AMERICAN BANKRUPTCY INSTITUTE

2019 Central States Bankruptcy Workshop

Top 10 Ethics Traps and How to Avoid Them

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PLENARY SESSION

2019

Top Ten (or so) Ethics Traps and how to avoid them

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Presented by:

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If you don't know, ask!

- Ethics Helpline—(877) 558-4760
- Members may contact the **SBM Ethics Helpline at (877) 558-4760** to receive a confidential informal, advisory opinion from a staff attorney regarding an ethics issue pertaining to the inquirer's prospective conduct. This confidential service is reserved for **lawyers and judges only**. Staff counsel will not advise on past conduct of the inquirer, the conduct of another attorney or judge, on questions of law, or hypotheticals. The opinions of staff counsel are non-binding and advisory only.

Rules Govern, Comments Guide

- Rules can help you say no
- Rules can give you permission to act
- Rules of supervision must be acted upon or YOU have a problem

- ½ Bar complaints: Neglect or Non-communication
- ¼ Bar complaints: Non-cooperation

Terms are defined

- Both ABA and MRCP have definitions:
  - Informed consent
  - Knowingly, know or knows
  - Fraud/fraudulent
  - Reasonable/reasonably
  - Reasonable belief
  - Reasonably should know

Mistake #1: Not Knowing the Rules

Not Knowing the Rules – a breach of duty of compentency: 1.1

A lawyer shall provide competent representation to a client. A lawyer shall not: (a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it; (b) handle a legal matter without preparation adequate in the circumstances; or (c) neglect a legal matter entrusted to the lawyer.

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

The Rules – 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

- Comment 2: "A lawyer's workload must be controlled so that each matter can be handled competently."
- Comment 3: "Perhaps no professional shortcoming is more widely resented than procrastination."

The Rules – 5.1 Responsibilities of a Partner or Supervisory Lawyer

- Comparable managerial authority or supervision
- Knows of the conduct
- Fails to take action

Mistake 2: The Accidental Attorney-Client Relationship

The Accidental Attorney-Client Relationship

- Joe Attorney is hired to represent ch. 11 debtor Big Box Corporation
- Secured lender notices up deposition of Big Box former CFO, Nate Numbers
- Joe preps Nate for the deposition
- Nate provides Joe with candid and confidential information during prep session

The Accidental Attorney-Client Relationship

- At the deposition:
  - Lender's lawyer asks Nate if he is represented by counsel
  - Nate tells lender's lawyer that Joe is his counsel
  - Joe says nothing on the record to disclaim Nate's statement
  - Nate then proceeds to testify about some troubling inaccuracies in Big Box's borrowing base certificates

The Accidental Attorney-Client Relationship

- After the deposition, Joe tells Nate that he should probably hire a lawyer
- Nate responds, "what do you mean, Joe? I thought that you were my lawyer"
- Is Nate correct?
- If so, at what point was the atty-client relationship created?

The Accidental Attorney-Client Relationship

- The Restatement (Third) of the Law Governing Lawyers, §14 Formation of a Client-Lawyer Relationship:
  - A relationship of client and lawyer arises when:
  - (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
  - (a) the lawyer manifests to the person consent to do so; or
  - (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services. . . .

Mistake 3: The Lingering Attorney-Client Relationship

The Lingering Attorney-Client Relationship

- Smith & Jones LLC ("S&J") represented Acme Corp. as its attorneys in a contract dispute that settled six years ago
- The settlement agreement had a ten-year term
- It also listed an S&J attorney (now at another firm) as one of Acme's notice designees for purposes of any future communications required by the parties under the agreement

The Lingering Attorney-Client Relationship

- S&J only handled a few small matters regarding the agreement in the immediate aftermath of its execution
- For at least five years, S&J has billed no time and has done no work for Acme
- Nevertheless, S&J has maintained Acme's contract dispute as an active, open matter in S&J's files
- S&J has also continued to store almost 50 boxes of documents relating to the dispute in an off-site storage facility

The Lingering Attorney-Client Relationship

- Today, a potential new client approaches S&J about representing it in an unrelated dispute against Acme
- Can S&J take the case without Acme's consent?
- Is Acme still a current S&J client even though the representation has been dormant for five years?

The Lingering Attorney-Client Relationship

- **ABA Model 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.

The Lingering Attorney-Client Relationship

- **ABA Model Rule 1.7: Conflict of Interest: Current Clients**
- (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.

The Lingering Attorney-Client Relationship

- **ABA Model Rule 1.3: Diligence**
- Comment [4]: Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. . . . Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. . . .

Mistake 4: Failure to Embrace the Importance of Social Media.

Why Does This Matter to a Bankruptcy Attorney?

- Understanding your client's exposure can better assist the client and thereby avoid professional malpractice claims.
- There are a variety of applicable ethical rules that relate to an attorney and the world of social media.

So...When Does Social Media Cross Into Legal Ethics?

- Is the lawyer communicating with a client or other lawyers?
- Is the lawyer discussing cases online? (A social media site is not the only format. Consider blogs, LinkedIn)
- Is the lawyer commenting to a post or responding to a post?
- Is the lawyer presenting "specialties" or "expertise"?
- Is the lawyer making an endorsement?

Applicable ABA Model Rules of Professional Conduct

- Rule 1.1
- Rule 1.6
- Rule 7.1
- Rule 7.2
- Rule 7.3
- Rule 4.3
- Rule 5.5

Mistake 5: Using Social Medial Inappropriately

A situation to consider:

An unrepresented debtor appears at a 341 hearing. The Trustee is convinced that the debtor has not disclosed a 1977 Pontiac Firebird Trans Am. The Trustee, a true Smokey and the Bandit fan, is certain that the car is posted for sale on a neighborhood Facebook page. The Trustee is not a member of the Facebook group, but the Trustee's sister is a member of the community page and the Trustee recalls she mentioned seeing the advertisement on the referenced page and seller by name. But, when asked at the 341, the debtor makes no reference to owning such a car.

Questions to consider...

- May the Trustee look at the debtor's phone to review photos of the car or review uploads?
- May the Trustee pretend to be a member of the neighborhood and become a member of the marketplace?
- May the Trustee ask the sister to obtain the information and inquire about the sale?
- May the Trustee seek a Subpoena from Facebook to disclose postings?

Mistake 6: Not Understanding the Expectation of Privacy.

There Is No Expectation of Privacy. Or Is There?

Interesting cases on the issue of privacy and social media.

Romano v. Steelcase, Inc. is one of the first cases involving social media and privacy claims. In this case the plaintiff claimed injuries involving certain office equipment and sued Steelcase, the manufacturer. Steelcase reviewed the plaintiff's social media posts and found the posts to indicate that the plaintiff's activities did not support her injury claims. Upon Steelcase seeking the social media posts in discovery the plaintiff defended against the production, basing it on the expectation of privacy. The court authorized Steelcase's discovery. 30 Misc. 3d 426, 907 N.Y.S.2d 650 (Sup. Ct. Suffolk County 2010).

In the landmark case of *Riley v. California*, however, the United States Supreme Court held (in a 9-0 decision) that the police must have a warrant to search a cell phone at the time of arrest. 573 U.S. 373, 134 S. Ct. 2473 (2014). The belief is that cell phones do much more than make telephone calls. They are like computers. And a citizen would have a reasonable expectation of privacy concerning the contents of their smartphones.

Most recently, the United States Supreme Court also takes the position that the police generally must have a warrant to search an individual's cell-site location information, i.e., the metadata from cell phone towers and carriers showing where an individual used a cell phone.

In *Carpenter v. United States*, the Court found that an individual has a legitimate expectation of privacy in his or her record of physical movement and thus, obtaining that information, constitutes a search that requires a warrant. 138 S. Ct. 2206 (2018). (Note: This is a recent shift in the expectation of privacy of metadata.)

Mistake 7: Failure to prepare for and manage a data breach.

Data Breaches

1.1: Duty of Competence
- ✓Understanding
  - • Benefits and risks
  - • Use and maintenance
- ✓Monitor for data breaches
  - ○ BREACH
  - ○ RANSOMWARE

Data Breaches

5.1: Responsibilities of Partners/Managers/Supervisory Lawyers

5.3: Responsibilities re: non-lawyer assistants

- Ensuring all attorneys and staff adhere to established policies and procedures & PRC's
- Use reasonable efforts to monitor office tech connected to the internet, external data sources, vendors and data use

Addressing the breach

1.1: Duty to act reasonably and promptly to stop breach and mitigate damage.

- Develop an incident response plan and team.
  - Identify and evaluate any network anomaly or intrusion
  - Assess nature and scope
  - Assess what data compromised
  - Quarantine the threat
  - Prevent exfiltration of data
  - Eradicate the malware
  - Restore network
  - Identify team contacts, roles and responsibilities

Notifying clients of breach

1.4 and 8.4: Duty of communication and honesty to client → • Part of Incident Response Plan

Current client: 1.4(b) where breach is serious enough to affect client's position or outcome of the matter.

Former Client: 1.9(c): lawyer may not reveal information of former client → • No affirmative duty of notification

Notifying clients of breach

1.6: Duty of Confidentiality: (c) A lawyer must make reasonable efforts to prevent inadvertent or unauthorized disclosure of client information

- *Reasonable efforts* to protect information is a defense – but disclosure must be made if required

*other state and federal requirements may also apply

Notification requirements

- Mich. Comp. Laws §§ 445.63, 445.72

Unless the person or agency determines that the security breach has not or is not likely to cause substantial loss or injury to, or result in identity theft with respect to, 1 or more residents of this state, a person or agency that owns or licenses data that are included in a database that discovers a security breach, or receives notice of a security breach under subsection (2), shall provide a notice of the security breach to each resident of this state.

Mistake 8: "But I'm an Associate – I Was Just Following Directions"

"But I'm an Associate – I Was Just Following Directions"

- Jane Associate works for the Debtor Law Firm
- The Firm represents consumer debtors in bankruptcy cases and charges them a flat fixed amount, plus court filing fees
- Among other duties, Jane oversees client intake and the preparation of consumer bankruptcy filings

"But I'm an Associate – I Was Just Following Directions"

- During the course of Jane's work, she learned that the Firm routinely adds a surcharge of $75 on top of the actual court filing fees charged to the Firm's clients
- However, that surcharge is never specifically disclosed or explained to the clients
- The surcharge is just automatically added to the amount of the filing fees on the clients' invoices

"But I'm an Associate – I Was Just Following Directions"

- When Jane raised the surcharge issue with her supervisor, Paul Partner, he told her that the surcharge was a processing fee that the Firm charges
- Paul also tells Jane that the charge is ethical and legal and that she "shouldn't worry about it"
- Jane accepted Paul's explanation and let the matter go without any further inquiry
- Is Jane on safe ethical ground?

"But I'm an Associate – I Was Just Following Directions"

- **ABA Model Rule 5.2: Responsibilities of a Subordinate Lawyer**
- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

"But I'm an Associate – I Was Just Following Directions"

- **Rule 8.3: Reporting Professional Misconduct**
- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. . . .

Mistake 9: True Friends? Or Fake?

NYSBA Ethics Opinion 843 (2010). An attorney can view the publicly available pages of an opposing party or a witness, but cannot friend the opposing party or witness or have another person do so. Use of public pages is acceptable. But be careful. An attorney's intention to have a third party "friend" a witness to obtain access to non-public access to gain impeachment information would violate the rule concerning attorney dishonesty. See NYSBA Opinion 843, citing to Philadelphia Bar Association Opinion 2009-02 (March 2009).

Mistake 10 - Hiding mistakes

Mistakes happen – Duty to notify

A. Current Client

- 1.4: duty to fulfill reasonable client expectations for information consistent with duty to act in clients best interests. Information should not be withheld to serve lawyers own interests.
- 1.7: a conflict exists when a the representation might will be limited by the personal interests of the attorney

B. Material

- Errors that result in financial loss, substantial delay, material disadvantage to client's legal position
- Client protection and the purposes of legal representation dictate the standard for the obligation to disclose

Mistake 11: "What We've Got Here Is Failure to Communicate"

"What We've Got Here Is Failure to Communicate"

- John Lakeman represents an unsecured trade creditor with an undisputed claim in the chapter 7 bankruptcy case of Fraudco, Inc.
- After filing a proof of claim on behalf of the trade creditor, John is then approached by an insider creditor to represent its interests in the case.
- The insider creditor is a likely litigation target of the Fraudco bankruptcy trustee, but it hasn't been sued (yet)

"What We've Got Here Is Failure to Communicate"

- John takes on the representation of the insider creditor without any advance notice or communication to his trade creditor client
- Should John have communicated with the trade creditor before taking on the insider representation?
- Did John need a conflict waiver from the trade creditor before taking on the representation?

"What We've Got Here Is Failure to Communicate"

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

"What We've Got Here Is Failure to Communicate"

- **ABA Model 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.

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- **ABA Model Rule 1.7: Conflict of Interest: Current Clients**
- (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; [and]
- . . . .
- (4) each affected client gives informed consent, confirmed in writing.

Mistake 12: Crossing the line with online marketing efforts.

Online Marketing Services and Lawyer Referrals

- A lawyer referral service is commonly used by state bar associations, criminal defense bars, and the like.

- The service can help attorneys grow their practices while at the same time connect clients in need of representation.

- Such online marketing services, especially for-profit ones, are not always viewed or treated the same way.

States have consistently regulated and limited such services. These rules include:

- Prohibiting a lawyer from compensating or providing value to a person or organization to recommend employment by a client;
- Limits the organizations that a lawyer may pay for recommendations or the promotion of that lawyer's services;
- Prohibits lawyers from splitting fees with non-lawyers.

A situation to consider:

A debtor is seeking to keep his residential home and contacts a for-profit lawyer referral service looking for a bankruptcy attorney. The service asks for a description of the problem in order to best determine that an experienced bankruptcy attorney knowledgeable about homestead exemptions would be needed due to the client's legal issues.

Questions to consider...

- May attorneys gain clients through lawyer referral services?
- May they do so by flat fees?
- Does it matter the referral service is for-profit?
- Should referral services connect attorneys with clients based on credentials?
- May the service rate the attorney?

In NYSBA Ethics Opinion 1131 (2017), the question posed was whether a lawyer may pay (by fixed fee or per each client lead) an online lawyer referral service to provide the lawyer with contact information of potential clients?

The Committee provided that, upon certain conditions being met, a lawyer could pay an online lawyer referral service to gain the contact information for potential clients that need legal services.

The validity was based on the following:

- Did the service select the lawyer by "transparent and mechanical methods"? Was the selection based on a random computer search?
- Was the lawyer selected by qualifications? Was the client's legal issue analyzed?
- What is the payment structure? Does the service receive more money if the lawyer receives more work?
- Did the communications about the lawyer's services comply with attorney advertising rules?
- Did the service provider's website require the potential client to answer a series of specific legal questions?
- Does the service rate the lawyer?

In the complimenting NYSBA Ethics Opinion 1132 (2017), the Committee addressed Avvo's Legal Services. It determined that Avvo's marketing fee violated referral fee rules.

- Avvo's service required a potential client to answer a series of questions and packages were offered.
- Attorneys were assigned randomly or based on a list.
- Participating attorneys were paid depending on a client's purchased package.
- Attorneys were charged separate marketing fees.
- And Avvo also created a rating system.

Mistake 13 - The impaired lawyer

What is your role?

- The challenge of working for/with an impaired lawyer
  - Enabling - covering for mistakes and lapses
  - Intimidation
  - You don't know what you don't know
- Protecting clients
  - Call the LAP
  - Call Lawyer Regulation
  - Firm ethics partner or your PR professor

For Employers

- Establish Organizational Infrastructure to Promote Well -Being.
- Form a Lawyer Well-Being Committee.
- Assess Lawyers' Well-Being.
- Establish Policies and Practices to Support Lawyer Well-Being.
- Monitor for Signs of Work Addiction and Poor Self-Care.
- Actively Combat Social Isolation and Encourage Interconnectivity.
- Provide Training and Education on Well-Being, Including During New Lawyer Orientation.
- Emphasize a Service-Centered Mission.
- Create Standards, Align Incentives, and Give Feedback.

State Bar of Michigan

Lawyers and Judges Assistance Program "LJAP" Helpline (800) 996-5522

- Law students; Bar applicants
- Attorneys
  - In good standing
  - Suspended
  - Disbarred
  - Re-instatement candidates
- Judges
- Family members, Colleagues, Other concerned parties

ETHICS TRAPS AND HOW TO AVOID THEM

Moderated by: Hon. Thomas J. Tucker

SOCIAL MEDIA'S CONNECTION WITH LEGAL ETHICS

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FOUR ETHICS TRAPS FOR THE UNWARY

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Understanding your client's exposure can better assist the client and thereby avoid professional malpractice claims. There are a variety of applicable ethical rules that relate to an attorney and the world of social media.

When Does Social Media Cross Into Legal Ethics?

- Is the lawyer communicating with a client or other lawyers?
- Is the lawyer discussing cases online? (A social media site is not the only format. Consider blogs, LinkedIn)
- Is the lawyer commenting to a post or responding to a post?
- Is the lawyer presenting "specialties" or "expertise"?
- Is the lawyer making an endorsement?

Applicable Rules: Using the ABA Model Rules of Professional Conduct

Consider the above activities in context with some the duties set forth below.

TOPIC	RULE
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.*
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).* *…*

	(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."
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.*
Information About Legal Services	**Rule 7.2: Communications Concerning Lawyer's Services: Specific Rules:** *(a) A lawyer may communicate information regarding the lawyer's services through any media.* *(b) A lawyer shall not compensate, give or promise 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;* *(3) pay for a law practice in accordance with Rule 1.17;* *(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; and* *(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.* *(c) 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 authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and *(2) the name of the certifying organization is clearly identified in the communication.* *(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.*
Information About Legal Services	**Rule: 7.3 Solicitation of Clients:** *(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.* *(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:* *(1) lawyer;* *(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or* *(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.* *…* *(e) Notwithstanding the prohibitions in this Rule, 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 live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.*

Dealing with Unrepresented Person	**Rule 4.3: Transactions with Persons other than Clients:** *In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.*
Law Firms and Associations	**Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practices:** *(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.* *(b) A lawyer who is not admitted to practice in this jurisdiction shall not:* *(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or* *(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.* …

EXAMPLE #1: An unrepresented debtor appears at a 341 hearing. The Trustee is convinced that the Debtor has not disclosed a 1977 Pontiac Firebird Trans Am. The Trustee, a true Smokey and the Bandit fan, is certain that the car is posted for sale on a neighborhood Facebook page. The Trustee is not a member of the Facebook group, but the Trustee's sister is a member of the community page and the Trustee recalls she mentioned seeing the advertisement on the referenced page and seller by name. But, when asked at the 341, the debtor makes no reference to owning such a car. May the Trustee look at the debtor's phone to review photos of the car or review uploads? May the Trustee pretend to be a member of the neighborhood and become a member of the marketplace? May the Trustee ask the sister to obtain the information and inquire about the sale? May the Trustee seek a Subpoena from Facebook to disclose postings?

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In NYSBA Ethics Opinion 1131 (2017), the question posed was whether a lawyer may pay (by fixed fee or per each client lead) an online lawyer referral service to provide the lawyer with contact information of potential clients? The Committee provided that, upon certain conditions being met, a lawyer could pay an online lawyer referral service to gain the contact information for potential clients that need legal services. The validity was based on the following:

- Did the service select the lawyer by "transparent and mechanical methods"? Was the selection based on a random computer search?
- Was the lawyer selected by qualifications? Was the client's legal issue analyzed?
- What is the payment structure? Does the service receive more money if the lawyer receives more work?
- Did the communications about the lawyer's services comply with attorney advertising rules?
- Did the service provider's website require the potential client to answer a series of specific legal questions?
- Does the service rate the lawyer?

In the complimenting NYSBA Ethics Opinion 1132 (2017), the Committee addressed Avvo's Legal Services. It determined that Avvo's marketing fee violated referral fee rules. Avvo's service required a potential client to answer a series of questions and packages were offered. Attorneys were assigned randomly or based on a list. Participating attorneys were paid depending on a client's purchased package. Attorneys were charged separate marketing fees. And Avvo also created a rating system.

FOUR ETHICS TRAPS FOR THE UNWARY

Peter J. Roberts, Fox Rothschild LLP

ABI 2019 Central States Workshop, June 14, 2019

Ethics Trap No. 1: The Accidental Attorney-Client Relationship[1]

Joe Attorney is hired to represent Big Box Corporation as the debtor in a highly contentious chapter 11 case. In the course of litigation with Big Box's secured lender over a contested cash collateral motion, the lender notices up the deposition of Big Box's former CFO, Nate Numbers. In advance of the deposition, Joe arranges to meet with Nate to prepare him for the deposition. Nate freely meets with Joe, provides him with candid and confidential information relating to the contested matter, and listens carefully to Joe's advice on how to handle anticipated questions at the deposition.

At his subsequent deposition, Nate is asked by the lender's lawyer if he is represented by counsel, and Nate replies that Joe is his counsel. Joe says nothing on the record to correct Nate. Later, however, when discussing Nate's review of the deposition transcript and some of Nate's very troubling testimony on the accuracy of Big Box's prepetition borrowing base certificates, Joe tells Nate that he should probably hire a lawyer. Nate says, "what do you mean, Joe, I thought that you were my lawyer." Is Nate correct?

Available resources for discussion and resolution:

The ABA Model Rules are silent on the formation of a lawyer-client relationship. However, the Restatement (Third) of the Law Governing Lawyers is instructive:

> **§ 14 Formation of a Client–Lawyer Relationship**
> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with power to do so appoints the lawyer to provide the services.

See also Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1317 (7th Cir. 1978) ("A professional relationship is not dependent upon the payment of fees nor … upon the execution of a formal contract.").

[1] Inspired by *Advanced Mfg. Techs., Inc. v. Motorola, Inc.*, No. CIV 99-01219, 2002 WL 1446953 (D. Ariz. July 2, 2002).

Ethics Trap No. 2: The Lingering Attorney-Client Relationship[2]

Smith & Jones LLC ("S&J") represented Acme Corp. as its attorneys in a contract dispute that settled six years ago. The settlement agreement had a ten-year term, and it listed an S&J attorney (now at another firm) as one of Acme's notice designees for purposes of any future communications required by the parties under the agreement. Though S&J handled a few small matters regarding the agreement in the immediate aftermath of its execution, S&J has billed no time and has done no work for Acme in connection with the agreement or otherwise for at least five years. Nevertheless, S&J has maintained Acme's contract dispute as an active, open matter in S&J's files, and it has continued to store almost 50 boxes of documents relating to the dispute in an off-site storage facility.

Today, a potential new client approached S&J about representing it in an unrelated dispute against Acme. Can S&J take the case without Acme's consent? Is Acme still a current S&J client even though the representation has been dormant for five years?

Available resources for discussion and resolution:

Applicable ABA Model Rules:

1. Rule 1.3: Diligence

> A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> Comment [4]: Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. . . .

2. 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] Inspired by *Jones v. Rabanco, Ltd.*, No. C03-3195P, 2006 WL 2237708 (W.D. Wash. Aug. 3, 2006).

(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.

Ethics Trap No. 3: "But I'm an Associate – I Was Just Following Directions."[3]

Jane Associate works for the Debtor Law Firm, which represents consumer debtors in bankruptcy cases and charges them a flat fixed amount, plus court filing fees. Among other duties, Jane oversees client intake and the preparation of consumer bankruptcy filings. During the course of Jane's work, she learned that the Firm routinely adds a surcharge of $75 on top of the actual court filing fees charged to the Firm's clients. However, that surcharge is never specifically disclosed or explained to the clients; it's just automatically added to the amount of the filing fees on the clients' invoices. When Jane raised the surcharge issue with her supervisor, Paul Partner, he told her that the surcharge was a processing fee that the Firm charges, and that the charge is ethical and legal and that she shouldn't worry about it. Jane accepted Paul's explanation and let the matter go without any further inquiry. Is Jane on safe ethical ground?

Available resources for discussion and resolution:

Applicable ABA Model Rules:

1. Rule 5.2: Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

[3] Inspired by *In re Bowden*, Opinion No. 25978 (SC Sup. Ct. May 9, 2005).

2. Rule 8.3: Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Ethics Trap No. 4: "What We've Got Here Is Failure to Communicate"[4]

John Lakeman represents an unsecured trade creditor with an undisputed claim in the chapter 7 bankruptcy case of Fraudco, Inc. After filing a proof of claim on behalf of the trade creditor, John is then approached by an insider creditor to represent its interests in the case. The insider creditor is a likely litigation target of the Fraudco bankruptcy trustee, but it hasn't been sued (yet). John takes on the representation of the insider creditor without any advance notice or communication to his trade creditor client. Should John have communicated with the trade creditor before taking on the insider representation? Did John need a conflict waiver from the trade creditor before taking on the representation?

Available resources for discussion and resolution:

Applicable ABA Model Rules:

1. 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] Inspired by *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 WL 578989 (N.D. Cal. Feb. 21, 2007).

(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.

2. 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.

You Might Just Be An "Expert," But Keep It To Yourself—Restrictions on Lawyer Self-Promotion in Advertising.

By: Jason Urey and Alane A. Becket
Becket & Lee LLP
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"An expert is a person who has made all the mistakes that can be made in a very narrow field." Niels Bohr[5]

Early Views on Lawyer Advertising

Lawyer advertising has long been viewed with a jaundiced eye by the legal profession itself. Such negative sentiment is said to be rooted in the view held by attorneys in seventeenth century England that practicing law was a form of public service rather than a way of making a living.[6] Despite such general aversion, lawyers in the U.S. have long engaged in advertising their services, with one prominent example being Abraham Lincoln who placed classified ads for his partnerships in the 1830's and 1850's.[7] However, restrictions on such advertising have had a similar lengthy tradition as shown by establishment of the first statewide code of ethics in Alabama in 1887, and establishment of the American Bar Association (ABA) Canons of Ethics in 1908, both of which placed restrictions on lawyer advertising.[8] Seeking to persuade lawyers not to advertise, the ABA rules were more restrictive, banning advertising as an unacceptable form of solicitation, except for certain customary communications and telephone directory listings.[9] These restrictions were continued by the ABA in 1969 with establishment of the Model Code of Professional Responsibility which almost all states adopted.[10]

The American legal profession's self-imposed ban, and companion state prohibitions on lawyer advertising began to give way significantly in 1975, when the ABA amended its existing rules to permit lawyers to advertise certain fee-related information and to place such advertisements in telephone directories, customary law lists and legal directories, and other

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[5] 1922 Nobel Prize winner. See "The Nobel Prize in Physics 1922," NobelPrize.org.Nobel Media AB 2019, *available at* https://www.nobelprize.org/prizes/physics/1922/summary/ (last visited Apr. 24, 2019). See also "Niels Bohr," https://www.newworldencyclopedia.org/entry/Niels_Bohr (last visited Apr. 24, 2019).

[6] Pennsylvania Bar Association, Committee On Legal Ethics and Professional Responsibility, "FORMAL OPINION 85-170, LAWYER ADVERTISING AND SOLICITATION," (Nov. 25th 1985), *available at* https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F1985-170.pdf#search=%2285-170%22 (subscription required)(last visited Apr. 19, 2019).

[7] Jack P. Sahl, "The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment," 34 St. Mary's L.J. 795, 827-28 (2003), *available at* https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?referer=http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjA4J-O8-jhAhUPqlkKHcQFBhUQFjABegQIBRAB&url=http%3A%2F%2Fideaexchange.uakron.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1184%26context%3Dua_law_publications&usg=AOvVaw2O2vInPqD6qrNn0u2aQ2Vc&httpsredir=1&article=1184&context=ua_law_publications (last visited Apr. 24, 2019).

[8] *Id*. at 830.

[9] Jerry L. Wattier, "In re Johnson: A Lawyer's Right To Advertise Specialized Expertise," South Dakota Law Review, 29 S.D.L. Rev. 527, 529 (1984).

[10] Sahl, *Supra* note 3, at 832.

consumer group directories.[11] Shortly thereafter, in 1977 the U.S. Supreme Court gave its Constitutional blessing to lawyer advertising in *Bates v. State Bar of Arizona*.[12] In *Bates*, two attorneys who previously worked for a legal aid organization decided to open a practice providing low-cost legal services in uncontested matters to clients of moderate income who did not qualify for legal aid. In order to stay afloat, and in contravention of an Arizona disciplinary rule prohibiting lawyers from advertising by means of newspaper, magazine, radio, etc, the attorneys placed an ad in a local newspaper describing, among other things, their fees for services.[13] The president of the Arizona Bar filed a complaint over the ad and a suspension was recommended. The lawyers claimed the regulation violated the Sherman Act by limiting competition, and infringed on their First Amendment rights. These arguments were rejected by the Arizona Supreme Court. However, the United States Supreme Court later determined that the state could not, by blanket suppression, regulate lawyer advertising because such advertising was a form of commercial speech protected by the First Amendment.[14]

Although the decision secured the rights of lawyers to advertise under the U.S Constitution, this protection was not unlimited. The Court instead determined that states were also free to adopt regulations to make sure that such advertising was not false, deceptive, or misleading:

> [B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.[15]

Shortly after *Bates* the Supreme Court again had the opportunity to review the limits of restrictions on lawyer advertising in *In re R.M.J.*[16] That case involved a Missouri disciplinary rule restricting advertising by such mediums as newspapers and yellow pages and also allowed only ten specific categories of basic information to be published including name, address, telephone number, areas of practice, office hours, fee for a consultation, etc. A dual-state licensed lawyer tested the limits of the rule by announcing the opening of his new office by mailing professional announcement cards to select addressees and by placing newspaper and telephone book ads stating that he was licensed in Missouri and Illinois and was admitted to practice before the United States Supreme Court. The ad also listed various practice areas that deviated from the twenty-three specific practice areas allowed by the rule and it failed to include

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[11] Pennsylvania Bar Association, *Supra* note 2.
[12] *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
[13] For an appreciation of the impact of inflation, the ad in *Bates,* provided the following bankruptcy related fees:

> Bankruptcy – non-business, no contested proceedings
>
> Individual
> $250.00 plus $55.00 court filing fee
>
> Wife and Husband
> $300.00 plus $110.00 court filing fee

See *Bates*, 433 U.S. at 385.
[14] *Bates,* 433 U.S. at 383.
[15] *Id*. at 383-84.
[16] *In re R.M.J.*, 455 U.S. 191 (1982).

a required disclaimer as to certification of expertise in the listed practice areas—a requirement to which the lawyer conceded non-compliance. The Missouri Supreme Court upheld the constitutionality of the rule and issued a private reprimand without explaining its reasons, and the lawyer appealed to the U.S. Supreme Court. The U.S. Supreme Court reversed the Missouri Supreme Court's ruling and found that the advertising restrictions were invalid. Citing *Bates*, the Court emphasized that states retain the authority to regulate advertising that is inherently misleading or that proves to be misleading in practice, but that the First and Fourteenth Amendments require that the restrictions be no more extensive than reasonably necessary to further the state's interest.[17] In this case, however, the Court determined that none of the lawyer's representations in the advertising at issue were misleading and that in absence of such evidence the restrictions did not meet the Constitutional requirements.[18]

Eight years later, in *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*,[19] the Supreme Court further expanded opportunities for lawyers to advertise when it addressed an Illinois regulation prohibiting lawyers from holding themselves out as "certified" or as a "specialist." In *Peel* an attorney truthfully represented on his letterhead that he was a civil trial specialist certified by the National Board of Trial Advocacy. The attorney's position was bolstered by the fact that he had conducted over 100 jury trials, 300 nonjury trials and handled hundreds of other litigated matters that were settled. Citing *Bates,* the Court determined that the state could not discipline the lawyer for truthfully advertising his certification because there was nothing actually or inherently misleading and that the facts stated on his letterhead were true and verifiable.[20]

ABA Model Rules

The above-referenced cases from the high court are reflected in the ABA Model Rules of Professional Conduct (MRPC) which were initially adopted in 1983 and serve as the model rules of ethics for many states.[21] MRPC 7.1 provides:

> 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.[22]

Model Rule 7.2(c) concerning claims of specialization provides:

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

[17] *Id*. at 207.
[18] *Id*. at 206-207.
[19] *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990).
[20] *Id* at 110.
[21] See *In re PRB Docket No. 2002.093*, 177 VT 629, 631(2005).
[22] ABA MRPC 7.1. *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_1_communication_concerning_a_lawyer_s_services/ (last visited Apr. 24, 2019).

> (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
>
> (2) the name of the certifying organization is clearly identified in the communication.[23]

Pennsylvania is one state that has adopted the MRPC, with some variation, which has court guidance on interpretation of these kinds of lawyer self-promotion rules. In *Spencer v. Honorable Justices of Supreme Court of Pa.,*[24] a member of the Pennsylvania Bar brought an action seeking a declaration that various provisions of the State's Disciplinary Rules were unconstitutional, including DR 2-101(A), an antecedent to current PA.R.C.P. 7.1, which provided that "No lawyer shall engage in, utilize, or allow any form of advertising that is knowingly false, fraudulent or misleading."[25] The lawyer was also a certified pilot and held a master's degree in computer science and sought to concentrate his practice in computer law and aviation law and to advertise to clients that he was an "experienced" pilot and computer programmer. The state argued that such subjective characterization of the lawyer's background was inherently misleading and should be banned. The U.S. District Court for the Eastern District of PA found the Rule to be constitutional stating:

> Claims using terms such as 'experienced,' 'expert,' 'highly qualified,' or 'competent' are difficult for a layman to confirm, measure, or verify. A lawyer who has handled three or four tort or antitrust cases clearly is less 'experienced' than one who has handled fifty, yet the term 'experienced' would arguably be available to both. Rather than identify himself as an 'experienced' pilot, plaintiff can convey his experience through the use of more objective information such as the number of hours flown in various types of aircraft, his certification by the Federal Aviation Administration as a pilot in single engine planes, and his certification as a flight instructor in single and multi-engine aircraft. Similarly, a lawyer may describe the quality of his legal services only through the use of objective, verifiable terms such as the number of cases handled in a particular legal field or the number of years in practice.[26]

The Court found the state's prohibition of the use of terms which subjectively evaluate a lawyer's credentials or the quality of his services directly advanced the state's substantial interest in protecting consumers from misleading claims, and that it was not more extensive than necessary to serve that interest.[27]

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[23] ABA MRPC 7.2(c) (incorporating former rule 7.4(d)) *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising/ (last visited Apr. 24, 2019).

[24] *Spencer v. Honorable Justices of Supreme Court of Pa.*, 579 F. Supp. 880 (E.D. Pa. 1984), aff'd sub nom.
[25] See PA.R.P.C. 7.1 (West) and Editor's Notes to Rule 7.1, Code of Prof. Resp. Comparison.
[26] *Spencer,* 579 F. Supp. 887-888.
[27] *Id*. at 888.

Spencer has been cited by courts of other states when applying their own versions of Rule 7.1. and 7.2(d). In *In re PRB Docket No. 2002.093*,[28] the Supreme Court of Vermont, citing *Spencer*, affirmed a professional responsibility panel's recommendation to impose a private admonition upon an attorney for violating Vermont's version of Rule 7.1 which prohibited false or misleading communications about a lawyer or the lawyer's services, when the lawyer described his firm in a telephone directory as "INJURY EXPERTS" and "WE ARE THE EXPERTS IN" and then listed several areas of law.[29] The Court stated:

> As the case law and rules make clear, in the area of communications concerning attorney 'quality' or 'specialization' the underlying principle is that consumers should be free to infer for themselves an attorney's level of quality or expertise so long as the information conveyed is truthful, objectively verifiable, and not otherwise misleading. Direct claims of expertise that are not truthful and factually verifiable, however, may be prohibited or restricted as unduly misleading.[30]

The Court found that the "[lawyer's] advertisement proclaiming his firm to be 'injury experts' and 'the experts' in certain enumerated fields of law falls squarely within that category of qualitative advertising claims that are not susceptible of measurement or verification" and that they are "'likely to create an unjustified expectation and differentiation among those reading the advertisement about the results which can be achieved by a lawyer claiming to be an expert' in violation of Rule 7.1"[31]

Similar holdings from state supreme courts around the country abound indicating that the disciplinary risks of non-compliance are real, and that the reach of the rules can be vast.[32] For example, even Pennsylvania's Rule 7.4, which lacks Model Rule 7.2(d)'s explicit prohibition against the "implication" of being a "specialist,"[33] has been interpreted by some bar association committees as encompassing such implicit statements.[34] In *Philadelphia Bar Association*, Opinion 87-27,[35] an inquirer proposed a direct mailing advertisement referring to the lawyer as a

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[28] *In re PRB Docket No. 2002.093*, 177 VT 629 (2005).
[29] *Id*. at 630.
[30] *Id*. at 632.
[31] *Id*.
[32] See *In re Defillo*, 762 S.E. 2d 552 (S. Carolina 2014)(Florida licensed attorney subject to discipline when firm solicited clients in South Carolina and website included forms of the word "expert" and "specialist" when attorney was not state certified in South Carolina in violation of rule 7.4(b); *In re Wells*, 709 S.E. 2d 644 (S. Carolina 2011)(Attorney publicly reprimanded when among other improper representations in various mediums, website referred to the firm's "expertise" in personal injury matters and "expert nursing home litigation advisors" violated rule 7.4(b)); *In re Park*, 894 A.2d 411, (D.C. 2006)(Attorney suspended for six months for falsely holding himself out as an "expert" or "specialist" in immigration law; *In re Anonymous*, 783 N.E. 2d 1130 (Ind. 2003)(Two attorneys privately reprimanded for advertising in a privately owned directory that they were "Elder Law Specialists" as misleading in violation of rule 7.1(b); *In re Anonymous*, 689 N.E. 2d 434 (Ind. 1997)(Private reprimand warranted for attorney that represented in radio advertisement that he "specialized in personal injury cases" when he was not certified as a specialist, in violation of rule 7.4(a); *Office of Disciplinary Counsel v. Furth*, 754 N.E. 2d 219 (OH. 2001)(Attorney permanently disbarred due to numerous professional conduct violations, including holding himself out as a specialist) *In re Schmidt*, 976 So. 2d 1267 (LA 2008)(Attorney licensed in Louisiana and South Carolina reciprocally disciplined by public reprimand in Louisiana after being sanctioned in South Carolina for, among other conduct, posting a billboard using a form of the word "specialist" when he was not certified as such, and sending solicitation letters including a form of the word "expert."
[33] PA ST RPC Rule 7.4 provides in relevant part: "(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state that the lawyer is a specialist except as follows: (1) 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; (2) a lawyer engaged in admiralty practice may use the designation 'admiralty,' 'proctor in admiralty' or a substantially similar designation . . ."
[34] See Philadelphia Bar Association, Opinion 87-27 (Dec. 1987), *available at* http://www.philadelphiabar.org/page/EthicsOpinion87-27?appNum=2 (last visited Apr. 24, 2019).
[35] *Id*.

"business lawyer." The Professional Guidance Committee found that the use of the description "business lawyer" suggested the lawyer was a "specialist" in that area and that the issue was further compounded by use of the words "training," "expert" and "trained" in the advertisement, and thus, could violate Rules 7.1 and 7.4. The Professional Guidance Committee has also opined in response to another inquiry that a lawyer representing herself as an "expert" in a particular field could reasonably lead a consumer to believe the lawyer is a "specialist" in violation of Rule 7.4.[36] These ethics opinions are instructive and show that the use of phrases that provide even the implication of being a "specialist" could be interpreted to invoke liability under Rule 7.1 as being inherently false or misleading, and could also invoke liability under Rule 7.4, as a violation of the prohibition of a lawyer stating that she is a "specialist."

Conclusion

It is quite clear that using subjective terms such as "expert," "experienced," or "highly qualified" to describe the quality of legal services or expressly stating that an attorney is a "specialist," or using terms "implying" that the firm or its attorneys are "specialists," without the proper certification poses a significant risk of a violation of Model Rules 7.1 and 7.2 and state variations of these rules.

In order to reduce the risk of a potential violation, a review of all attorney professional CV's, websites, biographies, social media profiles, and advertisements may be warranted to verify that representations as to quality of legal services provided are presented only in objective and verifiable terms such as years of practice, number of cases handled etc. and that "specialization" references only be used if allowed by applicable state rules in conjunction with any necessary formal certification and disclosure requirements.

[36] Philadelphia Bar Association, Opinion 2012-8 (Nov. 2012) *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2012-8Final.pdf (last visited Apr. 24, 2019).

YOUR FIRM NAME HERE

Incident Management Operations

PROPRIETARY

Initial Release: XXXX
Current Version: XXXX

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Document Revision History

Name	Version Number	Revision Date	Modifications

Review and Approval

Name	Approval Date	Comments

Introduction and Purpose

This document outlines baseline processes and procedures that support YOUR LAW FIRM's incident management policies in support of incident management operations across the company from employees to management. This includes, but is not limited to, incident management and reporting, issue management and tracking, business resumption, risk assessment and monitoring and training. Detailed procedures and policies may be referenced and written into other documents.

Incident Management

Incident Reporting

An incident is defined as an event that would cause an unexpected interruption to normal business processes or one that could potentially expose the firm to undue risk including: application and system outages regardless of internal or external causes, all security breaches, violations and denial of service, vendor violations, hardware and software outages, validated alerts from intrusion-detection, intrusion-prevention, file-integrity monitoring systems, unauthorized wireless devices and remote or mobile violations. An Incident Report is required to document all company incidents within 24 hours of resolution. The standard form is located XXXXXXXX for company access by IT, Facilities, HR, Attorneys and Managers. All the aforementioned personnel are required to attend training on incident reporting and receive notification of changes or incidents that are pertinent to them.

Incident reporting begins with notification of an occurrence to the CIO or Partner. The Incident Report form includes the type of incident, the date and time of the incident and the owners of the issue as it goes through the process of resolution. The "Chain of Custody" includes identifying responsibility for each step in the resolution, what evidence has been collected, where the evidence is and where it goes next. The information sections contained on the Incident Report are the Description, Chain of Custody, which describes all communications and actions, Final Resolution and any Future Considerations to update YOUR LAW FIRM policies or procedures.

Incidents are urgent business matters that require immediate action and escalation to executive management immediately. Incident reports are created as soon as the immediate issue resolution is underway and within 24 hours. Incident types, such as; application and system outages regardless of internal or external causes, all security breaches, violations and denial of service, vendor violations, hardware and software outages, validated alerts from intrusion-detection, intrusion-prevention, file-integrity monitoring systems, unauthorized wireless devices and remote or mobile violations ae considered urgent and a priority for executive escalation and decision for communication.

Digital Forensics Overview

This policy provides the basis for which YOUR LAW FIRM has implemented tools and policies to protect the integrity of data in the event of an investigation requiring digital forensics. This

includes the identification, collection, examination, and analysis of data while protecting the integrity of the information and maintaining a strict chain of custody. Within the incident management policies, the procedures for managing a forensic investigation will follow the incident management chain of custody.

Supporting Forensics in the Information System Life Cycle

YOUR LAW FIRM has security measures in place that protect data throughout the entire system life cycle. By incorporating these DLP (Data Loss Prevention) and monitoring tools, incidents can be handled more effectively.

- Daily Backups are performed of critical data
- Auditing of application, system, and security logs are turned on for critical servers and workstations in accordance with PCI
- Database servers are configured to forward authentication and auditing information to server event logs
- All workstations, servers, and network devices forward audit logs (including authentication and auditing from databases) to a centralized log server.
- Servers, workstations, and network devices are monitored by a file integrity monitor.
- Databases, sensitive files, and backups are encrypted to protect against intentional or accidental data damage or deletion
- Intrusion detection is implemented on both internal and external networks
- Workstations hard drives are locked down and removable storage disabled, forcing data to be saved to encrypted network server
- Servers, workstations, and network devices use NTP so that logs have the proper timestamp.

Forensic Process

The following steps should be followed throughout the forensic process:

1. Data Collection
2. Examination
3. Analysis
4. Reporting

Data Collection

This section describes the process for collecting the necessary data in the event that digital forensics are required.

1. An analyst must identify the data sources – this could be a server, email, or from a centralized log server.
2. Develop a plan to acquire and contain the data. This may involve immediate action in some cases, so data collection should be prioritized. For instance, data may be located in a volatile area that could be changed by others. Decisions to temporarily disable access to and make copies of data may be necessary. Depending on the nature of the incident, law enforcement may be required, or backup tapes must be retrieved. These steps must be prioritized by the analyst in conjunction with the Incident Management Team.

3. Acquire the Data. Enact the plan from above and begin gathering data. This portion requires a strict chain of custody log. This log must be meticulously kept using the Incident Report form. This should include a detailed log of every step in the process, including information about every tool that is used. In addition, before a system is accessed, notes and photographs should be taken to document the state of a system before the investigation begins. One person should be designated as the evidence custodian, with sole responsibility of documenting, photographing, and potentially labeling evidence through this process.
4. Verify the integrity of the data. For most incidents, this requires the chain of custody logs as well as the ability to show the appropriate logs to ensure that the data was not tampered with. In the case of a criminal investigation, this may involve law enforcement to protect against physical tampering.

Examination
Once data is collected, it must be examined, using copies to protect the integrity of the original data. String search methods, file viewers, and/or uncompressing tools to analyze files should be used as necessary. This portion may involve restoring data from tape or reviewing backup logs to compare file changes. XXXSoftware should be used to examine system file changes. XXXSoftware should be used to assist in identifying data deletions or changes.

Analysis
Evidence is examined in order to draw conclusions. This should include identifying and correlating the people, events, and items that were gathered in the investigation. The tools that are at YOUR LAW FIRM's disposal for this include SOFTWARE (for antivirus, malware, and host IDS logs), and SOFTWARE for internal and external network intrusion detection. XXXSoftware assists in checking network device logs, server event logs, and workstation event logs. Network device ACLs are set up to log key deny rules. Server and workstation audit rules are set up to capture system, application, and security logs in accordance with PCI DSS requirement 10. This includes information authentication and application capturing through SQL Server Audit. Rules and actions are setup with XXXSoftware to monitor system file integrity rules. All data sets should be compared to determine cause and effect pertaining to the incident.

Reporting
Once analysis is complete, report the findings. Considerations should include the audience to whom it is being presented. If no definitive explanations are available, all alternative explanations should be explored and explained. In some cases, further actionable items may be required to collect new sources of information. As with all incidents, this portion also includes analysis of remediations or policy changes to prevent future incidents.

Incident Response Team

Incident Escalation

Incidents urgent matters and are given the highest priority. The Incident Response Team is should be notified of an occurrence and a lead will be assigned. Management will determine if an email notification is warranted outside the IT Department, and Executive Management will determine if client notification is required. If there is a suspected theft of data or breach of the system, the Managing Partners must be notified immediately and actions to inform clients, notify the authorities, and take the appropriate actions to retrieve and protect the data will be initiated.

Review Process

The Incident Response Team meets quarterly to review all incident reports. The review process includes any changes that may be required for company policy communications, additional training or processes. The Incident Response Team is responsible for evaluating all incidents for continual process improvement. Any improvements or changes to the incident management or risk management processes will be implemented and communicated to management to maintain YOUR LAW FIRM security compliance.

Each report is reviewed and signed quarterly by Executive Management maintained in YOUR LAW FIRM'S records. The QA Manager will ensure that reports are completed and filed and future considerations are distributed and acted on through change management. These filed reports are reviewed weekly at the IT Change Management meeting.

Incident Response Team Policy & Guidelines (Form)

Executive Overview
The procedure for incident recording and tracking for IT has been actively in place since XXXX, including all power outages an any system issues that caused an impact to business continuity. In June XXXX the incident reporting process was expanded to incorporate incident tracking for all aspects of the Business. All Partners, department managers, supervisors and attorneys receive training on these procedures and definitions.
The Incident Response Team meets quarterly and follows these guidelines to review and act on any incident reported.
A Team is defined and emergency access cards are distributed to Partners, Facilities, HR and IT personnel to respond in an emergency 24 hour\7 days per week. This laminated wallet card is updated quarterly or as changes are made.
Team – body of YOUR LAW FIRM executives and employees responsible to respond to each incident in order to protect the Business, its employees and client information.
Business – defined as the YOUR LAW FIRM
Incident – any event or occurrence that happens to impact business continuity, compromise security or fail to support the industry standards being protected. See Types.
Types - application and system outages regardless of internal or external causes, all security breaches, violations and denial of service, vendor violations, hardware and software outages, validated alerts from intrusion-detection, intrusion-prevention, file-integrity monitoring systems, unauthorized wireless devices and remote or mobile violations.
Plan – strategy in which the Team will design and support the business to fulfill a safe environment of minimal incidents and prepare the entire business to be responsive and supportive. Effective July XXXX, the Team continually reviews the company risk assessment.

Incident Response Team Requirements
1. Team meets quarterly to review all company security and business incidents and the Plan for the next quarter in support of the overall Plan
    - Review of incident reports includes discussion of cause, remediation, follow-up and training requirements
    - Review incident reports for any changes to the Company Risk Assessment Management Matrix
    - All changes to Incident processes, procedures, operations and risk assessment are documented at each quarterly meeting.
2. Define Team Structure & Responsibilities
    - Executive Sponsor, Partner
    - Team Lead, CIO
    - Department Team members, See team

3. Identify team responsibilities and reviews at year-end if adding or changing team members is necessary.
    - IT Operations Manager
    - HR Manager
    - Facilities Manager
    - Controller
    - Partner
    - Business Client Manager

Team Membership
Define responsibilities for Executive Sponsor, Lead and members.
Conduct of Meetings and Process
Agenda, meeting minutes and follow-up actions document each meeting. All documents are tracked in a SOFTWARE
Incident Training
Determine company training requirements quarterly.
Incident Response Team Members and Support Role:

Incident Document Management

1. Incident Report Electronic Files: [LOCATION]
2. Incident Report Paper Files: [LOCATION]
3. Incident Response Team Meeting Activity: [LOCATION]
4. Incident Template: [LOCATION]
5. Incident Operational Guidelines: [LOCATION]

Appendix A: Incident Report Template

(Updated XXXX)

An Incident Report is required to be prepared to document all business, facility, human resource and information system incidents within 24 hours of the incident. In most cases documentation is collected at the time of the incident. Types of incidents are defined as: application and system outages regardless of internal or external causes, all security breaches, violations and denial of service, vendor violations, hardware and software outages, validated alerts from intrusion-detection, intrusion-prevention, and file-integrity monitoring systems, unauthorized wireless devices, remote or mobile violations. The standard form is located on the YOUR LAW FIRM Intranet for company access by all IT, Facilities, HR and Business Managers. All IT, Facilities, HR and Business Managers are required to attend training on incident reporting and receive notification of changes or incidents that are pertinent to them.

Follow the instructions below for logging any incident within YOUR LAW FIRM as described above.

1. Date of Incident and Submitted by information in the footer.
2. Save Filename Format: Incident, date, system name example: INCIDENT20040830
3. File Storage: Managed by IS Operations Manager and Closure by QA Manager
4. Incident tracked, reviewed and closed as form indicates

PROPRIETARY

Report Submitter:	
Incident Date:	
Select Type of Incident(s):	
Hardware Affected:	
Software Affected:	
Business Application Affected:	
Denial of Service:	
Security Breach:	
Media Violation:	
Vital Record Storage Violation:	
Off-site Paper Storage Violation:	
Vulnerability Scan Violation:	
Monitoring Violation (FIM, IDS, etc.):	
Other Violation (Policy, company operations):	
Time Problem Occurred:	
Time Problem Resolved:	
Total Outage Time:	
Notification:	
IT Department Manager Notified:	
Notified By:	
Management Escalation Required:	
Executive Management Escalation Required:	
Communications Required (broadcast):	
Client Communications Required:	
Incident Response Team Review:	
Closure of Incident:	
Review of Changes Implemented (QA):	*(date)*
Management Approval:	*(signature)*
Exec. Management Approval:	*(signature)*
Client Communication of Closure:	*(signature)*
Filing through QA Completed:	*(initial)*

Incident Description:

Incident Detail Log for Communication and Chain of Custody

Person From	Person To	Date *(20080424)*	Time (0600 / 2400)	Action

Incident Final Resolution Description:

Future Considerations:
(List all changes to: Policy & Procedure Documentation, Technical Hardware and Software Configurations, etc.)

Security Breach Notification Laws

http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx

Mich. Comp. Laws §445.72

445.72 Notice of security breach; requirements.

Sec. 12.

(1) Unless the person or agency determines that the security breach has not or is not likely to cause substantial loss or injury to, or result in identity theft with respect to, 1 or more residents of this state, a person or agency that owns or licenses data that are included in a database that discovers a security breach, or receives notice of a security breach under subsection (2), shall provide a notice of the security breach to each resident of this state who meets 1 or more of the following:

(a) That resident's unencrypted and unredacted personal information was accessed and acquired by an unauthorized person.

(b) That resident's personal information was accessed and acquired in encrypted form by a person with unauthorized access to the encryption key.

(2) Unless the person or agency determines that the security breach has not or is not likely to cause substantial loss or injury to, or result in identity theft with respect to, 1 or more residents of this state, a person or agency that maintains a database that includes data that the person or agency does not own or license that discovers a breach of the security of the database shall provide a notice to the owner or licensor of the information of the security breach.

(3) In determining whether a security breach is not likely to cause substantial loss or injury to, or result in identity theft with respect to, 1 or more residents of this state under subsection (1) or (2), a person or agency shall act with the care an ordinarily prudent person or agency in like position would exercise under similar circumstances.

(4) A person or agency shall provide any notice required under this section without unreasonable delay. A person or agency may delay providing notice without violating this subsection if either of the following is met:

(a) A delay is necessary in order for the person or agency to take any measures necessary to determine the scope of the security breach and restore the reasonable integrity of the database. However, the agency or person shall provide the notice required under this subsection without unreasonable delay after the person or agency completes the measures necessary to determine the scope of the security breach and restore the reasonable integrity of the database.

(b) A law enforcement agency determines and advises the agency or person that providing a notice will impede a criminal or civil investigation or jeopardize homeland or national security. However, the agency or person shall provide the notice required under this section without unreasonable delay after the law enforcement agency determines that providing the notice will no longer impede the investigation or jeopardize homeland or national security.

(5) Except as provided in subsection (11), an agency or person shall provide any notice required under this section by providing 1 or more of the following to the recipient:

(a) Written notice sent to the recipient at the recipient's postal address in the records of the agency or person.

(b) Written notice sent electronically to the recipient if any of the following are met:

(i) The recipient has expressly consented to receive electronic notice.

(ii) The person or agency has an existing business relationship with the recipient that includes periodic electronic mail communications and based on those communications the person or agency reasonably believes that it has the recipient's current electronic mail address.

(iii) The person or agency conducts its business primarily through internet account transactions or on the internet.

(c) If not otherwise prohibited by state or federal law, notice given by telephone by an individual who represents the person or agency if all of the following are met:

(i) The notice is not given in whole or in part by use of a recorded message.

(ii) The recipient has expressly consented to receive notice by telephone, or if the recipient has not expressly consented to receive notice by telephone, the person or agency also provides notice under subdivision (a) or (b) if the notice by telephone does not result in a live conversation between the individual representing the person or agency and the recipient within 3 business days after the initial attempt to provide telephonic notice.

(d) Substitute notice, if the person or agency demonstrates that the cost of providing notice under subdivision (a), (b), or (c) will exceed $250,000.00 or that the person or agency has to provide notice to more than 500,000 residents of this state. A person or agency provides substitute notice under this subdivision by doing all of the following:

(i) If the person or agency has electronic mail addresses for any of the residents of this state who are entitled to receive the notice, providing electronic notice to those residents.

(ii) If the person or agency maintains a website, conspicuously posting the notice on that website.

(iii) Notifying major statewide media. A notification under this subparagraph shall include a telephone number or a website address that a person may use to obtain additional assistance and information.

(6) A notice under this section shall do all of the following:

(a) For a notice provided under subsection (5)(a) or (b), be written in a clear and conspicuous manner and contain the content required under subdivisions (c) to (g).

(b) For a notice provided under subsection (5)(c), clearly communicate the content required under subdivisions (c) to (g) to the recipient of the telephone call.

(c) Describe the security breach in general terms.

(d) Describe the type of personal information that is the subject of the unauthorized access or use.

(e) If applicable, generally describe what the agency or person providing the notice has done to protect data from further security breaches.

(f) Include a telephone number where a notice recipient may obtain assistance or additional information.

(g) Remind notice recipients of the need to remain vigilant for incidents of fraud and identity theft.

(7) A person or agency may provide any notice required under this section pursuant to an agreement between that person or agency and another person or agency, if the notice provided pursuant to the agreement does not conflict with any provision of this section.

(8) Except as provided in this subsection, after a person or agency provides a notice under this section, the person or agency shall notify each consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, as defined in 15 USC 1681a(p), of the security breach without unreasonable delay. A notification under this subsection shall include the number of notices that the person or agency provided to residents of this state and the timing of those notices. This subsection does not apply if either of the following is met:

(a) The person or agency is required under this section to provide notice of a security breach to 1,000 or fewer residents of this state.

(b) The person or agency is subject to 15 USC 6801 to 6809.

(9) A financial institution that is subject to, and has notification procedures in place that are subject to examination by the financial institution's appropriate regulator for compliance with, the interagency guidance on response programs for unauthorized access to customer information and customer notice prescribed by the board of governors of the federal reserve system and the

other federal bank and thrift regulatory agencies, or similar guidance prescribed and adopted by the national credit union administration, and its affiliates, is considered to be in compliance with this section.

(10) A person or agency that is subject to and complies with the health insurance portability and accountability act of 1996, Public Law 104-191, and with regulations promulgated under that act, 45 CFR parts 160 and 164, for the prevention of unauthorized access to customer information and customer notice is considered to be in compliance with this section.

(11) A public utility that sends monthly billing or account statements to the postal address of its customers may provide notice of a security breach to its customers in the manner described in subsection (5), or alternatively by providing all of the following:

(a) As applicable, notice as described in subsection (5)(b).

(b) Notification to the media reasonably calculated to inform the customers of the public utility of the security breach.

(c) Conspicuous posting of the notice of the security breach on the website of the public utility.

(d) Written notice sent in conjunction with the monthly billing or account statement to the customer at the customer's postal address in the records of the public utility.

(12) A person that provides notice of a security breach in the manner described in this section when a security breach has not occurred, with the intent to defraud, is guilty of a misdemeanor punishable as follows:

(a) Except as otherwise provided under subdivisions (b) and (c), by imprisonment for not more than 93 days or a fine of not more than $250.00 for each violation, or both.

(b) For a second violation, by imprisonment for not more than 93 days or a fine of not more than $500.00 for each violation, or both.

(c) For a third or subsequent violation, by imprisonment for not more than 93 days or a fine of not more than $750.00 for each violation, or both.

(13) Subject to subsection (14), a person that knowingly fails to provide any notice of a security breach required under this section may be ordered to pay a civil fine of not more than $250.00 for each failure to provide notice. The attorney general or a prosecuting attorney may bring an action to recover a civil fine under this section.

(14) The aggregate liability of a person for civil fines under subsection (13) for multiple violations of subsection (13) that arise from the same security breach shall not exceed $750,000.00.

(15) Subsections (12) and (13) do not affect the availability of any civil remedy for a violation of state or federal law.

(16) This section applies to the discovery or notification of a breach of the security of a database that occurs on or after July 2, 2006.

(17) This section does not apply to the access or acquisition by a person or agency of federal, state, or local government records or documents lawfully made available to the general public.

(18) This section deals with subject matter that is of statewide concern, and any charter, ordinance, resolution, regulation, rule, or other action by a municipal corporation or other political subdivision of this state to regulate, directly or indirectly, any matter expressly set forth in this section is preempted.