NOTICE TO THE BAR

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS AND COMMITTEE ON ATTORNEY ADVERTISING

PROPOSED AMENDMENTS TO RULES OF PROFESSIONAL CONDUCT 7.2 AND 1.6 – ATTORNEY RETENTION OF WEBSITE PAGES – COMMENTS REQUESTED

The Supreme Court asked the Committee on Attorney Advertising (CAA) and the Advisory Committee on Professional Ethics (ACPE) "to consider jointly whether RPC 7.2(b) should be amended to require the retention of webpages of an attorney's or a law firm's website and, if so, the limits of such a requirement as well as the appropriate manner of compliance." The Committees recommended to the Court that Rule of Professional Conduct 7.2(b) be amended to require lawyers to capture all material on their websites in the form of an electronic backup on at least a monthly basis, and retain the information for a period of three years. The ACPE further considered Rule of Professional Conduct 1.6(a), which broadly requires lawyers to maintain confidentiality of "information relating to representation of a client" unless the client has consented. The ACPE recommended a revision of Rule of Professional Conduct 1.6 expressly permitting a lawyer to disclose information relating to representation that is "generally known." The Court, after preliminarily reviewing these recommendations, is requesting the legal community and interested members of the public to comment on the proposed amendments to RPCs 7.2 and 1.6.

Rule of Professional Conduct 7.2(b) provides: "A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used." "Advertisements" subject to the rules governing attorney advertising is defined as "communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement." Rule of Professional Conduct 7.1(a).

The rules governing attorney advertising do not differentiate between advertising in traditional media, such as the Yellow Pages or a newspaper, and advertising in electronic media, such as the internet. The Court has previously held that "attorneys are responsible for monitoring the content of all communications with the public – including their websites – to ensure that those communications conform at all times with the Rules of Professional Conduct." In re Hyderally, 208 N.J. 452, 461 (2011). Accordingly, Rule of Professional Conduct 7.2(b), like other rules governing attorney advertising, applies to webpages on an attorney's or a law firm's website.

To fulfill its regulatory purpose, the Committee on Attorney Advertising (CAA) relies on lawyers to retain backup versions of their websites. Unlike other jurisdictions, New Jersey does not require lawyers to submit their advertisements for pre-publication review. Grievants bring purported improper advertising to the Committee's attention, either by duplicating the advertising and sending it to the Committee or notifying the Committee of the advertisement and providing the internet address (URL). There have been cases where there was a delay between the time the allegedly fraudulent advertising was first posted and the time the matter is brought to the Committee's attention and then addressed. The required retention period must be long enough to allow the regulatory authority to review advertising that was viewed by the client at the initiation of the attorney-client relationship. Accordingly, the CAA recommended that lawyers be required to retain backup versions of webpages on the law firm's website, and any other advertising material, for a period of three years, as set forth in the current Rule.

With regard to the "appropriate manner of compliance," the CAA recommended that lawyers be required to capture all material on their websites in the form of an electronic backup on at least a monthly basis. In addition, all new content posted on a lawyer's website should be retained – even if it is posted but then deleted prior to the monthly backup. The CAA does not recommend that lawyers retain a copy of every edit to every paragraph made during the month; it differentiates between new content and editing of existing content. The CAA reasons that if a lawyer places outrageous claims on the attorney's website on the first day of the month, and then removes the post on the 29th day, the lawyer should not be able to hide that material by claiming that the monthly backup did not capture it.

A lawyer who uses the internet to advertise the lawyer's services should also know how to retain or back up the data placed on the internet. A lawyer who relies on outside assistance to create and maintain a website can also rely on outside assistance to retain the data on that website. Recent revisions to Rules of Professional Conduct 1.6 and 4.4(b) place a duty of technological competence on lawyers with regard to safeguarding information, including electronically stored information, and preventing inadvertent or unauthorized disclosure of information, including disclosure of metadata. These Rule revisions reflect the requirement that lawyers must have at least a baseline familiarity with the technology they use in the course of their law practices. Accordingly, it is not unfair or burdensome to impose a duty to retain data that a lawyer posts on his or her internet website.

Accordingly, the Committees recommend that Rule of Professional Conduct 7.2(b) be amended as follows:

> (b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used. Lawyers shall capture all material on their websites, in the form of an electronic or paper backup, including all new content, on at least a monthly basis, and retain this information for three years.

In the course of reviewing this matter, the Advisory Committee on Professional Ethics further considered Rule of Professional Conduct 1.6(a), which broadly requires lawyers to maintain confidentiality of "information relating to representation of a client" unless the client has consented. There currently is not an exception in the Rule permitting a lawyer to disclose information "relating to representation of a client" that is generally known, part of a public record, publicly available, or known to other persons. See Twenty-First Century Rail v. New Jersey Transit, 419 N.J. Super. 343, 359 (App. Div. 2011), rev'd on other grounds 210 N.J. 264 (2012) ("client information communicated to an attorney from the client, even if otherwise disseminated or already in the public domain, retains the status of a confidence"). See also Michels, New Jersey Attorney Ethics, Section 15:2-7, p. 334 (Gann 2018)(noting that while RPC 1.6(a) contains no exception for generally-known information, RPC 1.9(c)(1), regarding former clients, does contain such an exception; suggesting that only when a representation has ended may a lawyer use generally-known information about a former client).

Scholarly commentary, however, supports a construction of Rule of Professional Conduct 1.6 that sets information that is generally known outside the definition of confidential information. Restatement (Third) of the Law Governing Lawyers § 59 (2000) (removing information that is generally known from the definition of confidential information); G. Hazard & W. Hodes, The Law of Lawyering (3d ed. Supp. 2003) § 9.5 (approving the Restatement definition of confidential information).

The Restatement (Third) of the Law Governing Lawyers offers this definition of "confidential information" for purposes of both Rule of Professional Conduct 1.6 and 1.9: "Confidential client information consists of information relating to representation of a client, other than information that is generally known." The Restatement includes a comment about what is "generally known" information:

> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.
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> [Restatement, supra, Comment d.]

Accordingly, the Committees have recommended an amendment to Rule of Professional Conduct 1.6(a) and a new Official Comment expressly permitting a lawyer to disclose information relating to representation that is "generally known." RPC 1.6(a) thus would provide:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (i) disclosures that are impliedly authorized in order to carry out the representation, (ii) disclosures of information that is generally known, and [except] (iii) as stated in paragraphs (b), (c) and (d).
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> Official Comment (new)
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> The Court adopts the comment in the Restatement (Third) of the Law Governing Lawyers on confidential information, which states:
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> > Whether information is "generally known" depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.

The Court requests comment on these proposed amendments to Rules of Professional Conduct 7.2 and 1.6. Written comments should be sent by **May 24, 2018**, to:

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on RPCs and Attorney Retention of Website Pages
Richard J. Hughes Justice Complex
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Comments may also be submitted via Internet e-mail to the following address: Comments.Mailbox@njcourts.gov.

The Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address and those submitting comments by e-

mail should include their name and e-mail address. Comments submitted in response may be subject to public disclosure after the Court has acted on the Committee's recommendation.

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: April 24, 2018