ETHICS: PRACTICE ISSUES AND CHALLENGES FOR NEW AND EXPERIENCED LAWYERS

SPEAKERS:
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HAYDEN MOORE AND ABBOUD THOMAS

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Ethics: Practice Issues and Challenges for New and Experienced Lawyers

2016 Bench Bar Conference

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Today's Panel

- New Attorney, Danielle "Dani" Borel
- Experienced Attorney, Kara Kantrow
- Seasoned Attorney, Jeanne Comeaux



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Social Media

- **<u>Researching Potential Jurors</u>**
  - Can I view their public pages?
  - Can I view their private pages?
  - What if the site informs them I've seen their page?
  - Can I "friend" them?
  - Can I create a fake profile?

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Social Media cont.

- **Rule 3.5 Impartiality and Decorum of the Tribunal**

  A lawyer shall not:

  . . .

  (c) communicate with a juror or prospective juror after discharge of the jury if:

  (1) the communication is prohibited by law or court order;

  (2) the juror has made known to the lawyer a desire not to communicate; or

  (3) the communication involves misrepresentation, coercion, duress or harassment; . . .

Social Media cont.

- ABA Formal Opinion 14-466
  - **1) Do not communicate with the juror**
  - *Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.*
- **2) Do not "friend" the juror**
  - *A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).*

Social Media cont.

- **Rule 4.1 Truthfulness in Statements to Others**
- *In the course of representing a client a lawyer shall not knowingly:*
  - *(a) make a false statement of material fact or law to a third person; or*
  - *(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.*

Social Media cont.

- **Rule 8.4 Misconduct**
- *It is professional misconduct for a lawyer to:*

. . .

- *(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; . . .*

Social Media cont.

- Researching Jurors Overview:
  - Can I view their public pages? **YES**
  - Can I view their private pages? **NO**
  - What if the site informs them I've seen their page? **No Violation**
  - Can I "friend" them? **NO**
  - Can I create a fake profile? **NO**

Social Media cont.

- **"Friends" in Unethical Places**
  - Can I accept a friend request from:
    - Client;
    - Party;
    - Witness; or
    - Opposing Counsel?

Social Media cont.

- **Rule 4.2. Communication with Person Represented by Counsel**
- Unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order, a lawyer in representing a client shall not communicate about the subject of the representation with:
  - (a) a person the lawyer knows to be represented by another lawyer in the matter; or
  - (b) a person the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of a represented organization and
    - (1) who supervises, directs or regularly consults with the organization's lawyer concerning the matter;
    - (2) who has the authority to obligate the organization with respect to the matter; or
    - (3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Social Media cont.

- Can't "friend" adverse party or represented party.
- Consider appearance of impropriety

Social Media cont.

- **<u>Using Social Media to discuss and try to influence ongoing matters</u>**
  - Can I talk about my case?
  - Can I start an online petition?
  - Should I blog about the judges?

Social Media cont.

- In re McCool, 2015-0284 (La. 6/30/15), 172 So. 3d 1058, cert. denied sub nom. McCool v. Louisiana Attorney Disciplinary Bd., 136 S. Ct. 989, 194 L. Ed. 2d 6 (2016)
  - Used online petitions and blog posts to discuss child custody case and judges' decisions.
  - Result: Disbarred.

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Social Media cont.

- Example of McCool's Posts:
  - Please sign the petition, circulate it to all of your friends and families and call Judge Amacker and Judge Gambrell during the hours of 8:30 to 5:00 starting Monday, August 15 to ask why they won't follow the law and protect these children. Let them know you're watching and expect them to do their job and most of all, make sure these precious little girls are safe!
  - Call the Louisiana Supreme Court and tell them you want the law to protect these girls? [phone number] [A]sk about the writ pending that was filed by attorney Nanine McCool on Friday, August 12, 2011.
  - Let's turn this around and be [H's] hero. Please sign the Care2 petition and continue to call Judge Gambrell to ask her why she is unwilling to afford [H] and [Z] simple justice.

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Social Media cont.

- Example of McCool's Posts cont.:
  - You can sign the petition and lend your voice to this cause *here.* Or, you can contact directly. Contact information is: [provided contact information for the judges and their staff].
  - Sign our petition telling the judges that there can be no justice for [H] and [Z], or any child, if the law and evidence is ignored. Tell them they must look at the evidence before they make a decision that will affect the rest of [H] and [Z's] lives. Ask yourself, what if these were your daughters? … Horrified? Call the judges and let them know.

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Social Media cont.

Improper Ex Parte Communication

- **Rule 3.5 Impartiality and Decorum of the Tribunal**
- *A lawyer shall not:*
  - *(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;*
  - *(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order; . . .*
- **Rule 8.4 Misconduct**
- *It is professional misconduct for a lawyer to:*
  - *(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . .*

Social Media cont.

- *The ODC alleges respondent violated these rules by using "the internet and social media to elicit outrage in the general public and to encourage others to make direct contact with judges in an effort to influence their handling of pending cases."*
- *Although not directly responsible for its delivery, respondent, by signing the petition, "lent her voice to the cause" along with the rest of the signatories, making the petition her own and, in turn, communicating directly to the judges and this Court, in its entirety . . .*

Social Media cont.

Dissemination of False and Misleading Information

Rule 8.4 Misconduct

- *It is professional misconduct for a lawyer to:*

. . .

- *(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;*

Social Media cont.

- *The ODC alleges respondent "disseminated false, misleading and/or inflammatory information through the internet and social media about Judge Deborah Gambrell and Judge Dawn Amacker in pending cases wherein Respondent was counsel of record and/or had a personal interest."*

Social Media cont.

- In finding respondent violated this rule, the hearing committee made several specific factual findings:
  - (1) Respondent stated Judge Gambrell ignored "overwhelming evidence" of abuse and "refuses to even look at the evidence, and has now ordered the girls be sent to unsupervised *1074 visitation with their father." The committee found respondent's statement was a "gross mischaracterization" of the facts.
  - (2) Respondent stated Judge Amacker "in Louisiana also refused to protect the girls, even though she has the power and authority to protect them ..." The committee found this statement was false and inflammatory, as Judge Amacker did not refuse to protect the children, but instead stayed the Louisiana proceedings on the ground related proceedings were already pending in Mississippi.
  - (3) Respondent posted audio recordings of the minor children purportedly talking about abuse and stated that on August 16, 2011, Judge Gambrell "once again refused to admit all of Raven's evidence, including these recordings, and ordered that [H] and [Z] have visits with their father in the house where they both report having been molested by their father in the past." The committee found this statement was clearly false, as the tapes were not offered into evidence on August 16, 2011; therefore, Judge Gambrell could not have "refused to admit" them.

Social Media cont.

- (4) Respondent stated, "Judge Dawn Amacker in the 22nd Judicial District Court for the Parish of St. Tammany in Louisiana is also refusing to hear any evidence or to protect [H] and [Z], even though the law requires her to have a hearing and to take evidence." The committee found this statement was false, because Judge Amacker had stayed the Louisiana proceedings in light of the Mississippi proceeding.
- (5) Respondent stated the Louisiana court (Judge Amacker presiding) "has voluntarily and expressly admitted its extreme bias and conflict in recusing itself in two other cases, which grounds are equally applicable in the case at bar." The committee found this statement was false, as Judge Amacker's judgment stated, "[t]he Court hereby voluntarily recuses itself due to the possibility that the judge may be called as a witness in the proceedings referenced by counsel, and out of an abundance of caution and to avoid the appearance of impropriety."

Social Media cont.

Conduct Prejudicial to the Administration of Justice

Rule 8.4 Misconduct

- *It is professional misconduct for a lawyer to:*

. . .

- *(d) Engage in conduct that is prejudicial to the administration of justice;*

Social Media cont.

- *Lastly, the ODC alleges respondent's overall conduct—utilizing the internet and social media both in an attempt to influence the judges and to expedite achievement of her goals in the case—was prejudicial to the administration of justice and violated Rule 8.4(d).*

Social Media cont.

- In determining respondent violated this rule, the hearing committee found:
  - Respondent used the internet and social media in an effort to influence Judge Gambrell's and Judge Amacker's future rulings in pending litigation. Respondent's conduct threatened the independence and integrity of the court and was clearly prejudicial to the administration of justice.
  - Respondent also used her Twitter account to publish multiple tweets linking the audio recordings of the minor children discussing alleged sexual abuse; to publish false, misleading and inflammatory information about Judge Gambrell and Judge Amacker, and to promote the online petition, all of which was designed to intimidate and influence the judges' future rulings in the underlying proceedings.

Social Media cont.

- In determining respondent violated this rule, the hearing committee found:
  - Respondent knowingly if not intentionally embarked on a campaign using internet, social media and *ex parte* communication specifically designed to intimidate and to influence the judges' future rulings in pending litigation. Her online campaign to influence judges in pending litigation threatened the independence and integrity of the judiciary. Respondent's conduct also caused the judges concern for their personal safety.

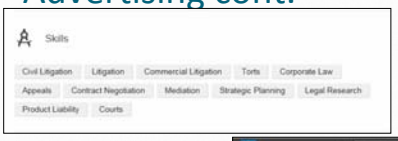
Social Media cont.

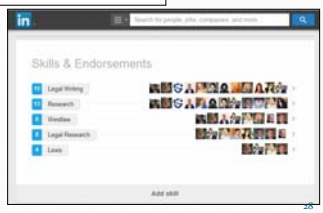
- Using Social Media to discuss and try to influence ongoing matters
  - Can I talk about my case? **Maybe**
  - Can I start an online petition? **No**
  - Should I blog about the judges? **No**

Advertising cont.

- **LinkedIn Skills Endorsements**

Advertising cont.





Advertising cont.

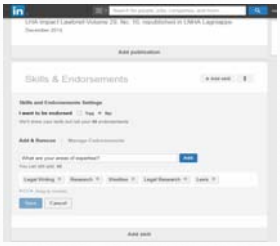
- **Rule 7.2 Communications Concerning a Lawyer's Services**
- (c) Prohibitions and General Rules Governing Content of Advertisements and Unsolicited Written Communications.
  - (1) *Statements About Legal Services.* A lawyer shall not make or permit to be made a false, misleading or deceptive communication about the lawyer, the lawyer's services or the law firm's services. A communication violates this Rule if it:
  - (A) contains a material misrepresentation of fact or law;
  - (B) is false, misleading or deceptive;
  - (C) fails to disclose material information necessary to prevent the information supplied from being false, misleading or deceptive;
  - [(D) contains a reference or testimonial to past successes or results obtained, except as allowed in the Rule regulating information about a lawyer's services provided upon request];
  - *Pursuant to Louisiana Supreme Court order dated April 27, 2011, the enforcement of Rule 7.2(c)(1)(D) was suspended.*
  - (E) promises results;
- ...
- (2) *Prohibited Visual and Verbal Portrayals and Illustrations.* A lawyer shall not include in any advertisement or unsolicited written communication any visual or verbal descriptions, depictions, illustrations (including photographs) or portrayals of persons, things, or events that are false, misleading or deceptive.
- (3) *Advertising Areas of Practice.* A lawyer or law firm shall not state or imply in advertisements or unsolicited written communications that the lawyer or law firm currently practices in an area of practice when that is not the case.

Advertising cont.

- Recommendations:
  - "Flattery can inflate the ego, but in the case of social media endorsements, it must be sincere. Keep an eye on your social media websites and carefully monitor what others may wish to post about you." *Social Media Endorsements: Undue flattery will get you nowhere*, ABA Eye on Ethics, July 2016

Advertising cont.

- Recommendations:
  - Disable your Endorsements



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Advertising cont.

- **<u>Client Reviews</u>**
  - My firm allows clients to posts comments on our website.
    - Can we post the great comments?
    - Do we have to post the negative comments?
    - Can I respond to negative comments?

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Advertising cont.

- **Rule 7.2 Communications Concerning a Lawyer's Services**
- (c) Prohibitions and General Rules Governing Content of Advertisements and Unsolicited Written Communications.
  - (1) *Statements About Legal Services*. A lawyer shall not make or permit to be made a false, misleading or deceptive communication about the lawyer, the lawyer's services or the law firm's services. A communication violates this Rule if it:
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  - (3) *Advertising Areas of Practice*. A lawyer or law firm shall not state or imply in advertisements or unsolicited written communications that the lawyer or law firm currently practices in an area of practice when that is not the case.

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Advertising cont.

- ABA Formal Opinion 10-457
  - Legal information on a lawyer's website must be accurate, current, and not misleading
  - Use of "appropriate disclaimer" or "qualifying language"
    - Sample: "Prior results do no guarantee a similar outcome"

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Advertising cont.

- **"Specialist" designation**
  - Can I call myself a specialist?

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Advertising cont.

- **Rule 7.2 Communications Concerning a Lawyer's Services**
- **(c) Prohibitions and General Rules Governing Content of Advertisements and Unsolicited Written Communications.**

…

- **(5) *Communication of Fields of Practice.*** **A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is "certified," "board certified," and "expert" or a "specialist" except as follows: may state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1(c)(1) to communications concerning a lawyer's services. A lawyer shall not state or imply that the lawyer is "certified," or "board certified" except as follows:**

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Advertising cont.

- Can I call myself a specialist? **YES, if you are a specialist.**

Client Service

- **<u>Inexperienced Associates</u>**
- Associate/Young Lawyer doesn't feel competent to handle task. What to do?

Client Service cont.

- **Rule 1.1 Competence**
  - *(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*
  - *(b) A lawyer is required to comply with the minimum requirements of continuing legal education as prescribed by Louisiana Supreme Court rule.*
  - *(c) A lawyer is required to comply with all of the requirements of the Supreme Court's rules regarding annual registration, including payment of Bar dues, payment of the disciplinary assessment, timely notification of changes of address, and proper disclosure of trust account information or any changes therein.*

Client Service cont.

- **Mentally Incompetent Attorneys**
  - Partner/Seasoned Attorney may no longer be competent to handle matter. What to do?

Client Service cont.

- **Rule 1.1 Competence**
  - *(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*
  - *(b) A lawyer is required to comply with the minimum requirements of continuing legal education as prescribed by Louisiana Supreme Court rule.*
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Client Service cont.

- Recommendations for Approaching Impaired/Declining Lawyer:

1. Partner with individuals with first hand observations of the behavior and who are trust by the lawyer.
2. Consider using Cognitive Impairment Worksheet to gather and organize concerns.

Client Service cont.

Cognitive Impairment Worksheet for Lawyer Assistance Programs

Attorney Name: _____ Date of Interview: _____
Place of Interview: _____

Observational Signs & Symptoms:

Behavioral Functioning at Work	Observations
Practice management • Deteriorating performance at work • Making mistakes on files / cases • Difficulties functioning without the help of a legal assistant /other lawyers • Committing obvious ethical violations • Failing to remain current re changes in law; over-relying on expertise • Exhibiting confusion re tax breakeven, deadlines, conflicts, trust accounting	
Appearance / dress • Inappropriately dressed • Poor grooming/hygiene	
Interpersonal disinhibition • Making sexually inappropriate statements that are historically uncharacteristic for the lawyer • Engaging in uncharacteristically sexually inappropriate behavior • Disinhibition in other nonsexual behaviors	
Self awareness • Denial of any problem • Exhibits/expresses highly defensive beliefs • Feels others out "to get" him/her, organized against him/her	
Significant changes in characteristic routine at work	

Client Service cont.

Cognitive Functioning	Observations
Short term memory problems (reduced ability to manipulate information in ST memory) • Forgets conversations, events, details of cases • Repeats questions and requests for information frequently	
Executive functioning (slower and less accurate in shifting from one thought or action to another) • Trouble staying on task / topic • Trouble following through and getting things done in a reasonable time	
Lack of mental flexibility • Difficulty adjusting to changes • Difficulty understanding alternative or competing legal analysis positions	
Language related problems • Comprehension problems • Problems with verbal expression o Difficulty finding the correct word to express o Circumlocution, (providing a lot of unnecessary details- taking a long time to get to the point) o Tangentiality, (getting distracted and never getting back to the point)	
Disorientation • Confused about date / time sensitive tasks • Missing deadlines for filing legal documents	
Attention / concentration problems with dividing attention, filtering out noise and shifting attention) • Lapses in attention • Overly distractible	

Emotional Functioning	Observations
• Emotional distress • Emotional lability (rapidly changing swings in mood and emotional affect)	

Client Service cont.

Other Observations/Nature of Functional Behavior

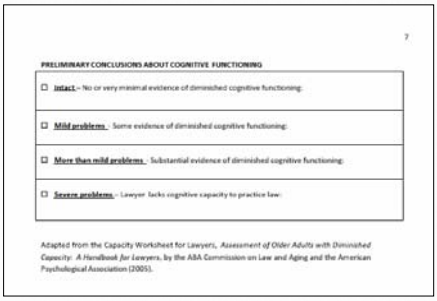
Mitigating/Qualifying Factors Affecting Observations

Stress, Grief, Depression , Recent Events affecting stability of client.

Medical Factors / medical conditions

- Sensory Functioning (hearing / vision loss)
- Family History of Dementia
- Substance abuse / dependence
- Head Injuries
- Stroke history
- Thyroid disease
- Chemotherapy
- Sleep apnea
- Prescription medications
- High cholesterol
- _____
- _____

Client Service cont.



PRELIMINARY CONCLUSIONS ABOUT COGNITIVE FUNCTIONING

- ☐ **Intact** – No or very minimal evidence of diminished cognitive functioning.
- ☐ **Mild problems** – Some evidence of diminished cognitive functioning.
- ☐ **More than mild problems** – Substantial evidence of diminished cognitive functioning.
- ☐ **Severe problems** – Lawyer lacks cognitive capacity to practice law.

Adapted from the Capacity Worksheet for Lawyers, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, by the ABA Commission on Law and Aging and the American Psychological Association (2005).

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Client Service cont.

- Recommendations for Approaching Impaired/Declining Lawyer cont.:

3. Non-confrontational meeting.
4. Icebreakers:
   - I am concerned about you because . . .
   - We have worked together for a long time. SO I hope you won't think I'm interfering when I tell you I am worried about you . . .
   - I've noticed you haven't been yourself lately, and am concerned about how you are doing . . .
5. Get the lawyer to talk; listen!

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Client Service cont.

- Recommendations for Approaching Impaired/Declining Lawyer cont.:

6. Express concern with gentleness and respect.
7. Share firsthand observations.
8. Review lawyer's good qualities/achievements/etc.
9. Offer to call lawyer's doctor with observations.

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Client Service cont.

- Recommendations for Approaching Impaired/Declining Lawyer:

10. Suggest alternative status- "inactive" "retired" or "emeritus"
11. Suggest potential consequence for inaction: malpractice or disciplinary complaints

Client Service cont.

- Don't:
  1. Ignore the problem
  2. Attempt to Diagnose
  3. Approach meeting as authority figure
  4. Lecture lawyer
  5. Act in "crisis mode"
  6. Insist or threaten if lawyer is not receptive

Client Service cont.

- Intervention is a process, not a onetime event.

Ethical Dilemma?

- **Discuss with mentors**
- **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.*

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Ethical Dilemma?

- **No mentor? Get one!**
- Louisiana State Bar Association's Transition Into Practice (TIP) Voluntary Mentoring Program
  - *The Louisiana Supreme Court has formally approved the Transition Into Practice (TIP) Program for new lawyers admitted to practice this year. The TIP Program, sponsored by CNA/Gilsbar, commences in January and is implemented through the LSBA Committee on the Profession.*
  - *https://www.lsba.org/Mentoring/*

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Ethical Dilemma?

- **Request Ethics Advisory Opinion**
  - Louisiana State Bar Associations' Ethics Advisory Service and Opinions
  - Fax or email question to the attention of Ethics Counsel at fax: (504)598-6753 or e-mail to Eric Barefield.
  - For simple inquires contact Ethics Counsel by phone at 504-619-0122 or 1-800-421-5722.
  - https://www.lsba.org/Members/EthicsAdvisary.aspx

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THANK YOU!

Louisiana Rules of Professional Conduct

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Table of Contents

Rule 1.0. Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question. 7

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and electronic communication. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Client-Lawyer Relationship

Rule 1.1. Competence

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

(b) A lawyer is required to comply with the minimum requirements of continuing legal education as prescribed by Louisiana Supreme Court rule.

(c) A lawyer is required to comply with all of the requirements of the Supreme Court's rules regarding annual registration, including payment of Bar dues, payment of the disciplinary assessment, timely notification of changes of address, and proper disclosure of trust account information or any changes therein.

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions of Rule 1.16 and to paragraphs (c) and (d) of this Rule, a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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

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

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

Rule 1.3. Diligence

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

Rule 1.4. Communication

(a) A lawyer shall:

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

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

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

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

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

(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

(c) A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e).

Rule 1.5. Fees

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

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

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

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client. A copy or duplicate original of the executed agreement shall be given to the client at the time of execution of the agreement. The contingency fee agreement shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; the litigation and other expenses that are to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

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

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

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

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

(1) the client agrees in writing to the representation by all of the lawyers involved, and is advised in writing as to the share of the fee that each lawyer will receive;

(2) the total fee is reasonable; and

(3) each lawyer renders meaningful legal services for the client in the matter.

(f) Payment of fees in advance of services shall be subject to the following rules:

(1) When the client pays the lawyer a fee to retain the lawyer's general availability to the client and the fee is not related to a particular representation, the funds become the property of the lawyer when paid and may be placed in the lawyer's operating account.

(2) When the client pays the lawyer all or part of a fixed fee or of a minimum fee for particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid, subject to the provisions of Rule 1.5(f)(5). Such funds need not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account.

(3) When the client pays the lawyer an advance deposit against fees which are to accrue in the future on an hourly or other agreed basis, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may transfer these funds as fees are earned from the trust account to the operating account, without further authorization from the client for each transfer, but must render a periodic accounting for these funds as is reasonable under the circumstances.

(4) When the client pays the lawyer an advance deposit to be used for costs and expenses, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may expend these funds as costs and expenses accrue, without further authorization from the client for each expenditure, but must render a periodic accounting for these funds as is reasonable under the circumstances.

(5) When the client pays the lawyer a fixed fee, a minimum fee or a fee drawn from an advanced deposit, and a fee dispute arises between the lawyer and the client, either during the course of the representation or at the termination of the representation, the lawyer shall immediately refund to the client the unearned portion of such fee, if any. If the lawyer and the client disagree on the unearned portion of such fee, the lawyer shall immediately refund to the client the amount, if any, that they agree has not been earned, and the lawyer shall deposit into a trust account an amount representing the portion reasonably in dispute. The lawyer shall hold such disputed funds in trust until the dispute is resolved, but the lawyer shall not do so to coerce the client into accepting the lawyer's contentions. As to any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the Louisiana State Bar Association Fee Dispute Program.

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interests between lawyers in different firms, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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.

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules

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

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

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

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

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

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

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

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

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter, provided that the expenses were reasonably incurred. Court costs and expenses of litigation include, but are not necessarily limited to, filing fees; deposition costs; expert witness fees; transcript costs; witness fees; copy costs; photographic, electronic, or digital evidence production; investigation fees; related travel expenses; litigation related medical expenses; and any other case specific expenses directly related to the representation undertaken, including those set out in Rule 1.8(e)(3).

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

(3) Overhead costs of a lawyer's practice which are those not incurred by the lawyer solely for the purposes of a particular representation, shall not be passed on to a client. Overhead costs include, but are not necessarily limited to, office rent, utility costs, charges for local telephone service, office supplies, fixed asset expenses, and ordinary secretarial and staff services.

With the informed consent of the client, the lawyer may charge as recoverable costs such items as computer legal research charges, long distance telephone expenses, postage charges, copying charges, mileage and outside courier service charges, incurred solely for the purposes of the representation undertaken for that client, provided they are charged at the lawyer's actual, invoiced costs for these expenses.

With client consent and where the lawyer's fee is based upon an hourly rate, a reasonable charge for paralegal services may be chargeable to the client. In all other instances, paralegal services shall be considered an overhead cost of the lawyer.

(4) In addition to costs of court and expenses of litigation, a lawyer may provide financial assistance to a client who is in necessitous circumstances, subject however to the following restrictions.

(i) Upon reasonable inquiry, the lawyer must determine that the client's necessitous circumstances, without minimal financial assistance, would adversely affect the client's ability to initiate and/or maintain the cause for which the lawyer's services were engaged.

(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.

(iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

(iv) Financial assistance under this rule may provide but shall not exceed that minimum sum necessary to meet the client's, the client's spouse's, and/or dependents' documented obligations for food, shelter, utilities, insurance, non-litigation related medical care and treatment, transportation expenses, education, or other documented expenses necessary for subsistence.

(5) Any financial assistance provided by a lawyer to a client, whether for court costs, expenses of litigation, or for necessitous circumstances, shall be subject to the following additional restrictions.

(i) Any financial assistance provided directly from the funds of the lawyer to a client shall not bear interest, fees or charges of any nature.

(ii) Financial assistance provided by a lawyer to a client may be made using a lawyer's line of credit or loans obtained from financial institutions in which the lawyer has no ownership, control and/or security interest; provided, however, that this prohibition shall not apply to any federally insured bank, savings and loan association, savings bank, or credit union where the lawyer's ownership, control and/or security interest is less than 15%.

(iii) Where the lawyer uses a line of credit or loans obtained from financial institutions to provide financial assistance to a client, the lawyer shall not pass on to the client interest charges, including any fees or other charges attendant to such loans, in an amount exceeding the actual charge by the third party lender, or ten percentage points above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding, whichever is less.

(iv) A lawyer providing a guarantee or security on a loan made in favor of a client may do so only to the extent that the interest charges, including any fees or other charges attendant to such a loan, do not exceed ten percentage points (10%) above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding. Interest together with other charges attendant to such loans which exceeds this maximum may not be the subject of the lawyer's guarantee or security.

(v) The lawyer shall procure the client's written consent to the terms and conditions under which such financial assistance is made. Nothing in this rule shall require client consent in those matters in which a court has certified a class under applicable state or federal law; provided, however, that the court must have accepted and exercised responsibility for making the determination that interest and fees are owed, and that the amount of interest and fees chargeable to the client is fair and reasonable considering the facts and circumstances presented.

(vi) In every instance where the client has been provided financial assistance by the lawyer, the full text of this rule shall be provided to the client at the time of execution of any settlement documents, approval of any disbursement sheet as provided for in Rule 1.5, or upon submission of a bill for the lawyer's services.

(vii) For purposes of Rule 1.8(e), the term "financial institution" shall include a federally insured financial institution and any of its affiliates, bank, savings and loan, credit union, savings bank, loan or finance company, thrift, and any other business or person that, for a commercial purpose, loans or advances money to attorneys and/or the clients of attorneys for court costs, litigation expenses, or for necessitous circumstances.

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

(1) the client gives informed consent, or the compensation is provided by contract with a third person such as an insurance contract or a prepaid legal service plan;

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

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

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

(h) A lawyer shall not:

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

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

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

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

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

(j) [Reserved].

(k) A lawyer shall not solicit or obtain a power of attorney or mandate from a client which would authorize the attorney, without first obtaining the client's informed consent to settle, to enter into a binding settlement agreement on the client's behalf or to execute on behalf of the client any settlement or release documents. An attorney may obtain a client's authorization to endorse and negotiate an instrument given in settlement of the client's claim, but only after the client has approved the settlement.

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

Rule 1.9. Duties to Former Clients

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

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

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

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

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

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

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

Rule 1.10. Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does

not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

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

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

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

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

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

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

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

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material

disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other

third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

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

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

Rule 1.13. Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a fiduciary, including a guardian, curator or tutor, to protect the client's interests.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.15. Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Except as provided in (g) and the IOLTA Rules below, funds shall be kept in one or more separate interest-bearing client trust accounts maintained in a bank or savings and loan association: 1) authorized by federal or state law to do business in Louisiana, the deposits of which are

insured by an agency of the federal government; 2) in the state where the lawyer's primary office is situated, if not within Louisiana; or 3) elsewhere with the consent of the client or third person. No earnings on a client trust account may be made available to or utilized by a lawyer or law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account or obtaining a waiver of those charges, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. The lawyer shall deposit legal fees and expenses into the client trust account consistent with Rule 1.5(f).

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) Every check, draft, electronic transfer, or other withdrawal instrument or authorization from a client trust account shall be personally signed by a lawyer or, in the case of electronic, telephone, or wire transfer, from a client trust account, directed by a lawyer or, in the case of a law firm, one or more lawyers authorized by the law firm. A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a client trust account. On client trust accounts, cash withdrawals and checks made payable to "Cash" are prohibited. A lawyer shall subject all client trust accounts to a reconciliation process at least quarterly, and shall maintain records of the reconciliation as mandated by this rule. **[Last sentence added 1/13/2015 and effective 4/1/2015]**

(g) A lawyer shall create and maintain an "IOLTA Account," which is a pooled interest-bearing client trust account for funds of clients or third persons which are nominal in amount or to be held for such a short period of time that the funds would not be expected

to earn income for the client or third person in excess of the costs incurred to secure such income.

(1) IOLTA Accounts shall be of a type approved and authorized by the Louisiana Bar Foundation and maintained only in "eligible" financial institutions, as approved and certified by the Louisiana Bar Foundation. The Louisiana Bar Foundation shall establish regulations, subject to approval by the Supreme Court of Louisiana, governing the determination that a financial institution is eligible to hold IOLTA Accounts and shall at least annually publish a list of LBF-approved/certified eligible financial institutions. Participation in the IOLTA program is voluntary for financial institutions. IOLTA Accounts shall be established at a bank or savings and loan association authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government or at an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Louisiana which shall be invested solely in or fully collateralized by U.S. Government Securities with total assets of at least $250,000,000 and in order for a financial institution to be approved and certified by the Louisiana Bar Foundation as eligible, shall comply with the following provisions:

(A) No earnings from such an account shall be made available to a lawyer or law firm.

(B) Such account shall include all funds of clients or third persons which are nominal in amount or to be held for such a short period of time the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income.

(C) Funds in each interest-bearing client trust account shall be subject to withdrawal upon request and without delay, except as permitted by law.

(2) To be approved and certified by the Louisiana Bar Foundation as eligible, financial institutions shall maintain IOLTA Accounts which pay an interest rate comparable to the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when IOLTA Accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA Account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA Accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA Account. The eligible institution shall calculate interest and dividends in accordance with its standard practice for non-IOLTA customers, but the eligible institution may elect to pay a higher interest or dividend rate on IOLTA Accounts.

(3) To be approved and certified by the Louisiana Bar Foundation as eligible, a financial institution may achieve rate comparability required in (g)(2) by:

(A) Establishing the IOLTA Account as:

(1) an interest-bearing checking account; (2) a money market deposit account with or tied to checking; (3) a sweep account which is a money market fund or daily (overnight) financial institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities; or (4) an open-end money market fund solely invested in or fully collateralized by U.S. Government Securities. A daily financial institution repurchase agreement may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000. "U.S. Government Securities" refers to U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof.

(B) Paying the comparable rate on the IOLTA checking account in lieu of establishing the IOLTA Account as the higher rate product; or

(C) Paying a "benchmark" amount of qualifying funds equal to 60% of the Federal Fund Target Rate as of the first business day of the quarter or other IOLTA remitting period; no fees may be deducted from this amount which is deemed already to be net of "allowable reasonable fees."

(4) Lawyers or law firms depositing the funds of clients or third persons in an IOLTA Account shall direct the depository institution:

(A) To remit interest or dividends, net of any allowable reasonable fees on the average monthly balance in the account, or as otherwise computed in accordance with an eligible institution's standard accounting practice, at least quarterly, to the Louisiana Bar Foundation, Inc.;

(B) To transmit with each remittance to the Foundation, a statement, on a form approved by the LBF, showing the name of the lawyer or law firm for whom the remittance is sent and for each account: the rate of interest or dividend applied; the amount of interest or dividends earned; the types of fees deducted, if any; and the average account balance for each account for each month of the period in which the report is made; and

(C) To transmit to the depositing lawyer or law firm a report in accordance with normal procedures for reporting to its depositors.

(5) "Allowable reasonable fees" for IOLTA Accounts are: per check charges; per deposit charges; a fee in lieu of minimum balance; sweep fees and a reasonable IOLTA Account administrative fee. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA Account. Fees or service charges that are not "allowable reasonable fees" include, but are not limited to: the cost of check printing; deposit stamps; NSF charges; collection charges; wire transfers; and fees for cash management. Fees or charges in excess of the earnings accrued on the account for any month or quarter shall not be taken from earnings accrued on other IOLTA Accounts or from the principal of the account. Eligible financial institutions may elect to waive any or all fees on IOLTA Accounts.

(6) A lawyer is not required independently to determine whether an interest rate is comparable to the highest rate or dividend generally available and shall be in presumptive compliance with Rule 1.15(g) by maintaining a client trust account of the type approved and authorized by the Louisiana Bar Foundation at an "eligible" financial institution.

(7) "Unidentified Funds" are funds on deposit in an IOLTA account for at least one year that after reasonable due diligence cannot be documented as belonging to a client, a third person, or the lawyer or law firm.

(h) A lawyer who learns of Unidentified Funds in an IOLTA account must remit the funds to the Louisiana Bar Foundation. No charge of misconduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph (h).

A lawyer who either remits funds in error or later ascertains the ownership of remitted funds may make a claim to the Louisiana Bar Foundation, which after verification of the claim will return the funds to the lawyer.

IOLTA Rules

(1) The IOLTA program shall be a mandatory program requiring participation by lawyers and law firms, whether proprietorships, partnerships, limited liability companies or professional corporations.

(2) The following principles shall apply to funds of clients or third persons which are held by lawyers and law firms:

(a) No earnings on the IOLTA Accounts may be made available to or utilized by a lawyer or law firm.

(b) Upon the request of, or with the informed consent of a client or third person, a lawyer may deposit funds of the client or third person into a non-IOLTA, interest-bearing client trust account and earnings may be made available to the client or

third person, respectively, whenever possible upon deposited funds which are not nominal in amount or are to be held for a period of time long enough that the funds would be expected to earn income for the client or third person in excess of the costs incurred to secure such income; however, traditional lawyer-client relationships do not compel lawyers either to invest such funds or to advise clients or third persons to make their funds productive.

(c) Funds of clients or third-persons which are nominal in amount or to be held for such a short period of time that the funds would not be expected to earn income for the client or third person in excess of the costs incurred to secure such income shall be retained in an IOLTA Account at an eligible financial institution as outlined above in section (g), with the interest or dividend (net of allowable reasonable fees) made payable to the Louisiana Bar Foundation, Inc., said payments to be made at least quarterly.

(d) In determining whether the funds of a client or third person can earn income in excess of costs, a lawyer or law firm shall consider the following factors:

(1) The amount of the funds to be deposited;

(2) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(3) The rates of interest or yield at financial institutions where the funds are to be deposited;

(4) The cost of establishing and administering non-IOLTA accounts for the benefit of the client or third person including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the benefit of the client or third person;

(5) The capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients or third persons;

(6) Any other circumstances that affect the ability of the funds of the client or third person to earn a positive return for the client or third person. The determination of whether funds to be invested could be utilized to provide a positive net return to the client or third person rests in the sound judgment of each lawyer or law firm. The lawyer or law firm shall review its IOLTA Account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third person.

(e) Although notification of a lawyer's participation in the IOLTA Program is not required to be given to clients or third persons whose funds are held in IOLTA Accounts, many lawyers may want to notify their clients or third persons of their

participation in the program in some fashion. The Rules do not prohibit a lawyer from advising all clients or third persons of the lawyer's advancing the administration of justice in Louisiana beyond the lawyer's individual abilities in conjunction with other public-spirited members of the profession. The placement of funds of clients or third persons in an IOLTA Account is within the sole discretion of the lawyer in the exercise of the lawyer's independent professional judgment; notice to the client or third person is for informational purposes only.

(3) The Louisiana Bar Foundation shall hold the entire beneficial interest in the interest or dividend income derived from client trust accounts in the IOLTA program. Interest or dividend earned by the program will be paid to the Louisiana Bar Foundation, Inc. to be used solely for the following purposes:

(a) to provide legal services to the indigent and to the mentally disabled;

(b) to provide law-related educational programs for the public;

(c) to study and support improvements to the administration of justice; and

(d) for such other programs for the benefit of the public and the legal system of the state as are specifically approved from time to time by the Supreme Court of Louisiana.

(4) The Louisiana Bar Foundation shall prepare an annual report to the Supreme Court of Louisiana that summarizes IOLTA income, grants, operating expenses and any other problems arising out of administration of the IOLTA program. In addition, the Louisiana Bar Foundation shall also prepare an annual report to the Supreme Court of Louisiana that summarizes all other Foundation income, grants, operating expenses and activities, as well as any other problems which arise out of the Foundation's implementation of its corporate purposes. The Supreme Court of Louisiana shall review, study and analyze such reports and shall make recommendations to the Foundation with respect thereto.

Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

Rule 1.17. [Reserved]

Rule 1.18. Duties to Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the

lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

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

(ii) written notice is promptly given to the prospective client.

Counselor

Rule 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 2.2. (DELETED)

Rule 2.3. Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Rule 2.4. Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Advocate

Rule 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a)and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

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

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client, and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Rule 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Rule 3.7. Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows, or reasonably should know, either tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing,

disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Rule 3.9. Appearance in Nonadjudicative Proceedings

A lawyer appearing before a legislative or administrative tribunal in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provision of Rule 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Transactions with Persons other than Clients

Rule 4.1. Truthfulness in Statements to Others

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

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2. Communication with Persons Represented by Counsel

Unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order, a lawyer in representing a client shall not communicate about the subject of the representation with:

(a) a person the lawyer knows to be represented by another lawyer in the matter; or

(b) a person the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of a represented organization and

(1) who supervises, directs or regularly consults with the organization's lawyer concerning the matter;

(2) who has the authority to obligate the organization with respect to the matter; or

(3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Rule 4.3. Dealing with Unrepresented Person

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 a 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.

Rule 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a writing or electronically stored information that, on its face, appears to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the writing or electronically stored information was not intended for the receiving lawyer, shall refrain from examining or reading the writing or electronically stored information, promptly notify the sending lawyer, and return the writing or delete the electronically stored information.

Law Firms and Associations

Rule 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers

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

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistance

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

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a non lawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer or law firm may include non lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit sharing arrangement; and

(4) [Reserved]

(5) a lawyer may share legal fees as otherwise provided in Rule 7.2(c)(13).

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law 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.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission and that are provided by an attorney who has received a limited license to practice law pursuant to La. S. Ct. Rule XVII, §14; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) (1) A lawyer shall not:

(i) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a disbarred attorney, during the period of disbarment, or any person the attorney knows or reasonably should know is an attorney who has permanently resigned from the practice of law in lieu of discipline; or

(ii) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a suspended attorney, or an attorney who has been transferred to disability inactive status, during the period of suspension or transfer, unless first preceded by the submission of a fully executed employment registration statement to the Office of Disciplinary Counsel, on a registration form provided by the Louisiana Attorney Disciplinary Board, and approved by the Louisiana Supreme Court.

(2) The registration form provided for in Section (e)(1) shall include:

(i) the identity and bar roll number of the suspended or transferred attorney sought to be hired;

(ii) the identity and bar roll number of the attorney having direct supervisory responsibility over the suspended attorney, or the attorney transferred to disability inactive status, throughout the duration of employment or association;

(iii) a list of all duties and activities to be assigned to the suspended attorney, or the attorney transferred to disability inactive status, during the period of employment or association;

(iv) the terms of employment of the suspended attorney, or the attorney transferred to disability inactive status, including method of compensation;

(v) a statement by the employing attorney that includes a consent to random compliance audits, to be conducted by the Office of Disciplinary Counsel, at any time during the employment or association of the suspended attorney, or the attorney transferred to disability inactive status; and

(vi) a statement by the employing attorney certifying that the order giving rise to the suspension or transfer of the proposed employee has been provided for review and consideration in advance of employment by the suspended attorney, or the attorney transferred to disability inactive status.

(3) For purposes of this Rule, the practice of law shall include the following activities:

(i) holding oneself out as an attorney or lawyer authorized to practice law;

(ii) rendering legal consultation or advice to a client;

(iii) appearing on behalf of a client in any hearing or proceeding, or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body operating in an adjudicative capacity, including submission of pleadings, except as may otherwise be permitted by law;

(iv) appearing as a representative of the client at a deposition or other discovery matter;

(v) negotiating or transacting any matter for or on behalf of a client with third parties;

(vi) otherwise engaging in activities defined by law or Supreme Court decision as constituting the practice of law.

(4) In addition, a suspended lawyer, or a lawyer transferred to disability inactive status, shall not receive, disburse or otherwise handle client funds.

(5) Upon termination of the suspended attorney, or the attorney transferred to disability inactive status, the employing attorney having direct supervisory authority shall promptly serve upon the Office of Disciplinary Counsel written notice of the termination.

Rule 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

PUBLIC SERVICE

Rule 6.1. Voluntary Pro Bono Publico Service

Every lawyer should aspire to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this aspirational goal, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, legal system or the legal profession.

Rule 6.2. Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Rule 6.3. Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Rule 6.4. Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Rule 6.5. Nonprofit and Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. General

(a) Permissible Forms of Advertising. Subject to all the requirements set forth in these Rules, including the filing requirements of Rule 7.7, a lawyer may advertise services through public media, including but not limited to: print media, such as a telephone directory, legal directory, newspaper or other periodical; outdoor advertising, such as billboards and other signs; radio, television, and computer-accessed communications; recorded messages the public may access by dialing a telephone number; and written communication in accordance with Rule 7.4.

(b) Advertisements Not Disseminated in Louisiana. These rules shall not apply to any advertisement broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and is not intended for broadcast or dissemination within the state of Louisiana.

(c) Communications for Non-Profit Organizations. Publications, educational materials, websites and other communications by lawyers on behalf of non-profit organizations that are not motivated by pecuniary gain are not advertisements or unsolicited written communications within the meaning of these Rules.

Rule 7.2. Communications Concerning a Lawyer's Services

[Enforcement of Rule 7.2(c)(1)(D) and Rule 7.2(c)(1)(J) is suspended, until further notice, by order of the Supreme Court of Louisiana, dated April 27, 2011.]

[Enforcement of Rule 7.2(c)(1)(J) is reinstated, except for the portion of the Rule prohibiting "the portrayal of a judge or jury", by order of the Supreme Court of Louisiana, dated April 29, 2011.]

The following shall apply to any communication conveying information about a lawyer, a lawyer's services or a law firm's services:

(a) Required Content of Advertisements and Unsolicited Written Communications.

(1) *Name of Lawyer.* All advertisements and unsolicited written communications pursuant to these Rules shall include the name of at least one lawyer responsible for their content.

(2) *Location of Practice.* All advertisements and unsolicited written communications provided for under these Rules shall disclose, by city or town, one or more bona fide office location(s) of the lawyer or lawyers who will actually perform the services advertised. If the office location is outside a city or town, the parish where the office is located must be disclosed. For the purposes of this Rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis, and which physical location shall have at least one lawyer who is regularly and routinely present in that physical location. In the absence of a bona fide office, the lawyer shall disclose the city or town of the primary registration statement address as it appears on the lawyer's annual registration statement. If an advertisement or unsolicited written communication lists a telephone number in connection with a specified geographic area other than an area containing a bona fide office or the lawyer's primary registration statement address, appropriate qualifying language must appear in the advertisement.

(3) The following items may be used without including the content required by subdivisions (a)(1) and (a)(2) of this Rule 7.2:

(A) Sponsorships. A brief announcement in any public media that identifies a lawyer or law firm as a contributor to a specified charity or as a sponsor of a public service announcement or a specified charitable, community, or public interest program, activity, or event, provided that the announcement contains no information about the lawyer or the law firm other than permissible content of advertisements listed in Rule 7.2(b) and the fact of the sponsorship or contribution, in keeping with Rule 7.8(b);

(B) Gift/Promotional Items. Items, such as coffee mugs, pens, pencils, apparel, and the like, that identify a lawyer or law firm and are used/disseminated by

a lawyer or law firm not in violation of these Rules, including but not limited to Rule 7.2(c)(13) and Rule 7.4; and

(C) Office Sign(s) for Bona Fide Office Location(s). A sign, placard, lettering, mural, engraving, carving or other alphanumeric display conveying information about a lawyer, a lawyer's services or a law firm's services that is permanently affixed, hanging, erected or otherwise attached to the physical structure of the building containing a bona fide office location for a lawyer or law firm, or to the property on which that bona fide office location sits.

(b) Permissible Content of Advertisements and Unsolicited Written Communications. If the content of an advertisement in any public media or unsolicited written communication is limited to the following information, the advertisement or unsolicited written communication is exempt from the filing and review requirement and, if true, shall be presumed not to be misleading or deceptive.

(1) *Lawyers and Law Firms.* A lawyer or law firm may include the following information in advertisements and unsolicited written communications:

(A) subject to the requirements of this Rule and Rule 7.10, the name of the lawyer or law firm, a listing of lawyers associated with the firm, office locations and parking arrangements, disability accommodations, telephone numbers, Web site addresses, and electronic mail addresses, office and telephone service hours, and a designation such as "attorney", "lawyer" or "law firm";

(B) date of admission to the Louisiana State Bar Association and any other bars, current membership or positions held in the Louisiana State Bar Association, its sections or committees, former membership or positions held in the Louisiana State Bar Association, its sections or committees, together with dates of membership, former positions of employment held in the legal profession, together with dates the positions were held, years of experience practicing law, number of lawyers in the advertising law firm, and a listing of federal courts and jurisdictions other than Louisiana where the lawyer is licensed to practice;

(C) technical and professional licenses granted by the State or other recognized licensing authorities and educational degrees received, including dates and institutions;

(D) military service, including branch and dates of service;

(E) foreign language ability;

(F) fields of law in which the lawyer practices, including official certification logos, subject to the requirements of subdivision (c)(5) of this Rule;

(G) prepaid or group legal service plans in which the lawyer participates;

(H) fee for initial consultation and fee schedule, subject to the requirements of subdivisions (c)(6) and (c)(7) of this Rule;

(I) common salutatory language such as "best wishes," "good luck," "happy holidays," or "pleased to announce";

(J) punctuation marks and common typographical marks; and

(K) a photograph or image of the lawyer or lawyers who are members of or employed by the firm against a plain background.

(2) *Public Service Announcements.* A lawyer or law firm may be listed as a sponsor of a public service announcement or charitable, civic, or community program or event as long as the information about the lawyer or law firm is limited to the permissible content set forth in subdivision (b)(1) of this Rule.

(c) Prohibitions and General Rules Governing Content of Advertisements and Unsolicited Written Communications.

(1) *Statements About Legal Services.* A lawyer shall not make or permit to be made a false, misleading or deceptive communication about the lawyer, the lawyer's services or the law firm's services. A communication violates this Rule if it:

(A) contains a material misrepresentation of fact or law;

(B) is false, misleading or deceptive;

(C) fails to disclose material information necessary to prevent the information supplied from being false, misleading or deceptive;

(D) contains a reference or testimonial to past successes or results obtained, except as allowed in the Rule regulating information about a lawyer's services provided upon request; (Suspended)

(E) promises results;

(F) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(G) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;

(H) contains a paid testimonial or endorsement, unless the fact of payment is disclosed;

(I) includes (i) a portrayal of a client by a non-client without disclaimer of such, as required by Rule 7.2(c)(10); (ii) the depiction of any events or scenes, other than still pictures, photographs or other static images, that are not actual or authentic without disclaimer of such, as required by Rule 7.2(c)(10); or (iii) a still picture, photograph or other static image that, due to alteration or the context of its use, is false, misleading or deceptive;

(J) the portrayal of a lawyer by a non-lawyer, the portrayal of a law firm as a fictionalized entity, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise implies that lawyers are associated in a law firm if that is not the case;

(K) resembles a legal pleading, notice, contract or other legal document;

(L) utilizes a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter; or

(M) fails to comply with Rule 1.8(e)(4)(iii).

(2) *Prohibited Visual and Verbal Portrayals and Illustrations.* A lawyer shall not include in any advertisement or unsolicited written communication any visual or verbal descriptions, depictions, illustrations (including photographs) or portrayals of persons, things, or events that are false, misleading or deceptive.

(3) *Advertising Areas of Practice.* A lawyer or law firm shall not state or imply in advertisements or unsolicited written communications that the lawyer or law firm currently practices in an area of practice when that is not the case.

(4) *Stating or Implying Louisiana State Bar Association Approval.* A lawyer or law firm shall not make any statement that directly or impliedly indicates that the communication has received any kind of approval from The Louisiana State Bar Association.

(5) *Communication of Fields of Practice.* A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.2(c)(1) to communications concerning a lawyer's services. A lawyer shall not state or imply that the lawyer is "certified," or "board certified" except as follows:

(A) **Lawyers Certified by the Louisiana Board of Legal Specialization.** A lawyer who complies with the Plan of Legal Specialization, as determined by the Louisiana Board of Legal Specialization, may inform the public and other lawyers of the lawyer's certified area(s) of legal practice. Such communications should identify the Louisiana Board of Legal Specialization as the certifying organization and may state that the lawyer is "certified," or "board certified in (area of certification)."

(B) **Lawyers Certified by Organizations Other Than the Louisiana Board of Legal Specialization or Another State Bar.** A lawyer certified by an organization other than the Louisiana Board of Legal Specialization or another state bar may inform the public and other lawyers of the lawyer's certified area(s) of legal practice by stating that the lawyer is "certified," or "board certified in (area of certification)" if:

(i) (i) the lawyer complies with Section 6.2 of the Plan of Legal Specialization for the Louisiana Board of Legal Specialization; and,

(ii) the lawyer includes the full name of the organization in all communications pertaining to such certification. A lawyer who has been certified by an organization that is accredited by the American Bar Association is not subject to Section 6.2 of the Plan of Legal Specialization.

(C) **Certification by Other State Bars.** A lawyer certified by another state bar may inform the public and other lawyers of the lawyer's certified area(s) of legal practice and may state in communications to the public that the lawyer is "certified," or "board certified in (area of certification)" if:

(i) the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Plan of Legal Specialization, as determined by the Louisiana Board of Legal Specialization; and,

(ii) the lawyer includes the name of the state bar in all communications pertaining to such certification.

(6) *Disclosure of Liability For Expenses Other Than Fees.* Every advertisement and unsolicited written communication that contains information about the lawyer's fee, including those that indicate no fee will be charged in the absence of a recovery, shall disclose whether the client will be liable for any costs and/or expenses in addition to the fee.

(7) *Period for Which Advertised Fee Must be Honored.* A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or range of fees for at least ninety days from the date last advertised unless the

advertisement specifies a shorter period; provided that, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

(8) *Firm Name.* A lawyer shall not advertise services under a name that violates the provisions of Rule 7.10.

(9) *Language of Required Statements.* Any words or statements required by these Rules to appear in an advertisement or unsolicited written communication must appear in the same language in which the advertisement or unsolicited written communication appears. If more than one language is used in an advertisement or unsolicited written communication, any words or statements required by these Rules must appear in each language used in the advertisement or unsolicited written communication.

(10) *Appearance of Required Statements, Disclosures and Disclaimers.* Any words or statements required by these Rules to appear in an advertisement or unsolicited written communication must be clearly legible if written or intelligible if spoken aloud. All disclosures and disclaimers required by these Rules shall be clear, conspicuous and clearly associated with the item requiring disclosure or disclaimer. Written disclosures and disclaimers shall be clearly legible and, if televised or displayed electronically, shall be displayed for a sufficient time to enable the viewer to easily see and read the disclosure or disclaimer. Spoken disclosures and disclaimers shall be plainly audible and clearly intelligible.

(11) *Payment by Non-Advertising Lawyer.* No lawyer shall, directly or indirectly, pay all or a part of the cost of an advertisement by a lawyer not in the same firm.

(12) *Referrals to Another Lawyer.* If the case or matter will be, or is likely to be, referred to another lawyer or law firm, the communication shall include a statement so advising the prospective client.

(13) *Payment for Recommendations; Lawyer Referral Service Fees.* A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written or recorded communication permitted by these Rules, and may pay the usual charges of a lawyer referral service or other legal service organization only as follows:

(A) A lawyer may pay the usual, reasonable and customary charges of a lawyer referral service operated by the Louisiana State Bar Association, any local bar association, or any other not-for-profit organization, provided the lawyer referral service:

(i) refers all persons who request legal services to a participating lawyer;

(ii) prohibits lawyers from increasing their fee to a client to compensate for the referral service charges; and

(iii) fairly and equitably distributes referral cases among the participating lawyers, within their area of practice, by random allotment or by rotation.

Rule 7.3. [Reserved]

Rule 7.4. Direct Contact with Prospective Clients

(a) Solicitation. Except as provided in subdivision (b) of this Rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior lawyer-client relationship, in person, by person to person verbal telephone contact, through others acting at the lawyer's request or on the lawyer's behalf or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this Rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this Rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of Rule 7.6. For the purposes of this Rule 7.4, the phrase "prior lawyer-client relationship" shall not include relationships in which the client was an unnamed member of a class action.

(b) Written Communication Sent on an Unsolicited Basis.

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment if:

(A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than thirty days prior to the mailing of the communication;

(B) it has been made known to the lawyer that the person does not want to receive such communications from the lawyer;

(C) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;

(D) the communication contains a false, misleading or deceptive statement or claim or is improper under subdivision (c)(1) of Rule 7.2; or

(E) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

(2) Unsolicited written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements:

(A) Unsolicited written communications to a prospective client are subject to the requirements of Rule 7.2.

(B) In instances where there is no family or prior lawyer-client relationship, a lawyer shall not initiate any form of targeted solicitation, whether a written or recorded communication, of a person or persons known to need legal services of a particular kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment unless such communication complies with the requirements set forth below and is not otherwise in violation of these Rules:

(i) Such communication shall state clearly the name of at least one member in good standing of the Association responsible for its content.

(ii) The top of each page of such written communication and the lower left corner of the face of the envelope in which the written communication is enclosed shall be plainly marked "ADVERTISEMENT" in print size at least as large as the largest print used in the written communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the "ADVERTISEMENT" mark shall appear above the address panel of the brochure or pamphlet and on the inside of the brochure or pamphlet. Written communications solicited by clients or prospective clients, or written communications sent only to other lawyers need not contain the "ADVERTISEMENT" mark.

(C) Unsolicited written communications mailed to prospective clients shall not resemble a legal pleading, notice, contract or other legal document and shall not be sent by registered mail, certified mail or other forms of restricted delivery.

(D) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, any unsolicited

written communication concerning a specific matter shall include a statement so advising the client.

(E) Any unsolicited written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member of that person shall disclose how the lawyer obtained the information prompting the communication.

(F) An unsolicited written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.

Rule 7.5. Advertisements in the Electronic Media other than Computer-Accessed Communications

[Enforcement of Rule 7.5(b)(2)(C) is suspended, until further notice, by order of the Supreme Court of Louisiana, dated September 22, 2009.]

(a) Generally. With the exception of computer-based advertisements (which are subject to the special requirements set forth in Rule 7.6), all advertisements in the electronic media, including but not limited to television and radio, are subject to the requirements of Rule 7.2.

(b) Appearance on Television or Radio. Advertisements on the electronic media such as television and radio shall conform to the requirements of this Rule.

(1) *Prohibited Content.* Television and radio advertisements shall not contain:

(A) any feature, including, but not limited to, background sounds, that is false, misleading or deceptive; or

(B) lawyers who are not members of the advertising law firm speaking on behalf of the advertising lawyer or law firm.

(2) *Permissible Content.* Television and radio advertisements may contain:

(A) images that otherwise conform to the requirements of these Rules;

(B) a lawyer who is a member of the advertising firm personally appearing to speak regarding the legal services the lawyer or law firm is available to perform, the fees to be charged for such services, and the background and experience of the lawyer or law firm; or

(C) a non-lawyer spokesperson speaking on behalf of the lawyer or law firm, as long as that spokesperson shall provide a spoken and written disclosure, as required by Rule 7.2(c)(10), identifying the spokesperson as a spokesperson

and disclosing that the spokesperson is not a lawyer and disclosing that the spokesperson is being paid to be a spokesperson, if paid.

Rule 7.6. Computer-Accessed Communications

[Enforcement of Rule 7.6(d) is suspended, until further notice, by order of the Supreme Court of Louisiana, dated September 22, 2009.]

(a) Definition. For purposes of these Rules, "computer-accessed communications" are defined as information regarding a lawyer's or law firm's services that is read, viewed, or heard directly through the use of a computer. Computer-accessed communications include, but are not limited to, Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer's or law firm's services that appears on World Wide Web search engine screens and elsewhere.

(b) Internet Presence. All World Wide Web sites and home pages accessed via the Internet that are controlled, sponsored, or authorized by a lawyer or law firm and that contain information concerning the lawyer's or law firm's services:

(1) shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law;

(2) shall disclose one or more bona fide office location(s) of the lawyer or law firm or, in the absence of a bona fide office, the city or town of the lawyer's primary registration statement address, in accordance with subdivision (a)(2) of Rule 7.2; and

(3) are considered to be information provided upon request and, therefore, are otherwise governed by the requirements of Rule 7.9.

(c) Electronic Mail Communications. A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment unless:

(1) the requirements of subdivisions (b)(1), (b)(2)(A), (b)(2)(B)(i), (b)(2)(C), (b)(2)(D), (b)(2)(E) and (b)(2)(F) of Rule 7.4 are met;

(2) the communication discloses one or more bona fide office location(s) of the lawyer or lawyers who will actually perform the services advertised or, in the absence of a bona fide office, the city or town of the lawyer's primary registration statement address, in accordance with subdivision (a)(2) of Rule 7.2; and

(3) the subject line of the communication states "LEGAL ADVERTISEMENT". This is not required for electronic mail communications sent only to other lawyers.

(d) Advertisements. All computer-accessed communications concerning a lawyer's or law firm's services, other than those subject to subdivisions (b) and (c) of this Rule, are subject

to the requirements of Rule 7.2 when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

Rule 7.7. Evaluation of Advertisements

[Enforcement of Rule 7.7 as it pertains to filing requirements for Internet advertising is suspended, until further notice, by order of the Supreme Court of Louisiana, dated September 22, 2009.]

(a) Louisiana State Bar Association Rules of Professional Conduct Committee. With respect to said Committee, it shall be the task of the Committee, or any subcommittee designated by the Rules of Professional Conduct Committee (hereinafter collectively referred to as "the Committee"): 1) to evaluate all advertisements filed with the Committee for compliance with the Rules governing lawyer advertising and solicitation and to provide written advisory opinions concerning compliance with those Rules to the respective filing lawyers; 2) to develop a handbook on lawyer advertising for the guidance of and dissemination to the members of the Louisiana State Bar Association; and 3) to recommend, from time to time, such amendments to the Rules of Professional Conduct as the Committee may deem advisable.

(1) *Recusal of Members.* Members of the Committee shall recuse themselves from consideration of any advertisement proposed or used by themselves or by other lawyers in their firms.

(2) *Meetings.* The Committee shall meet as often as is necessary to fulfill its duty to provide prompt opinions regarding submitted advertisements' compliance with the lawyer advertising and solicitation rules.

(3) *Procedural Rules.* The Committee may adopt such procedural rules for its activities as may be required to enable the Committee to fulfill its functions.

(4) *Reports to the Court.* Within six months following the conclusion of the first year of the Committee's evaluation of advertisements in accordance with these Rules, and annually thereafter, the Committee shall submit to the Supreme Court of Louisiana a report detailing the year's activities of the Committee. The report shall include such information as the Court may require.

(b) Advance Written Advisory Opinion. Subject to the exemptions stated in Rule 7.8, any lawyer who advertises services through any public media or through unsolicited written communications sent in compliance with Rule 7.4 or 7.6(c) may obtain a written advisory opinion concerning the compliance of a contemplated advertisement or unsolicited written communication in advance of disseminating the advertisement or communication by submitting to the Committee the material and fee specified in subdivision (d) of this Rule at least thirty days prior to such dissemination. If the Committee finds that the advertisement or unsolicited written communication complies with these Rules, the lawyer's voluntary submission in compliance with this subdivision shall be deemed to satisfy the regular filing requirement set forth below in subdivision (c) of this Rule.

(c) **Regular Filing.** Subject to the exemptions stated in Rule 7.8, any lawyer who advertises services through any public media or through unsolicited written communications sent in compliance with Rule 7.4 or 7.6(c) shall file a copy of each such advertisement or unsolicited written communication with the Committee for evaluation of compliance with these Rules. The copy shall be filed either prior to or concurrently with the lawyer's first dissemination of the advertisement or unsolicited written communication and shall be accompanied by the information and fee specified in subdivision (d) of this Rule. If the lawyer has opted to submit an advertisement or unsolicited written communication in advance of dissemination, in compliance with subdivision (b) of this Rule, and the advertisement or unsolicited written communication is then found to be in compliance with the Rules, that voluntary advance submission shall be deemed to satisfy the regular filing requirement set forth above.

(d) **Contents of Filing.** A filing with the Committee as permitted by subdivision (b) or as required by subdivision (c) shall consist of:

(1) a copy of the advertisement or communication in the form or forms in which it is to be disseminated and is readily-capable of duplication by the Committee (e.g., videotapes, audiotapes, print media, photographs of outdoor advertising, etc.);

(2) a typewritten transcript of the advertisement or communication, if any portion of the advertisement or communication is on videotape, audiotape, electronic/digital media or otherwise not embodied in written/printed form;

(3) a printed copy of all text used in the advertisement;

(4) an accurate English translation, if the advertisement appears or is audible in a language other than English;

(5) a sample envelope in which the written communication will be enclosed, if the communication is to be mailed;

(6) a statement listing all media in which the advertisement or communication will appear, the anticipated frequency of use of the advertisement or communication in each medium in which it will appear, and the anticipated time period during which the advertisement or communication will be used; and

(7) fees paid to the Louisiana State Bar Association, in an amount set by the Supreme Court of Louisiana: (A) for submissions filed prior to or concurrently with the lawyer's first dissemination of the advertisement or unsolicited written communication, as provided in subdivisions (b) and (c); or (B) for submissions not filed until after the lawyer's first dissemination of the advertisement or unsolicited written communication.

(e) **Evaluation of Advertisements.** The Committee shall evaluate all advertisements and unsolicited written communications filed with it pursuant to this Rule for compliance with

the applicable rules on lawyer advertising and solicitation. The Committee shall complete its evaluation within thirty days following receipt of a filing unless the Committee determines that there is reasonable doubt that the advertisement or unsolicited written communication is in compliance with the Rules and that further examination is warranted but cannot be completed within the thirty-day period, and so advises the filing lawyer in writing within the thirty-day period. In the latter event, the Committee shall complete its review as promptly as the circumstances reasonably allow. If the Committee does not send any communication in writing to the filing lawyer within thirty days following receipt of the filing, the advertisement or unsolicited written communication will be deemed approved.

(f) **Additional Information.** If the Committee requests additional information, the filing lawyer shall comply promptly with the request. Failure to comply with such requests may result in a finding of non-compliance for insufficient information.

(g) **Notice of Noncompliance; Effect of Continued Use of Advertisement.** When the Committee determines that an advertisement or unsolicited written communication is not in compliance with the applicable Rules, the Committee shall advise the lawyer in writing that dissemination or continued dissemination of the advertisement or unsolicited written communication may result in professional discipline. The Committee shall report to the Office of Disciplinary Counsel a finding under subsections (c) or (f) of this Rule that the advertisement or unsolicited written communication is not in compliance, unless, within ten days of notice from the Committee, the filing lawyer certifies in writing that the advertisement or unsolicited written communication has not and will not be disseminated.

(h) **Committee Determination Not Binding; Evidence.** A finding by the Committee of either compliance or noncompliance shall not be binding in a disciplinary proceeding, but may be offered as evidence.

(i) **Change of Circumstances; Re-filing Requirement.** If a change of circumstances occurring subsequent to the Committee's evaluation of an advertisement or unsolicited written communication raises a substantial possibility that the advertisement or communication has become false, misleading or deceptive as a result of the change in circumstances, the lawyer shall promptly re-file the advertisement or a modified advertisement with the Committee along with an explanation of the change in circumstances and an additional fee as set by the Court.

(j) **Maintaining Copies of Advertisements.** A copy or recording of an advertisement or written or recorded communication shall be submitted to the Committee in accordance with the requirements of Rule 7.7, and the lawyer shall retain a copy or recording for five years after its last dissemination along with a record of when and where it was used. If identical unsolicited written communications are sent to two or more prospective clients, the lawyer may comply with this requirement by filing a copy of one of the identical unsolicited written communications and retaining for five years a single copy together with a list of the names and addresses of all persons to whom the unsolicited written communication was sent.

Rule 7.8. Exemptions from the Filing and Review Requirement

The following are exempt from the filing and review requirements of Rule 7.7:

(a) any advertisement or unsolicited written communication that contains only content that is permissible under Rule 7.2(b).

(b) a brief announcement in any public media that identifies a lawyer or law firm as a contributor to a specified charity or as a sponsor of a public service announcement or a specified charitable, community, or public interest program, activity, or event, provided that the announcement contains no information about the lawyer or law firm other than permissible content of advertisements listed in Rule 7.2(b) and the fact of the sponsorship or contribution. In determining whether an announcement is a public service announcement for purposes of this Rule and the Rule setting forth permissible content of advertisements, the following are criteria that may be considered:

(1) whether the content of the announcement appears to serve the particular interests of the lawyer or law firm as much as or more than the interests of the public;

(2) whether the announcement contains information concerning the lawyer's or law firm's area(s) of practice, legal background, or experience;

(3) whether the announcement contains the address or telephone number of the lawyer or law firm;

(4) whether the announcement concerns a legal subject;

(5) whether the announcement contains legal advice; and

(6) whether the lawyer or law firm paid to have the announcement published.

(c) A listing or entry in a law list or bar publication.

(d) A communication mailed only to existing clients, former clients, or other lawyers.

(e) Any written communications requested by a prospective client.

(f) Professional announcement cards stating new or changed associations, new offices, and similar changes relating to a lawyer or law firm, and that are mailed only to other lawyers, relatives, close personal friends, and existing or former clients.

(g) Computer-accessed communications as described in subdivision (b) of Rule 7.6.

(h) **Gift/Promotional Items.** Items, such as coffee mugs, pens, pencils, apparel, and the like, that identify a lawyer or law firm and are used/disseminated by a lawyer or law firm not in violation of these Rules, including but not limited to Rule 7.2(c)(13) and Rule 7.4; and

(i) **Office Sign(s) for Bona Fide Office Location(s).** A sign, placard, lettering, mural, engraving, carving or other alphanumeric display conveying information about a lawyer, a lawyer's services or a law firm's services that is permanently affixed, hanging, erected or otherwise attached to the physical structure of the building containing a bona fide office location for a lawyer or law firm, or to the property on which that bona fide office location sits.

Rule 7.9. Information about a Lawyer's Services Provided upon Request

(a) **Generally.** Information provided about a lawyer's or law firm's services upon request shall comply with the requirements of Rule 7.2 unless otherwise provided in this Rule 7.9.

(b) **Request for Information by Potential Client.** Whenever a potential client shall request information regarding a lawyer or law firm for the purpose of making a decision regarding employment of the lawyer or law firm:

(1) The lawyer or law firm may furnish such factual information regarding the lawyer or law firm deemed valuable to assist the client.

(2) The lawyer or law firm may furnish an engagement letter to the potential client; however, if the information furnished to the potential client includes a contingency fee contract, the top of each page of the contract shall be marked "SAMPLE" in print size at least as large as the largest print used in the contract and the words "DO NOT SIGN" shall appear on the client signature line.

(3) Notwithstanding the provisions of subdivision (c)(1)(D) of Rule 7.2, information provided to a potential client in response to a potential client's request may contain factually verifiable statements concerning past results obtained by the lawyer or law firm, if, either alone or in the context in which they appear, such statements are not otherwise false, misleading or deceptive.

(c) **Disclosure of Intent to Refer Matter to Another Lawyer or Law Firm.** A statement and any information furnished to a prospective client, as authorized by subdivision (b) of this Rule, that a lawyer or law firm will represent a client in a particular type of matter, without appropriate qualification, shall be presumed to be misleading if the lawyer reasonably believes that a lawyer or law firm not associated with the originally-retained lawyer or law firm will be associated or act as primary counsel in representing the client. In determining whether the statement is misleading in this respect, the history of prior conduct by the lawyer in similar matters may be considered.

Rule 7.10. Firm Names and Letterhead

(a) **False, Misleading, or Deceptive.** A lawyer or law firm shall not use a firm name, logo, letterhead, professional designation, trade name or service mark that violates the provisions of these Rules.

(b) **Trade Names.** A lawyer or law firm shall not practice under a trade name that implies a connection with a government agency, public or charitable services organization or other professional association, that implies that the firm is something other than a private law firm, or that is otherwise in violation of subdivision (c)(1) of Rule 7.2.

(c) **Advertising Under Trade Name.** A lawyer shall not advertise under a trade or fictitious name, except that a lawyer who actually practices under a trade name as authorized by subdivision (b) may use that name in advertisements. A lawyer who advertises under a trade or fictitious name shall be in violation of this Rule unless the same name is the law firm name that appears on the lawyer's letterhead, business cards, office sign, and fee contracts, and appears with the lawyer's signature on pleadings and other legal documents.

(d) **Law Firm with Offices in More Than One Jurisdiction.** A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in any jurisdiction where an office is located.

(e) **Name of Public Officer or Former Member in Firm Name.** The name of a lawyer holding a public office or formerly associated with a firm shall not be used in the name of a law firm, on its letterhead, or in any communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(f) **Partnerships and Organizational Business Entities.** Lawyers may state or imply that they practice in a partnership or other organizational business entity only when that is the fact.

(g) **Deceased or Retired Members of Law Firm.** If otherwise lawful and permitted under these Rules, a law firm may use as, or continue to include in, its name, the name or names of one or more deceased or retired members of the law firm, or of a predecessor firm in a continuing line of succession.

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1. Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) Knowingly make a false statement of material fact;

(b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6; or

(c) Fail to cooperate with the Office of Disciplinary Counsel in its investigation of any matter before it except for an openly expressed claim of a constitutional privilege.

Rule 8.2. Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

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 question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Disciplinary Counsel.

(b) A lawyer who knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a question as to the judge's honesty, trustworthiness or fitness for office shall inform the Judiciary Commission. Complaints concerning the conduct of federal judges shall be filed with the appropriate federal authorities in accordance with federal laws and rules governing federal judicial conduct and disability.

(c) This rule does not require the 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 or while serving as a member of the Ethics Advisory Service Committee.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;

(e) State or imply an ability to influence improperly a judge, judicial officer, governmental agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; or

(g) Threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

Rule 8.5. Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 466 **April 24, 2014**
Lawyer Reviewing Jurors' Internet Presence

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors'[1] presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review.

Juror Internet Presence

Jurors may and often will have an Internet presence through electronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as "websites."

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as "electronic social media" or "ESM." Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to

1. Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.

another's ESM will be denoted as an "access request," and a person who creates and maintains ESM will be denoted as a "subscriber."

Depending on the privacy settings chosen by the ESM subscriber, some information posted on ESM sites might be available to the general public, making it similar to a website, while other information is available only to a fellow subscriber of a shared ESM service, or in some cases only to those whom the subscriber has granted access. Privacy settings allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access. In general, a person who wishes to obtain access to these protected pages must send a request to the ESM subscriber asking for permission to do so. Access depends on the willingness of the subscriber to grant permission.[2]

This opinion addresses three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;

2. active lawyer review where the lawyer requests access to the juror's ESM; and

3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer;

Trial Management and Jury Instructions

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents. Lawyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.[3] In today's Internet-saturated world, the line is increasingly blurred.

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2. The capabilities of ESM change frequently. The committee notes that this opinion does not address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion, key elements like the ability of a subscriber to control access to ESM or to identify third parties who review a subscriber's ESM are considered generically.

3. While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." *See also* Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

For this reason, we strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM and websites.[4] If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
>
> (c) communicate with a juror or prospective juror after discharge of the jury if:
>
> (1) the communication is prohibited by law or court order;
>
> (2) the juror has made known to the lawyer a desire not to communicate; or
>
> (3) the communication involves misrepresentation, coercion, duress or harassment . . .

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. *See, e.g., In re Holman*, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer's client was "serious crime" warranting disbarment).

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4. Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror's Internet presence.

A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). *See also In re Myers*, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his "jury selection team" phone venire member's home); *cf.* S.C. Ethics Op. 93-27 (1993) (lawyer "cannot avoid the proscription of the rule by using agents to communicate improperly" with prospective jurors).

Passive review of a juror's website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b). In the world outside of the Internet, a lawyer or another, acting on the lawyer's behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions. The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b).[5]

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror's electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule 3.5(b).[6] This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror's ESM. The details of how this is accomplished will vary from network to network, but the key feature that is

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5. Or. State Bar Ass'n, Formal Op. 2013-189 ("Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website"); N.Y. Cnty. Lawyers Ass'n, Formal Op. 743 (2011) (lawyer may search juror's "publicly available" webpages and ESM); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass'n, Op. E-434 (2012) ("If the site is 'public,' and accessible to all, then there does not appear to be any ethics issue."). *See also* N.Y. State Bar Ass'n, Advisory Op. 843 (2010) ("A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation"); Or. State Bar Ass'n, Formal Op. 2005-164 ("Accessing an adversary's public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary"); N.H. Bar Ass'n, *supra* note 3 (viewing a Facebook user's page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party's public Facebook page may be viewed by lawyer).

6. *See* Or. State Bar Ass'n, *supra* note 5, fn. 2, (a "lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so"); N.Y. Cnty. Lawyers Ass'n, *supra* note 5 ("Significant ethical concerns would be raised by sending a 'friend request,' attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog, or 'following' a juror's Twitter account"); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may not chat, message or send a "friend request" to a juror); Conn. Bar Ass'n, Informal Op. 2011-4 (friend request is a communication); Mo. Bar Ass'n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). *But see* N.H. Bar Ass'n, *supra* note 3 (lawyer may request access to witness's private ESM, but request must "correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer's involvement" in the matter); Phila. Bar Ass'n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness's private ESM, but may ask the witness "forthrightly" for access).

relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2[7], concluded that a network-generated notice to the juror that the lawyer has reviewed the juror's social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of "communication" from Black's Law Dictionary (9th ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed "the process of bringing an idea, information or knowledge to another's perception—including the fact that they have been researched." While the ABCNY Committee found that the communication would "constitute a prohibited communication if the attorney was aware that her actions" would send such a notice, the Committee took "no position on whether an inadvertent communication would be a violation of the Rules." The New York County Lawyers' Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY's opinion and went further explaining, "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."[8]

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber-notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy

7. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra*, note 3.
8. N.Y. Cnty. Lawyers' Ass'n, *supra* note 5.

features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions "that have no substantial purpose other than to embarrass, delay, or burden a third person . . ." Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet. These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.[9]

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name.[10] The recommended instruction states in part:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

These same jury instructions were provided by both a federal district court and state criminal court judge during a three-year study on juries and social media. Their research found that "jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media."[11] As a result, the authors recommend jury instruction on social media "early and often" and daily in lengthy trials.[12]

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9. For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 Duke Law & Technology Review no. 1, 69-78 (2014), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr.

10. Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, USCOURTS.GOV (June 2012), http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

11. *Id.* at 66.

12. *Id.* at 87.

Analyzing the approximately 8% of the jurors who admitted to being "tempted" to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission's proposal, to expand on a lawyer's previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer's client to also include such conduct by any person.[13]

Model Rule 3.3(b) reads:

> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comment [12] to Rule 3.3 provides:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000's stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional

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13. Ethics 2000 Commission, *Model Rule 3.3: Candor Toward the Tribunal*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33.html (last visited Apr. 18, 2014).

Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

> This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge"). *Reporter's Explanation of Changes, Model Rule 3.3.*[14]

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code's DR 7-108(G), a lawyer knowing of "improper conduct" by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer's obligation to act arises only when the juror or venireperson engages in conduct that is *fraudulent or criminal.*[15] While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror's conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee's authority, applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b).[16]

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14. Ethics 2000 Commission, *Model Rule 3.3 Reporter's Explanation of Changes*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33rem.html (last visited Apr. 18, 2014).

15. Compare MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF'L CONDUCT, R. 3.5(d) (2013) ("a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror....").

16. *See, e.g.*, U.S. v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. U.S. v. Rowe, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

Conclusion

In sum, a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

172 So.3d 1058
Supreme Court of Louisiana.

In re Joyce Nanine McCOOL.

No. 2015-B-0284.
|
June 30, 2015.

Synopsis

Background: Disciplinary proceedings were brought against attorney. Disciplinary Board recommended suspension of one year and one day.

Holdings: The Supreme Court, Knoll, J., held that:

[1] attorney violated rules, and

[2] disbarment was warranted.

Disbarment ordered.

Weimer, J., concurred in part and dissented in part, and assigned reasons.

Guidry, J., concurred in part and dissented in part, and assigned reasons.

Crichton, J., additionally concurred and assigned reasons.

Cannella, J., concurred in part and dissented in part, and assigned reasons.

Attorneys and Law Firms

***1060** Office of Disciplinary Counsel, Charles Bennett Plattsmier, Tammy Pruet Northrup, Baton Rouge, LA, for Applicant.

McCool Law, LLC, Mandeville, LA, Joyce Nanine McCool; Richard Ducote, PC, Richard Lynn Ducote, Metairie, LA, for Respondent.

ATTORNEY DISCIPLINARY PROCEEDING

KNOLL, Justice. *

****1** This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Joyce Nanine McCool, [1] an attorney licensed to practice law in Louisiana.

UNDERLYING FACTS

The underlying facts of this case are rather complex. By way of background, respondent was friends with Raven Skye Boyd Maurer ("Raven"). Following Raven's divorce in 2006, she and her former husband were involved in a bitter child custody dispute. Raven accused her ex-husband of sexually abusing their two young daughters, H. and Z., [2] and unsuccessfully sought to terminate his parental rights in proceedings pending in Mississippi before Judge Deborah Gambrell. [3] Respondent is not admitted to the Mississippi Bar and was not admitted *pro hac vice* in Raven's Mississippi case, but she did offer assistance to Raven as a friend.

Meanwhile, respondent filed a petition in St. Tammany Parish on behalf of Raven's ***1061** new husband, who sought to adopt H. and Z. The presiding judge, Judge ****2** Dawn Amacker, stayed the intrafamily adoption proceedings pending resolution of the Mississippi matter. Judge Amacker also declined to exercise subject matter jurisdiction in response to a motion for emergency custody filed by respondent on Raven's behalf. After Judge Amacker issued her ruling declining to exercise subject matter jurisdiction, respondent filed a writ application with the First Circuit Court of Appeal, which was denied. [4] On August 31, 2011, this Court likewise denied writs. *Maurer v. Boyd*, 11-1787 (La.8/31/11), 68 So.3d 517.

Unhappy with the various rulings made by Judge Gambrell and Judge Amacker and believing those rulings were legally wrong, respondent drafted an online petition entitled "Justice for [H] and [Z]" which she and Raven posted on the internet at change.org, along with a photo of the two girls. With regard to the Mississippi proceeding before Judge Gambrell, the online petition stated:

> To Judge Deborah Gambrell, we, the undersigned, ask that you renounce jurisdiction in this matter

> to the Louisiana court because the children have lived exclusively in Louisiana for the past three years. Their schools, teachers, physicians, therapists, little sister and brother and the vast majority of significant contacts are now in Louisiana. There is also an adoption proceeding pending in Louisiana over which Louisiana has jurisdiction and in the interest of judicial economy, and the best interest of the girls, Louisiana is the more appropriate forum to oversee ensure [sic] the "best interest" of the girls are protected. If you refuse to relinquish jurisdiction to Louisiana, we insist that you remove the Guardian Ad Litem currently assigned to the case, and replace him with one that has the proper training and experience in investigating allegations of child sexual abuse in custody proceedings. We further insist that, in keeping [with] *S.G. v. D.C.*, 13 So.3d 269 (Miss.2009), you specifically define the Guardian Ad Litem's role in the suit; require the new Guardian Ad Litem [to] prepare a written report; require that the report be shared with all parties prior to a hearing; that all proceeding be conducted on the record, with advance notice and opportunity to be heard, and that an evidentiary hearing be conducted to review the **3 allegations of child sexual abuse, and that no visitation be allowed until you have seen all of the evidence.

As to Judge Amacker and the Louisiana proceedings, the petition stated:

> To Judge Amacker, we, the undersigned, insist that you withdraw the unlawful stay of the adoption proceedings currently pending in your court, and, in accordance with La.Ch.C. art. 1253, a hearing be set with all due speed to allow the girls' stepfather to show why it is in the girls' best interest that they be adopted by him, thereby terminating all parental rights of the girls' biological father.

Respondent re-posted the online petition on her blog site and in online articles she authored, one of which again included a photo of the two girls. She provided contact information for the judges' offices and this Court, and added comments in which she solicited and encouraged others to express their feelings to the judges and this Court about the pending cases:

> In spite of overwhelming evidence that the girls have been abused by their father, ***1062** the judge in Mississippi, Judge Deborah Gambrell, of the Chancery Court of Marion County, Mississippi, refuses to even look at the evidence, and has now ordered the girls be sent to unsupervised visitation with their father.
>
> Judge Dawn Amacker, in the 22nd JDC, Division L, for the Parish of St. Tammany in Louisiana also refused to protect the girls, even though she has the power and authority to protect them. RM now has an application to the LA supreme court, asking that it order Judge Amacker to protect the children.
>
> Insist that Judge Amacker and Judge Gambrell do their jobs! If you want more info, go to [website] and read the writ application to the LA supreme court.
>
> Please sign the petition, circulate it to all of your friends and families and call Judge Amacker and Judge Gambrell during the hours of 8:30 to 5:00 starting Monday, August 15 to ask why they won't follow the law and protect these children. Let them know you're watching and expect them to do their job and most of all, make sure these precious little girls are safe!
>
> Call the Louisiana Supreme Court and tell them you want the law to protect these girls [phone number]. [A]sk **4 about the writ pending that was filed by attorney Nanine McCool on Friday, August 12, 2011.
>
> Let's turn this around and be [H's] hero. Please sign the Care2 petition and continue to call Judge Gambrell to ask her why she is unwilling to afford [H] and [Z] simple justice.

> You can sign the petition and lend your voice to this cause *here.* Or, you can contact directly. Contact information is: [provided contact information for the judges].

In response to the postings made by respondent, on August 14, 2011—two days prior to a hearing in Mississippi on Raven's motion for contempt and to terminate her former husband's parental rights—Judge Gambrell's staff received an e-mail from Heather Lyons, a signer of the online petition. Ms. Lyons stated she lived and voted in Forrest County, Mississippi, and she would "be paying attention" to Raven's case "due to the fact that Judge Gambrell refused to hear evidence of abuse in the case of little girls who are likely being molested by their father. She has an obligation to protect our most vulnerable children. Please do not let them down judge!"

A copy of the online petition and comments thereto was then filed with the Marion County Chancery Clerk of Court's Office ("Marion County Court") and faxed directly to Judge Amacker's office in Louisiana, apparently by Raven or her mother. On August 22, 2011, Judge Amacker had her administrative assistant return the petition to respondent with instructions respondent caution her client against *ex parte* communications with the judge.

Undaunted, respondent continued her online and social media campaign, further disseminating the sexual abuse allegations and even going so far as to link the audio recordings in which Raven and her children discussed the alleged abuse.[5] ****5** Respondent also stated (falsely) that no ***1063** judge had ever heard these recordings because Judge Gambrell refused to allow the recordings into evidence and Judge Amacker refused to conduct a hearing:

> Listen to their 1st disclosure to Raven: [link to recording] and a day later, their second: [link to recording]
>
> > Now consider that no judge has ever heard those recordings. Why? Because for 4.5 years, the judges have simply refuse [sic] to do so. On August 16, 2011, Judge Deborah Gambrell in the Chancery Court of Marion County, Mississippi, once again refused to admit all of Raven's evidence, including these recordings, and ordered that [H] and [Z] have visits with their father in the house where they both report having been molested by their father in the past.
> >
> > Judge Dawn Amacker in the 22nd Judicial District Court for the Parish of St. Tammany in Louisiana is also refusing to hear any evidence or to protect [H] and [Z], even though the law requires her to have a hearing and to take evidence.
> >
> > Their dad keeps calling them liars and saying that their mom is making them say it. All their mom wants is for a judge to look at ALL the evidence and THEN decide who to believe. Don't you think Judge Gambrell and Judge Amacker should look at the evidence before they make [H] and [Z] go back to their father's house where there is no one to protect them except the person they are most afraid of?
> >
> > [H] still loves her daddy. She just wants him to stop doing what he is doing to her. She does not feel safe with him alone. She said as much in her journal, but Judge Gambrell refused to allow it as evidence and Judge Amacker just ignored her.
> >
> > Sign our petition telling the judges that there can be no justice for [H] and [Z], or any child, if the law and evidence is ignored. Tell them they must look at the evidence before they make a decision that will affect the rest of [H] and [Z]'s lives. Ask yourself, what if these were your daughters?
> >
> > ****6** Have questions want to do more to help? Email us at [address] and someone will respond within 24 hours. Want to see more, go to [website] and read the writ submitted to the Louisiana Supreme Court on August 12, 2011.
> >
> > Horrified? Call the judges and let them know: [contact information provided]

Respondent also used her personal Twitter account to promote the online petition and to otherwise draw attention to the audio recordings and the manner in which the judges were handling the cases. On August 16, 2011, the day of the Mississippi hearing, respondent tweeted 30 messages about the case and petition, including:

> I realize most of u think the courts care about kids but too often there's no walk to go with the talk: [link to online petition].

> Shouldn't judges base decisions about kids on evidence?: [link to online petition].
>
> GIMME GIMME GIMME Evidence! Want some? I got it. Think u can convince a judge to look at it? Sign this petition: [link to online petition].
>
> Judges are supposed to know shit about ... the law ... aren't they. And like evidence and shit? Due process? [link to online petition].
>
> I am SO going 2 have 2 change jobs after this ...! I'm risking sanctions by the LA supreme court; u could be a HUGE help.

The very next day, she tweeted: "Make judges protect [H] and [Z] from abuse by their father!: [link to online petition]."

On August 24, 2011, respondent tweeted a local investigative news organization ***1064** should "focus ur lens on Y Judge Amacker won't protect these girls ..." and "ask Judge Amacker why she won't listen." Respondent also provided links to the audio recordings and the online petition in numerous tweets, asking various national news/ media outlets and celebrities from *Dateline* to Oprah inquire "why 2 girls can't get a judge to listen to this." Another tweet said, "Judge ****7** Gambrell at it again—turned a 4 YO child over to a validated abuser—PLEASE TELL ME WHAT IT WILL TAKE FOR EVERYON [sic] TO SAY 'ENOUGH'."

These online articles and postings by respondent contain numerous false, misleading, and inflammatory statements about the manner in which Judge Gambrell and Judge Amacker were handling the pending cases. But respondent denies any responsibility for these misstatements, contending these were "Raven's perceptions of what had happened" and respondent was simply "helping [Raven] get her voice out there." For example:

- In an article entitled "Make Louisiana and Mississippi Courts Protect HB and ZB!" it is alleged the children were being sexually abused by their father and in spite of "overwhelming" evidence, Judge Gambrell "refuses to even look at the evidence, and has now ordered the girls be sent to unsupervised visitation with their father." This allegation refers to journals written by H., which Judge Gambrell excluded from evidence. Judge Gambrell gave reasons for her evidentiary rulings, but in any event, she did not simply "refuse" to look at the evidence. As for Judge Amacker, it is alleged she "refused to protect the girls, even though she has the power and authority to protect them." Judge Amacker did not refuse to protect the minor children, but rather, she stayed proceedings in Louisiana because related proceedings were already pending in Mississippi.

- In an article entitled "Justice for [H] and [Z]," it was alleged the children were being sexually abused by their father, and the children's mother had evidence of the abuse, including an audio recording and video evidence, but this evidence "was excluded from consideration on one legal technicality or another" by Judge Gambrell. Once again, Judge Gambrell's evidentiary rulings were not arbitrary or capricious. She gave reasons for her evidentiary rulings and did not simply "refuse" to look at the evidence.

- In ****8** a posting on her online blog, respondent linked to audio recordings of the minor children speaking to their mother about alleged sexual abuse by their father, contrary to the September 2, 2008 Agreed Judgment in the Mississippi proceedings. *See supra,* note 5. Respondent's blog stated no judge had ever heard the recordings because "for 4.5 years, the judges have simply refuse [sic] to do so. On August 16, 2011, Judge Deborah Gambrell in the Chancery Court of Marion County, Mississippi once again refused to admit all of Raven's evidence, including these recordings, and ordered that [H] and [Z] have visits with their father in the house where they both report having been molested by their father in the past." However, respondent later acknowledged the audio recordings were not offered into evidence at the August 16, 2011 hearing. In fact, the audio recordings were not even brought to court that day. Furthermore, the audio recordings have ***never*** been offered into evidence in any proceeding before Judge Gambrell. In the same blog, respondent stated Judge Amacker "is also refusing to hear any ***1065** evidence or to protect [H] and [Z], even though the law requires her to have a hearing and to take evidence." However, Judge Amacker did not refuse to have a hearing; she declined to exercise jurisdiction because related domestic proceedings were already pending in Mississippi. Judge Amacker's ruling was upheld when both the court of appeal and this Court denied writs. *Maurer, supra.*

Subsequently, respondent filed motions to recuse Judge Amacker in two matters unrelated to Raven's case. In response, Judge Amacker signed orders stating she was "voluntarily recus[ing herself] due to the possibility that the judge may be called as a witness" in disciplinary proceedings against respondent, "and out of an abundance of caution and to avoid the appearance of impropriety." Notwithstanding the judge's stated reasons for her recusal, respondent filed two more motions for recusal in which she stated Judge Amacker had "voluntarily and *expressly admitted [her] extreme bias and conflict in recusing [herself]* in several **9 other cases, which grounds are equally applicable in the case at bar." [Emphasis added.] Respondent testified this was not an untruthful statement because in her view, the mere fact Judge Amacker had voluntarily recused herself was an express admission by Judge Amacker of bias against her. She also noted Judge Amacker had not denied any of the allegations respondent made in the motions to recuse, nor did Judge Amacker impose sanctions against her or file a disciplinary complaint against her. These facts further reinforced respondent's view Judge Amacker had admitted being biased against her.

On September 14, 2011, Judge Gambrell signed an order commanding respondent to appear before the Marion County Court on October 5, 2011, to show cause why she should not be held in contempt of court by disclosing information from a "sealed" record. Respondent received a copy of the notice of the contempt hearing by regular United States mail; however, she did not appear, contending she was not properly served and the Mississippi court did not have jurisdiction over her. On October 6, 2011, Judge Gambrell signed an order holding respondent in contempt of court. In October 2012, Judge Gambrell rescinded the order of contempt because "service of process was insufficient ... and though violations of this Court's order relating to disclosure of audio transcriptions may have taken place, the Court is without authority to hold said Joyce Nanine McCool in contempt of this Court." In January 2013, Judge Gambrell *sua sponte* recused herself from further action in Raven's case "in accordance with the Mississippi Code of Judicial Conduct Canon 3 and to avoid the appearance of impropriety or bias."

DISCIPLINARY PROCEEDINGS

In September 2011, Judge Gambrell filed a complaint against respondent with the ODC. Judge Amacker also provided information in connection with the ODC's investigation. In May 2014, the ODC filed one count of formal charges **10 against respondent, alleging her conduct as set forth above violated Rules 3.5(a)(a lawyer shall not seek to influence a judge by means prohibited by law), 3.5(b)(a lawyer shall not communicate *ex parte* with a judge during the proceeding), 8.4(a)(it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another), 8.4(c)(it is professional misconduct for a lawyer to engage in dishonesty, fraud, deceit, or misrepresentation), and 8.4(d)(it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct.

*1066 Respondent answered the formal charges by denying any misconduct and asserting her actions are protected by the First Amendment. In her pre-hearing memorandum, respondent admitted she "did implore the electorate to communicate accountability to its elected judges" and "asked publically [sic] elected judges to 'look at the evidence,' 'protect children,' and 'apply the law'," but she denied this constituted ethical misconduct. Respondent also filed an exception of vagueness and a motion for more specific allegations of misconduct. The ODC opposed the exception and motion, arguing the formal charges give respondent fair and adequate notice of the alleged misconduct. Following a telephone conference conducted on December 11, 2013, the chair of the hearing committee denied the exception and motion.

On January 10, 2014, respondent directed discovery to the ODC seeking a listing of each and every specific act or omission, which the ODC alleged to constitute a violation of the Rules of Professional Conduct, the date of each and every such act or omission, and the specific Rule purportedly violated by each such act or omission. The ODC responded to the discovery request, but refused to provide any additional information, noting the chair's previous ruling denying the exception of vagueness and the motion for more specific allegations of **11 misconduct. Respondent then filed a motion to compel the ODC to provide the requested information. Following

a telephone conference conducted on February 11, 2014, the chair denied the motion to compel. Consequently, respondent filed a petition for writ of mandamus in this Court, seeking to compel the ODC to provide more specific details of the alleged misconduct set forth in the formal charges. She also sought a stay of the hearing on the formal charges set for February 27, 2014. We denied respondent's writ and her request for a stay on February 21, 2014. *In re: McCool,* 14-0366 (La.2/21/14), 133 So.3d 669 (Hughes, J., recused).

Formal Hearing

The hearing committee conducted a two-day hearing on February 27, 2014, and March 27, 2014. Therein, the ODC called Judge Amacker and Judge Gambrell to testify before the committee. Respondent testified on her own behalf and was cross-examined by the ODC. During her testimony, respondent repeatedly denied she violated the Rules of Professional Conduct. Instead, she suggested her conduct was justified by what the judges had done in the underlying cases and in the interest of protecting the minor children:

> Q. What does the law say, if anything, you can do after [the Supreme Court denies writs]? I mean you've exhausted what the law allows you to do. What is your recourse then under the law?
>
> A. Weep for the children.
>
> Q. Okay. Can you cite me a law that says you can take to an online campaign to try to get the Judge's [sic] to change their mind?
>
> A. This is the United States of America. The land of the free. The home of the brave. Cite me a law that says I can't.
>
> Q. The rules that you are charged with are in the formal charges.
>
> A. They do not say that I can't take—I cannot assist a client to craft an online petition seeking whatever help ****12** she can to protect her children because the legal system absolutely failed her—
>
> Q. Ms. McCool—
>
> A. —because the Judge's [sic] and the processes will not follow the law, will not obey the law, but hold us to the letter of the law.

***1067** *Hearing Committee Report*

After considering the evidence and testimony presented at the hearing, the hearing committee made factual findings generally consistent with the facts set forth above. Based on these facts, the committee determined respondent violated the Rules of Professional Conduct as follows:

Rules 3.5(a), 3.5(b), and 8.4(a)—Respondent used the internet, an online petition, and social media to spread information, some of which was false, misleading, and inflammatory, about Judge Gambrell's and Judge Amacker's handling of and rulings in pending litigation. Respondent circulated contact information for Judge Gambrell and Judge Amacker and solicited and encouraged others to make direct, *ex parte* contact with the judges to express their feelings about the pending cases, and attempted to influence the outcome of the pending cases. The clear intent of respondent's online campaign was an attempt to influence the judges' future rulings in the respective cases, and to do so through improper *ex parte* communication directed at the judges.

Rule 8.4(c)—Respondent disseminated false, misleading, and inflammatory information on the internet and through social media about Judge Gambrell and Judge Amacker and their handling of these pending domestic proceedings. She also instructed others to sign and circulate an online petition, and to call the judges and let them know they are "watching" them and are "horrified" by their rulings. Finally, respondent made blatantly false statements about Judge Amacker in multiple motions to recuse.

****13** *Rule 8.4(d)*—Respondent used the internet and social media in an effort to influence Judge Gambrell's and Judge Amacker's future rulings in pending litigation. Respondent's conduct threatened the integrity and independence of the court and was clearly prejudicial to the administration of justice. Respondent also used her Twitter account to publish tweets linking the audio recordings of the minor children discussing alleged sexual abuse; to publish false, misleading, and inflammatory

information about Judge Gambrell and Judge Amacker; and to promote the online petition, all of which was designed to intimidate and influence the judges' future rulings in the underlying proceedings.

The committee determined respondent violated a duty owed to the public and the legal system. She acted knowingly, if not intentionally. She caused actual and potential harm by threatening the independence and integrity of the judicial system, and causing the judges concern for their personal safety and well-being. The applicable baseline sanctions, therefore, range from suspension to disbarment.

In aggravation, the committee found a dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law (admitted 2000). In mitigation, the committee found respondent has no prior disciplinary record.

Considering this Court's prior jurisprudence addressing similar misconduct, the committee recommended respondent be suspended from the practice of law for one year and one day. The committee further recommended respondent be required to attend the Louisiana State Bar Association's Ethics School ("Ethics School") and assessed with the costs and expenses of this proceeding.

Respondent filed a brief with the disciplinary board objecting to the hearing committee's report and recommendation.

Disciplinary Board Recommendation

**14 After review, the disciplinary board determined the hearing committee's factual findings are supported by the record *1068 and are not manifestly erroneous. Based on these facts, the board agreed the committee correctly applied the Rules of Professional Conduct to the facts, except the board declined to find respondent engaged in *ex parte* communications with a judge, in violation of Rule 3.5(b). The board reasoned respondent did not have direct contact with either Judge Gambrell or Judge Amacker, and thus, no violation of Rule 3.5(b) occurred. Nevertheless, by circulating contact information for the judges and soliciting non-lawyer members of the public to make direct contact with the judges regarding a matter pending before them, respondent encouraged the public to do what she is forbidden to do by Rule 3.5(b). As such, she violated Rule 8.4(a) by attempting to communicate with Judge Gambrell and Judge Amacker "through the acts of another."

By her own admission, respondent was unhappy with the decisions rendered in the matters she was litigating. After her legal options were exhausted, she decided to launch a social media campaign to influence the presiding judges. Consequently, respondent knowingly, if not intentionally, spearheaded a social media blitz in an attempt to influence the judiciary.

The board determined respondent violated duties owed to the public and the legal system by making false, misleading, and inflammatory statements about two judges. She did so as part of a pattern of conduct intended to influence the judges' future rulings in pending litigation. Considering the ABA's *Standards for Imposing Lawyer Sanctions* ("ABA Standards"), the board determined the baseline sanction is suspension.

In aggravation, the board found a dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the **15 conduct, and substantial experience in the practice of law. In mitigation, the board found respondent has no prior disciplinary record.

After further considering respondent's misconduct in light of this Court's prior jurisprudence, the board adopted the committee's recommendation respondent be suspended from the practice of law for one year and one day, required to attend Ethics School, and assessed with the costs and expenses of this proceeding.

Respondent filed an objection to the disciplinary board's recommendation. Accordingly, the case was docketed for oral argument pursuant to Louisiana Supreme Court Rule XIX, § 11(G)(1)(b).

DISCUSSION

[1] [2] Bar disciplinary matters come within the exclusive original jurisdiction of this Court. La. Const. art. V, § 5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine

whether the alleged misconduct has been proven by clear and convincing evidence. La. Sup.Ct. R. XIX, § 11(G); *In re: Banks,* 09–1212, p. 10 (La.10/2/09), 18 So.3d 57, 63. While we are not bound in any way by the findings and recommendations of the hearing committee and disciplinary board, we have held the manifest error standard is applicable to the committee's factual findings. *Banks,* 09–1212 at p. 10, 18 So.3d at 63; *see also In re: Caulfield,* 96–1401 (La.11/25/96), 683 So.2d 714.

At the outset, we note the ODC's formal charges in this case are somewhat confusing. Rather than separating out the allegations and rule violations into multiple counts, the ODC chose to combine all the factual allegations into a single count spanning eighteen pages. In an effort to clarify the matter, we have divided the allegations into three broad categories: (1) improper *ex parte* communications; (2) dissemination of false and misleading information; ***1069** and (3) conduct prejudicial to the administration of justice. We will address each category in turn.

****16** *Improper Ex Parte Communication*

The ODC's allegations in this area relate to respondent's use of the internet and social media to disseminate information about the manner in which Judge Gambrell and Judge Amacker handled the child custody and visitation cases at issue, in an apparent attempt to marshal public opinion against these judges and attention from this Court. According to the ODC, this conduct violated Rules 3.5(a) and (b) and Rule 8.4(a) of the Rules of Professional Conduct.

Rule 3.5 provides:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

Rule 8.4(a) provides:

> It is professional misconduct for a lawyer to:
>
> Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

The ODC alleges respondent violated these rules by using "the internet and social media to elicit outrage in the general public and to encourage others to make direct contact with judges in an effort to influence their handling of pending cases." Respondent, however, takes the position her comments were only intended to encourage the public to remind the judges to do justice in this case by listening to the evidence and applying the law. Nonetheless, the hearing committee made a finding of fact that respondent's clear intent was to influence the judges' future rulings in this case through *ex parte* communication directed specifically at the judges. In support, the committee cited the following examples of respondent's actions:

- ****17** Please sign the petition, circulate it to all of your friends and families and call Judge Amacker and Judge Gambrell during the hours of 8:30 to 5:00 starting Monday, August 15 to ask why they won't follow the law and protect these children. Let them know you're watching and expect them to do their job and most of all, make sure these precious little girls are safe!

- Call the Louisiana Supreme Court and tell them you want the law to protect these girls? [phone number] [A]sk about the writ pending that was filed by attorney Nanine McCool on Friday, August 12, 2011.

- Let's turn this around and be [H's] hero. Please sign the Care2 petition and continue to call Judge Gambrell to ask her why she is unwilling to afford [H] and [Z] simple justice.

- You can sign the petition and lend your voice to this cause *here.* Or, you can contact directly. Contact information is: [provided contact information for the judges and their staff].

- Sign our petition telling the judges that there can be no justice for [H] and [Z], or any child, if the law and evidence is ignored. Tell them they must look at the evidence before they make a decision that will affect the rest of [H] and [Z's] lives. Ask yourself, what

> if these were your daughters? ... Horrified? Call the judges and let them know.

We agree the examples clearly and convincingly establish respondent solicited the public to contact the presiding judges and this Court. Although respondent asserts "the admonitions in the petitions did nothing other than ensure that both parties ***1070** would receive the same treatment —a hearing based on the law and evidence," the evidence shows she used the internet and social media to solicit and encourage others to make direct, *ex parte* contact with Judge Gambrell, Judge Amacker, and this Court in an effort to influence their and our decisions in sealed, pending domestic litigations.

Moreover, when the petition was printed and faxed to the Marion County Court and Judge Amacker's office, it became *ex parte* communication between the ****18** judiciary and all signatories just as if it were a signed letter. And the first signatory on both printed petitions was respondent: "1. Nanine McCool Lacombe, LA."

Although not directly responsible for its delivery, respondent, by signing the petition, "lent her voice to the cause" along with the rest of the signatories, making the petition her own and, in turn, communicating directly to the judges and this Court, in its entirety:

> LA Supreme Court; Judge Dawn Amacker; Judge Deborah Gambrell
>
> We, the undersigned, insist that you ensure that the two little girls who are the subject of the case [ ], pending in the 22nd JDC, St. Tammany Parish Louisiana, and the case [ ], pending in the Chancery Court of Marion County Mississippi, are afforded all legal protections, including a full evidentiary hearing, to ensure that they are protected from abuse.
>
> To the Louisiana Supreme Court, we, the undersigned, ask that you issue emergency writs, ordering the courts below to exercise emergency jurisdiction over the two small girls until, based on all the evidence available, it is established by clear and convincing evidence, that the little girls subject to these proceedings are being protected from further abuse, including ordering the Hon. Dawn Amacker, Judge, Division L, 22nd JDC, Parish of St. Tammany, to lift the unlawful stay of the adoption proceedings and to set an evidentiary hearing at all due speed, allowing the girls' stepfather to show why it is in the girls' best interest that he be allowed to adopt them.
>
> To Judge Amacker, we, the undersigned, insist that you withdraw the unlawful stay of the adoption proceedings currently pending in your court, and, in accordance with La.Ch.C. art. 1253, a hearing be set with all due speed to allow the girls' stepfather to show why it is in the girls' best interest that they be adopted by him, thereby terminating all parental rights of the girls' biological father.
>
> To Judge Deborah Gambrell, we, the undersigned, ask that you renounce jurisdiction in this matter to the Louisiana court because the children have lived exclusively in Louisiana for the past three years. Their schools, teachers, physicians, therapists, little sister and brother and the vast majority of significant contacts are now in Louisiana. There is also an adoption proceeding pending in Louisiana over which Louisiana has ****19** jurisdiction and in the interest of judicial economy, and the best interest of the girls, Louisiana is the more appropriate forum to oversee ensure [sic] the "best interest" of the girls are protected. If you refuse to relinquish jurisdiction to Louisiana, we insist that you remove the Guardian Ad Litem currently assigned to the case, and replace him with one that has the proper training and experience in investigating allegations of child sexual abuse in custody proceedings. We further insist that, in keeping [with] *S.G. v. D.C.*, 13 So.3d 269 (Miss.2009), you specifically define the Guardian Ad Litem's role in the suit; require the new Guardian Ad Litem [to] prepare a written report; require that ***1071** the report be shared with all parties prior to a hearing; that all proceedings be conducted on the record, with advance notice and opportunity to be heard, and that an evidentiary hearing be conducted to review the allegations of child sexual abuse, and that no visitation be allowed until you have seen all of the evidence.
>
> Thank you for your consideration and for protecting HB and ZB!

This petition is not just a communication from the electorate to its elected judges to "look at the evidence," "protect children," and "apply the law," it is a directive asking and insisting the judges and this Court:

- issue emergency writs

- order[ ] lower courts below exercise emergency jurisdiction
- order[ ] [Judge] Amacker to lift the unlawful stay
- set ... a hearing at all due speed
- withdraw the unlawful stay
- terminat[e] all parental rights of the girls' biological father
- renounce jurisdiction
- remove the Guardian Ad Litem
- replace [the Guardian Ad Litem]
- define the Guardian Ad Litem's role in the suit
- require the new Guardian Ad Litem prepare a written report

**20 • conduct all proceedings ... on the record

- conduct an evidentiary hearing ... to review the allegations of child sexual abuse
- disallow visitation ... until [the judge] ha[s] seen all of the evidence

By its very language, the petition implores the judges to review/see "ALL" the evidence irrespective of the rules of evidence and the judges' discretionary gatekeeping function conferred therein and likewise sets forth in explicit detail the specific manner in which the petitioners want the judges and this Court to "apply" and "follow" the law—essentially a quest for mob justice or rather "trial by internet."

Respondent claims her postings are not *ex parte* communication because

> first and foremost we encourage people to draw their own conclusions. We gave them the information, we gave them the evidence and we said form your own opinion, and then if you feel strongly about it share your opinion, your independent opinion of that with the judge.... But I don't consider it an ex parte communication unless I told all those people this is what you need to tell them, and I didn't.

However, the postings belie her depiction and speak for themselves:

- Insist that Judge Amacker and Judge Gambrell do their jobs!
- Call Judge Amacker and Judge Gambrell ... to ask why they won't follow the law and protect these children.
- Let them know you're watching and expect them to do their job and most of all, make sure these precious little girls are safe!
- Call the Louisiana Supreme Court and tell them you want the law to protect these girls....
- Continue to call Judge Gambrell to ask her why she is unwilling to afford [H] and [Z] simple justice.
- Tell[ ] the judges that there can be no justice for [H] and [Z], or any child, if the law and evidence is ignored.
- Tell **21 them they must look at the evidence before they make a decision that will affect the rest of [H] and [Z's] lives.
- Ask Judge Amacker why she won't listen

Just as in the petition, respondent gives explicit directives to the public on how to *1072 voice "concern" and "horror" to the presiding judges.

As to this Court, respondent repeatedly admitted she sought to bring this case to our attention through the elicited phone calls because this Court is a "policy court":

Q. And while the writ was pending at the Supreme Court you encouraged people to call them also?

A. Yes. To let them know that they were concerned because it's a Policy Court.

Q. Do you still think that's appropriate conduct today for an attorney to encourage people to contact a Court and ask them and voice their opinions about pending cases?

A. To—yes. I do.

Q. Okay. And do you think it's perfectly okay, even today, for you to encourage that and to solicit that?

A. Yes. They're elected officials. They are responsible —they are responsive and responsible to the people they serve. And if they don't know that people aren't concerned—The Supreme Court is a Policy Court. It responds to things that they believe are important social trends. So, yes, I do believe it's important that the Supreme Court be aware that this is an important issue for people in the community. And the number that was provided is the Clerk of Court's number.

We also note the petition was drafted and posted on more than one internet site when the matter was pending before this Court on writs and just days before Judge Gambrell held her first hearing in the custody matter in Mississippi on August 16, 2011. The pleas to "call Judge Amacker and Judge Gambrell during the hours of 8:30 to 5:00 starting Monday, August 15 to ask why they won't follow the law and protect these children" and "call the Louisiana Supreme Court ... and **22 ask about the writ pending that was filed by [respondent]" were made, therefore, for the sole purpose of improperly influencing the courts' future rulings to gain a tactical advantage in the pending underlying litigation. In her sworn statement, respondent even explained:

> I guess I see judges as public officials. If I understand this correctly they're elected both in Mississippi and Louisiana. They answer to the public. The public has a right to tell them how they feel. And I guess—oh boy, I'm getting on a soap box now, when the judicial—when it comes to the judiciary they have such incredible immunity that they somehow feel like they don't have to answer to the public. And I feel strongly that particularly when it comes to family law that hearing from people about what's going on is a part of what will make them better judges.

As the record reveals, one of the signatories, Heather Lyons, not only emailed Judge Gambell on August 14, 2011—just two days before the August 16, 2011 hearing —she also apparently called Judge Gambell at home, "[a]ccusing [her] of being a person who supports child predators or whatever." Judge Amacker testified her office received "hundreds" of calls regarding the petitions, while Judge Gambell testified she even mentioned on the record in the August 16, 2011 hearing "that numerous people were calling and that they should not do that." Both viewed the petition as an attempt to threaten, intimidate, and/or harass them into handling the case in the manner the petitioners wanted, and they both felt threatened. Specifically, Judge Gambell explained:

Q. Judge, did you receive any calls or view anything in the petition or these comments that we've looked at already that ever gave you any *1073 cause for concern for your personal safety?

A. Yes, sir. The kind of work that we do in this court places you in a situation where somebody is going to win most of time and somebody's going to lose.... So that concerned me that all these people are being told to call me. You could easily Google map me; find out where I am and it really—I was really concerned because I had just gotten into the case and before I could even do what I needed to do, I was being harassed by phone calls and **23 then this Twitter and all this other stuff. It did not make sense to me, but I was concerned about my safety.

When asked a similar question regarding whether she had personally received any telephone calls, Judge Amacker responded:

> Let me see if I can break that down just to be accurate. I—no. We have things put in place at our offices that no one ever gets to me as the Judge without it first being vetted through usually my secretary and my staff attorney. So if there's ex-parte communications that come in, and we get a lot in Family Court. You get a lot of angry people and people calling in and it happens. Those never get to the Judge.
>
> So I can't tell you who called, what they said, these types of things of who called in. I can say that hundreds of members of the public and attorneys have stopped by or called to let us know this was on the internet out of concern; out of concern for us. They just wanted to let my staff know or me know. Stop me on the street, in the hallway, whatever, out of concern and horror—the horrified was the public and the attorneys that saw this. And still are.

Reviewing all the evidence, we conclude the telephone calls, the email, and the faxed petitions constitute prohibited *ex parte* communication induced and/or encouraged by respondent. Coupled with her social media postings, we further conclude respondent's online activity amounted to a viral campaign to influence and intimidate the judiciary, including this Court, in pending, sealed domestic litigations by means prohibited by law and through the actions of others. Accordingly, we find the evidence clearly and convincingly shows respondent's conduct in this regard violated Rules 3.5(a) and (b) and Rule 8.4(a) of the Rules of Professional Conduct.

Dissemination of False and Misleading Information

The ODC alleges respondent "disseminated false, misleading and/or inflammatory information through the internet and social media about Judge Deborah Gambrell and Judge Dawn Amacker in pending cases wherein Respondent was counsel of record and/or had a personal interest." It further ****24** alleges respondent "also made false and misleading statements in multiple motions to recuse Judge Amacker." The ODC concludes these actions violate Rule 8.4(c).

Rule 8.4(c) provides:

> It is professional misconduct for a lawyer to:
>
> (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

In finding respondent violated this rule, the hearing committee made several specific factual findings:

(1) Respondent stated Judge Gambrell ignored "overwhelming evidence" of abuse and "refuses to even look at the evidence, and has now ordered the girls be sent to unsupervised ***1074** visitation with their father." The committee found respondent's statement was a "gross mischaracterization" of the facts.

(2) Respondent stated Judge Amacker "in Louisiana also refused to protect the girls, even though she has the power and authority to protect them ..." The committee found this statement was false and inflammatory, as Judge Amacker did not refuse to protect the children, but instead stayed the Louisiana proceedings on the ground related proceedings were already pending in Mississippi.

(3) Respondent posted audio recordings of the minor children purportedly talking about abuse and stated that on August 16, 2011, Judge Gambrell "once again refused to admit all of Raven's evidence, including these recordings, and ordered that [H] and [Z] have visits with their father in the house where they both report having been molested by their father in the past." The committee found this statement was clearly false, as the tapes were not offered into evidence on August 16, 2011; therefore, Judge Gambrell could not have "refused to admit" them.

(4) Respondent stated, "Judge Dawn Amacker in the 22nd Judicial District Court for the Parish of St. Tammany in Louisiana is also refusing to hear any evidence or to protect [H] and [Z], even though the law requires her to have a hearing and to take evidence." The committee found this statement was false, because Judge Amacker had stayed the Louisiana proceedings in light of the Mississippi proceeding.

(5) Respondent stated the Louisiana court (Judge Amacker presiding) "has voluntarily and expressly admitted its extreme bias and conflict in recusing itself in two other cases, which grounds are equally applicable in the case at ****25** bar." The committee found this statement was false, as Judge Amacker's judgment stated, "[t]he Court hereby voluntarily recuses itself due to the possibility that the judge may be called as a witness in the proceedings referenced by counsel, and out of an abundance of caution and to avoid the appearance of impropriety."

In her brief, respondent takes the position she did not make any knowingly false statements. While respondent acknowledges she may have made some factual mistakes, such as with regard to the admission of the audio tapes, she claims this does not amount to making an intentionally false statement. She further contends her characterization of the judges' actions in this case was not false, but simply based on her subjective analysis of their actions.

However, we find the record evidence supports the ODC's charges in this regard. Respondent's online posting and twitter feeds are littered with misrepresentations and

outright false statements. Although she claims they were not made intentionally, respondent even concedes to the misrepresentations. Moreover, even after learning of the "mistakes" through her own review of the underlying records, respondent made no attempt to remedy them, but merely took the position they were her client's subject view of the proceedings, raising the level of her continuous posting and twitter conduct from a simple mischaracterization into a knowing and arguably intentional dissemination of false information. This is particularly true regarding the judges' "refusal" to "hear," "view," or "admit" evidence, namely the audio recordings, which were never offered into evidence at any proceeding before either Judge Gambrell or Judge Amacker.

***1075** Regarding the recusal notices, the signed orders of recusal contain no express admissions of "extreme bias." Respondent attempts to excuse her statements as merely her subjective interpretation of Judge Amacker's action in recusing herself, arguing the recusal itself is an expression of bias. Moreover, she styles her motion to recuse a pleading, casting Judge Amacker as the adverse party, ****26** and argues that by not outright denying the allegations therein, Judge Amacker essentially admitted to the extreme bias. Rather than an answer, however, Judge Amacker's recusal is an order of the court, and as well established, those matters not expressly granted in a judgment or order of a court are considered denied. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 07–2371, p. 12 (La.7/1/08), 998 So.2d 16, 26 (relief sought presumed denied when judgment silent as to claim or demand). Accordingly, we find the evidence clearly and convincingly shows respondent's repeated false statements concerning Judge Amacker's "expressly admitted extreme bias" were not mere misrepresentations, but false statements knowingly and intentionally made. Accordingly, we find the evidence clearly and convincingly shows a violation of Rule 8.4(c) of the Rules of Professional Conduct.

Conduct Prejudicial to the Administration of Justice

Lastly, the ODC alleges respondent's overall conduct—utilizing the internet and social media both in an attempt to influence the judges and to expedite achievement of her goals in the case—was prejudicial to the administration of justice and violated Rule 8.4(d).

Rule 8.4(d) provides:

> It is professional misconduct for a lawyer to:
>
> (d) Engage in conduct that is prejudicial to the administration of justice.

In determining respondent violated this rule, the hearing committee found:

> Respondent used the internet and social media in an effort to influence Judge Gambrell's and Judge Amacker's future rulings in pending litigation. Respondent's conduct threatened the independence and integrity of the court and was clearly prejudicial to the administration of justice.
>
> Respondent also used her Twitter account to publish multiple tweets linking the audio recordings of the minor children discussing alleged sexual abuse; to publish false, ****27** misleading and inflammatory information about Judge Gambrell and Judge Amacker, and to promote the online petition, all of which was designed to intimidate and influence the judges' future rulings in the underlying proceedings.
>
> Respondent knowingly if not intentionally embarked on a campaign using internet, social media and *ex parte* communication specifically designed to intimidate and to influence the judges' future rulings in pending litigation. Her online campaign to influence judges in pending litigation threatened the independence and integrity of the judiciary. Respondent's conduct also caused the judges concern for their personal safety.

In her brief, respondent asserts there is no evidence any of her statements were intended to be intimidating or threatening to the judges. Rather, she claims her statements were within the scope of the First Amendment and were intended to "encourage the public, to extoll their elected judges to do justice, listen to the evidence, apply the law, and protect children."

[3] **[4]** We disagree and take strong exception to respondent's artful attempt to use the First Amendment as a shield against her clearly and convincingly proven ethical misconduct. As the United ***1076** States Supreme Court noted in *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991):

> It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech"

an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal. *Sacher v. United States,* 343 U.S. 1, 8, 72 S.Ct. 451, 454, 96 L.Ed. 717 (1952) (criminal trial); *Fisher v. Pace,* 336 U.S. 155, 69 S.Ct. 425, 93 L.Ed. 569 (1949) (civil trial). Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In re Sawyer,* 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be. There, the Court had before it an order affirming the suspension of an attorney from practice because of her attack on the fairness and impartiality of a judge. The plurality opinion, which found the discipline improper, concluded that the comments had not in fact impugned the judge's integrity. Justice Stewart, who provided the fifth vote for **28 reversal of the sanction, said in his separate opinion that he could not join any possible "intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct." *Id.,* at 646, 79 S.Ct., at 1388. He said that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." *Id.,* at 646–647, 79 S.Ct., at 1388–1389. The four dissenting Justices who would have sustained the discipline said:

> "Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer."

....

"He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." *Id.,* at 666, 668, 79 S.Ct., at 1398, 1399 (Frankfurter, J., dissenting, joined by Clark, Harlan, and Whittaker, JJ.).

Likewise, in *Sheppard v. Maxwell,* where the defendant's conviction was overturned because extensive prejudicial pretrial publicity had denied the defendant a fair trial, we held that a new trial was a remedy for such publicity, but

> "we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*" 384 U.S., at 363, 86 S.Ct., at 1522 (emphasis added).

.....

**29 We think that the quoted statements from our opinions in *In re Sawyer,* 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), and *Sheppard v.* *1077 *Maxwell, supra,* rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), and the cases which preceded it. Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. As noted by Justice Brennan in his concurring opinion in *Nebraska Press,* which was joined by Justices Stewart and Marshall, "[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Id.,* at 601, n. 27, 96 S.Ct., at 2823, n. 27. Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative. *See, e.g., In re Hinds,* 90 N.J.

> 604, 627, 449 A.2d 483, 496 (1982) (statements by attorneys of record relating to the case "are likely to be considered knowledgeable, reliable and true" because of attorneys' unique access to information); *In re Rachmiel,* 90 N.J. 646, 656, 449 A.2d 505, 511 (N.J.1982) (attorneys' role as advocates gives them "extraordinary power to undermine or destroy the efficacy of the criminal justice system"). We agree with the majority of the States that the "substantial likelihood of material prejudice" standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials.

Gentile, 501 U.S. at 1071–73, 111 S.Ct. at 2743–44.

Applying this reasoning herein, respondent, as an officer of the court, is held to a higher standard than a non-lawyer member of the public. As we stated in the matter of *In re: Thomas,* 10–0593, p. 11 (La.6/25/10), 38 So.3d 248, 255:

> An attorney is trained at law, has taken an oath, assumes a position of public trust and holds himself out to the public as being fit and capable of handling its funds and problems. The attorney has assumed a position of responsibility to the law itself and any disregard for the ****30** law is more serious than a breach by a layman or non-lawyer. He is an officer of the Court.

By holding the privilege of a law license, respondent, along with all members of the bar, is expected to act accordingly. This is particularly so when a lawyer is actively participating in a trial, particularly an emotionally charged child custody proceeding. Respondent in this instance "is not merely a person and not even merely a lawyer. [She] is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." *See Gentile, supra.* And as such, her "[o]bedience to ethical precepts require[d] abstention from what in other circumstances might be constitutionally protected speech," to preserve the integrity and independence of the judicial system. *Id.*

The appropriate method for challenging a judge's decisions and evidentiary rulings, as respondent even conceded, is through the writ and appeal process, not by starting a social media blitz to influence the judges' and this Court's rulings in pending matters and then claiming immunity from discipline through the First Amendment.

***1078** Rather than protected speech, the evidence clearly and convincingly shows respondent's online and social media campaign was nothing more than an orchestrated effort to inflame the public sensibility for the sole purpose of influencing this Court and the judges presiding over the pending litigation. As such it most assuredly threatened the independence and integrity of the courts in the underlying sealed domestic matters. Moreover, the testimony irrefutably establishes both presiding judges perceived the campaign as a threat to their personal security and as an attempt to intimidate and harass them into ruling as the petitioners wanted.

We also find the ultimate result of the viral blitz was the recusal of both judges from the underlying domestic cases as well as other cases involving ****31** respondent as counsel. As Judge Gambrell testified, to which Judge Amacker would agree:

> A Judge is a human being also and it is very difficult for me to feel that I am exercising my integrity and being independent when I'm being constantly barraged by allegations that are just completely false. It is very difficult for a Judge to make decisions without knowing that all of this intimidation and harassment is out there.
>
> It is insulting to me as an—well, I practiced law for 30 years. I'm a mother of six daughters. It would have been better for [respondent] just to drive across the state line and come sit in the court and actually see what was being done. As an advocate for the children or whatever as opposed to making these malicious attacks to the point—I think it was designed to run me from the case. Intimidate me to the point that I felt that there was no way to be fair or impartial.
>
> That's basically what it did. I tried—I've never been one to run away from doing what I've been called to do, but this was just more than I could bear. I have a family like everybody else and it just would not stop. My—I wanted to stop it at the Show Cause hearing so that I could just look at everybody and say look, this is not how we do this. Give me a chance to look at this and let everybody have access to the court system. But everybody just went on their own tears and it took away my ability to really do anything with the case.

Though not as blatantly offensive as the blitzing itself, this result nevertheless prejudiced the administration of justice by causing undue delays in numerous time sensitive matters, some of which these judges had presided over for a long period of time. Therefore, we find respondent's overall conduct in this regard was prejudicial to the administration of justice in violation of Rule 8.4(d).

Accordingly, having found the ODC has proven by clear and convincing evidence respondent's conduct violated Rule 3.5(a) and (b) and Rule 8.4(a), (c), and (d), we must determine the appropriate sanctions.

Sanctions

[5] **[6]** **[7]** In determining a sanction, we are mindful disciplinary proceedings are not primarily to punish the lawyer, but rather are designed to maintain high standards ****32** of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *Louisiana State Bar Ass'n v. Reis,* 513 So.2d 1173, 1177–78 (La.1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington,* 459 So.2d 520, 524 (La.1984).

Louisiana Supreme Court Rule XIX, § 10(C) states, in imposing a sanction after ***1079** a finding of lawyer misconduct, this Court shall consider four factors:

(1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;

(2) whether the lawyer acted intentionally, knowingly, negligently;

(3) the amount of actual or potential injury caused by the lawyer's misconduct; and

(4) the existence of any aggravating or mitigating factors.

As required, we turn now to a consideration of each factor.

Violated Duties

As the hearing committee and disciplinary board both found, there is no question respondent's misconduct violated a duty to the legal system, as well as the public. More importantly, we find her misconduct also violated a duty to the children in the underlying domestic litigation. In child custody and abuse cases, our courts are extremely cognizant of the need to protect the identity and privacy of the children and their best interest is always at the forefront of any litigation involving their welfare. *State ex rel. S.M.W.,* 00-3277, p. 21 (La.2/21/01), 781 So.2d 1223, 1238 ("primary concern of the courts and the State remains to secure the best interest for the child"); La. Civ.Code art. 131 (custody awarded "in accordance with the best interest of the child"); *Kieffer v. Heriard,* 221 La. 151, 160, 58 So.2d 836, 839 (1952)("well established that the paramount consideration ****33** ... is the welfare and best interest of the child"). This is why such cases are often sealed as the litigations herein were, one of which was sealed at the request of respondent. With that being said, we take umbrage with respondent's online and social media activity that not only released the names of these children, but linked their audio conversations with their mother detailing their abuse allegations and posted their faces on the world wide web for anyone to see. We find very telling in this regard the following discussion respondent had with ODC counsel in her sworn statement:

> Q. And so part of the concern is in now in Louisiana in a knowingly sealed matter because you are the one who asked it be sealed, I assume it was granted and was sealed, that now in the public arena you're discussing and complaining about those very proceedings which are sealed.
>
> A. Well, I guess my understanding of sealing records is that you would be sealing the sensitive evidence or information in the record, not the fact that the record exists itself. So we never and I would not allow the drawings that were submitted as part of that record to be made part of the social—
>
> Q. Okay.
>
> A. —you know,—
>
> Q. So the drawings and none of the excerpts from the journal, none of that was ever—
>
> A. No.

Q. —linked or attached or images uploaded and connected with any of the social media sites?

A. No, absolutely not.

Q. Okay.

A. They've very compelling images but I believe they belong to H. So I wouldn't—didn't want to do that to her.

We agree, but would also extend respondent's reasoning and concerns to the children's audio recordings, their photos, and their names, some of which are still **34 accessible even today. In her misguided attempt to protect the children, respondent intentionally facilitated their exposure, breaching what we would consider one of the greatest duties owed by an attorney in a domestic litigation involving *1080 minor children and allegations of sexual abuse.

Intentional, Knowing, Negligent Action

The ABA Standards define the terms intent, knowledge, and negligence. Intent is defined as "the conscious objective or purpose to accomplish a particular result." Knowledge is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Whereas negligence is "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation."

Both the hearing committee and disciplinary board found the evidence proved respondent acted knowingly if not intentionally. As to the internet and social media campaign, respondent repeatedly admitted her purpose was to increase the chance of this Court granting her writ, to "influence the judges to apply the law and look at the evidence ... through whatever means available," and "to get local and national media attention on this particular case." In her sworn statement, respondent explained her reasons for employing her social media blitz:

Q. ... you've afforded yourself the appeal route although we discussed at least in the one instance where that was not, didn't give the results that y'all were still looking for.

A. Correct.

Q. But you understand that's how our system is set up, and you go to district court and if the ruling is wrong and or you disagree with it factually or legally and you have grounds to then you appeal and you can go up to the circuit court and to the Louisiana Supreme Court. What I don't understand is or what I'm trying to understand is **35 why the two pronged attack. I mean you know you have access to appeal Judge Amacker—

A. Uh-huh.

Q. —since that's the case you're involved in, okay, and if she's wrong to get her ruling overturned, right?

A. Right.

Q. And y'all availed yourself of that?

A. Correct.

Q. Why also then used the online slash social media attack to effect her rulings at the district court level?

A. Yeah, well, you know, my initial thing that I wanted to say was why not because we're talking about little kids here and used every available resource to try and protect them. So as a general response to your question that would be my answer as to why I would use any available and appropriate tactic to help these kids. Whether or not I thought—I mean at the moment the—I think the social pressure that, you know, we thought —because the appeal process is a long process, in the meantime the kids are being exposed, you know, and they're not being protected. So I think maybe the better answer to your question is that our concern was that even if we were successful on the appeal or the writ it was going to take a while and in fact it did. I think it took up two months, two maybe two and a half months. And even if we had been successful that would have been two and a half months where these children were being exposed to this trauma and we were just trying to do anything we could to protect them.

Q. Did you ever think that this—the kind of social media approach that there was something wrong with it or that it jeopardized you?

> A. I wanted to be careful that I didn't do anything inappropriate. I understand *1081 that I'm a lawyer and that I have to protect, you know, that my—I'm very, very, very serious about my own ethics and my own integrity. So—but, you know, I served in the military, I have a very strong sense of what it means to be a U.S. citizens and I absolutely believe in being active and pro-active and just standing up and taking a voice. I'm standing up against what I do believe is wrong in an appropriate manner and I didn't see anything wrong with reaching out to other citizens and saying I have a problem with this, do you agree with me, and if you do come join me. I think that's **36 just, you know, inherently American. So, no, I guess the short answer is no, did I proceed with caution, yes, I did. I had—I had to have a sit down with myself about whether or not how involved I wanted to be in drafting the petition. But after considering it, you know, Raven needed my help. She didn't, you know, she was too close to it emotionally to be coherent so I helped her shape her ideas. I helped her be more coherent in what she wanted to say. And I have no—I can't regret doing that.

We agree this evidence demonstrates both a level of intent and knowledge. As previously discussed, we likewise find the evidence demonstrates respondent acted knowingly, if not outright intentionally, in the dissemination of false information on social media/internet and in her motions to recuse as well as in her request for public action in calling the presiding judges to express concern and outrage.

Regarding the actual faxing of the petition to the Marion County Court and Judge Amacker's office, we find respondent's participation was knowingly made, *i.e.*, with "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." Without question, once respondent knowingly and intentionally signed the petition, it was published and released to anyone with access to the internet. Her act in signing an online petition directly related to a pending litigation in which she was enrolled as counsel thus rises to the level of knowledge, because although she did not fax the petition, she, given her internet and social media suavity, clearly was aware the petition she signed could and might very well be printed and sent to the judges and courts to whom the petition was addressed. Though "uncomfortable" upon learning of the fax shortly after it was sent, respondent could not admit she was surprised. And when asked if she said anything that either directed or encouraged her client to fax the petition, she conceded:

> I can't remember anything I said that was directly encourage [sic] her but I don't know that I did anything to discourage her, you know, honestly. You know, there is a lot of frustration with this case....

**37 Thus, we find this evidence does demonstrate knowledge on respondent's part.

Actual or Potential Harm

Furthermore, we find the evidence shows respondent's conduct caused actual and potential harm to the independence and integrity of the judicial system and also caused the judges concern for their personal well-being. We also find her exposure of the children on the world wide web extremely harmful.

Aggravating and Mitigating Factors

[8] After reviewing the record, we adopt the hearing committee's and disciplinary board's findings on the aggravating and mitigating factors in this case. In aggravation, we find respondent: (1) acted dishonestly and selfishly, (2) engaged in a pattern of misconduct involving multiple offenses, (3) had substantial experience in *1082 the practice of law having been admitted to the practice of law since October 2000, and, most importantly, (4) absolutely refuses to acknowledge the wrongful nature of her conduct or show any remorse for her actions. It is this utter lack of remorse that astonished this Court when she appeared before us for oral argument. Her defiant attitude as to the rules of our profession vis-à-vis her First Amendment rights was clearly evident in her response to questions posed by several members of the Court. Completely unapologetic for her misconduct, respondent made it abundantly clear she would continue to use social media and blogs to effect her agenda to bring about the changes she sought in the underlying cases. Respondent will not admit to any wrong doing whatsoever.

There can be no greater professional calling than to stand as an attorney at the bar of justice and assert as well as defend the rights of citizens. With that being said, we have long recognized the utmost importance of our rules of

professional conduct to maintain and preserve the dignity and integrity of our time-honored profession. Any lawyer privileged to stand at the bar and pursue this noble **38 endeavor has taken an oath to abide by those rules. This Court will not tolerate respondent's defiant attitude and unapologetic actions, which make a mockery of our rules and traditions.

[9] In imposing sanctions we also look at any mitigating factors. The only mitigating factor in this case is respondent's absence of a prior disciplinary record.

While there is no Louisiana case directly on point with the manner in which respondent facilitated her misconduct, *i.e.*, through social media and the internet, we do find the serious nature of her actions requires serious sanction. In these cases, we look to the ABA Standards for guidance in determining the baseline sanction. Under the standards relevant herein, disbarment is generally appropriate when a lawyer:

(1) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceedings; or

(2) engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

ABA Standards 6.31(b) and 5.11(b), respectively. Suspension is generally appropriate when a lawyer:

> engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

ABA Standard 6.32. Accordingly, the applicable baseline sanction under the ABA Standards ranges from suspension to disbarment.

Although the manner in which respondent violated the applicable rules of professional conduct is novel, the misconduct—*ex parte* communication, dissemination of false and misleading information, and conduct prejudicial to the **39 administration of justice—is hardly so. As both the hearing committee and disciplinary board properly noted, our prior jurisprudence provides us guidance in dealing with professional misconduct involving lawyers who engage in improper communications with and about judges and in conduct dishonest and prejudicial to the administration of justice.

For example, in the matter of *1083 *In re: White,* 08–1390, p. 14 (La.12/02/08), 996 So.2d 266, 274, this Court held "disbarment is the applicable baseline standard for respondent's conduct in engaging in *ex parte* communications with the trial judge presiding over his client's pending domestic litigation." This Court disbarred attorney White for, among other things, his *ex parte* communication with the presiding judge, Ronald Bodenheimer, about seafood pricing information.

In the matter of *In re: Lee,* 07–2061, p. 10 (La.02/16/08), 977 So.2d 852, 858, this Court stated "the language of Rule 3.5(b) clearly and broadly prohibits all *ex parte* communication with a judge during the course of a proceeding." The attorney therein was suspended for six months, with all but 45 days deferred, subject to the condition he attend Ethics School and obtain five additional hours of continuing legal education in professionalism, for his misconduct which included extremely vile and insulting remarks to the trial court and an *ex parte* communication with the judge during the course of a proceeding. This Court noted his behavior presented a common theme of "lack of respect for the dignity, impartiality, and authority of the district court." *Lee,* 07–2061 at p. 10, 977 So.2d at 858. And in *Louisiana State Bar Ass'n v. Harrington,* 585 So.2d 514 (La.1990), this Court found a lawyer need not represent a party in a case to be subject to the Rule 3.5(b) proscription against *ex parte* communication and suspended an attorney for 18 months for making false statements, engaging in conduct that unduly embarrassed, delayed or burdened a third person, and engaging in improper *ex parte* communication with a judge. Considering the attorney's conduct "caused **40 no harm to his clients and his inexperience and remorse," this Court reduced the suspension to nine months on rehearing. *Harrington,* 585 So.2d at 524.

We likewise suspended an attorney for six months, with all but 30 days deferred, for making false statements about judges in a hypothetical attached to an appellate brief in which the attorney described a judge's ruling as having "violated not only controlling legal authority but the very principals [sic] (honesty and fundamental fairness) upon which our judicial system is based." *In re: Simon,* 04–2947, p. 4 (La.6/29/05), 913 So.2d 816, 819. In the matter of *In re: Larvadain,* 95–2090 (La.12/8/95), 664 So.2d 395, 395–96, this Court suspended a lawyer for three months, fully deferred, and placed him on unsupervised probation for one year with special conditions, for having accused the judge of being a racist while cursing him, threatening him, and attempting to intimidate him.

Notably, we also suspended an attorney for one year for accusing a judge of being "dishonest, corrupt and engaging in fraud and misconduct," and for causing his unfounded accusations to be published in the local newspaper. *Louisiana State Bar Ass'n v. Karst,* 428 So.2d 406, 408 (1983).

As these cases demonstrate, the discipline for similar misconduct corresponds with the ABA recommended baseline sanction ranging from suspension to disbarment. Respondent's misconduct is further distinguishable because of her use of the internet and social media to facilitate her misconduct. As a result, the petition and associated offensive postings had and still have the potential to reach a large number of people world-wide and remain present and accessible on the world wide web even today. Coupled with her complete lack of remorse and admitted refusal to simply allow our system of review to work without seeking outside interference, respondent's misconduct reflects a horrifying lack of respect for the dignity, impartiality, and authority of our courts and our judicial process as a whole. As noted by the United State Supreme Court:

> ***1084 **41** The vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system. Though cost and delays undermine it in all too many cases, the American judicial trial remains one of the purest, most rational forums for the lawful determination of disputes. A profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom. But constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases.

Gentile, 501 U.S. at 1058, 111 S.Ct. at 2736. Respondent's social media campaign conducted outside the sealed realm of the underlying judicial proceedings constitutes, in our view, an intolerable disservice to these traditions and our judicial system, which the constraints of our rules of professional conduct seek to safeguard against. Accordingly, we find her ethical misconduct warrants the highest of sanction—disbarment.

DECREE

Upon review of the findings and recommendations of the hearing committee and the disciplinary board, and considering the record, briefs, and oral arguments, it is ordered that Joyce Nanine McCool, Louisiana Bar Number 27026, be and hereby is disbarred. Her name shall be stricken from the roll of attorneys and her license to practice law in the State of Louisiana shall be revoked. All costs and expenses in the matter are assessed against respondent in accordance with Louisiana Supreme Court Rule XIX, § 10.1, with legal interest to commence thirty days from the date of finality of this Court's judgment until paid.

WEIMER, Justice, concurs in part and dissents in part and assigns reasons.

GUIDRY, Justice, concurs in part and dissents in part.

CRICHTON, Justice, additionally concurs and assigns reasons.

CANNELLA, Justice, concurring in part and dissenting in part.

WEIMER, J., concurring in part, dissenting in part.
I agree with the majority that the respondent has engaged in professional misconduct. However, I find some aspects of respondent's conduct amounted to constitutionally protected speech, for which respondent cannot be sanctioned. Furthermore, I find the majority's sanction of disbarment to be disproportional to respondent's misconduct.

The majority finds that the respondent's online and social media campaign was an orchestrated effort to inflame the public sensibility and to direct public criticism toward the judges presiding over child custody litigation in both Louisiana and Mississippi. I do not doubt this was the respondent's motivation. I also have no doubt that the respondent was wrong on several points for which she sought to have the public become incensed. Contrary to respondent's internet postings, the Mississippi judge did not ignore audio recordings of the children. Rather, the recordings were never offered into evidence in the Mississippi proceeding. Similarly, and contrary to respondent's postings, the Louisiana judge did not ignore evidence because proceedings in Louisiana were appropriately stayed in deference to the proceedings pending in Mississippi. After the Louisiana judge realized she would likely be a witness in the respondent's disciplinary proceedings, the judge recused herself "to avoid the appearance of impropriety" in two unrelated cases in which respondent ***1085** was counsel of record. However, the respondent followed this up by filing motions in two other unrelated cases in which the respondent misrepresented the judge had recused herself because of the judge's "extreme bias" against the respondent.

Making misrepresentations in court pleadings is sanctionable. The misrepresentations within the respondent's online and social media campaign and the fact that they were made by a lawyer representing the mother's custody interests are also sanctionable. *See Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1038, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (upholding the ability of a state supreme court to sanction an attorney who "knew or reasonably should have known his remarks created a substantial likelihood of material prejudice" to a judicial proceeding). The misrepresentations in respondent's statements justify a sanction under Rule 3.5 [1] for the substantial likelihood it would prejudicially disrupt the child custody proceedings, "since lawyers' statements are likely to be received as especially authoritative." *Id.* at 1074, 111 S.Ct. 2720. Also, to the extent respondent maintained internet resources, such as websites and social media, directing petitions to be sent to the Louisiana and Mississippi judges, I construe respondent's actions as sanctionable ex parte communications in violation of Rule 3.5. [2] This court's majority goes further, however, and sanctions the very acts of criticizing judges and inspiring public criticism toward judges. In so doing, the majority impermissibly sanctions the respondent for engaging in constitutionally protected speech.

As the Court in *Gentile* explained, "[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Id.* at 1034–35, 111 S.Ct. 2720. Furthermore, "limits upon public comment about pending cases are 'likely to fall not only at a crucial time but upon the most important topics of discussion.' " *Id.* at 1035, 111 S.Ct. 2720, *quoting Bridges v. California,* 314 U.S. 252, 268, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

Indeed, because of the adversarial nature of our system of justice, criticism of judges is an expected part of the judicial system. Criticism of judges takes place regularly by parties who perceive they have been aggrieved by judges' decisions. The appeals process actually requires parties—and the lawyers who represent them—to identify and criticize the aspects of judicial decisions with which they disagree. Had the respondent not peppered her criticism with misrepresentations, engaged in ex parte communications, engaged in conduct designed to gain an unfair advantage in on-going litigation, and broken a court-ordered seal imposed to protect confidentiality, the respondent's online criticisms of the judges' handling of the child custody matter would likely have ***1086** been fully protected speech. [3] As the Supreme Court explained in *Bridges,* 314 U.S. at 270–71, 62 S.Ct. 190:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion .... And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Here, the respondent perceived there to be mistreatment of her client's children and looked to the judicial system to address that mistreatment. In light of her evaluation of the situation, respondent's initial efforts to invoke judicial action were both expected and appropriate. However, as an officer of the court, a lawyer must abide by the principle that cases should be decided by careful deliberation and application of the facts to the law, not by public clamor. Therefore, after the litigation was complete, the respondent would have been entitled to disseminate appropriate criticism—on the internet if she

preferred—that the courts ignored the rule of law, if her representations had been true. But they were not.

Respondent cannot even lay claim to holding a reasonable belief in the veracity of some of her most significant criticisms. As noted earlier, there was simply no evidence that the Mississippi court had ignored tape recordings, which allegedly revealed child abuse, when those recordings had never been submitted for the court's consideration. I emphasize this example, because I believe it underscores that the respondent is passionate in her belief there is a need for society to prevent child abuse. Passionate belief is usually preferable to apathy and, regarding the need for society to prevent child abuse, only an unreasonable person would argue in favor of apathy. In every given case as to whether abuse has actually occurred and must be stopped, society has chosen the courts to be the ultimate arbiters. Because respondent, in her privileged role as a lawyer, is an officer of the court, both society and the government serving it have a justified expectation that officers of the courts will temper their public criticisms with truthful statements. *See Gentile,* 501 U.S. at 1031, 111 S.Ct. 2720 (explaining that lawyers "are key participants" in the justice system, "and the State may demand some adherence to that system's precepts in regulating their speech and conduct.").

Respondent certainly did not champion the rule of law in her handling of information relating to her client's children. Respondent sought and obtained the sealing of the record in a case dealing with the children. However, respondent later released information in violation of the seal that she had obtained from the judicial system.

Therefore, I concur with the majority inasmuch as I find discipline is warranted for respondent's misrepresentations, ex parte communications during on-going litigation, and breaking of a court-ordered seal. I dissent, however, from the majority's inclusion of respondent's acts of online criticism (apart from the impermissible content just noted) as sanctionable conduct.[4]

***1087** I further dissent as to the sanction. The Office of Disciplinary Counsel (ODC) recognizes that "[t]here is no Louisiana Jurisprudence addressing misconduct similar to Respondent's" and relies on the jurisprudence of two other states[5] to support the recommended sanction of one year and one day suspension. While it is true that the novelty in Louisiana of the issues in this case presents certain challenges, this court is not without guidance and that guidance does not point to the disbarment the majority now imposes.

Specifically, the ABA Standards for Imposing Lawyer Sanctions address violations of a lawyer's duties to the legal system. Respondent's violations of her duties to the legal system are the crux of this case, even under the majority's analysis. However, under the rubric of "Improper Communications with Individuals in the Legal Systems," ABA Standard 6.32 provides a baseline sanction of a suspension for an ex parte "communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding." Under the same rubric of improper communications, disbarment is reserved for an ex parte communication which "causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding." ABA Standard 6.31(b). However, in its prosecution of this case, the ODC did not charge respondent with violating Rule 3.6[6] or even allege that respondent's ***1088** actions created a danger of imminent and substantial harm. Thus, the baseline sanction is suspension because of the potential for harm rather than a showing of actual harm. *See* ABA Standard 6.32; *compare* ABA Standard 6.31(b).

In contrast to these standards establishing a baseline of suspension, the majority's sanction analysis relies on *In re White,* 08–1390 (La.12/02/08), 996 So.2d 266, 274, in which this court determined a lawyer's ex parte communications fell within a baseline sanction of disbarment. The majority presently describes our analysis in *In re White* as turning on the fact that the ex parte communication was "about seafood pricing information." *In re McCool,* No. 15–0284, op. at 1083 (La.06/30/15). While it is true that seafood prices were one topic of the lawyer's ex parte communications in *In re White,* the majority presently fails to mention that the seafood pricing information supplied by the lawyer was stipulated to be "relatively useless" to the judge and, therefore, our finding in *In re White* that the baseline sanction for certain ex parte communications was disbarment actually rested on the lawyer engaging in other communications. *In re White,* 08–1390 at 7, 996 So.2d at 270. To benefit

his employer in a pending domestic dispute case, the lawyer engaged in ex parte communications to arrange for providing lavish gifts to a judge and his family. *Id.* at 7–8, 996 So.2d at 270–71. Specifically, the lawyer stipulated to the following ex parte communications with Judge Bodenheimer, which were found to have been made with the intent to benefit the lawyer's client, restauranteur Al Copeland:

> 14. During the course of the Copeland/Hunter domestic relations proceedings, Bodenheimer requested and respondent provided complimentary appetizers and refreshments at one of Copeland's restaurants to Bodenheimer's daughter for a birthday. Although it was (and is) a regular and common practice of Copeland's restaurants to provide complimentary food and beverages to various members of the public, respondent acknowledges that he should have declined Judge Bodenheimer's request.
>
> 15. Additionally, on another occasion, respondent provided promotional gift cards for complimentary food and refreshments at a Copeland's restaurant to members of Bodenheimer's staff during the time that the Copeland/Hunter proceedings were then pending. Although it was (and is) a regular and common practice of Copeland's restaurants to provide complimentary food and beverages to various members of the public, respondent acknowledges that he should have declined to furnish these promotional gift cards.

In re White, 08–1390 at 7–8, 11–12, 996 So.2d at 270, 272–73.

Here, and unlike *In re White,* there has been no allegation that the respondent engaged in ex parte communications as part of a *quid pro quo* exchange to curry favor with a judge during a pending case. Aside from *In re White,* which plainly deals with misconduct of a more egregious nature than the misconduct here, the majority's sanction analysis relies on cases in which this court suspended lawyers who engaged in ex parte communications. *In re McCool,* No. 15–0284, op. at 1082–83 (*citing In re Lee,* 07–2061, p. 11 (La.02/26/08), 977 So.2d 852, 858 (suspension of 6 months, all but 45 days deferred); *In re Simon,* 04–2947 (La.06/29/05), 913 So.2d 816, 819 (suspension of 6 months, all but 30 days deferred); *In re Larvadain,* 95–2090 (La.12/08/95), 664 So.2d 395 (suspension of 3 months, fully deferred); *Louisiana State Bar Ass'n v. Harrington,* 585 So.2d 514 (La.1990) (suspension of 18 months); and *Louisiana State Bar Ass'n v. Karst,* 428 So.2d 406 (La.1983) (suspension of 1 year)). To disbar the respondent here, ***1089** considering the suspensions cited by the majority, reveals that disbarment is not only disproportionate to the misconduct, but is impermissibly punitive. *See Louisiana State Bar Ass'n v. Reis,* 513 So.2d 1173, 1177–78 (La.1987) (noting the primary purposes of disciplinary proceedings are to maintain the high standards and integrity of the legal profession, protect the public, and to deter misconduct, rather than punish the lawyer).

The suspension of one year and one day recommended by the hearing committee, disciplinary board, and ODC is consistent with the baseline of suspension under the ABA Standards. I would impose the recommended suspension, with one alteration. Because the misconduct here is novel in that this court has never directly addressed an attorney's use of social media and the internet and the ODC points to only two other states that have addressed misconduct involving improper internet postings, I would defer all but six months of the suspension subject to the condition that the suspension would be fully imposed if respondent were to commit misconduct during the period of active or deferred suspension. *See In re Raspanti,* 08–0954, p. 23 (La.3/17/09), 8 So.3d 526, 540 (finding as a significant mitigating factor that "we are issuing a sanction for a matter for which no one has been sanctioned previously."). [7] The recommended suspension is also supported by the mitigating factor that respondent has no disciplinary history in over 14 years as a member of the bar.

Thus, I respectfully concur in part and dissent in part, with the opinion of the majority.

GUIDRY, Justice, concurs in part and dissents in part.
I concur that respondent should be sanctioned, but I dissent as to majority's imposition of disbarment and I would impose a suspension of three years.

CRICHTON, J., additionally concurs and assigns reasons:
I wholeheartedly agree with the majority opinion in this matter. I write separately, however, to touch upon what I believe to be an outrageous disregard for the sacred profession we, as well as respondent, have chosen.

The majority aptly notes that holding a law license is a great privilege. As United States Supreme Court Justice Benjamin Cardozo, then Judge on the Court of Appeals of New York, also stated almost a century ago: "Membership in the bar is a privilege burdened with conditions." *In re Rouss,* 221 N.Y. 81, 116 N.E. 782, 783 (1917). Those conditions are numerous, and do not come without great sacrifice. Respondent is an " 'officer of the court' in the most compelling sense," [1] as the majority so correctly finds, and consequently, she is held to a higher standard than a non-lawyer member of the public. She cannot confuse a First Amendment claim of the right to free speech with a serious and intentional violation ***1090** of the Rules of Professional Conduct, which are rules that apply both to her and to every lawyer. Not only did her conduct cause major disruptions in the course of litigation, it also unnecessarily put members of the judiciary at risk.

But perhaps respondent's most astounding and egregious action is her complete and utter lack of remorse, and defiance in the face of her impending sanction. At oral argument of this matter, respondent admitted she did "not have any remorse for [my] conduct" and that she would "continue to speak out and advocate for change." It is unfortunate that respondent does not seem to understand that being a zealous advocate does not equate to such repugnant disrespect for the system we are charged to honor and serve. It is for these reasons I agree with the majority's decision to impose the most serious of sanctions: disbarment.

CANNELLA, J.,* concurring in part and dissenting in part.

I dissent in part as to the sanction and would impose a three year suspension, but I concur in all other respects.

All Citations

172 So.3d 1058, 2015-0284 (La. 6/30/15)

Footnotes

* Retired Judge James L. Cannella, assigned as Justice ad hoc, sitting for Hughes, J., recused.

1 Respondent, a Mandeville attorney, is 52 years of age and was admitted to the practice of law in Louisiana in 2000.

2 The children's names have been redacted from the record of this matter and only their initials are used to protect and maintain their privacy. All phone numbers and addresses for social media and internet sites have been redacted as well to further ensure their privacy.

3 To date, no law enforcement agency or court has found any merit to the serious allegations made against Raven's former husband.

4 In denying Raven's writ application, the court of appeal, with a panel composed of Judges Guidry, Pettigrew, and Welch, stated: "[o]n the showing made, we find no error."

5 Pursuant to a September 2, 2008 Agreed Judgment in the Mississippi case, the parties agreed and were ordered not to disclose any audio or video recordings of the minor children to anyone except counsel of record and the court, and not to make said recordings available to anyone except the appropriate investigatory agencies at their request. Respondent argues the Agreed Judgment does not bind her because she is not a party to the Mississippi proceeding, or counsel in the proceeding, or even an attorney licensed to practice law in Mississippi.

1 Rule 3.5 of the Louisiana Rules of Professional Conduct provides:

> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
> (c) communicate with a juror or prospective juror after discharge of the jury if:
> (1) the communication is prohibited by law or court order;
> (2) the juror has made known to the lawyer a desire not to communicate; or
> (3) the communication involves misrepresentation, coercion, duress or harassment; or
> (d) engage in conduct intended to disrupt a tribunal.

2 The Rules of Professional Conduct prohibit a lawyer from utilizing others to do what a lawyer is prohibited from doing. *See* Rule 8.4(a).

3 Although the respondent's brief relies heavily on First Amendment protections of speech, during oral argument, the respondent's repeated comments about the possibility of losing her license to practice law tacitly recognize that a lawyer's speech is subject to regulation.

4 The majority finds that the respondent's "overall conduct" constitutes misconduct by "clear and convincing evidence." *In re McCool,* No. 15–0284, op. at 1075, 1078 (La.06/30/15). Thus, the majority sweeps both protected and un-protected speech into the category of sanctionable conduct.

I certainly share the majority's concern that unfounded criticism can impede the judicial process. As one commentator also has noted, "with increasing frequency ... attacks on the judiciary ... are purely ideologically driven. This type of 'criticism' ... undermines the rule of law by suggesting that judges are free to ignore the relevant facts or the applicable law to reach the outcome sought by a special interest group." Steven M. Puiszis, *The Need to Protect Judicial Independence,* 55 No. 4 DRI For Def. 1 (Apr.2013). Caustic though it may be, such speech even by a lawyer is protected by the First Amendment, as long as the speech does not, as it does here, contain misrepresentations or as the Supreme Court has explained, present a "substantial likelihood of material prejudice" to a case. *Gentile,* 501 U.S. at 1037, 111 S.Ct. 2720.

5 The ODC cited unpublished disciplinary cases. It cited the public reprimand ordered in *The Florida Bar v. Conway,* SC08–326 (Fla.10/29/08), 2008 WL 4748577, and administered by the Florida Bar in *The Florida Bar v. Sean William Conway,* TFB File No. 2007–51,308(17B), *available at* https://www.floridabar.org/DIVADM/ME/MPDisAct.nsf/daToc!OpenForm&AutoFramed&MFL =Sean William C#onway&ICN=200751308&DAD=Public Reprimand (last visited 6/4/15).

In *Conway,* the lawyer maintained a website entitled "Judge Aleman's New (illegal) 'One–Week to prepare' policy," and referred to the judge throughout the website as an "EVIL UNFAIR WITCH." *Conway,* TFB File No. 2007–51,308(17B). The reprimand stated: "although attorneys play an important role in exposing valid problems within the judicial system, statements impugning the integrity of a judge, when made with reckless disregard as to their truth or falsity, erode public confidence in the judicial system without assisting to publicize problems that legitimately deserve attention."

The ODC also cited *In re: Kristine Ann Peshek,* M.R.23794 (Ill.5/18/10), *available at* http://www.illinoiscourts.gov/SupremeCourt/Announce/2010/05181.pdf, and accepting the petition for discipline *available at* http://www.iardc.org/09CH0089CM.html (last visited 6/4/15). According to the petition in *Peschek,* the attorney referred to a judge as "Judge Clueless" and referred to another judge as "a total a* * * * * *."

6 Rule 3.6(a) of the Rules of Professional Conduct prohibits a lawyer from "mak[ing] an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

7 Noting the novelty of internet blogging, one commentator suggests the rules governing the legal profession currently fail to equate blogging with an ex parte communication. *See* Rachel C. Lee, Symposium: *Media, Justice, and the Law:* Note: *Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era,* 61 Stan. L.Rev. 1535 (April 2009). Here, respondent's conduct, such as her online petition, went beyond the type of commentary typically associated with blogging and, as earlier noted, I have no difficulty finding that the respondent has engaged in communications which violate the Rules of Professional Conduct. However, the commentary just cited underscores that this is a developing area of the law, a reality which weighs against imposing disbarment under the facts presented.

1 *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (internal citations omitted).

* Retired Judge James L. Cannella, assigned as Justice ad hoc, sitting for Hughes, J., recused.

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Social media endorsements: Undue flattery will get you nowhere

July 2016 | Eye on Ethics

by Peter Geraghty, Director, ETHICSearch

It goes without saying, but I'll say it again: social media has a way of raising ethical issues that filter into the day-to-day practice of law in ways that may not have been fully anticipated, but at the same time raise familiar themes that the profession has addressed in different nonelectronic contexts over the past 100 years.

Take for example the subject of endorsements that lawyers receive either from clients or from other lawyers on their social media websites.

What if a lawyer who concentrates his practice in real estate transactions and who never engages in litigation receives an endorsement from a former client lauding his ability as a litigator? Or where a lawyer who has a Social Security disability practice gets an endorsement from another lawyer touting his abilities as an estate planner? Does a lawyer have an obligation to monitor his social media page to ensure that the endorsements he receives are accurate?

We at ETHICSearch have produced a variety of columns on social media over the past few years, some of which touch on some of the issues addressed in this month's column. See, e.g., Facebook follies (April 2016), Privacy settings and postings on social media: Etched in plastic or carved in stone? (February 2015), Client reviews: Your thumbs down may come back around (September 2014) and May 2009 entitled, Ringing or stinging endorsements?

ABA Model Rule 7.1

The place to start the analysis is ABA Model Rule 7.1 *Communications Concerning a Lawyer's Services*. The rule states:

> 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.

This is the core ethical principle of lawyer advertising – a lawyer shall not make false or misleading communications either about himself or the services that he provides. In fact, pursuant to a proposal put forth by the Association of Professional Responsibility Lawyers (APRL), all of the ABA Model Rules on lawyer advertising would be withdrawn and replaced by what is in effect the essence of Rule 7.1 so that all lawyer advertising would be regulated by a false and misleading standard. For further information on the APRL proposal, see Mark Tuft, Rethinking Lawyer Advertising Rules that was published in Vol. 23 No. 3 of the Professional Lawyer.

State and local bar ethics opinions

There have been several very recent comprehensive state bar ethics opinions that have addressed a myriad of issues as they relate to lawyers and social media that have also addressed the social media endorsement issue. Most of them focus their analysis under their respective state versions of Model Rule 7.1.

Two of these opinions come from New York State. New York has adopted a very detailed set of advertising rules which are located here and the New York State Bar has also drafted the Social Media Ethics Guidelines which are available here.

New York City Bar Association Opinion 2015-7 *Application of Attorney Advertising Rules to LinkedIn* (2015) began with a detailed discussion of the factors to be considered when making a determination as to whether a lawyer's social media page is to be considered lawyer advertising. These include:

> ... (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising.

Regardless of whether the lawyer's LinkedIn website is considered to be advertising, the committee stated that the false, misleading standard applies to all content on a lawyer's LinkedIn page. The committee stated:

> ...this requirement to avoid false, deceptive or misleading statements exists, regardless of whether the communication is an "advertisement." R. 8.4(c)

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> (lawyers shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").
>
> ... all content that an attorney posts on LinkedIn – or any other social media platform – must be truthful and accurate. For example, attorneys should not list practice areas or skills in which they have little or no experience. *See, e.g., In re Dickey*, 396 S.C. 500 (S.C. 2012). In addition, we concur with the conclusion in NYCLA Ethics Op. 748 that attorneys are responsible for periodically monitoring third-party endorsements and recommendations on LinkedIn "at reasonable intervals" to ensure that they are "truthful, not misleading, and based on actual knowledge." *See also* NYSBA 2015 Social Media Guidelines, at 9 ("A lawyer must ensure the accuracy of third-party legal endorsements, recommendations or online reviews posted to the lawyer's social media profile" and "must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.").

See Also New York County Lawyers' Association Opinion 748 (2015):

> "Because LinkedIn gives users control over the entire content of their profiles, including "Endorsements" and "Recommendations" by other users (by allowing an attorney to accept or reject an endorsement or recommendation), we conclude that attorneys are responsible for periodically monitoring the content of their LinkedIn pages at reasonable intervals...

and West Virginia Opinion 2015-02 *Social Media and Attorneys* (2015):

> Although attorneys are not responsible for the content others post on the attorneys' social networking websites, attorneys: (1) should monitor their social networking websites; (2) must verify the accuracy of any information posted on their social networking websites; and (3) must remove or correct any inaccurate endorsements.

See Also Pennsylvania Bar Association Opinion 2014-300

Ethical Obligations For Attorneys Using Social Media, 2014 Formal Ethics Opinion 8 | North Carolina State Bar *Accepting an Invitation from a Judge to Connect on LinkedIn* (2015)

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Flattery can inflate the ego, but in the case of social media endorsements, it must be sincere. Keep an eye on your social media websites and carefully monitor what others may wish to post about you.

As always, for further guidance, check the local rules of professional conduct, ethics opinions and case law of the jurisdiction. Your state or local bar may also be able to help.

Do you have a legal ethics topic or prickly dilemma that you'd like to see developed into a future Eye on Ethics column? Send your ideas to ETHICSearch@americanbar.org and we'll consider it.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 10-457 **August 5, 2010**
Lawyer Websites

Websites have become a common means by which lawyers communicate with the public. Lawyers must not include misleading information on websites, must be mindful of the expectations created by the website, and must carefully manage inquiries invited through the website. Websites that invite inquiries may create a prospective client-lawyer relationship under Rule 1.18. Lawyers who respond to website-initiated inquiries about legal services should consider the possibility that Rule 1.18 may apply.[1]

I. Introduction

Many lawyers and law firms have established websites as a means of communicating with the public. A lawyer website can provide to anyone with Internet access a wide array of information about the law, legal institutions, and the value of legal services. Websites also offer lawyers a twenty-four hour marketing tool by calling attention to the particular qualifications of a lawyer or a law firm, explaining the scope of the legal services they provide and describing their clientele, and adding an electronic link to contact an individual lawyer.

The obvious benefit of this information can diminish or disappear if the website visitor misunderstands or is misled by website information and features. A website visitor might rely on general legal information to answer a personal legal question. Another might assume that a website's provision of direct electronic contact to a lawyer implies that the lawyer agrees to preserve the confidentiality of information disclosed by website visitors.

For lawyers, website marketing can give rise to the problem of unanticipated reliance or unexpected inquiries or information from website visitors seeking legal advice. This opinion addresses some of the ethical obligations that lawyers should address in considering the content and features of their websites.[2]

II. Website Content

A. Information about Lawyers, their Law Firm, or their Clients

Lawyer websites may provide biographical information about lawyers, including educational background, experience, area of practice, and contact information (telephone, facsimile and e-mail address). A website also may add information about the law firm, such as its history, experience, and areas of practice, including general descriptions about prior engagements. More specific information about a lawyer or law firm's former or current clients, including clients' identities, matters handled, or results obtained also might be included.

Any of this information constitutes a "communication about the lawyer or the lawyer's services," and is therefore subject to the requirements of Model Rule 7.1[3] as well as the prohibitions against false and misleading statements in Rules 8.4(c) (generally) and 4.1(a) (when representing clients). Together, these rules prohibit false, fraudulent or misleading statements of law or fact. Thus, no website communication may be false or misleading, or may omit facts such that the resulting statement is materially misleading. Rules 5.1 and 5.3 extend this obligation to managerial lawyers in law firms by obligating them to make reasonable efforts to ensure the firm has in place measures giving reasonable assurance that all firm lawyers and nonlawyer assistants will comply with the rules of professional conduct.

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] We do not deal here with website content generated by governmental lawyers or offices or by non-profit law advocacy firms or organizations. *See, e.g., In re Primus*, 436 U.S. 412 (1978) (discussing how solicitation of prospective litigants by nonprofit organizations that engage in litigation as form of political expression and political association constitutes expressive and associational conduct entitled to First Amendment protection, which government may regulate only narrowly).

[3] *See, e.g.*, Arizona State Bar Op. 97-04 (1997), *available at* http://www.myazbar.org/Ethics/opinionview.cfm?id=480; California Standing Committee on Prof'l Resp. and Conduct Formal Op. 2001-155, 2001 WL 34029609 (2001); Hawaii Sup. Ct. Disc. Bd. Formal Op. 41 (2001), available at http://www.odchawaii.com/FORMAL_WRITTEN_OPINIONS.html; South Carolina Bar Eth. Advisory Committee Op. 04-06, 2004 WL 1520110 *1 (2004); Vermont Advisory Eth. Op. 2000-04, *available at* http://www.vtbar.org/Upload%20Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Advertising/advertising.htm. Many state and local ethics opinions are published online can be accessed through the ABA Center for Professional Responsibility website at http://www.abanet.org/cpr/links.html.

As applied to lawyer websites, these rules allow a lawyer to include accurate information that is not misleading about the lawyer and the lawyer's law firm, including contact information and information about the law practice.[4] To avoid misleading readers, this information should be updated on a regular basis.[5] Specific information that identifies current or former clients or the scope of their matters also may be disclosed, as long as the clients or former clients give informed consent[6] as required by Rules 1.6 (current clients) and 1.9 (former clients).[7] Website disclosure of client identifying information is not normally impliedly authorized because the disclosure is not being made to carry out the representation of a client, but to promote the lawyer or the law firm.[8]

B. Information about the Law

Lawyers have long offered legal information to the public in a variety of ways, such as by writing books or articles, giving talks to groups, or staffing legal hotlines. Lawyer websites also can assist the public in understanding the law and in identifying when and how to obtain legal services.[9] Legal information might include general information about the law applicable to a lawyer's area(s) of practice, as well as links to other websites, blogs, or forums with related information. Information may be presented in narrative form, in a "FAQ" (frequently asked questions) format, in a "Q & A" (question and answer) format, or in some other manner.[10]

Legal information, like information about a lawyer or the lawyer's services, must meet the requirements of Rules 7.1, 8.4(c), and 4.1(a). Lawyers may offer accurate legal information that does not materially mislead reasonable readers.[11] To avoid misleading readers, lawyers should make sure that legal information is accurate and current,[12] and should include qualifying statements or disclaimers that "may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client."[13] Although no exact line can be drawn between legal information and legal advice, both the context and content of the information offered are helpful in distinguishing between the two.[14]

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[4] *See, e.g.*, North Carolina State Bar Formal Eth. Op. 2009-6 (2009) (firm may provide case summaries on website, including accurate information about verdicts and settlements, as long as it adds specific information about factual and legal circumstances of cases ((complexity, whether liability or damages were contested, whether opposing party was represented by counsel, firm's success in collecting judgment)) in conjunction with appropriate disclaimer to preclude misleading prospective clients).

[5] *See, e.g.*, Missouri Bar Inf. Advisory Op. 20060005 (2006) (firm must remove lawyer's biographical information within reasonable time after lawyer leaves firm).

[6] *See, e.g.*, Ohio Advisory Op. 2000-6, 2000 WL 1872572 *5 (2000) (law firm may list client's name on firm website with client's informed consent). *See also* New York Rule of Professional Conduct 7.1(b) (2) (2009) (lawyer may advertise name of regularly represented client, provided that client has given prior written consent).

[7] These rules apply to "all information relating to the representation, whatever its source" including publicly available information. Model Rule 1.6 cmt. 3. The consent can be oral or written. Rules 1.6 and 1.9(c) require informed consent, but do not require a written confirmation.

[8] *See* ABA Committee on Eth. and Prof'l Responsibility, Formal Op. 09-455 (2009) (Disclosure of Conflicts Information When Lawyers Move Between Law Firms) (absent demonstrable benefit to client's representation, disclosure of client identifying information, including client's name and nature of matter handled, is not impliedly authorized under Rule 1.6(a)).

[9] Model Rule 7.2 Comment [1] acknowledges that the "public's need to know about legal services can be fulfilled in part through advertising," a need that may be "particularly acute" in the case of persons who have not made extensive use of, or fear they may not be able to pay for, legal services.

[10] *See, e.g.*, Vermont Advisory Eth. Op. 2000-04, *supra* note 3 (lawyer may use "frequently asked questions" format as long as information is current, accurate, and includes clear statement that it does not constitute legal advice and readers should not rely on it to solve individual problem).

[11] Rule 7.1 Comment [2] provides that a "truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion ... for which there is no reasonable factual foundation."

[12] ABA Law Practice Management Section, *Best Practice Guidelines for Legal Information Web Site Providers* 1 (Feb. 2003), *available at* http://meetings.abanet.org/webupload/commupload/EP024500/relatedresources/best_practice_guidelines.pdf (website providing legal information should provide full and accurate information about identity and contact details of provider on each page of website, as well as dates on which substantive content was last reviewed).

[13] Model Rule 7.1 cmt. 3. *See, e.g.*, ABA Law Practice Management Section, *Best Practice Guidelines*, *supra* note 12 at 2 (website providers should avoid misleading users about jurisdiction to which site's content relates, and if clearly state-specific, the jurisdiction in which the law applies should be identified).

[14] *See, e.g.*, Arizona State Bar Op. 97-04, *supra* note 3 (because of inability to screen for conflicts of interest and possibility of disclosing confidential information, lawyers should not answer specific legal questions posed by laypersons in Internet chat rooms unless question presented is of general nature and advice given is not fact-specific); California Standing Committee on Prof'l Resp. and Conduct Formal Op. 2003-164, 2003 WL 23146203 (2003) (legal advice includes making recommendations about specific course of action to follow; public context of radio call-in show that includes warnings about information not being substitute for individualized legal advice makes it unlikely lawyers have agreed to act as caller's lawyer); South Carolina Bar Eth. Advisory Committee Op. 94-27 *2 (1995), 1995 WL 934127 (lawyer may maintain electronic presence for purpose of discussing legal topics, but must obtain sufficient information to make conflicts check before offering legal advice), Utah Eth. Op. 95-01 (1995), 1995 WL 49472 *1 ("how to" booklet on legal subject matter does not constitute practice of law).

With respect to context, lawyers who speak to groups generally have been characterized as offering only general legal information. With respect to content, lawyers who answer fact-specific legal questions may be characterized as offering personal legal advice, especially if the lawyer is responding to a question that can reasonably be understood to refer to the questioner's individual circumstances. However, a lawyer who poses and answers a hypothetical question usually will not be characterized as offering legal advice. To avoid misunderstanding, our previous opinions have recommended that lawyers who provide general legal information include statements that characterize the information as general in nature and caution that it should not be understood as a substitute for personal legal advice.[15]

Such a warning is especially useful for website visitors who may be inexperienced in using legal services, and may believe that they can rely on general legal information to solve their specific problem.[16] It would be prudent to avoid any misunderstanding by warning visitors that the legal information provided is general and should not be relied on as legal advice, and by explaining that legal advice cannot be given without full consideration of all relevant information relating to the visitor's individual situation.

C. Website Visitor Inquiries

Inquiries from a website visitor about legal advice or representation may raise an issue concerning the application of Rule 1.18 (Duties to Prospective Clients).[17] Rule 1.18 protects the confidentiality of prospective client communications. It also recognizes several ways that lawyers may limit subsequent disqualification based on these prospective client disclosures when they decide not to undertake a matter.[18]

Rule 1.18(a) addresses whether the inquirer has become a "prospective client," defined as "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship."

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[15] ABA Inf. Op. 85-1512 (1985) (Establishment of Private Multistate Lawyer Referral Service by Nonprofit Religious Organization), in FORMAL AND INFORMAL ETHICS OPINIONS: FORMAL OPINIONS 1983-1998, at 550, 551 (ABA 2000) (not unethical to prepare articles of general legal information for lay public, but may be prudent to include statement that information furnished is only general and not substitute for personalized legal advice); ABA Inf. Op. 85-1510 (1985) (Establishment of Multistate Private Lawyer Referral Service for Benefit of Subscribers to Corporation's Services), in FORMAL AND INFORMAL ETHICS OPINIONS: FORMAL OPINIONS 1983-1998, at 544, 545 (corporate counsel may author articles of general legal information for corporations' subscriber newsletter, but "good practice" to include a statement that information is only general in nature and not substitute for personal legal advice).

[16] *See, e.g.*, ABA Law Practice Management Section, *Best Practice Guidelines*, *supra* note 12 at 3 (websites that provide legal information should give users conspicuous notice that information does not constitute legal advice). Some state opinions also warn against providing specific or particularized facts in a lawyer's communication to avoid creating a client-lawyer relationship. *See also* District of Columbia Bar Eth. Op. 316 (2002), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm (online chat rooms and listserves); Maryland State Bar Ass'n Committee on Eth. Op. 2007-18 (2008) (lawyer conducting domestic relations law seminars for lay public); New Jersey Advisory Committee on Prof'l Eth. Op. 712 (2008) (Attorney-Staffed Legal Hotline For Members of Nonprofit Trade Association), *available at* http://lawlibrary.rutgers.edu/ethics/acpe/acp712_1.html (lawyer staffing telephone hotline); New Jersey Advisory Committee on Prof'l Eth. Op 671, 1993 WL 137685 (1993) (Activities and Obligations of Pro Bono Attorneys), (lawyer-volunteer at abused women shelter); New Mexico Bar Op. 2001-1 (2001) (Application of Rules of Professional Conduct to Lawyer's Use of Listserve-type Message Boards and Communications) (listserves); Wisconsin Prof'l Eth. Committee Op. E-95-5 (1995), *available at* http://www.wisbar.org/AM/Template.cfm?Section=Legal_Research&Template=/CustomSource/Search/Search.cfm&output=xml_no_dtd&proxystylesheet=wisbar5&client=wisbar5&filter=1&start=0&Site=SBW&q=%22formal+opinion%22+E%2D95%2D5&submit=ethics (lawyer-volunteer at organization that provides information about landlord-tenant law). The Model Rules defer to "principles of substantive law external to these Rules [to] determine when a client-lawyer relationship exists." Scope cmt. 17.

[17] *See, e.g.*, Arizona State Bar Op. 02-04 (2002), *available at* http://www.myazbar.org/Ethics/opinionview.cfm?id=288 (lawyer does not owe duty of confidentiality to individuals who unilaterally e-mail inquiries to lawyer when e-mail is unsolicited); California Standing Committee on Prof'l Resp. and Conduct Formal Op. 2001-155, *supra* note 3 (lawyer may avoid incurring duty of confidentiality to persons who seek legal services by visiting lawyer's website and disclose confidential information only if site contains clear disclaimer); Iowa Bar Ass'n Eth. Op. 07-02 (2007), *available at* http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492/cb0a70672d69d8c1862573380013fb9d?OpenDocument (message that encourages detailed response about case could in some situations be considered bilateral); New Hampshire Bar Ass'n Eth. Committee Op. 2009-2010/1(2009), *available at* http://www.nhbar.org/legal-links/ethics1.asp (when law firm's website invites public to send e-mail to one of firm's lawyers, it is opening itself to potential obligations to prospective clients); Ass'n of the Bar of the City of New York, Formal Op. 2001-1 (2001) (Obligations Of Law Firm Receiving Unsolicited E-Mail Communications From Prospective Client), *available at* http://www.abcny.org/Ethics/eth2001-01.html (where firm website does not adequately warn that information transmitted will not be treated as confidential, information should be held in confidence by lawyer receiving communication and not disclosed to or used for benefit of another client even though lawyer declines to represent potential client); New Jersey Advisory Committee on Prof'l Eth. Op. 695, 2004 WL 833032 (2004) (firm has duty to keep information received from prospective client confidential); San Diego County Bar Ass'n Eth. Op. 2006-1 (2006), *available at* http://www.sdcba.org/index.cfm?Pg=ethicsopinion06-1 (private information received from non-client via unsolicited e-mail is not required to be held as confidential if lawyer has not had opportunity to warn or stop flow of information at or before the communication is delivered).

[18] Lawyers do not normally owe confidentiality obligations to persons who are not clients (protected by Rule 1.6), former clients (Rule 1.9), or prospective clients (Rule 1.18).

To "discuss," meaning to talk about, generally contemplates a two-way communication, which necessarily must begin with an initial communication.[19] Rule 1.18 implicitly recognizes that this initial communication can come either from a lawyer or a person who wishes to become a prospective client.

Rule 1.18 Comment [2] also recognizes that not all initial communications from persons who wish to be prospective clients necessarily result in a "discussion" within the meaning of the rule: "a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a prospective client."

For example, if a lawyer website specifically requests or invites submission of information concerning the possibility of forming a client-lawyer relationship with respect to a matter, a discussion, as that term is used in Rule 1.18, will result when a website visitor submits the requested information.[20] If a website visitor submits information to a site that does not specifically request or invite this, the lawyer's response to that submission will determine whether a discussion under Rule 1.18 has occurred.

A telephone, mail or e-mail exchange between an individual seeking legal services and a lawyer is analogous.[21] In these contexts, the lawyer takes part in a bilateral discussion about the possibility of forming a client-lawyer relationship and has the opportunity to limit or encourage the flow of information. For example, the lawyer may ask for additional details or may caution against providing any personal or sensitive information until a conflicts check can be completed.

Lawyers have a similar ability on their websites to control features and content so as to invite, encourage, limit, or discourage the flow of information to and from website visitors.[22] A particular website might facilitate a very direct and almost immediate bilateral communication in response to marketing information about a specific lawyer. It might, for example, specifically encourage a website visitor to submit a personal inquiry about a proposed representation on a conveniently-provided website electronic form which, when responded to, begins a "discussion" about a proposed representation and, absent any cautionary language, invites submission of confidential information.[23] Another website might describe the work of the law firm and each of its lawyers, list only contact information such as a telephone number, e-mail or street address, or provide a website e-mail link to a lawyer. Providing such information alone does not create a reasonable expectation that the lawyer is willing to discuss a specific client-lawyer relationship.[24] A lawyer's response to an inquiry submitted by a visitor who uses this contact information may, however, begin a "discussion" within the meaning of Rule 1.18.

In between these two examples, a variety of website content and features might indicate that a lawyer has agreed to discuss a possible client-lawyer relationship. A former client's website communication to a lawyer about a new matter must be analyzed in light of their previous relationship, which may have given rise to a reasonable expectation of confidentiality.[25] But a person who knows that the lawyer already declined a particular representation or is already representing an adverse party can neither reasonably expect confidentiality, nor reasonably believe that

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[19] For example, in ABA Committee on Eth. and Prof'l Responsibility, Formal Op. 90-358 (1990) (Protection of Information Imparted by Prospective Client), this Committee considered the obligations of a lawyer who engaged in such a "discussion" in the context of a face-to-face meeting.

[20] Rule 1.18 cmt. 1.

[21] *See, e.g.*, Virginia Legal Eth. Op. 1842 (2008), *available at* http://www.vacle.org/opinions/1842.htm (absent voicemail message that asks for detailed information, providing phone number and voicemail is an invitation only to contact lawyer, not to submit confidential information); Iowa State Bar Ass'n Eth. Op. 07-02 ("Communication from and with Potential Clients), *available at* http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492/cb0a70672d69d8c1862573380013fb9d?OpenDocument (telephone voicemail message that simply asks for contact details does not give rise to bilateral communication, but message that encourages caller to leave detailed messages about their case could be considered bilateral)

[22] *See, e.g.*, Arizona State Bar Op. 02-04 (2002), *available at* http://www.myazbar.org/Ethics/opinionview.cfm?id=288 (lawyers who maintain websites with e-mail links should include disclaimers to clarify whether e-mail communications from prospective clients will be treated as confidential); Massachusetts Bar Ass'n Op. 07-01 (2007), *available at* http://www.massbar.org/publications/ethics-opinions/2000-2009/2007/opinion-07-01 (lawyer who receives unsolicited information from prospective client through e-mail link on law firm website without effective disclaimer must hold information confidential because law firm has opportunity to set conditions on flow of information); South Dakota Bar Eth. Op. 2002-2 (2002) (lawyer's website that invites viewers to send e-mail through jump site creates expectation of confidentiality).

[23] *See, e.g.*, Iowa State Bar Ass'n Eth. Op. 07-02, *supra* note 21 (web page inviting specific questions constitutes bilateral communication with expectation of confidentiality) and Virginia Legal Eth. Op. 1842 *supra* note 21 (website that specifically invites visitor to submit information in exchange for evaluation invites formation of client-lawyer relationship).

[24] E-mails received from unknown persons who send them apart from the lawyer's website may even more easily be viewed as unsolicited. *See, e.g.*, Arizona State Bar Op. 02-04, *supra* note 22 (e-mail to multiple lawyers asking for representation); Iowa State Bar Ass'n Eth. Op. 07-02, *supra* note 21 (website that gives contact information does not without more indicate that lawyer requested or consented to sending of confidential information); San Diego County Bar Assn. Op. 2006-1, *available at* http://www.sdcba.org/index.cfm?Pg=ethicsopinion06-1 (inquirer found lawyer's e-mail address on state bar membership records website accessible to the public).

[25] *See, e.g.*, Iowa State Bar Ass'n Committee Eth. Op. 07-02, *supra* note 22 (lack of prior relationship with person sending unsolicited e-mail requesting representation was one factor in determining whether communicator's disclosures were unilateral and whether expectation of

the lawyer wishes to discuss a client-lawyer relationship. Similarly, a person who purports to be a prospective client and who communicates with a number of lawyers with the intent to prevent other parties from retaining them in the same matter should have no reasonable expectation of confidentiality or that the lawyer would refrain from an adverse representation.[26]

In other circumstances, it may be difficult to predict when the overall message of a given website communicates a willingness by a lawyer to discuss a particular prospective client-lawyer relationship. Imprecision in a website message and failure to include a clarifying disclaimer may result in a website visitor reasonably viewing the website communication itself as the first step in a discussion.[27] Lawyers are therefore well-advised to consider that a website-generated inquiry may have come from a prospective client, and should pay special attention to including the appropriate warnings mentioned in the next section.

If a discussion with a prospective client has occurred, Rule 1.18(b) prohibits use or disclosure of information learned during such a discussion absent the prospective client's informed consent.[28] When the discussion reveals a conflict of interest, the lawyer should decline the representation,[29] and cannot disclose the information received without the informed consent of the prospective client.[30] For various reasons, including the need for a conflicts check, the lawyer may have tried to limit the initial discussion and may have clearly expressed those limitations to the prospective client. If this has been done, any information given to the lawyer that exceeds those express limitations generally would not be protected under Rule 1.18(b).

Rule 1.18(c) disqualifies lawyers and their law firms who have received information that "could be significantly harmful" to the prospective client from representing others with adverse interests in the same or substantially related matters.[31] For example, if a prospective client previously had disclosed only an intention to bring a particular lawsuit and has now retained a different lawyer to initiate the same suit, it is difficult to imagine any significant harm that could result from the law firm proceeding with the defense of the same matter.[32] On the other hand, absent an appropriate warning, the prospective client's prior disclosure of more extensive facts about the matter may well be disqualifying.

Rule 1.18(d) creates two exceptions that allow subsequent adverse representation even if the prospective client disclosed information that was significantly harmful: (1) informed consent confirmed in writing from both the affected and the prospective client, or (2) reasonable measures to limit the disqualifying information, combined with timely screening of the disqualified lawyer from the subsequent adverse matter. Rule 1.18(d) (2) specifically would allow the law firm (but not the contacted lawyer) to "undertake or continue" the representation of someone with adverse interests without receiving the informed consent of the prospective client if the lawyer who initially received the information took reasonable precautions to limit the prospective client's initial disclosures and was timely screened from further involvement in the matter as required by Rule 1.0(k).

III. Warnings or Cautionary Statements Intended to Limit, Condition, or Disclaim a Lawyer's Obligations to Website Visitors

Warnings or cautionary statements on a lawyer's website can be designed to and may effectively limit, condition, or disclaim a lawyer's obligation to a website reader. Such warnings or statements may be written so as

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confidentiality was reasonable); Oregon Eth. Op. 2005-146, 2005 WL 5679570 *1 (2005) (lawyer who sends periodic reminders to former clients risks giving recipients reasonable belief they are still current clients).

[26] *See, e.g.*, Virginia Legal Eth. Op. 1794 (2004), *available at* http://www.vacle.org/opinions/1794.htm (person who meets with lawyer for primary purpose of precluding others from obtaining legal representation does not have reasonable expectation of confidentiality); Ass'n of the Bar of the City of New York Committee on Prof'l and Jud. Eth. Formal Op. 2001-1 (2001), *available at* http://www.abcny.org/Ethics/eth2001.html ("taint shoppers," who interview lawyers or law firms for purpose of disqualifying them from future adverse representation, have no good faith expectation of confidentiality).

[27] *See e.g.*, Massachusetts Bar Ass'n Op. 07-01, *supra* note 22 (in absence of effective disclaimer, prospective client visiting law firm website that markets background and qualifications of each lawyer in attractive light, stresses lawyer's skill at solving clients' practical problems, and provides e-mail link for immediate communication with that lawyer might reasonably conclude that firm and its individual lawyers have implicitly "agreed to consider" whether to form client-lawyer relationship).

[28] Rule 1.18(b) allows disclosure or use if permitted by Rule 1.9. Rule 1.9(c) (2) and its Comment [7] in turn link disclosure to Rule 1.6, the general confidentiality rule, which requires client informed consent to disclosure.

[29] Rule 1.18 cmt. 4.

[30] Rule 1.18 cmt. 3.

[31] *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 (2) (2000).

[32] Rule 1.18 cmt. 5 also allows lawyers to condition an initial conversation on the prospective client's informed consent to subsequent adverse representation in the same matter or subsequent use of any confidential information provided.

to avoid a misunderstanding by the website visitor that (1) a client-lawyer relationship has been created;[33] (2) the visitor's information will be kept confidential;[34] (3) legal advice has been given;[35] or (4) the lawyer will be prevented from representing an adverse party.[36]

Limitations, conditions, or disclaimers of lawyer obligations will be effective only if reasonably understandable, properly placed, and not misleading. This requires a clear warning in a readable format whose meaning can be understood by a reasonable person.[37] If the website uses a particular language, any waiver, disclaimer, limitation, or condition must be in the same language. The appropriate information should be conspicuously placed to assure that the reader is likely to see it before proceeding.[38]

Finally, a limitation, condition, waiver, or disclaimer may be undercut if the lawyer acts or communicates contrary to its warning.

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[33] *See, e.g.*, New Mexico Bar Op. 2001-1 (2001), *available at* http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html (appropriate disclaimers of attorney-client relationship should accompany any response to listserve message board, but any response that would suggest to reasonable person that, despite disclaimer, relationship is being or has been established, would negate disclaimer); North Carolina State Bar Formal Eth. Op. 2000-3, 2000 WL 33300702 *2 (2000) (Responding to Inquiries Posted on a Message Board on the Web) (lawyers who do not want to create client-lawyer relationships on law firm message board should use specific disclaimers on any communications with inquirers, but substantive law will determine whether client-lawyer relationship is created); Ass'n of the Bar of the City of New York Committee on Prof'l and Jud. Eth. Formal Op. 1998-2 (1998), *available at* http://www.abcny.org/Ethics/eth1998-2.htm (disclaimer that "if specific legal advice is sought, we will indicate that this requires establishment of an attorney-client relationship which cannot be carried out through the use of a web page" may not necessarily serve to shield law firm from claim that attorney-client relationship was established by specific on-line communications); Utah State Bar Eth. Advisory Op. Committee Op. 96-12, 1997 WL 45137 *1 (1997) ("if legal advice is sought from an attorney, if the advice sought is pertinent to the attorney's profession, and if the attorney gives the advice for which fees will be charged, an attorney-client relationship is created that cannot be disclaimed by the attorney giving the advice"); Vermont Bar Ass'n Advisory Eth. Op. 2000-04 (2000), *supra* note 3 (despite website caveat and disclaimers, nonlawyer may still rely on information on website or lawyer's responses; disclaimer cannot preclude possibility of establishing client-lawyer relationship in an individual case).

[34] The Committee does not opine whether a confidentiality waiver might affect the attorney-client privilege. *See, e.g.*, Barton v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 410 F. 3d 1104, 1111-12 (9th Cir. 2005) (checking "yes" box on law firm website that acknowledged providing information in answer to questionnaire "does not constitute a request for legal advice and I am not forming an attorney-client relationship by submitting this information" did not waive attorney-client privilege because confidentiality was not mentioned in attempted disclaimer and questionnaires were nevertheless submitted in course of seeking attorney-client relationship in potential class action). *Cf.* Schiller v. The City of New York, 245 F.R.D. 112, 117-18 (S.D.N.Y. 2007) (although privilege may protect pre-engagement communications from prospective clients, it does not apply to person who completed questionnaires soliciting information from N.Y. Civil Liberties Union to allow it to "effectively advocate for change"). *See also* David Hricik, *To Whom it May Concern: Using Disclaimers to Avoid Disqualification by Receipt of Unsolicited E-Mail from Prospective Clients*, 16 ABA PROFESSIONAL LAWYER 1, 5 (2005) (agreement that waives all confidentiality tries to do too much and might destroy the ability of prospective client who eventually becomes firm client to claim privilege).

[35] *See* note 15 *supra.*

[36] Rule 1.18 cmt. 5.

[37] *See, e.g.*, California Bar Committee on Prof'l Resp. Op. 2005-168, 2005 WL 3068090 *4 (2005) (finding disclaimer stating that "confidential relationship" would not be formed was not enough to waive confidentiality, because it confused not forming client-lawyer relationship with agreeing to keep communications confidential).

[38] *See, e.g.*, District of Columbia Bar Eth. Op. 302 (2000), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion302.cfm (lawyers may want to use "click through" pages that automatically direct the reader to another webpage containing disclaimers to ensure that visitors are not misled and other devices such as confirmatory messages that clarify nature of relationship); Virginia Legal Eth. Op. 1842, *supra* note 21 (approving of prominent "click through" disclaimers that require readers to assent to terms of disclaimer before submitting information). Courts have refused to uphold disclaimers or licensing agreements that appeared on separate pages and did not require a reader's affirmative consent to their terms because they did not provide reasonable notice). *See, e.g.*, Sprecht v. Netscape Communications Corp., 306 F.3d 17, 31-32 (2d Cir. 2002). On the other hand, courts have upheld website restrictions that provided actual knowledge by presenting the information and requiring an affirmative action (a click through or "clickwrap" agreement) before gaining access to the website content. *See, e.g.*, Register.com v. Verio, 356 F.3d 393, 401-02 (2d Cir. 2004)

SUPREME COURT OF LOUISIANA

ORDER

Acting in accordance with Article V, Sections 1 and 5 of the 1974 Louisiana Constitution, and the inherent power of this Court, and considering the need to amend the Louisiana Rules of Professional Conduct,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Rule 7.2(c)(5) of the Louisiana Rules of Professional Conduct be and is hereby amended to read:

> **(c) Prohibitions and General Rules Governing Content of Advertisements and Unsolicited Written Communications.**
>
> * * * * *
>
> (5) *Communication of Fields of Practice.* A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.2(c)(1) to communications concerning a lawyer's services. A lawyer shall not state or imply that the lawyer is "certified," or "board certified" except as follows:
>
> (A) **Lawyers Certified by the Louisiana Board of Legal Specialization.** A lawyer who complies with the Plan of Legal Specialization, as determined by the Louisiana Board of Legal

Specialization, may inform the public and other lawyers of the lawyer's certified area(s) of legal practice. Such communications should identify the Louisiana Board of Legal Specialization as the certifying organization and may state that the lawyer is "certified," or "board certified in (area of certification)."

(B) **Lawyers Certified by Organizations Other Than the Louisiana Board of Legal Specialization or Another State Bar.** A lawyer certified by an organization other than the Louisiana Board of Legal Specialization or another state bar may inform the public and other lawyers of the lawyer's certified area(s) of legal practice by stating that the lawyer is "certified," or "board certified in (area of certification)" if:

(i) the lawyer complies with Section 6.2 of the Plan of Legal Specialization for the Louisiana Board of Legal Specialization; and,

(ii) the lawyer includes the full name of the organization in all communications pertaining to such certification. A lawyer who has been certified by an organization that is accredited by the American Bar Association is not subject to Section 6.2 of the Plan of Legal Specialization.

(C) **Certification by Other State Bars.** A lawyer certified by another state bar may inform the public and other lawyers of the lawyer's certified area(s) of legal practice and may state in communications to the public that the lawyer is "certified," or "board certified in (area of certification)" if:

(i) the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Plan of Legal Specialization, as determined by the Louisiana Board of Legal Specialization; and,

(ii) the lawyer includes the name of the state bar in all communications pertaining to such certification.

This rule change shall become effective upon signing and shall remain in full force and effect thereafter, until amended or changed through future Orders of this Court.

New Orleans, Louisiana, this _____ day of June, 2016

FOR THE COURT:

_____
Bernette Joshua Johnson, Chief Justice

11April 2014

ABA CoLAP Senior Lawyer Assistance Committee
Working Paper on Cognitive Impairment and Cognitive Decline

Introduction

CoLAP, the American Bar Association's Commission on Lawyer Assistance Programs, is dedicated to assisting the legal community with addiction and mental health issues and supporting state Lawyer Assistance Programs. In response to reports of increasing calls regarding older lawyers and judges from lawyer assistance programs around the country, CoLAP created a Senior Lawyer Assistance Task Force in 2008 and turned the Task Force into a Committee in 2009.

CoLAP's creation of a committee dedicated to senior attorney issues does not mean that CoLAP believes that qualifying as a senior attorney necessarily indicates impairment. However, a range of conditions occur more frequently in seniors--including cognitive impairment and dementia, grief from loss of a spouse, hearing loss, vision loss, and multiple other health conditions--that together heighten the risk of impairment in this attorney group. The Senior Lawyer Committee was formed to investigate how lawyer assistance programs could effectively assist with these issues.

Over the years our key areas of focus have been:

- raising awareness of cognitive and medical conditions affecting the senior attorney, and of the availability of assistance;
- assisting law firms, bar associations, and individuals in handling cases of cognitive decline or impairment in a manner that protects the public and the dignity of the senior (or not senior) lawyer or judge;
- providing education and resources to assist legal professionals with the transition to retirement; and
- providing education and resources on best practices in planning for unanticipated absences from the practice.

We have collaborated with the CoLAP Judicial Assistance Initiative, the Tort Trial & Insurance Practice Section of the ABA, the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers in addressing these mutual concerns. We have recently begun discussions with the National Academy of Neuropsychology (NAN), the nation's largest professional group of practicing neuropsychologists, to see what we can do collaboratively to assist lawyers and judges dealing with issues of cognitive impairment. We hope to continue our collaboration with these entities and develop new relationships with others as well.

This article was written by members of the Senior Lawyer Assistance Committee, with assistance from NAN and its Policy and Planning Committee, with the hope of raising awareness of cognitive decline in legal professionals and encouraging lawyers and judges to take action to protect clients, the profession, and their colleagues should they encounter such a situation. We hope that you find it helpful.

I. Signs and Symptoms of Cognitive Decline

The degree to which individuals exhibit normal cognitive changes during aging varies, with some people maintaining excellent cognitive functioning throughout life, and others having declines severe enough to significantly interfere with daily functioning. Two key concepts in understanding these different trajectories are *normal cognitive aging* and *cognitive disorders of aging*.

Normal Cognitive Aging

The brain and central nervous system, like other organ systems in the human body, undergo normal age related decline over time. Thus age based changes in cognitive abilities are an expected part of normal aging. For example, declines in reaction time and processing speed can emerge as early as the late 20's; other cognitive functions show decline in later decades. In general, with increasing age, information tends to be processed more slowly, retrieval of information is less accurate and efficient, learning new information is more challenging, and the ability to multi- task and carry out complex, novel problem solving declines. In contrast, other abilities, including vocabulary, breadth of general knowledge, emotional functioning, and (we hope) wisdom, can remain stable or even improve over time into the upper decades.

Cognitive Disorders of Aging

Cognitive disorders of aging are biologically based diseases that cause abnormal cognitive changes that are not age expectable and that are superimposed on normal cognitive aging. One common cause of abnormal cognitive decline is cerebrovascular disease, which includes small and/or large strokes, microvascular ischemic changes, chronic inflammation, and risk factors like diabetes, insulin resistance, high blood pressure, high cholesterol, and obesity. Other causes including history of traumatic brain injuries, excessive alcohol and drug use, and low levels of cognitive activity can also be associated with poorer cognitive functioning as we age. Many of these risk factors and conditions are potentially treatable, highlighting the importance of accurate diagnosis.

The most common cognitive disorders of aging, however, are neurodegenerative diseases that involve progressive deterioration of the brain over time. Neurodegenerative diseases generally have an insidious onset and gradual progression, and are associated with protein-specific neuropathological changes. The most common neurodegenerative disease is Alzheimer's disease, but Parkinson's disease, diffuse Lewy body disease, and frontotemporal dementia are also fairly common. When they present in their typical form, each neurodegenerative disease is associated with a different pattern of cognitive and behavioral symptoms. Short term memory impairments are prominent in early Alzheimer's disease, whereas problems with multi-tasking and attention are common cognitive changes in Parkinson's disease, and behavioral control and language skills are common deficits in early frontotemporal dementia. Importantly, we now know that neurodegenerative brain changes can begin years before symptoms emerge or become obvious and debilitating. Consequently, some very mild declines in memory, for example, could reflect the symptoms of incipient Alzheimer's disease. It is only later in the progression that the memory, language, behavioral, spatial, and other effects of the disease are severe enough to cause dementia. Dementia is a clinical term and construct used to describe a decline in cognitive and behavioral skills that is severe enough to interfere with daily functioning and the ability to live independently. Dementia is a significant clinical finding insofar as it strongly implies that an individual is disabled in key aspects of everyday life and may no longer be able to carry out work functions.

Dementia: It is important to emphasize that dementia is a syndrome and not a specific disease. It is used as a general term to identify or label a decline in mental ability that is severe enough to interfere with daily functioning **and the ability to live independently**.

Numerous conditions can potentially cause dementia besides neurodegenerative diseases, including brain tumors, brain injuries, nutrition deficiencies, infections, drug reactions and thyroid related disorders. Some of these dementias may be reversible but many are not.

Age, family history, genetics, lifestyle, diseases, and accidents are the most common risk factors for all type of dementias. The greatest known risk factor for Alzheimer's is advancing age. The age at onset is typically after 65, and the likelihood of developing Alzheimer's doubles every five years after the age of 65. After age 85, the risk reaches nearly 50%.

II. Assessment of Cognitive Impairment and Cognitive Decline by LAP Professionals

Lawyers and even LAP Professionals generally do not have the requisite training and expertise to formally assess and definitively diagnose cognitive disorders and associated impairment and decline. Formal assessment/evaluation of cognitive impairment and cognitive decline is referred to specialists in the fields of psychology, psychiatry, and neurology.[1] LAP professionals and lawyers, however, need to be informed and to have available a mental checklist of the 'red flags' that serve to alert us to the possibility that a colleague's cognitive abilities and associated professional abilities have dropped below the level that is required to practice law effectively.

In 2005, the American Bar Association Commission on Law and Aging and the American Psychological Association published *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers.* The lawyer's handbook discusses many concepts relevant to the assessment of the senior attorney with cognitive impairment. In particular, the CoLAP Senior Lawyer Assistance Committee has adapted the *Capacity Worksheet for Lawyers* contained in the handbook to serve as a worksheet and guide to LAP professionals and other concerned colleagues called on to assess or assist a lawyer exhibiting signs of cognitive impairment or cognitive decline.

[1] Neuropsychologists, geropsychologists, neuropsychiatrists, geriatric psychiatrists, and neurologists.

Cognitive Impairment Worksheet for Lawyer Assistance Programs

Attorney Name: _____ **Date of Interview:** _____

Place of Interview: _____

Observational Signs & Symptoms:

Behavioral Functioning at Work	Observations
Practice management • Deteriorating performance at work • Making mistakes on files / cases • Difficulties functioning without the help of a legal assistant /other lawyers • Committing obvious ethical violations • Failing to remain current re changes in law; over-relying on experience • Exhibiting confusion re timelines, deadlines, conflicts, trust accounting	
Appearance / dress • Inappropriately dressed • Poor grooming/hygiene	
Interpersonal disinhibition • Making sexually inappropriate statements that are historically uncharacteristic for the lawyer • Engaging in uncharacteristically sexually inappropriate behavior • Disinhibition in other nonsexual behaviors	
Self awareness • Denial of any problem • Exhibits/expresses highly defensive beliefs • Feels others out "to get" him/her, organized against him/her	
Significant changes in characteristic routine at work	

Cognitive Functioning	Observations
Short-term memory problems (reduced ability to manipulate information in ST memory) • Forgets conversations, events, details of cases • Repeats questions and requests for information frequently	
Executive functioning (slower and less accurate in shifting from one thought or action to another) • Trouble staying on task / topic • Trouble following through and getting things done in a reasonable time	
Lack of mental flexibility • Difficulty adjusting to changes • Difficulty understanding alternative or competing legal analysis, positions	

Language related problems
• Comprehension problems
• Problems with verbal expression
  o Difficulty finding the correct word to use
  o Circumstantiality (providing a lot of unnecessary details; taking a long time to get to the point)
  o Tangentiality (getting distracted and never getting back to the point)	

Disorientation • Confused about date / time sensitive tasks • Missing deadlines for filing legal documents	
Attention / concentration (problems with dividing attention, filtering our noise and shifting attention) • Lapses in attention • Overly distractible	

Emotional functioning	Observations
• Emotional distress: • Emotional lability (rapidly changing swings in mood and emotional affect):	

Other Observations/Notes of Functional Behavior

Mitigating/Qualifying Factors Affecting Observations
Stress, Grief, Depression, Recent Events affecting stability of client:
Medical Factors / medical conditions: o Sensory functioning (hearing / vision loss) o Family history of dementia o Substance abuse / dependence o Hypertension o Stroke history o Thyroid disease o Chemotherapy o Sleep apnea o Prescription medications o High cholesterol o _____ o _____

PRELIMINARY CONCLUSIONS ABOUT COGNITIVE FUNCTIONING

☐ **Intact** – No or very minimal evidence of diminished cognitive functioning:
☐ **Mild problems** - Some evidence of diminished cognitive functioning:
☐ **More than mild problems** - Substantial evidence of diminished cognitive functioning:
☐ **Severe problems** – Lawyer lacks cognitive capacity to practice law:

Adapted from the Capacity Worksheet for Lawyers, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, by the ABA Commission on Law and Aging and the American Psychological Association (2005).

III. Recommendations for Intervening on a Voluntary Basis with a Lawyer Exhibiting Cognitive Impairment/Decline

A. Approaching the Impaired / Declining Lawyer

1. Partner with individual(s) with first hand observations of the lawyer's behaviors that are raising concerns about the lawyer's continued competence to practice law and who are trusted by the lawyer.
2. Consider utilizing the Cognitive Impairment Worksheet to gather and organize concerns regarding the impaired/declining lawyer.
3. Have a non-confrontational meeting with lawyer and the concerned individual/s; actively avoid confrontation. (It is recommended to have a preparatory meeting with the concerned individuals.)
4. Starters / icebreakers
    - *I am concerned about you because...*
    - *We have worked together a long time. So I hope you won't think I'm interfering when I tell you I am worried about you...*
    - *I've noticed you haven't been yourself lately, and am concerned about how you are doing.....*
5. Get the lawyer to talk; listen, do not lecture.
6. While listening, add responsive and reflective comments.
7. Express concern with gentleness and respect.
8. Share firsthand observations of the lawyer's objective behavior that is raising questions or causing concerns.
9. Review the lawyer's good qualities, achievements and positive memories.
10. Approach as a respectful and concerned colleague, not an authority figure.
11. Act with kindness, dignity and privacy, not in crisis mode.
12. If the lawyer is not persuaded that his/her level of professional functioning has declined or is impaired, suggest assessment by a specific professional (in most instances, a neuropsychologist) and have contact information ready.
13. When appropriate, offer assistance and make recommendations for a plan providing oversight (such as a buddy system or part-time practice with co-counsel).
14. When appropriate, propose a voluntary transfer of attorney status to an available non-practicing option, e.g., taking "inactive," "retired," or "emeritus" status.
15. Remember that this is a process, not a onetime event.

B. Do's and Don'ts

1. Do
    - Be direct, specific, and identify the problem
    - Speak from personal observations and experience; state your feelings
    - Report what you actually see
    - Be respectful and treat the lawyer with dignity
    - Be cautious when including family members
    - Act in a non-judgmental, non-labeling, non-accusatory manner
    - Offer to call the lawyer's doctor with observations
    - Refer for evaluation, have resources at hand

- Suggest alternative status such as inactive status or disability leave
- Suggest the potential consequences for inaction: malpractice or disciplinary complaints

2. Don'ts
   - Ignore and do nothing
   - Attempt to diagnose
   - Insist or threaten if lawyer directs you to back off; attempt to discuss again at a later date

Adapted from the Texas Lawyer Assistance Program's *The Senior Lawyer in Decline: Transitions with Dignity – ABC's of Helping the Senior Lawyer in Need*