

NAPABA SSF BOOTCAMP ETHICS SESSION

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ETHICS OF LEAVING A FIRM

- 2 jurisdictions have adopted specific rule outlining the procedures for when a lawyer leaves a firm or when a law firm dissolves
 - Virginia Ethics Rule 5.8
 - Florida Ethics Rule 4-5.8



Rule 5.8

- Previous agreement between lawyer and law firm controls
- Absent any such agreement, the Rule prohibits unilateral contact with clients prior to meet and confer between the lawyer and the law firm for joint communication



Rule 5.8

- When no agreement can be reached between the lawyer and the law firm, either party may unilaterally contact the clients. In doing so, the party must:
 - Notify the client that the lawyer is leaving;
 - Provide the options to the client to remain a client of the firm or to transfer the matter to the departing lawyer, or to choose another lawyer or firm; and
 - May not make any false or misleading statement.



Rule 5.8

- The notice to client must be made promptly
- If the client fails to notify the parties of his/her choice of representation, the client is deemed to remain a client of law firm, until the client expresses a contrary intention.
- For law firm dissolution, the default is the other way around (i.e. client of the firm presumed to be lawyer's client)



ABA & Other Jurisdiction

- ABA and other jurisdictions deal with this issues through Ethics Opinions
- ABA Ethics Opinion 99-414 requires:
 - Notice to present clients,
 - Check any potential conflict of interest,
 - Protect client files & maintain confidentiality, and
 - Avoid any conduct involving dishonesty, fraud or deceit.



Things to Void

- Communicating with clients about leaving law firm before notifying the law firm
- Removing client files from the law firm
- Competing with the old law firm or trying to convince the client to change law firms
- Soliciting associates or other employees before the departure



Ethics of Advertising

- Section 7 of the ABA Model Rules and state equivalents deal with lawyer advertising.
- Lawyer Advertising Maxim: Don't Be Misleading
- Branding – the maxim covers law firm names
 - “& Associates” found to be misleading for solo practitioner
 - Non-lawyer names – for DC law firms, inclusion of non-lawyer partner may be misleading

Types of Social Media

- LinkedIn
- Avvo and other attorney rating websites
- Website/Blogs
- Facebook/MySpace
- Twitter
- Instagram



Social Media Advertising

- Special attention to AVVO and LinkedIn
 - Endorsements & testimonials may run afoul of rules without specific disclaimer
 - Specializations are restricted under ABA Rule 7.4 and equivalents

Certified specialist designation require:

- (1) the organization to be approved by state authority; and
- (2) the name of certifying organization must be stated

Hunter v. Va. State Bar

Hunter v. Va. State Bar, 744 S.E.2d 611 (Va. 2013)

- Hunter was a criminal defense lawyer who had a legal blog. Many of the posts were about cases where Hunter obtained favorable results for his clients. Hunter did not get prior approval from his clients to write of their cases. The blog also did not contain any disclaimer.
- The bar charged Hunter with violation of
 - Rule 1.6: Confidentiality
 - Rule 7.1: Communications Concerning a Lawyer's Services
 - Rule 7.5: Lawyer and Firm Names and Letterheads



Hunter v. Va. State Bar

- On appeal, the Virginia Supreme Court held that:
 - Hunter's blog was a partially protected by First Amendment right to free speech, and Rule 1.6 cannot prohibit Hunter from writing about a case when all the information has already been made public.
 - Hunter's blog about his success in the courtroom, however, is a commercial speech and can be regulated in order to further greater public interest.
 - His blogs are misleading to public and disseminating case results without a disclaimer violated Rule 7.1 and 7.5.



In re Dickey

In re Dickey, 772 S.E.2d 522 (S.C. 2012)

- Dickey was a recently licensed lawyer who decided to open a solo practice.
- Dickey used 2 websites and other online attorney profiles to promote his practice.
- He lied about his law school graduation year, and exaggerated his experience and past results.
- South Carolina Supreme Court issued a public reprimand



Recent Development

- New York State Bar Ethics Opinion 1052
 - The issue: compensating clients for rating a lawyer on an Internet website.
 - The NY Committee on Professional Ethics opined that giving a credit to clients for rating a lawyer on Internet website does not violate the Rules of Professional Conduct as long as:
 - The credit is not dependent on the content of the rating;
 - The client is not compelled or forced to rate the lawyer; and
 - The rating and reviews are done by the client, and not by the lawyer.

Recent Development

- The Committee opined that this arrangement does not violate Rule 7.2 (Payment for Referrals) because a rating is not necessarily a recommendation and the payment is not contingent upon the content of the rating, or whether someone retains the lawyer as a result of the rating.
- Rules 7.1 (Advertising) and 8.4 (Misconduct) are also not violated as long as the client provides the rating freely and not on behalf of the lawyer, and thus ratings do not fall under the definition of an advertisement. If such ratings were coerced or written by the lawyer, it would be an advertisement and violate Rule 7.1 because an advertisement may not be false or misleading.
- Coerced rating would also violate Rule 8.4 because coercing a rating from a client would constitute conduct involving deceit and misrepresentation.

Conflict Checks

- ABA Model Rule 1.6 recently amended to permit disclosure of information to check conflict before law firm merger and when a lawyer joins a new law firm
- ABA Model Rule 1.7 & 1.8 – Conflict of Interest/Current Clients
- ABA Model Rule 1.9 – Duties to Former Clients
- Rule 1.10 – Imputation of Conflict of Interest

Conflict Checks

- It is essential for each law firm to create a conflict check system
 - The type of system required to satisfy the ethical requirement would depend on variety of factors.
 - But once a system is in place, be sure to:
 - Standardize the intake system
 - Update with every engagement
 - Run the system often

Conflict Checks

- New York State Bar Formal Opinion 2003-03 on Conflict Check
 - Require law firms to keep records of representations to permit law firm check potential conflict
 - The type of record keeping depends on the size of the law firm, the nature of law firm's practice, etc.
 - However, the opinion is clear that papered client files is insufficient to satisfy the record keeping requirements for conflict check purposes

Northam v. Va. State Bar

Northam v. Virginia State Bar, 737 S.E.2d 905 (Va. 2013)

- Northam was contacted by Husband to represent him in a divorce proceeding. Unbeknown to Northam, his partner (Lewis) was contacted by Wife for representation in the same proceeding.
- When Lewis learns the Husband's identity during his meeting with Wife, he terminates the meeting immediately. He then goes to Northam's office and says "I have a problem" or "we have a problem". The conversation ends and Lewis declines representation of Wife. Northam, however, continues to representation of Husband.



Northam v. Va. State Bar

Northam v. Virginia State Bar, 737 S.E.2d 905 (Va. 2013)

- The disciplinary board finds Northam in violation of Rules 1.7 (conflict of interest), 1.10(imputed disqualification), and 1.16 (declining or terminating representation).
- On appeal, Virginia Supreme Court reverses the finding. The Court found that there was no finding of fact to support a claim that Northam “knowingly” continued to represent the husband when another lawyer in his firm (Lewis) would be prohibited from doing so.



Client Relationships

- Ethics Rule requires a lawyer to be competent
- Competency required of a lawyer is not limited to the knowledge of the law
 - Competency in client management
 - Competency in technology
- Section 1 of the ABA Model Rules and state equivalents deal with client relationships.

Use of Engagement Letter

- Well drafted Engagement Letter can assist the lawyer in addressing
 - Rule 1.2(Scope of Representation & Allocation of Authority)
 - Rule 1.4 (Communications)
 - Rule 1.5 (Fees)
 - Rule 1.6 (Confidentiality)

Use of Engagement Letter

- Well drafted Engagement Letter can assist the lawyer in addressing following Rules:
 - Rule 1.2(Scope of Representation & Allocation of Authority)
 - Rule 1.4 (Communications)
 - Rule 1.5 (Fees)
 - Rule 1.6 (Confidentiality)

Use of Engagement Letter

- Well drafted Engagement Letter should include:
 - Requirement for collaboration by client
 - Clear fee arrangement
 - The overview of the legal process
 - Conflict of interest disclosure
 - Permitted disclosure of confidential information, etc.

Competency in Technology

- ABA Model Rule 1.1, Comment 8 requires lawyer to maintain requisite knowledge of “relevant technology”
 - This comment has been formally adopted by 14 states (Arizona, Arkansas, Connecticut, Delaware, Idaho, Kansas, Massachusetts, Minnesota, New Mexico, North Carolina, Ohio, Pennsylvania, West Virginia and Wyoming)
 - Virginia has a proposal to adopt similar comment under advisement

Competency in Technology

- ABA Model Rule 1.6, Comment 18 requires a lawyer to implement reasonable safeguards against unauthorized/inadvertent disclosure of client confidential information.
 - Reasonable safeguards depends on various factors including:
 - Sensitivity of information
 - Likelihood of disclosure
 - Employment or use of competent IT personnel
 - Cost of safeguard
 - Difficulty of implementation

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Rule 1.1: Competence

Client-Lawyer Relationship

Rule 1.1 Competence

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

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Comment on Rule 1.1

Client-Lawyer Relationship **Rule 1.1 Competence - Comment**

Legal Knowledge and Skill

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

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

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

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

Thoroughness and Preparation

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

Retaining or Contracting With Other Lawyers

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

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

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

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Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

Client-Lawyer Relationship

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

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Rule 1.4: Communications

Client-Lawyer Relationship

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

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Rule 1.5: Fees

Client-Lawyer Relationship

Rule 1.5 Fees

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

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

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

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether

such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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

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

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

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

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

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

(3) the total fee is reasonable.

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Rule 1.6: Confidentiality of Information

Client-Lawyer Relationship

Rule 1.6 Confidentiality Of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 - (4) to secure legal advice about the lawyer's compliance with these Rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - (6) to comply with other law or a court order; or
 - (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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Comment on Rule 1.6

Client-Lawyer Relationship

Rule 1.6 Confidentiality Of Information - Comment

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

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

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See

also Scope.

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

Authorized Disclosure

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

Disclosure Adverse to Client

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

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The

client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

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

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

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

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

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

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict

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

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

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

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4]. —

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

govern data privacy, is beyond the scope of these Rules.

Former Client

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

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Rule 1.7: Conflict of Interest: Current Clients

Client-Lawyer Relationship

Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

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Rule 1.8: Current Clients: Specific Rules

Client-Lawyer Relationship

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

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Rule 1.9: Duties of Former Clients

Client-Lawyer Relationship

Rule 1.9 Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

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Rule 1.10: Imputation of Conflicts of Interest: General Rule

Client-Lawyer Relationship

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

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Rule 7.1: Communication Concerning a Lawyer's Services

Information About Legal Services

Rule 7.1 Communications Concerning A Lawyer's Services

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

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Rule 7.2: Advertising

Information About Legal Services

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 communication, including public media.

(b) 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;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

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Rule 7.3: Direct Contact with Prospective Clients

Information About Legal Services

Rule 7.3 Solicitation of Clients

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

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

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

- (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.

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

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

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Rule 7.4: Communication of Fields of Practice & Specialization

Information About Legal Services

Rule 7.4 Communication of Fields of Practice and Specialization

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

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

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

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

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

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

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Rule 7.5: Firm Names & Letterhead

Information About Legal Services

Rule 7.5 Firm Names And Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

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**NAPABA SOLO/SMALL FIRM BOOTCAMP
ETHICS SEMINAR: HOW TO AVOID ETHICAL PITFALLS FOR
SOLO/SMALL FIRM PRACTITIONERS**

Bernard J. DiMuro
Tsui Yee
Sara M. Sakagami

- I. ETHICS OF LEAVING A FIRM & STARTING YOUR OWN
 - A. ABA Model Rules have not yet adopted a specific rule regarding the procedure when a lawyer leaves a firm.
 - 1. ABA Ethics Opinion 99-414 requires:
 - a. Notice to present clients,
 - b. Check any potential conflict of interest,
 - c. Protect client files & maintain confidentiality, and
 - d. Avoid any conduct involving dishonesty, fraud or deceit.
 - B. Only two jurisdictions have adopted a specific rule
 - 1. Virginia Rule 5.8 - Procedure for Notification to Clients When a Lawyer Leaves a Law Firm or When a Law Firm Dissolves
 - 2. Florida Rule 4-5.8 – Procedures for Lawyers Leaving Law Firms and Dissolution of Law Firms
 - 3. Both rules require joint letter between the lawyer and the firm notifying the present clients about the lawyer’s departure, absent an agreement specifying the procedure
 - C. Other jurisdictions, such as D.C., Arizona, and California, have offered ethics opinions similar to that to ABA Ethics Opinion 99-414, highlighting the requirements to:
 - 1. Clearly communicate with clients, and respect the client’s right to choose counsel; and
 - 2. Avoid potential conflict of interest
 - D. Things to Avoid

1. Communicating with the client about the departure before notifying the law firm,
2. Removing client files from the firm
3. Competing with the old firm or trying to convince the client to change law firms, and
4. Soliciting associates or other employees before the departure

II. ADVERTISING

A. Rules

1. Section 7 of the ABA Model Rules deals with lawyer advertising.
2. The underlying consideration of these rules is to prevent misleading communications to the public about a lawyer's services.
 - a. For example, addition of "& Associates" in a law firm name for solo practitioner has been criticized by some jurisdictions. *See e.g. Minn. Lawyers Prof. Resp. Bd No. 20; In re Sussman & Tanner*, 405 P.2d 355, 356 (965)
3. ABA has all the rules governing lawyer advertising on one page - http://www.americanbar.org/groups/delivery_legal_services/resources/ad_rules.html

B. Special Considerations for Social Media Advertising

1. Pay special attention to AVVO and LinkedIn
 - a. Endorsements and testimonials may run afoul of rules without specific disclaimer
 - b. Specializations are restricted under ABA Rule 7.4 and equivalents

C. Case Law

1. *Hunter v. Va. State Bar*, 744 S.E.2d 611 (Va. 2013)
 - a. Hunter was a criminal defense lawyer who had a legal blog. Many of the posts were about cases where Hunter obtained favorable results for his clients. Hunter did not get prior approval from his clients to write of their cases. The blog also did not contain any disclaimer
 - b. The bar charged Hunter with violations of Rules 1.6, 7.1 and 7.5.

- c. On appeal, the Virginia Supreme Court held that:
 - a. Hunter's blog was a partially protected by the First Amendment right to free speech, and Rule 1.6 cannot prohibit Hunter from writing about a case when all the information has already been made public; and
 - b. Hunter's blog about his success in the courtroom, however, is commercial speech and can be regulated in order to further the public interest.

2. *In re Dickey*, 722 S.E.2d 522 (S.C. 2012)

- a. Dickey was a newly licensed attorney who just opened a solo practice. Dickey operated two websites and used other online profiles, in which he lied about his law school graduation year and exaggerated his experience and past results.
- b. By consent, the South Carolina Supreme Court issued a public reprimand for violations of Rules 7.1 (communications concerning a lawyer's services), 7.2 (advertising) and 7.4 (communication of field of practice).

III. CONFLICT CHECKS

A. ABA Model Rules

- 1. Rule 1.6 – Confidentiality of Information (Recent amendment permitting disclosure of information to check conflict before law firm merger or lawyer joining new firm)
- 2. Rules 1.7 & 1.8– Conflict of Interest/Current Clients
- 3. Rule 1.9 – Duties to Former Clients
- 4. Rules 1.10 – Imputation of Conflicts of Interest

B. Case Law

- 1. *Northam v. Virginia State Bar*, 737 S.E.2d 905 (Va. 2013)
 - a. Northam was contacted by Husband to represent him in a divorce proceeding. Unbeknown to Northam, his partner (Lewis) was contacted by Wife for representation in the same proceeding.
 - b. When Lewis learns the Husband's identity during his meeting with Wife, he terminates the meeting immediately. He then goes to

Northam's office and says "I have a problem" or "we have a problem". The conversation ends and Lewis declines representation of Wife. Northam, however, continues to representation of Husband.

- c. The disciplinary board finds Northam in violation of Rules 1.7 (conflict of interest), 1.10(imputed disqualification), and 1.16 (declining or terminating representation).
 - d. On appeal, Virginia Supreme Court reverses the finding. The Court found that there was no finding of fact to support a claim that Northam "knowingly" continued to represent the husband when another lawyer in his firm (Lewis) would be prohibited from doing so.
2. Formal Op. 03, Checking for Conflicts of Interest (2003) (New York City Bar) - <http://www.nycbar.org/ethics/ethics-opinions-local/2003-opinions/819-checking-for-conflicts-of-interest>
 3. DC Bar - Ethics Opinion 312 - Information That May Be Appropriately Provided to Check Conflicts When a Lawyer Seeks to Join a New Firm - <http://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion312.cfm>

C. Resources/ interesting articles

1. http://www.americanbar.org/publications/law_practice_magazine/2013/november-december/ethics.html
2. http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/conflictchecking.html
3. http://www.lbcclaw.com/article.php?news_id=282
4. http://www.abajournal.com/magazine/article/conflicts_check_please/

IV. CLIENT RELATIONSHIPS

A. ABA Model Rules

1. Section 1 of the Model Rules deals with attorney-client relationships

B. Use of Engagement Letter assists in addressing Rules 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.4 (Communications), 1.5 (Fees), and 1.6 (Confidentiality of Information)

1. Use Engagement Letter/Disengagement Letter

- a. To require collaborations/support from client
- b. As teaching tools to educate client on what lies ahead
- c. To manage expectations
- d. For conflict of interest disclosure
- e. To cover any permitted disclosure of confidential information, such as when a joint defense is contemplated, family members' cooperation is necessary, etc.

2. Mandatory Arbitration Clause

- a. ABA Ethics Opinion 02-425, and other jurisdictions state that mandatory arbitration clause in a retainer agreement does not violate the ethical rules, as long as the clients are fully informed (Rule 1.4) and such clause does not limit lawyer's liability (Rule 1.8).
- b. Other jurisdictions have mainly followed the ABA's opinion, with slight variations as to what steps must be taken to make the client fully informed.

C. Competence in Technology

- 1. ABA Model Rule 1.1 (competence), cmt. 8 requires lawyers "to maintain the requisite knowledge of skill...including the benefits and risks associated with relevant technology."
- 2. 14 States have formally adopted the ABA's comment 8 to their Rule 1.1, and Virginia has under advisement a proposal to adopt a similar comment.

D. Safeguarding Client Information

- 1. ABA Model Rule 1.6 (confidentiality of information), cmt. 18 requires lawyers to implement reasonable safeguards against unauthorized access to, or disclosure of, client confidential information.
- 2. Factors considered for what are the "reasonable safeguards" include:
 - a. Sensitivity of information,
 - b. Likelihood of disclosure if safeguard is not taken,
 - c. Employment or use of competent IT people,
 - d. Cost of safeguards,

e. Difficulty of implementing safeguards.