their office WiFi networks with a strong encryption key, and by using Virtual Private Network (VPN) to encrypt their communications with the office when they are out using public WiFi hot spots.

B. "Cyberwar"

In a recent NPR article, government agencies seem at odds about how to characterized the latest attacks on RSA, Lockheed Martin, and Google.[18] Howard Schmitt, White House coordinator for cyber security, views the recent attacks as more of the same—mainly that such attacks are forms of espionage, intellectual property theft, and other cybercrime. The Department of Defense, on the other hands, sees

[16] Virginia Legal Ethics Opinion 1848 (April 14, 2009)
[17] BBC News technology, Google Faces 'Wire Tapping' Case Over Steet View, July 1, 2011
[18] Tom Gjelton, Divisions Seen In Administration Over Cyberthreats, NPR 6/9/2011.

the new attacks as a new and advanced tactic designed to cause actual physical damage. Regardless of the semantics used, the government maintains that it will remain vigilant in combating such attacks.

2. The ethical rules and how they relate to social media (30 minutes)
    a. Risks of failing to use or at least familiarize oneself with social media.
        i. 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.**

        Because Facebook, Twitter, and other social media are so ubiquitous in people's everyday lives, a lawyer must know how social media fits in with current law, even if she does not use the media herself. For example:

            A. An employee is terminated for his Facebook postings and comes to you asking whether he can sue his former employer. What should you tell him?[19] Recent National Labor Relations Board (NLRB) decisions suggest that an employee is protected if the online activity is "concerted" activity among several employees because such activity implicates the right to unionize.[20] However, an off-the mark insult that merely garners a few "thumbs up" is likely not protected and can easily get a person fired.
            B. A woman has a "no contact" temporary restraining order against a former boyfriend, who sends her a "friend request" on MySpace. Does this violate the order? A New York court held that it does.[21]

        ii. RULE 1.3(a) Diligence

        A lawyer **shall act with reasonable diligence** and promptness in representing a client (emphasis added).

        Somewhat related to competence, especially with the "preparation" required in Rule 1.1, diligence requires that the attorney advocate on a clients behalf and thoroughly use the tools at his disposal. While the "zeal" language is not present in the Virginia Rules, a Virginia lawyer

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[19] Office of the General Counsel, Division of Operations-Management, Memorandum OM 11-74, 8/18/2011; NLRB Wal-Mart Case 17-CA-25030; NLRB Martin House Case 34-CA-12950; NLRB JT's Porch Saloon & Eatery, Ltd. Case 13-CA-46689; Man claims social media got him fired from Walmart - wdbj7.com.pdf.

[20] *See* Barry J. Kearney, NLRB Office of the General Counsel, Advice Memorandum, Case 13-CA-46689, 7/7/2011.

[21] *See* People v. Fernino, 851 N.Y.S.2d 339 (N.Y. Crim. Ct. 2008).

must nonetheless act with diligence[22]. In doing so, she may nonetheless need to utilize social media if such practice is standard among one's colleagues and is reasonable. It is becoming more common in jury selection[23] and trial preparation, and there is even an application for it on the Apple iPad®.[24]

In the much-hyped Casey Anthony trial, Trial Consultant Amy Singer led a team that monitored blogs and media sites around the clock to gauge what people were thinking, what arguments the other side was likely to make, and how to present certain facts. For example, "Singer said when Anthony's mother testified that she did an Internet search for chloroform, 'everybody hated her.' But other commenters said this was a mother protecting her child, she said. 'So we knew how to play that.'" The protection argument was made in closing. Singer credited social media use with the success.[25]

Another common example is in family law: if the husband's attorney is scouring the wife's Facebook page, the wife's attorney would be at a disadvantage not to return the favor.[26] In a child custody proceeding, an attorney asked the husband if he had a temper, which he denied. She then confronted him with his own Facebook posting: "If you have the b[…] to get in my face, I'll kick you're a[…] into submission."[27]

If the other side is using the latest and most advanced "weaponry," your side will lose unless it does the same. However, in performing this due diligence, an attorney must be careful about not breaking Rule 4.2: Communicating with a Person Represented by an Attorney. An Oregon bar opinion has stated that while publicly accessible blogs and postings are okay, the attorney may not seek information that requires communicating with a represented party (such as "friending" a represented witness).[28]

In 2009, the Philadelphia Bar Association issued an ethics opinion regarding such activity and how it relates to Rule 5.3.[29] The inquirer

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[22] However, the District of Columbia version of this rule does include a requirement that the attorney "zealously" represent its client's interests.
[23] "Tech Check: Lawyer uses Web to sort through jury pool," ABA Magazine, July 1, 2010.
[24] "Avatars Help Litigators Select Juries in New Ipad Ap", ABA Journal, August 2, 2010.
[25] "Using social media as part of your trial preparation" Virginia Lawyers Weekly, July 15, 2011.
[26] Margaret M. DiBianca. *Ethical Risks Arising From Lawyers' Use Of (And Refusal To Use) Social Media. Del L. Rev. Issue 12 # 2 (2011).*
[27] *See* Steven Seidenberg, Seduced: For Lawyers the Appeal of Social Media is Obvious. It's Also Dangerous; ABA Journal 2/1/2011
[28] *See Id.*
[29] Phila. Bar Ass'n. Op. Opinion 2009-02, May 2009, *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf

wanted to use a third party to "friend" a deposition witness so as to access the witness's Facebook page in order to obtain impeachment material.[30] The Attorney stated that the third party would not state anything untrue in the communication, but would not reveal his status as an agent of the attorney.[31] The opinion stated that such action would probably violate Model Rules 8.4(c) (Deception) and 4.1(Truthfulness) because Rule 5.3 obligates the attorney that is directing the conduct.[32]

iii. RULE 3.4 Fairness To Opposing Party And Counsel

"A lawyer shall not:

"(a) Obstruct another party's access to evidence or alter, **destroy or conceal a document or other material having potential evidentiary value** for the purpose of obstructing a party's access to evidence. **A lawyer shall not counsel or assist another person to do any such act**" (emphasis added).

Suppose you represent a client in a contested divorce and you find out your client has described himself as "single and looking" on MySpace or has posted photos of himself intoxicated on Facebook. Can you tell the client to delete the photos or the account altogether?[33] Rule 3.4 likely requires that you do not advise a client to do so, since a Facebook page might be admitted into evidence.[34]

iv. RULE 5.1 Responsibilities Of Partners And Supervisory Lawyers

"(a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, **shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.**

"(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**" (emphasis added).

RULE 5.3 Responsibilities Regarding Nonlawyer Assistants

"With respect to a nonlawyer employed or retained by or associated with a lawyer:

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[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] *See, eg*., Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ., No. 07-C-1586, 2010 U.S. Dist. LEXIS 42748, at *17 (N.D. Ill. Apr. 29, 2010) (admitting as evidence the number of persons that joined a Facebook page); United States v. Gagnon, No. 10-52-B-W, 2010 U.S. Dist. LEXIS 40392, at *9 (D. Me. Apr. 23, 2010) (stating that the defendants son bore animus towards an ex-girlfriend "as evidenced by the Facebook page submitted into evidence").

"(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm **shall make reasonable efforts to ensure that the firm has in effect measures** giving reasonable assurance that the person's conduct is compatible with the professional obligations of the 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**; and
"(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
" (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
" (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and **knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action**" (emphasis added).

Attorneys must ensure their assistants, paralegals, law clerks, and other attorneys are not breaking the rules through social media.[35] The Comments under rule 5.1 of the Model Rules suggest that a supervising attorney should establish policies and guidelines for the ethical use of social media by any junior attorney under his supervision.[36] Similar requirements apply to an attorney's non-attorney staff under rule 5.3. Moreover, an attorney that is unfamiliar with the workings of social media is in a poor position to lay guidelines or monitor his staff.

A prime example of the risks of failing to supervise employees and familiarize oneself with social media is the following:

Five attorneys in Louisiana were disciplined recently for posting misleading information on their website.[37] The website suggested that a former Louisiana governor was a member of the firm, when in fact he had only rendered professional expertise but not legal advice.[38] The attorneys stated that an employee had created the website and that the attorneys did not even know exactly what their website claimed.[39] The

[35] *Dibianca*, supra note 16 at 184-85.
[36] *Id*. at 186.
[37] "Law Firm Partners Reprimanded for Misleading Information on Website" - News - ABA Journal 10/18/2010.
[38] *Id*.
[39] *Id*.

Louisiana Supreme Court reprimanded all five for failing to supervise the employee and for violating rules 4.1 and 8.4.[40]

b. Risks of engaging in social media
   i. RULE 4.1 Truthfulness In Statements To Others

"In the course of representing a client a lawyer shall not knowingly:

"(a) **make a false statement of fact** or law; or

"(b) **fail to disclose a fact** when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client" (emphasis added).

RULE 8.4 Misconduct

"It is professional misconduct for a lawyer to:

…

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

As the previous example demonstrates, attorneys must be careful in what they put online, or what their employees put online on their behalf. Firm websites are often problematic. In Tampa, an attorney was suspended for 90 days for listing four lawyers, who were not licensed to practice in Florida, as members of his firm.[41]

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. 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."

This rule, along with rules 7.2-7.5, greatly limit the information an attorney can disseminate through social media. Advertising using

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[40] *Id*.

[41] "Ethics Officials Seeing More Cases from Lawyers' Online Foibles" - News - ABA Journal 8/25/2010.

misleading or false information is clearly forbidden under rules 7.1 and 7.2. Information regarding the states in which an attorney is licensed are required under rule 7.5. Direct contact with clients is limited by rule 7.3. Finally, Rule 7.4 is a trap for the unwary Linked In® user:

RULE 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. **A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law** except as follows: [exceptions listed for Patent, Admiralty, Mediation, and certifying organizations]" (emphasis added).

Linked In® allows the profile holder to designate "specialties." A Lawyer is better off putting his practice areas in with his experience rather than in this category because it might otherwise imply him as a specialist in violation of this rule.[42]

ii. RULE 8.2 Judicial Officials
"A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer."

Concerned that a judge was gaming the system to deny criminal defendants of their right to a speedy trial, a Florida attorney excoriated the judge on a blawg[43], calling her an "evil, unfair witch."[44] This garnered him a reprimand and a $1,250 fine. His claim of free speech fell on deaf ears. The lesson cannot be emphasized enough: be careful with what you post online or through social media because it can come back to bite you and even cost you your job or license.

iii. 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;

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[42] *See* Thomas A. Gilligian, Jr., Social Networking Sites and the Ethical Issues They Create, driToday, *available at* http://www.dritoday.org/feature.aspx?id=143.
[43] "blawg" is the new term for law blog – as if "blog" itself weren't obnoxious enough!
[44] *See* Steven Seidenberg, Seduced: For Lawyers the Appeal of Social Media is Obvious. It's Also Dangerous, ABA Journal, 2/1/2011.

"(2) after discharge of the jury from further consideration of a case:
"(i) **ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror** or to influence the juror's actions in future jury service;
"(ii) **communicate with a member of that jury** if the communication is prohibited by law or court order; or
"(iii) **communicate with a member of that jury if the juror** has made known to the lawyer a desire not to communicate; or
"(3) **conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation** of either a juror or a member of a venire.

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

"(c) A **lawyer shall reveal promptly to the court improper conduct by a member of a venire or a juror**, or by another toward a venireman or a juror or a member of the juror's family, of which the lawyer has knowledge.

"(e) In an adversary proceeding, **a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending**, except:
"(1) in the course of official proceedings in the cause;
"(2) in writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party who is not represented by a lawyer;
"(3) orally upon adequate notice to opposing counsel or to the adverse party who is not represented by a lawyer; or
"(4) as otherwise authorized by law" (emphasis added).

All social media are communication tools. Because this rule greatly limits communications between attorneys and jurors and judges, ethics concerns abound. Contacting jurors via Facebook or even responding to blog posts may implicate communication concerns. Embarrassing potential jurors with their Facebook pictures is likely a no-no, although viewing profiles is not only allowed but common practice in voi dire. Juries are supposed to be bound by the facts presented in a case, but jurors might easily be prejudiced by things posted online. Jurors may also disrupt proceedings by trivializing them in tweets.[45] Lawyers and judges have a duty to be alert for such things to protect their clients' interests and the integrity of the trials, and have a duty to report any misconduct by jurors, which includes both obtaining extra-judicial information but also releasing information through blogs and tweets if a trial is to remain under seal.

[45] Live From the Jury Box, It's Steve Martin, Reuters, 12/22/2010.

Furthermore, lawyers must be careful in "friending" judges, and judges should avoid even the appearance of impropriety. A judge in Staten Island was disciplined for "friending" on Facebook several attorneys he had regular contact with, and other judges have resigned over such improprieties.[46]

iv. RULE 3.6 Trial Publicity

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

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

Social media functions as a form of cheap publication. Most tweets can be read by anyone that "follows" the tweeter. Blogs and many Facebook pages are publicly accessible. Lawyers should refrain from making statements on blogs, Facebook, or anywhere online that might prejudice the other side, just as a lawyer must be careful when speaking to the press. If evidence has been excluded at trial, an attorney should not go about presenting it and making his case online.

v. RULE 3.4 Fairness To Opposing Party And Counsel

"A lawyer shall not:

"(f) In trial, **allude to any matter that the lawyer does not reasonably believe is relevant** or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused" (emphasis added).

Lawyers should refrain from tapping social media data if the sole purpose is to embarrass or burden the other side. While online photos of a philandering husband in the arms of another woman might be probative in a contested divorce, they would likely be used only to embarrass in a contract dispute.

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[46] *See* John Schwartz, For Judges on Facebook, Friendship Has Limits, The NY Times, 12/10/2009; Judges Can Have Facebook Friends, with 'Constant Vigil,' Says Ohio Supreme Court Board, ABA Journal News. 12/8/2010; Ga. Judge Resigns After Questions Raised About Facebook Contacts, ABA Journal News, 1/7/2010; Alex Ginsberg, S I Jude is Red Face'd, NYPOST, 8/25/2011.

vi. RULE 1.6 Confidentiality of Information

"(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, and except as stated in paragraphs (b) and (c)" (emphasis added).

This is an important issue that we have discussed repeatedly in previous years because it relates to the issue of cyber security and protecting data. However, simpler examples happen all-to frequently in the area of social media. Smart but careless lawyers may occasionally reveal too much online. An attorney representing the defense in a wrongful death case emailed a picture of the overweight deceased man lying naked on an emergency room table.[47] He was suspended for 60 days. Another attorney, an assistant PD, revealed confidential client information on a blog after thinly disguising the clients' names by using derivatives of the names or jail IDs.[48] She also incriminated herself in a post by demonstrating that she had failed to rectify a fraud on the court when she posted the following: "Huh?...You want me to go back and tell the judge that you lied to him, you lied to the pre-sentence investigator, you lied to me?"[49]

The comments to Rule 1.6 state: "A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections." In this day and age, lawyers that use social media must be extra careful when communicating confidential information.

An overlooked danger is "friending" and linking client if a client's identity is intended to be kept confidential, or using things like foursquare, which reveal one's location, when meeting clients.[50] Others might be able to use such location information to divine the identity of the client or even the nature of the legal inquiry.

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[47] *See* Debra Cassens Weiss, Ethics Officials Seeing More Cases from Lawyers' Online Foibles, ABA Journal News, 5/11/2010.

[48] *See* Debra Cassens Weiss, Blogging Assistant PD Accused of Revealing Secrets of Little-Disguised Clients, ABA Journal News, 9/10/2009; *In re Kristine Ann Peshek,* Illinois Attorney and Registration Disciplinary Commission, 8/252009.

[49] *Id*.

[50] Margaret M. DiBianca. ETHICAL RISKS ARISING FROM LAWYERS' USE OF (AND REFUSAL TO USE) SOCIAL MEDIA. *Del L. Rev. Issue 12 # 2 (2011).*

3. 2010 – 2011 Rule changes in Virginia and under federal practice (5 minutes)
   a. Will the federal data breach statute be enacted?
   Several bills have been proposed in Congress that might change the security requirements of attorneys, especially large firms. The Bill most likely to be enacted, which is currently in Committee, is the Safe Act.[51] The Safe Act would require any Person that is engaged in Interstate Commerce and has "Personal Information" about another to adopt certain security safeguards:

"SEC. 2. REQUIREMENTS FOR INFORMATION SECURITY.

"(a) General Security Policies and Procedures-

…

"(2) DATA SECURITY REQUIREMENTS- Such regulations shall, taking into consideration the quantity, type, nature, and sensitivity of the personal information, require the policies and procedures to include the following:

"(A) A security policy with respect to the collection, use, sale, other dissemination, and maintenance of such personal information.

"(B) The identification of an officer or other individual as the point of contact with responsibility for the management of information security.

"(C) A process for identifying and assessing any reasonably foreseeable vulnerabilities in each system maintained by such person that contains such data, which shall include regular monitoring to detect a breach of security of each such system.

"(D) A process for taking preventive and corrective action to mitigate against any vulnerabilities identified in the process required by subparagraph (C), which may include implementing any changes to security practices and to the architecture and installation of network or operating software.

"(E) A process for disposing of data in electronic form containing personal information by shredding, permanently erasing, or otherwise modifying the personal information contained in such data to make such personal information permanently unreadable or indecipherable.

"(F) A standard method or methods for the destruction of paper

[51] Joh H. Lacey, Federal Data Breach Notification Statute Moves Along, The McCormack Firm, Massachusetts Data Privacy Law Blog, 7/26/2011.

documents and other non-electronic data containing personal information."[52]

In the even of a security breach, the person would have to report the breach to the Federal Trade Commission and any person affected within 48 hours, "unless the person makes a reasonable determination that the breach of security presents no reasonable risk of identity theft, fraud, or other unlawful conduct affecting such individuals."[53]

The bill as currently written raises a lot of concerns for attorneys and businesses alike. Does it apply to law firms? If yes, to which ones? How do they fit in with current state laws and ethics rules? The penalties for violations are quite onerous, and can include $11,000/violation, with a maximum of $5,000,000 of liability. In contrast, Virginia's laws are quite tame.

b. State bar rules for out-of state attorneys may change.

Virginia's bar rules sometimes take previously out-of-state attorneys by surprise. Lawyers that take the Virginia Bar can quite easily change their status to associate or inactive members. However, out of state lawyers that have been admitted to Virginia are subject to stricter requirements to change their status.

A lawyer who has practiced law in another state for at least 5 years can be admitted in Virginia without taking the Virginia Bar only if he "intends to practice full time as a member of the Virginia State Bar (VSB)."[54] An out of state attorney that wishes to change his status may face a revocation notice from the Virginia State Bar.[55] Currently, there is no procedure for how the determination is made or how attorneys might go about appealing such a decision. The Supreme Court has asked the VSB to come up with a proposal in which the VSB would make the initial determination whether or not such an order should be given, with the Supreme Court having the final say.

Under the Committee proposal, foreign attorneys would have to certify that they are working at least 35 hours per week as attorneys when they renew their license each year. A lawyer that does not comply with the requirement would be issued a notice of non-compliance, and they would have 30 days to respond. A satisfactory response would end the matter, while an unsatisfactory one would result in a referral to the VSB disciplinary authority. A three justice panel would have the final say.[56]

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[52] H.R. 2577 § 2, *available at* http://thomas.loc.gov/cgi-bin/query/F?c112:1:./temp/~c112K4kJqR:e4608.
[53] Id. at § 3 (a) (4).
[54] Rule 1A of the Supreme Court of Virginia.
[55] Virginia Lawyers Weekly, Court seeks new rule on waiver into VSB, 8/11/2011.
[56] *Id*.

4. Questions & Answers (10 minutes)