Legal Ethics in Cyberspace

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I Introduction: The Ethical Boundaries of Practicing Law Over the Internet

The legal profession has a tradition of resisting technology and looking to the past, rather than the future, in the development of jurisprudence and public policy. Although most lawyers and law firms today have some familiarity with and use the Internet, the legal profession lags behind the business community in utilizing digital technology and e-commerce in the daily practice of law.[1] Even so, the rapid growth of legal services over the Internet raises serious ethical issues which include: (1) the use of Internet e-mail for lawyer-client communications; (2) legal referral services over the Internet; (3) legal advice lines over the Internet; and (4) online lawyer advertising and solicitation.

II Internet E-mail for Lawyer-Client Communications

The clear and overwhelming consensus of the regulatory bars is that unencrypted e-mail is a permissible method for a lawyer to communicate with a client.[2] Stated differently, it is not unethical for a lawyer to communicate with a client using unencrypted e-mail. First, there is a reasonable expectation of privacy in e-mail communications.[3] It should be noted, however, that unlike postal mail, simple e-mail is not a "sealed communication" and thus can be accessed and read on any intermediate computers between the sender and recipient.[4] A lawyer is still obligated to consider the sensitivity of the communication, the impact of its unintended disclosure to others and the relative security of e-mail vis-a-vis other forms of communication. ABA Formal Op. 99-413 (1999). If a lawyer senses that client information is highly sensitive, the lawyer should consult with the client as to the mode of communicating such information. In certain instances, restricted hand delivery or in-person communication may be appropriate, but the lawyer must abide by the client's wishes regarding the means of delivering client information. *Id.*; Rule 1.2 (a).

Second, e-mail is at least as secure (or as vulnerable to interception) as other means of communication, i.e., postal mail and telephone, commonly relied on as having a reasonable expectation of privacy. ABA Formal Op. 99-213 (1999). Therefore, the use of unencrypted e-mail by a lawyer does not violate Rule 1.6 or DR 4-101.[5]

III Internet Lawyer Referral Services and Directories

Lawyers and law firms now market their services through online directories and Internet lawyer referral plans. For example, West Group offers an extensive Internet directory for consumers and businesses which profiles more than one million lawyers and law firms.[6]

Some state bars prohibit a lawyer from participating in commercial or Internet lawyer referral plans. Arizona Bar Op. 99-06 (1999) ("for-profit" Internet lawyer referral service not approved or operated by any bar association is not an appropriate plan for lawyers to join); Nebraska State Bar Ass'n Op. 95-3 (1995) (lawyers may not participate in a "for-profit" Internet lawyer referral program); and S.D. Bar Ass'n Op. 98-10 (1999) (lawyer may not participate in an Internet referral service taking an advertising fee and a share of legal fees for referring clients to South Dakota lawyer but providing no legal services). The states that prohibit lawyers from participating in such referral plans do so because of the prohibitions against fee sharing with non-lawyers,[7] improper reward or compensation for referrals,[8] and aiding and abetting the unauthorized practice of law.[9] Arizona's position imposes high standards, based upon its definition of a "lawyer referral service":

> The Committee has previously found the defining characteristic of a lawyer referral service to be "[t]he process of ascertaining the caller's legal needs and then matching them to a member having the appropriate 'area of expertise'." Ariz. State Bar Committee on the Rules of Professional Conduct, Op. 95-13, p.4. Likewise, a report of the ABA Standing Committee on Lawyer Referral and Information Services notes that the primary purpose of lawyer referral services "is to provide the client with an unbiased referral to an attorney who has expertise in the area of law appropriate to the client's need . . . [The service] is expected to be able to match the consumer's particular legal, economic, geographic, language and other needs with an attorney who is competent to handle the matter referred . . . ." *Alabama State Bar Ass'n v. R.W. Lynch, Inc.*, 655 So.2d 982 (Ala. 1995).

Many of the so-called profit-making referral services are little more than joint marketing arrangements that are deceptive and do not match client needs with the attorney to whom a referral is made. Rather, calls are simply forwarded to the next attorney in the rotation. *See e.g.*, Va. Legal Ethics Op. 1014 (1988). Such arrangements are not proper and likely to result in the lawyers breaching a number of ethics rules.

The Virginia State Bar, however, permits lawyers to participate in private "for-profit" lawyer referral programs, not sponsored or approved by any bar association, subject to certain requirements and restrictions. Va. Legal Ethics Op. 926 (1987) (not

improper for lawyer to participate in a lawyer referral service that is a profit-making lay organization or corporation provided other requirements are met). However, such a referral service should limit membership based on specific criteria for the purpose of determining competence and should publish the specific criteria in the area where the service is intended to operate. Va. Legal Ethics Op. 738 (1985). The service may charge membership fees to the participating attorneys. *Id.* Statements or claims made by the lay corporation or organization about the participating attorneys or their services that are false, fraudulent, deceptive or misleading may be treated as disciplinary rule violations by the participating attorneys. Thus, participating attorneys have a duty to ascertain that the legal referral service complies with the bar's advertising rules. Va. Legal Ethics Op. 910 (1987). Finally, although a lawyer may pay the referral service an administrative or membership fee it is improper for a lawyer to split legal fees with a lay corporation for the referral of a client. Va. Legal Ethics Op. 1676 (1996); Virginia Rule of Professional Conduct 7.3 (d) [formerly DR 2-103 (D)].

While no opinion has yet been issued specifically addressing *Internet* lawyer referral services, based on the prior opinions concerning traditional referral services, it is likely that a Virginia attorney may ethically participate in a legal referral service that markets, advertises and operates over the Internet. However, if a Virginia lawyer participates in an Internet legal referral service, he or she must consider that the service's Web site can be accessed in all 50 states. Consequently, the Virginia lawyer may need to be mindful of how the bars in other states view or regulate such services. If another state like Arizona or Nebraska prohibits for-profit lawyer referral services, the service's Web site should include a disclaimer or warning that the service is not soliciting business from clients in those states. The legal and ethical rules are still evolving as to whether a lawyer's or law firm's home page on the Internet is, by itself, an attempt to advertise legal services, solicit clients or transact business in a particular state, particularly states in which the lawyer is not admitted to practice. Until the dust settles, appropriate disclaimers and designations of jurisdictional limitations are good precautionary measures.

Moreover, the lawyer should only accept referrals of clients from those states in which the lawyer is authorized to practice; otherwise, the lawyer may face a charge of unauthorized practice of law. In addition, the lawyer needs to ensure that any content on the service's Web site complies with each state's advertising and solicitation rules. This would include statements or claims regarding specialization, the regulation of which varies from state to state. *See* Rule 7.4 (d) (lawyer holding himself out as a recognized or certified specialist by a named organization must include disclaimer that there is no procedure in Virginia for approving certifying organizations). As with legal directories, the listings for each lawyer should indicate those jurisdictions where the lawyer is admitted to practice. The prospective client should be directed so as to choose only those lawyers who are authorized or licensed to handle that client's legal matter or issue. A law firm listing must include the full name and office address of an attorney licensed in Virginia who is responsible for its content. Rule 7.1 (e).

IV Giving Legal Advice or Information over the Internet

A lawyer-client relationship is created when a lawyer gives legal advice to a person, or permits a person to consult with the lawyer for the purpose of obtaining legal advice and confidential information is entrusted to the lawyer.[10] The ethical and legal duties of confidentiality, avoidance of conflicts and competence will attach. Even where no fee is paid and no agreement to undertake representation is entered, a lawyer-client relationship will be presumed for the limited purpose of enforcing ethical and legal obligations.[11] Sometimes, ethical duties will be imposed as a result of the conduct of the parties, even when the lawyer did not expressly agree or intend to represent that person as a client. A lawyer who casually gives legal advice to or obtains confidential information from a friend or acquaintance in a casual, social setting such as a cocktail party may have inadvertently created an attorney-client relationship.[12] If a person consults with an attorney for the obvious purpose of obtaining legal advice, an attorney-client relationship is likely to be found regardless of the attorney's intent or the fact that no engagement ensued after the primary consultation. *DeVaux v. American Home Assur. Co.*, 444 N.E.2d 355, 358 (Mass. 1983). As one commentator notes:

> The lawyer who offers gratuitous advice is in a position analogous to a physician who witnesses a traffic accident. The law does not impose a duty on physicians to treat a victim of the accident. Should the physician undertake to treat a victim, however, he will be liable if he does so negligently. Similarly, if a lawyer voluntarily offers legal advice to an individual, an attorney-client relationship should be deemed to be established and he should be liable if his negligence causes harm to the individual.[13]

Given the risks involved in giving legal advice in such casual settings, one wonders why attorneys are freely dispensing legal advice over the Internet. Yet the growth of legal advice Web sites is rapid. *FreeAdvice* and *LawGuru* invite persons to post legal questions on bulletin boards, requesting that they indicate their state of residence.[14] These sites encourage lawyers to post replies to those messages if they are licensed in the particular state of the inquirer. These Web sites make disclaimers that they are not giving legal advice and no attorney-client relationship is created even if a reply is given to a question.[15]

In surfing the Internet, I came across this Virginia bulletin board at the *DivorceNet* Web site.[16] Some of the questions posted include:

"Is it legal to garnish a joint checking account when only one individual on the account is a judgment debtor?" [17]

Answer [by attorney]: "Yes, I think it is. But there are limits on what they can take. I am not positive on this one."

"Is the fact that he has paid none of the court ordered child support relevant in the scheme of things [in a relocation case]?" [18]

Continued on Page 45

Answer [by attorney]: "His non-payment of support is relevant, but a judge may not give it a tremendous amount of weight."

"If I claim adultery (at least 4 different times in 5 years) as grounds for the divorce but have had 'relations' with my spouse a half dozen times during this period, does that remove my grounds?" [19]

Answer [by attorney]: "If you had sex after learning of her affairs, it forgives (condones) the affairs that you know about. However, it only forgives them so long as she does not subsequently commit an act that would constitute a ground for divorce."

"It seems that for an uncontested divorce, there has to be a separation of at least 6 months. Is this verified by the courts? What if both parties state that there has been the required separation? How is this shown?" [20]

Answer [by attorney]: "If it is a six month separation, there should be a written property settlement agreement and you should have no minor children. You will need a third party to corroborate the separation."

Another way a consumer might seek legal advice is to navigate to a law firm's Web page and send questions directly to attorneys by e-mail. Lawyers and law firms need to consider how to handle unsolicited e-mail inquiries. Suppose MegaLawFirm is representing Acme in its merger with and acquisition of TargetCo. Both companies are publicly traded and therefore subject to SEC rules and regulations. One of the terms and conditions for the approval of the merger is the disclosure of potential, imminent claims and liabilities known by the participants. MegaLawFirm receives an e-mail message from a law firm, inquiring as to MegaLawFirm's availability to represent another corporate client that is preparing to sue Acme. The e-mail message goes into some detail about the nature and circumstances of the claim, requests a reply, and that the information be kept confidential as the client does not want premature disclosure of its intent to sue Acme. While it is obvious that MegaLawFirm cannot undertake representation of that new client, was there an attorney-client relationship created when the e-mail was received and read? Does MegaLawFirm owe any duty of confidentiality to the prospective client? What if SEC rules require disclosure of this information? *See, e.g.*, Rule 1.6 (b)(1) (a lawyer may reveal client information when required by law or court order).

Probably there is no attorney-client relationship created simply because a law firm receives a detailed e-mail message from a prospective client. There was no legal advice given, whether casually or otherwise, and the law firm can inform the client that it will not undertake representation. There needs to be some *in-person* interaction between attorney and client before the law can presume an attorney-client relationship. Va. St. Bar Comm. on Legal Ethics, Op. 1577 (1994) (attorney operating bankruptcy "900" information line providing pre-recorded legal information to callers without any personal contact with caller does not create attorney-client information because there is no "in-person" communication). Otherwise, lawyers would become involuntarily employed simply on account of having received information from a person seeking legal advice. A lawyer-client relationship is consensual, created either by written or oral agreement of the parties or by the lawyer undertaking to perform a legal service from which the creation of the relationship may be implied. 2A MICH. JUR. *Attorney & Client* §12 (Repl. Vol. 1993).

Even though an attorney-client relationship may not have arisen in other respects, for the limited purpose of protecting client confidentiality and avoidance of conflicts, such a relationship may be presumed, regardless or whether the lawyer has performed any legal services or received any fees. Such is the case where a client, seeking legal advice, goes to an attorney's office or confides with an attorney over the telephone. Va. St. Bar Comm. on Legal Ethics, Op. 1601 (1994) (a person's meeting or interview with an attorney may create an expectation of confidentiality even though no formal relationship ensues). In these traditional settings, an attorney should be able to stop the consultation, once it becomes apparent that the prospective client is adverse to a client whom the attorney already represents, and avoid receiving confidential information that would create a conflict. With such casual settings in cyberspace, however, these prior opinions and ethical problems require careful reflection and deliberation.

A law firm with a Web page on the Internet may want to warn persons who opt to send e-mail to the firm to not include sensitive information in their e-mail messages which the inquirer would not want disclosed to others. The firm should also inform the inquirer that such information cannot be treated as confidential when it is communicated to the firm outside of an attorney-client relationship before the firm can consider representation.

The use of the Internet to exchange "legal information" or "legal advice" raises the risk that lawyers will give "off-the-cuff" advice which is either incomplete or inaccurate. For example, if a lawyer declines representation, telling the client that they do not have a case, and the client relies on the lawyer's assessment and forgoes a valuable claim, there is malpractice and possibly a breach of the duty of diligence and competence. *Togstead v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980) (lawyer met with client in a one-hour consultation and erroneously informed client that she did not have a medical malpractice case but failed to inform her that he had no expertise in medical malpractice cases and failed to inform her of statute of limitations, resulting in legal malpractice judgement against lawyer for $650,000). Thus, lawyers need to be circumspect and competent in giving advice in cyberspace, or pay the consequences.

Some lawyers and law firms provide fee-based legal advice services over the Internet.[21] One lawyer provides the following terms:

> You, the Questioner/Client will ask a short legal question of 200 words or less and our firm will provide a written e-mail response for a fee of $25 which will be

> billed to your credit card via our secure server. Each question will be responded to within a reasonable time and although both parties understand that an Attorney/Client relationship may be created hereby, it is understood and agreed to that such relationship will terminate upon the sending of our e-mail response to your e-mail address and no further legal services or advice will be required. It is further agreed to by you that the submission of your question shall not place upon Attorneys the duty to protect any statute of limitations or any other rights on your behalf or cause Attorneys to have a duty to take any action in any court of law, unless we agree in writing.[22]

Unlike the other sites discussed above, these sites do not disavow a lawyer-client relationship and in fact acknowledge that a legal representation exists, albeit the legal representation is a "limited representation." The Virginia Rules of Professional Conduct permit the lawyer and the client to limit the scope of the representation. Va. R. Prof. Cond., Rule 1.2 (b). Proponents of "unbundling" legal services find support in Comment [4] under Rule 1.2:

> The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

Nearly all of the Web sites where attorneys provide legal information or advice post disclaimers, but it is unclear whether such disclaimers are an adequate protection or defense against malpractice or disciplinary complaints. Courts and state bars are not likely to regard such disclaimers as effective if they are viewed as an attempt by the lawyer to limit his or her liability to the client for personal malpractice — which is precisely what some of these disclaimers attempt to do. Rule 1.8 (h) says that a lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement (i.e., corporate counsel indemnification) with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement. If a lawyer gives a person legal advice, but as a condition to doing so, has the client agree prospectively to a disclaimer in which the lawyer disavows an attorney-client relationship, it would appear that Rule 1.8 (h) has been violated. A number of bar opinions have held that once created, an attorney-client relationship cannot be disclaimed.[23]

Whether a lawyer may rely upon a disclaimer will depend on the circumstances. In the area of conflicts of interest, the Standing Committee on Legal Ethics has previously opined that a client can revoke, under certain circumstances, a waiver of an attorney's multiple client representation, suddenly leaving the attorney with a conflict and the duty to withdraw, which the attorney thought had been waived. Such matters are not contractually enforceable. Va. St. Bar Comm. on Legal Ethics, Op. 1652 (1995) (revised 1996). Yet, on the other hand, the Committee has said that it is ethically permissible for a lawyer, provided certain conditions are met, to have a client enter into contract of representation in which the client agrees to binding alternative dispute resolution on matters involving fee disputes and malpractice claims. Va. St. Bar Comm. on Legal Ethics, Op. 1707 (1998) (engagement agreement calling for binding arbitration of malpractice claim against lawyer limiting client's right to trial by jury).

I am of the view that neither courts nor disciplinary tribunals should be sympathetic to cyberspace lawyers who rely on boilerplate disclaimers to disavow their professional responsibility. As stated above, lawyers are not obligated to give advice, no matter how desperate the on-line inquirer may be. However, once the lawyer undertakes to advise, whether for a fee or gratuitously, these professional obligations attach. If legal advice or information is given that is specifically tailored to a person's factual and legal situation, and the lawyer knows or reasonably should know that person is relying upon such advice, an online disclaimer should not be effective.

V Lawyer Advertising and Solicitation Over the Internet

A threshold issue is whether a lawyer's Web page is a communication or advertisement subject to the bar's rules concerning advertising and solicitation, Rules of Professional Conduct 7.1-7.5. Some lawyers believe a distinction can be drawn with an Internet Web page because the viewer has to search for and find the Web page, unlike radio or television where the viewer has no control over the advertising which appears on the screen. As a result, some may argue that the special ethics rules that apply to electronic broadcast media should not apply to lawyer Web pages. Others may describe the Internet as more like a cyberspace "yellow pages" since the consumer has to browse or have an idea as to what he is seeking before using the resource.[24] At the very least, the advertising rules governing print media would then apply as they do with the traditional "yellow pages." In fact, the Internet is a blend of print, electronic and in-person communications. The bar's advertising rules, written before the digital age, did not contemplate the Internet as a media for lawyer advertising.

The yellow pages analogy may not hold. The Internet is changing rapidly and is no longer passive or benign. There are many uninvited "pop-up" ads and banners which sponsor Web sites and which have nothing to do with the subject matter an Internet surfer is seeking or viewing. Web sites are increasingly interactive.

Whether a lawyer or law firm *intends* to promote business or simply convey information, it is the *content* of the communication that controls whether the communication is subject to the

bar's ethics rules.[25] The key issue is not the media used to communicate, but whether the communication contains statements or claims concerning a lawyer or law firm's services.

The scope of Rule 7.1 is quite broad as paragraph (a) refers to "any form of public communication" containing a "false, fraudulent, misleading or deceptive statement or claim." Several bars, including the Virginia State Bar, have issued opinions indicating that a lawyer may place information about available legal services on the Internet, which may be viewed by users of the technology, as long as the ethics rules governing the content of the posted information are observed. Va. St. Bar Comm. on Lawyer Advertising & Solicitation, Op. A-0110 (1998) (a Virginia lawyer advertising on the Internet is subject to applicable disciplinary rules in the Virginia Code of Professional Responsibility); Arizona Bar. Op. 97-04 (1997) (a lawyer's Web site is a "communication" about the lawyer's services that is subject to all of the ethical requirements set forth in Rules 7.1-7.5); California Standing Comm. on Prof. Resp. & Conduct, Op. 96-0014 (1996) (an attorney's Internet Web site providing to the public information about her availability for professional employment is both a "communication" and "advertisement"); Mich. Bar Op. RI-276 (1996) (all forms of communications about lawyer services are governed by some of the ethics rules, regardless of whether they are in person, on paper, billboard, telephone, fax, computer or otherwise).[26] The ABA's Standing Committee on Legal Ethics and Professionalism has yet to opine on the subject of lawyer Web pages.

The task of undertaking to comply with each state's lawyer advertising rules is challenging. Each state has different rules, some requiring retention of hard copies of all advertising by electronic media[27], mandatory disclaimers[28], prohibitions of client testimonials[29], dramatizations[30], animations and advertising specific case results.[31] In addition, the advertising rules governing lawyers go to considerable lengths to prohibit misleading or deceptive statements which the business world would regard as permissible "puffing." For example, a statement or listing that suggests that a lawyer or law firm serves a geographical area in which no office is maintained and in which no clients are yet represented would be regarded as misleading. Statements such as "you pay nothing unless we win" are similarly misleading if they fail to warn that the client remains responsible for costs.[32] Lawyers who hold themselves out as "specialists" in an area of practice may also be in violation of Rule 7.1.[33] Rule 7.1 (a) (3) prohibits a lawyer from comparing his services with other lawyers' services unless they can be factually substantiated.

In addition to complying with the different states' interpretations of Rule 7.1 as to what statements are false, fraudulent, misleading or deceptive, lawyers must also be concerned about particular rules regulating specialization and solicitation. Some states prohibit claims of specialization unless that particular state has certified the specialization or has approved the certifying organization. Some states, like Virginia, have no certification process at all, and may or may not allow lawyers to say they are a specialist in a practice area. Some states disallow in-person solicitation in all areas of practice (i.e., Maryland) whereas Virginia prohibits in-person solicitation only in personal injury or wrongful death cases.[34] The District of Columbia Bar, on the other hand, does not prohibit in-person solicitation in personal injury or wrongful death cases. In Virginia, in-person solicitation includes communications by telephone.[35] Therefore, lawyers who communicate in Internet chat rooms and solicit a prospective client may be engaging in-person solicitation.[36] A lawyer's participation in bulletin boards or chat groups may implicate a state's anti-solicitation rules if the lawyer initiates an unrequested communication with a specific person. Ill. St. Bar Ass'n Op. 96-10 (1996).

Another issue is whether targeted solicitation messages sent to persons by Internet e-mail must be identified in the headers as "advertising material" so that the recipient can chose to delete the message without reading, as a consumer might choose to disregard "junk mail." Virginia's version of Rule 7.1 (c) is out of date and would not impose such a requirement for e-mail solicitation messages as it applies only to "written communication that is contained in an envelope." Other states have addressed this issue and would require e-mail messages and messages posted to bulletin boards to be identified as "advertising material." Ill. St. Bar Ass'n Op. 96-10, *supra*.

In my opinion, the business of lawyers marketing their services over the Internet is in its infancy. Lawyer advertising and solicitation rules for the Internet are incapable of keeping pace with the technology and this area of professional regulation is in a state of disarray. This issue, coupled with nonlawyers practicing law over the Internet raise difficult regulatory and enforcement issues, which will be addressed later in a separate article.

VI CONCLUSION

The organized bar has a challenging task ahead in facing and regulating this new technology. The profession should not react, however, by over-regulating, as this could stifle the lawyer's desire to implement Internet technology in his or her practice, moving the profession even further behind. Lay people, perhaps for the first time, can get quick affordable answers to basic legal questions. The Internet has undoubtedly helped the legal profession fulfill its obligation to improve access to legal service. On the other hand, though, lawyers who use this new technology must remain cognizant of applicable ethical and regulatory issues.

ENDNOTES

[1] For an excellent discussion of the legal profession's historical resistance to technological change, see Catherine J. Lanctot, *Attorney Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147 (1999). The article is also available online at http://www.law.duke.edu/journals/dlj/articles/dlj49p147.htm.

[2] Peter Krakaur's website "LegalEthics.com" has collected all state bar and American Bar Association opinions having to do with the Internet and the ethical issues which arise out of lawyers using the Internet for e-mail, advertising and solicitation, participation in Internet lawyer referral and legal advice lines and other related topics. The URL is http://www.legalethics.com. Ethics opinions holding that neither DR 4-101 nor Rule 1.6 requires that an attorney encode or encrypt e-mail messages to communicate with a client include: ABA Formal Op. 99-413 (1999), Alaska Bar Op. 98-2)(1998), D.C. Bar Op. 281 (1998) (certain situations may warrant additional security), Iowa Bar Op. 97-01 (1997) (amending prior opinion requiring encryption but still need client consent after disclo-

sure of risks of interception of e-mail), Ky. Bar Op. E-403 (1998), Mass. Bar Op. 00-01 (2000), Minn. Bar Op. 19 (1999), Mo. Bar Op. 99-07 (1999) (lawyers encouraged to discuss with clients the risks associated with e-mail communication and storage), N.Y. Bar Ass'n Op. 709 (1998), N.D. Bar Op. 97-09 (1997), Tenn. Bar Op. 98-A-650 (a) (1998).

3 The Electronic Communications Privacy Act (ECPA) of 1986 [Pub. L. No. 99-508, 100 Stat. 1848 (1986)] amended the Federal Wiretap Statute of 1968 by extending its scope to include "electronic communications." The ECPA makes it a criminal offense to unlawfully intercept or disclose any wire, oral or electronic communication. 18 U.S.C. § 2511. The ECPA protects the privileged character of any communication unlawfully intercepted "wire, oral, or electronic communication." 18 U.S.C. § 2517 (4). *See also United States v. Maxwell*, 42 M. J. 568, 576, 43 Fed. R. Serv. 24 (A. F. Ct. Crim. App. 1995) (holding that e-mail user maintained by ISP had a reasonable expectation of privacy in such communications) *aff'd in part and rev'd in part* 45 M.J. 406 (U.S. Armed Forces 1996).

4 *A.C.L.U. v. Reno*, 929 F. Supp 824. 834 (E.D. Pa. 1996), aff'd 521 U.S. 844 (1997).

5 DR 4-101 and Rule 1.6 require an attorney to preserve the confidentiality of client information:

DR 4-101. Preservation of Confidences and Secrets of a Client.

(B) Except as provided by DR 4-101(C) and (D), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

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).

6 The West Group directory is called "Lawoffice.com" and can be found at http://www.lawoffice.com.

7 Va. R. Prof. Cond. 5.4(a) [formerly DR 3-102 (A)(1)].

8 Va. R. Prof. Cond. 7.3 (d) [formerly DR 2-103 (D)].

9 Va. R. Prof. Cond. 5.5 (a)(2) [formerly DR 3-101 (A)].

10 *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1505 (9th Cir. 1993) ("[A]n attorney-client relationship is formed when an attorney renders advice directly to a client who has consulted with him seeking legal counsel.")

11 VSB Standing Comm. on Legal Ethics, Op. 1546 (1993) (finding an attorney-client relationship was created where wife had initial consult with lawyer regarding divorce and left without engaging law firm which blocked law firm from representing husband who sought representation by another lawyer in the firm three years later after parties had reconciled and again separated). *See also King v. King*, 367 N.E.2d 1358 (Ill. App. Ct. 1977) (attorney-client relationship created after half-hour meeting between husband and attorney and confidential information was disclosed creating conflict in undertaking representation of wife).

12 VSB Standing Comm. on Legal Ethics, Op. 452 (1982) (it is improper for an attorney to represent a husband in a divorce when the attorney had previously and gratuitously discussed in detail with the wife her marital situation at a social gathering).

13 Comment, *Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship*, 63 MINN. L. REV. 751, 758 n.50 (1979) *citing* William L. Prosser, HANDBOOK OF THE LAW OF TORTS § 56 (4th ed. 1971); *accord* 1 MALLEN & SMITH , LEGAL MALPRACTICE § 8.2 at 559 (4th ed. 1996) (if party is not adverse, gratuitous advice can result in imposition of duty of care).

14 *FreeAdvice.com* can be found on the Internet at http://www.freeadvice.com. This web site claims that it does not give legal advice, but rather "general legal information" and says it is not a substitute for personal legal advice. *LawGuru.com* is located at http://www.lawguru.com and is sponsored by the law firm of Eslamboly & Barlavi of Los Angeles, California. This site features a detailed disclaimer that the visitor is required to check off before posting a legal questions. The disclaimer warns that the information cannot "replace a face-to-face meeting or telephone consultation with a 'real live' attorney" and states that no attorney client relationship will be created in the absence of a written representation/retainer agreement, even if a reply is given to a question.

15 Note 14, *supra*.

16 *DivorceNet.com* is located at http://www.divorcenet.com.

17 Message posted 3/1/00 by kalm2000 at http://www.divorcenet.com:3336/.

18 Note 16, *supra*.

19 *Id*.

20 *Id*.

21 *See, e.g., Ask-A-Lawyer* < http://www.ask-a-lawyer.com >. This is the site of Peter R. Stone, Esquire, which allows a visitor to ask a short legal question for $20.

22 Law Offices of Richard P. Baker, P.A., *Legal Services Agreement-Terms and Conditions* < http://www.legalquestion.com/ask-a-question-terms.html >

23 Kan. Bar Ass'n Comm. of Ethics/Advisory Servs., Op. 93-8 (1993) (lawyer operating "900" pay-for-information telephone number service by which callers are given legal information . . . enters into lawyer-client relationship which cannot be avoided by disclaimer); N.J. Sup. Ct. Comm. on Unauthorized Pract. Op. 17 (1994) (attorney giving advice through a "900" number service cannot avoid malpractice liability by disclaiming attorney-client relationship). *See generally* Va. St. Bar Comm. on Unauth. Prac.. Op. 185 (1995) (attorney-client relationship created when caller calls up lawyer for telephone consultation pursuant to legal services plan)

24 Ill. St. Bar Ass'n Op. 96-10 (1996) (web site is equivalent to telephone directory yellow pages.)

25 William E. Hornsby, Jr., *The Ethical Boundaries of Selling Legal Services in Cyberspace* posted at http://www.computerbar.org/netethics/abawill.htm. Mr. Hornsby is staff counsel to the ABA's Commission on Advertising and writes and lectures frequently on the subject of lawyer advertising and solicitation.

26 *See also*, Iowa Bar Ass'n Ethics Op. 95-21 (1996) (lawyers who have home pages must comply with rules on advertising including publication of required disclaimers); Pa. Bar Ass'n Ethics Op. 96-17 (1996) (communications on the Internet about lawyers' services are subject to ethics rules regarding advertising); S. C. Bar Op. 94-27 (1995) (lawyer advertising on the Internet is subject to state's rules regarding advertising).

27 In Va. Standing Comm. Law. Advertising Op. A-0110 (1998), the Virginia State Bar's Standing Committee on lawyer advertising and solicitation observed that:

"a lawyer's communications over the Internet are 'disseminated to the public by use of electronic media' for which the lawyer has given value and therefore are subject to the requirements of DR 2-101(B)[now Rule 7.1 (b)]. This means that a lawyer or law firm that advertises on the Internet must make and preserve for at least one year a hard copy of any advertisement posted on the Internet. This includes advertisements in the form of home pages, postings to bulletin boards, newsgroups, usenets, telnets, etc."

28 Under Virginia Rule 7.4 (d), a lawyer holding himself out as a recognized or certified specialist in a communication must include a disclaimer that the is no procedure in the Commonwealth of Virginia for approving certifying organizations.

29 Virginia's rules do not prohibit client testimonials.

30 Dramatizations that include a portrayal of a client must include a disclaimer that the depiction is a dramatization. Va. R. Prof. Cond., Rule 7.1 (a) (5).

31 Virginia's rules, as interpreted by the Advertising Committee, prohibit a lawyer

— Continued on Page 8

Notice of Proposed Rule Change

Comments should be directed to Thomas A. Edmonds, Executive Director, Virginia State Bar, Suite 1500, 707 East Main Street, Richmond, Virginia 23219, and should be received no later than May 26, 2000.

The proposed amendment to Paragraph 13.B.(3) states, what has always been understood, that as allowed by the Rules of the Virginia Supreme Court and subject to the general supervision of the Standing Committee on Lawyer Discipline, Bar Counsel shall act independently and exercise prosecutorial autonomy and discretion in initiating, investigating, presenting or prosecuting bar complaints and other proceedings before subcommittee, district committees, the Disciplinary Board and three-judge circuit courts appointed by the Supreme Court of Virginia.

The rule seeks to insulate Bar Counsel from pressure by the public, members of the bar and others who seek to influence the outcome of attorney disciplinary actions, disability proceedings, reinstatement petitions and other matters relating to enforcement of the rules of professional conduct.

Part Six, Section IV, Paragraph 13.B.(3)

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS. —

* * *

B. Authority and Duties of the Council, the Standing Committee, Subcommittees, District Committees and Bar Counsel; Investigation and Prosecution of Complaints:

* * *

3) Authority and Duties of Bar Counsel:

To the extent provided in this rule and subject to the general supervision of the Standing Committee, Bar Counsel shall initiate, investigate, present or prosecute Complaints or other proceedings before Subcommittees, District Committees, the Board and the Circuit Courts. In the course of performing these functions, Bar Counsel shall act independently and exercise prosecutorial autonomy and discretion. This includes the authority to examine the financial books and records maintained by an attorney for the practice of law, including, without limitation, any and all trust accounts, estate accounts, fiduciary accounts and operating accounts maintained by the attorney or his/her law firm. Bar Counsel may also examine an attorney's trust account whenever Bar Counsel reasonably believes that the trust account may not be in compliance with the Rules of Professional Conduct or the Code of Professional Responsibility. In the exercise of this authority, Bar Counsel may issue such summons or subpoenas as he/she may reasonably deem necessary for the effective conduct of an investigation or an examination of an attorney's trust account. In every case in which Bar Counsel initiates examination of an attorney's trust account or issues any summons or subpoena in the conduct of an examination of or an investigation concerning an attorney's trust account, other than on the basis of a Complaint against the attorney, Bar Counsel shall file a written statement as part of the record in the case setting forth the reasons supporting his/her belief that the subject trust account may not be in compliance with the Rules of Professional Conduct or the Code of Professional Responsibility. A copy of this written statement shall be delivered to the attorney whose trust account is the subject of the investigation when an examination is begun or any summons or subpoena is issued.

Ethics Counsel —

Continued from Page 7

from advertising specific or cumulative case results. Va. Standing Comm. Law. Advertising Op. A-0106 (Rev. 1998).

[32] Va. Standing Comm. Law. Advertising Op. A-0102 (1993).

[33] Va. Standing Comm. Law. Advertising Op. A-0111 (1999) (lawyers should avoid the use of the terms "specialist" and "specializes in" relative to an area of practice unless such attorney is a "certified" or "recognized" specialist by an organization or entity, and the advertisement or public communication is accompanied by a disclaimer that there is no procedure in Virginia for approving such certifying organizations).

[34] Va. R. Prof. Cond., Rule 7.3 (f).

[35] Va. R. Prof. Cond., Rule 7.3 (a).

[36] Va. St. Bar Comm. on Lawyer Advertising Op. A-0111 (1999) (Lawyers who communicate on the Internet in "real time" chat rooms must abide by the restrictions on solicitation set forth in DR 2-103 [now Rule 7.3 (f)]. "In-person" communication in personal injury and wrongful death cases is prohibited, subject to certain exceptions, by DR 2-103(F) [now rule 7.3 (f)]. "In-person" communications include not only face to face communication but also "telephonic communication." The Committee believes that a lawyer who solicits employment in a "real time" chat room may not solicit employment in personal injury or wrongful death cases by communicating with the victim or their immediate family).