PENNSYLVANIA BAR ASSOCIATION
COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

FORMAL OPINION
2010-200

ETHICAL OBLIGATIONS ON MAINTAINING A VIRTUAL OFFICE FOR THE PRACTICE OF LAW IN PENNSYLVANIA

I. Introduction and Summary

In an effort to reduce costs and to improve efficiency, attorneys have embraced the "virtual law office" ("VLO") as a method of eliminating or drastically reducing the overhead associated with brick and mortar facilities. Although each VLO will differ in some respects, for purposes of this opinion, a virtual law office is defined as a law office that exists without a traditional physical counterpart, in which attorneys primarily or exclusively access client and other information online, and where most client communications are conducted electronically, e.g., by email, etc.[1]

Lawyers cite many benefits to utilizing a virtual law office, including:

- Allowing attorneys to work from any location with Internet access, thereby enhancing mobility, and permitting attorneys to juggle work and family obligations more flexibly;
- Offering clients the ability to discuss matters online, download and upload documents for review, and handle other business transactions electronically;[2]
- Reducing or eliminating the overhead associated with traditional law offices; and,
- Using online client and revenue generating software to manage case files and increase income.

In Inquiry No. 2009-053, this Committee considered whether a lawyer may maintain a VLO operated from the lawyer's home. The lawyer neither met with clients in his home nor listed his home address on legal stationery, advertising, or a website; rather, the lawyer used a post office

[1] There are many types of VLOs, just as there are various forms of traditional law offices. This Opinion is not intended to address every possible type of VLO, but is designed to answer the most common questions about VLOs.

[2] Because both traditional and virtual law offices may utilize client portals, i.e., websites that allow clients to access all or selected portions of their files through the Internet, this Opinion does not address issues relating to client portals.

box as the sole physical address for the law office. Since responding to that inquiry, this Committee has received numerous inquiries regarding the ethical obligations of attorneys who operate virtual law offices.[3] This Opinion will address the issues raised in those inquiries, *to wit:*

- Whether an attorney may maintain a virtual law office in Pennsylvania;
- Whether an attorney may maintain a virtual law office in which the attorney works from home, and associates, if any, work from their homes in various locations, including locations outside of Pennsylvania;
- Whether an attorney with a virtual office must list a physical address in advertisements and on letterheads;
- Whether an attorney must specify the geographic location where the attorney will perform the services advertised and/or meet clients at that location;
- Whether an attorney with a virtual office may use a post office box as the address where services are rendered;
- Whether a virtual law office must disclose the multiple cities and states where each attorney employed by the firm is performing the services advertised;
- Whether an attorney practicing in a virtual office may state that his or her fees are lower than those of traditional brick and mortar law offices;
- Whether an attorney practicing in a virtual office needs to take additional precautions to comply with his or her duty of confidentiality; and,
- Whether maintaining a virtual office, where attorneys and clients do not meet face to face, requires additional safeguards to (1) confirm the identity of clients and others; and (2) deal with those circumstances in which a client may have diminished capacity.

This Committee concludes that:

- An attorney may maintain a virtual law office in Pennsylvania;
- An attorney may maintain a virtual law office in which the attorney works from home, and associates work from their homes in various locations, including locations outside of Pennsylvania;
- An attorney practicing in a virtual office is not required to list a physical address in advertisements and on letterheads;
- An attorney with a virtual office is not required to meet with clients at the address listed in any advertisements and/or in the geographic location where the attorney will perform the services advertised, but must disclose to the client all of the information required under the Rules of Professional Conduct;
- An attorney may use a post office address in advertisements and letterheads, but may not state that services are performed at the address where the post office box is located;

[3] This opinion also does not address cloud computing, *i.e.*, online software services provided by other businesses, such as "Google Docs," which allow users to save, access, email and edit documents, case data, and other information online.

- A virtual law office must disclose information specifying where the services advertised will be performed, but need not disclose the specific address where each attorney is located;
- An attorney practicing in a virtual office may not state that his or her fees are lower than those of traditional brick and mortar law offices, but may state, if accurate, that the firm's overhead may be lower than traditional brick and mortar offices, thereby possibly reducing the fees the firm charges clients;
- There are no additional precautions necessary for an attorney practicing in a VLO to comply with his or her duty of confidentiality beyond those required of all attorneys; and,
- An attorney practicing in a virtual office at which attorneys and clients do not generally meet face to face must take appropriate safeguards to: (1) confirm the identity of clients and others; and (2) address those circumstances in which a client may have diminished capacity.

II. Discussion

A. Pa. Rules of Professional Conduct: Mandatory and Prohibited Conduct

Each of the issues raised in this Opinion implicates various Rules of Professional Conduct that affect an attorney's responsibilities towards clients, potential clients, other parties, and counsel. Although no Pennsylvania Rule of Professional Conduct specifically addresses virtual law offices, the Committee's conclusions are consistent with the existing Rules. The Rules implicated by these issues include:

- Rule 1.4 ("Communication");
- Rule 1.14 ("Client with Diminished Capacity");
- Rule 1.6 ("Confidentiality of Information");
- Rule 1.18 ("Duties to Prospective Clients);
- Rule 5.1 ("Responsibilities of Partners, Managers, and Supervisory Lawyers")
- Rule 7.1 ("Communications Concerning a Lawyer's Service");
- Rule 7.2 ("Advertising"); and,
- Rule 7.5 ("Firm Names and Letterheads").

The Rules define the requirements and limitations on an attorney's conduct that may subject the attorney to disciplinary sanctions. While the Comments may assist an attorney in understanding or arguing the intention of the Rules, they are not enforceable in disciplinary proceedings.

B. Communications with Clients

A lawyer operating a virtual law office is under the same obligations to communicate with his or her clients as a lawyer who works in a traditional office.

Rule 1.4 ("Communications") states in relevant part:

> (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.

Rule 1.14 ("Client with Diminished Capacity") states:

> (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 guardian ad litem, conservator or guardian.
>
> (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.

An attorney maintaining a VLO may have unique communication considerations that attorneys in traditional physical offices do not face. For example, because the lawyer may only communicate with a client by email, the lawyer must take appropriate steps to confirm that the client has read and understands the information provided. In addition, there may be situations in which an attorney has reason to believe that a client may be incompetent or otherwise have diminished capacity.[4] While this problem also confronts attorneys in traditional physical offices, those attorneys may be able to recognize incompetency through visual cues. Therefore, attorneys maintaining a virtual office may need to take special precautions to enable them to recognize incompetency issues as efficiently as traditional lawyers.

C. Confidentiality and Conflicts of Interest

An attorney with a virtual office is under the same obligation to maintain client confidentiality as is the attorney within a traditional physical office.

Rule 1.6 ("Confidentiality of Information") states in relevant part:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
>
> ...
>
> (d) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Rule 1.18 ("Duties to Prospective Clients") states:

> (a) A person who discusses with a lawyer 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 had discussions with a prospective client shall not use or reveal information which may be significantly harmful to that person learned in the consultation, 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 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 a 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, or;
>
> (2) all of the following apply:
>
> (i) the disqualified lawyer is 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.

Because the need to maintain confidentiality is crucial to the attorney-client relationship, attorneys in a VLO must take appropriate measures to protect confidential electronic communications. While the measures necessary to do so will vary based upon the technology and infrastructure of each office; common issues[5] include:

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[4] *See* Pa. Ethics Committee Inquiry No. 91-176 ("It is the duty of the [attorney] to be sure that [ ] clients are competent to properly consider the[ir] decision[s] and are not incapacitated in any manner (because of age, mental condition, etc.)."

[5] These various safeguards also apply to traditional law offices.

- Backing up data to allow the firm to restore data that has been lost, corrupted, or accidentally deleted;
- Installing a firewall to limit access to the firm's network;
- Limiting information that is provided to others to what is required/needed/requested;
- Avoiding inadvertent disclosure of information such as Social Security Numbers;
- Verifying the identity of individuals to whom the attorney provides confidential information;
- Refusing to disclose confidential information to unauthorized individuals (including family members and friends) without client permission;
- Protecting electronic records containing confidential data, including backups, by encrypting the confidential data;
- Implementing electronic audit trail procedures to monitor who is accessing the data; and
- Creating plans to address security breaches, including the identification of persons to be notified about any known or suspected security breach involving confidential data.

Attorneys in a virtual law office, or attorneys maintaining websites through which clients, prospective clients, and others may submit information, regardless whether there exists an attorney-client relationship, should also take protective measures to:

- Assure the confidentiality of information submitted through the website;
- Screen inquiries to avoid obtaining information from a prospective client that will conflict with the interests of current clients; and
- Take other reasonable measures to assure that all confidential data are protected.

D. Supervisory and Subordinate Lawyers within a Virtual Firm

Rule 5. 1 ("Responsibilities of Partners, Managers, and Supervisory Lawyers") states:

> (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.

It is likely in a VLO that a supervisory lawyer may not be practicing in the same building (or perhaps the same city or county) as subordinate lawyers over whom the lawyer has a duty of supervision. In these circumstances, a supervisory lawyer must "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

E. Location of Law Practice and Advertising

Rule 7.1 ("Communications Concerning a Lawyer's Service") 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.

Rule 7.2 ("Advertising") states, in relevant part:

> (h) Every advertisement that contains information about the lawyer's fee, shall be subject to the following requirements:
>
> (1) Advertisements that state or indicate that no fee shall be charged in the absence of recovery shall disclose that the client will be liable for certain expenses in addition to the fee, if such is the case.
>
> (2) A lawyer who advertises a specific fee or hourly rate or range of fees for a particular service shall honor the advertised fee for at least ninety (90) days; provided that for advertisements in media published annually, the advertised fee shall be honored for no less than one (1) year following initial publication unless otherwise stated as part of the advertisement.
>
> (i) All advertisements and written communications shall disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside the city or town, the county in which the office is located must be disclosed.

Rule 7.5 ("Firm names and Letterheads") states:

> (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.
>
> (b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

As outlined in Inquiry No. 2009-053, this Committee believes that an attorney is not required to disclose the specific location of his or her office, but must disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law.

III. Questions Raised

A. Whether an attorney may maintain a virtual law office under the Rules of Professional Conduct?

Yes. In Inquiry No. 2009-053, the inquirer asked whether the following conduct would comply with the Rules of Professional Conduct:

> [You are] interested in starting a law practice using a "virtual office"...
>
> [Your plan] would be to perform most of the work associated with the practice out of an office in [your] home. However, [you] would prefer neither to meet with clients there nor to identify [your] home address on [your] legal stationery, advertising, etc. There are technologies and services available to support this kind of a "virtual office" arrangement (*e.g.,* ReceptionHQ, an answering service with a live receptionist to answer calls and transfer them to [you] immediately or to take a message if [you are] unavailable). For hardcopy mail, [your] plan would be to use a local mailbox service (*e.g.,* Mailboxes, Etc., which provides 24 hour access to mail, package delivery notification, full-service mail & package receiving, mail holding & forwarding and postal services such as processing of return receipt requests). The address which would appear on [your] legal stationery, advertising, etc. would be:
>
> Firm Name
>
> 123 Main Street (*i.e.* the street address of the local mailbox service location)
>
> Unit # 456 (i.e., the # would be that of the postal box within the mailbox service location)[6]
>
> City, PA 67890 (i.e., city, state & zip code of local mailbox service location).

The author then concluded, as does the Committee, that:

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[6]The Committee notes that, consistent with Rule 7.1, the address provided by an attorney may not be misleading. Thus, letterhead or other documents that list a private mailbox or similar service as a physical address, but which is merely a mail drop, may be misleading and violate the Rules. Similarly, attorneys must also comply with their obligations under Pa.RDE 219(d)(1)(ii), which requires that every attorney complete an Annual Registration Statement that includes:

> The current residence and office addresses of the attorney, each of which shall be an actual street address or rural route box number, and the Attorney Registration Office shall refuse to accept a form that sets forth only a post office box number for either required address. A preferred mailing address different from those addresses may also be provided on the form and may be a post office box number. The attorney shall indicate which of the addresses, the residence, office or mailing address, will be accessible through the website of the Board (http://www.padisciplinaryboard.org/) and by written or oral request to the Board.

Finally, the Committee notes that attorneys must also comply with any requirements in the Rules of Civil Procedure that require the listing of addresses on pleadings and other filings.

- The manner in which the inquirer proposed to operate a virtual office complied with the Pennsylvania Rules of Professional Conduct;
- The Rules do not address the operation of a "virtual office;"
- Rule 7.5 ("Firm Names and Letterheads") does not discuss what type of office/address information must be placed on letterhead or disclosed to clients; and
- Rule 7.5 does not prohibit the use of a virtual office, or the use of a private mailbox or similar service, as a business address.

B. Whether an attorney may maintain a virtual firm in which the attorney works from his home, and his associates, if any, work from their homes in various locations, including locations outside of Pennsylvania?

Yes. As noted above, the Rules of Professional Conduct do not discuss or limit in any way the location from which an attorney (or a law firm) may practice. Thus, an attorney, or all attorneys in a virtual firm, may practice from whatever locations they desire, provided they comply with the Rules of Professional Conduct, and any applicable Rules of Procedure or regulations governing their practices.

C. Whether an attorney with a virtual office must list a physical address in advertisements and on letterheads?

No. Rule 7.2(i) does not require attorneys to list physical addresses in advertisements. Rather, the Rule requires attorneys to "disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law." The Rule further states that, "If the office location is outside the city or town, the county in which the office is located must be disclosed."

Note 11 to Rule 7.2 further explains:

> Paragraph (i) requires disclosure of the geographic location in which the advertising lawyer's primary practice is situated. This provision seeks to rectify situations in which a person seeking legal services is misled into concluding that an advertising lawyer has his or her primary practice in the client's hometown when, in fact, the advertising lawyer's primary practice is located elsewhere. Paragraph (i) ensures that a client has received a disclosure as to whether the lawyer he or she ultimately chooses maintains a primary practice located outside of the client's own city, town or county.

In furtherance of the Rules' goal that clients are informed about the location where their attorneys practice, Rule 7.5(b) requires that "A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located." In each instance, the goal of the Rules is to assure that clients are informed about the locations where the firm operates and the jurisdictions in which attorneys at the firm practice.

D. Whether an attorney must specify the geographical location where the attorney will perform the services advertised and/or meet the clients at that geographical location?

Yes. Consistent with Rule 7.5, "an attorney must disclose the city or town or county of the place where he or she principally practices law." The attorney is not required, however, to meet clients at a specific location. Thus, although an attorney may principally practice in one city, the Rules do not prohibit or limit the attorney's ability to meet clients in another location because the location where the attorney meets the clients is not necessarily related to the jurisdiction where he or she is licensed or the geographic area where he or she primarily practices.

E. Whether an attorney, with a virtual office, may use a post office box as the address where services are rendered.

Yes. An attorney may list a post office address on his website and/or letterhead. The Rules do not require an attorney to specify the particular address at which he or she practices. In fact, because attorneys in a virtual law office may not have an office, or attorneys who practice from home may not desire to either disclose their home addresses to clients or may not wish to meet clients at their homes, the Rules do not require attorneys to list a specific street or other address on letterhead and other documents.

Thus, pursuant to Rule 7.2, the inquiry is whether the letterhead properly discloses "the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law." With regard to a virtual office, this requirement may be particularly relevant. For example, if a virtual law office is comprised of two attorneys, one who handles employment matters, and the other who handles criminal cases, the letterhead and website must disclose "the geographic location, by city or town" of the office where the attorney who "***will actually perform the services advertised principally practice[s] law.***"

F. Whether a virtual law office must disclose the multiple cities and states where each attorney employed by the firm is performing the services advertised.

No. As noted above, Rule 7.2 requires letterhead and websites to disclose "the geographic location, by city or town" of the office where the attorney who "***will actually perform the services advertised principally practice[s] law.***" Virtual law office must disclose information specifying where the services advertised will be performed, but need not disclose the address where each attorney is located.

For example, a solo practitioner with a virtual office, principally practicing law in Philadelphia, decides to expand the practice by hiring two additional attorneys, one of whom principally practices in Pittsburgh and one of whom principally practices in Harrisburg. The solo practitioner and his associates each work from home and share client files and communicate electronically. If the attorney in Philadelphia is sending the electronic files of his local clients to the two attorneys in Pittsburgh and Harrisburg, then the two attorneys in Pittsburgh and Harrisburg are principally practicing law in Philadelphia, even if they never set foot within that city. Such a situation is

analogous to outsourcing,[7] and will not require the firm to list additional addresses in Pittsburgh and Harrisburg.[8]

G. Whether an attorney practicing in a virtual office may state that his or her fees are lower than those of traditional brick and mortar law offices.

No. An attorney practicing in a virtual office may not state that his or her fees are lower than those of traditional brick and mortar law offices, but may disclose that the firm's overhead may be lower than traditional brick and mortar offices, thereby reducing the fees the firm charges clients. Operating a VLO does not necessarily mean that the firm's fees for legal services will be lower than those of traditional offices.

Further, Rule 7.1 precludes a lawyer from making a "a false or misleading communication about the lawyer or the lawyer's services." The Rule defines a communication as "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." Legal fees vary from office to office, and from attorney to attorney, and it is not possible for an attorney to claim with any certainty, or with any reasonable basis, that his fees are lower than other attorneys' fees. As further noted in Comment 3 to Rule 7.1:

> Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

The Committee does not believe, however, that an attorney may claim that that his or her fees are lower than those of traditional brick and mortar law offices merely because the lawyer practices from a VLO. The Committee also does not believe that a proper disclaimer is possible with regard to legal fee claims such as this.

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[7] *See* ABA Formal Opinion 08-451 (permitting the practice of outsourcing legal work to attorneys licensed to practice law in other jurisdictions).

[8] If other states' ethics rules permit virtual offices, then the attorneys may open offices in other states. "There is no [ ] requirement that all the attorneys sharing in the firm be licensed in Pennsylvania. As a practical matter, more and more firms are opening branch offices not only in different states but also in different countries. . . . [Attorneys] may use letterhead showing all the firm members (partners and associates) provided [they] clearly delineate the jurisdictional limitations of those attorneys who are not admitted in Pennsylvania. In the alternative, [they] may use letterhead with the firm name and the Pennsylvania address, without individual listing of the other partners or associates [who are not admitted in Pennsylvania] in the firm. [The] simple use of the firm name, (as opposed to individual listing on the letterhead) . . . would not require delineation of the jurisdictional limitations of those partners." PA Ethics Committee Guidance Opinion Number 92-19. *See also* PA RPC 7.5.

The Committee also notes that attorneys may only practice in states in which they or a member of their firm are licensed, and this Opinion does not expand or modify any Opinions concerning the unauthorized practice of law.

H. Whether an attorney practicing in a virtual office needs to take additional precautions to comply with his or her duty of confidentiality.

No. All attorneys must assure the confidentiality of client information, and the issues confronting a VLO are similar to those of any law firm that has a website, allows attorneys to access the firm's computer from offsite, or that allows clients to access the firm's network remotely. Thus, consistent with their obligation of "competence" under Rule 1.1, every attorney must take reasonable precautions to assure the confidentiality of client information.

I. Whether maintaining a virtual office, where attorneys and clients do not meet face to face, requires additional safeguards to (1) confirm the identity of clients and others; and (2) deal with those circumstances in which a client may have diminished capacity.

Yes. In a virtual office, attorneys may meet with clients less frequently than in traditional offices; in fact, it is possible that attorneys may never meet their clients and will instead rely solely upon electronic communications. While this method of communication is generally acceptable, attorneys must be mindful of those situation in which they may be required to take extra measures to confirm the identity of the clients and to evaluate their clients' mental capacity.

Pursuant to Rule 1.14, an attorney is obligated to maintain a normal client-lawyer relationship "[w]hen 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." This obligation must be balanced with the attorney's concurrent obligation to assure that a client is competent and capable of making intelligent, informed decisions. This ability may be limited when communications are solely electronic, and lawyers practicing in VLOs may need to take special precautions to enable them to recognize incompetency issues as efficiently as traditional lawyers.

IV. Conclusion

The use of virtual law offices has become more and more popular because of the economy, and because of attorneys' desires to reduce their overhead. While not specifically referred to in the Rules, the Rules do not prohibit the creation of VLOs. As a result, attorneys practicing in a virtual law office must take appropriate measures to assure that they comply with the Rules of Professional Conduct.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2012-8
(November 2012)

The inquirer, a practicing Philadelphia lawyer, seeks guidance regarding advertising through LinkedIn, a website used for professional networking. According to the inquirer, each professional's LinkedIn profile contains a section entitled "Skills & Expertise," under which the user can list his or her skills and expertise, including areas of legal practice. In addition, the "Skills & Expertise" section permits a user to indicate his or her "proficiency," *i.e.*, beginner, intermediate, advanced or expert, in each practice area the user lists. The inquirer has two questions. May an attorney list his or her areas of practice in the "Skills & Expertise" section; if so may an attorney also use the proficiency categories within the "Skills & Expertise" section?

Resolution of these questions implicates Pennsylvania Rules of Professional Conduct (the "Rules) 7.1 and 7.4.

Rule 7.1 provides that: Rule 7.1. **Communications Concerning a Lawyer's Service.**

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.

The Comments to the Rules, although not adopted by the Pennsylvania Supreme Court, are meant to provide guidance in in the interpretation of the Rules. The Comments to Rule 7.1 provide that:

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or

fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

Rule 7.2. **Advertising,** provides in relevant part that,

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through written, recorded or electronic communications, including public media, not within the purview of Rule 7.3.

...

Comment [3] provides in part that,

...electronic media, such as the Internet, can be an important source of information about legal services...

Rule 7.4 **Communication of Fields of Practice and Specialization** provides in relevant part that:

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state that the lawyer is a specialist except as follows:

(1) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;

(2) a lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation;

(3) a lawyer who has been certified by an organization approved by the Supreme Court of Pennsylvania as a certifying organization in accordance with paragraph (b) may advertise the certification during such time as the certification of the lawyer and the approval of the organization are both in effect;

(4) a lawyer may communicate that the lawyer is certified in a field of practice only when that communication is not false or misleading and that certification is granted by the Supreme Court of Pennsylvania.

...

Applying Rule 7.1, it is clear that any statements on LinkedIn, or on any other website, must be truthful, may not mislead the public, and should convey only objective verifiable information.

Use of the internet as a permissible means of advertising is made clear by the provisions of Rule 7.2(a) as well as Comment 3 to that Rule.

While it is clear that Rule 7.4(a) permits a lawyer to communicate the fact that he or she does or does not practice in a particular field of law, it is also made clear by Rule 7.4(a) that a lawyer is strictly prohibited from stating that the lawyer is a specialist unless, *inter alia,* that lawyer has been certified as a specialist by an organization that has been approved by the Supreme Court of Pennsylvania.

The format of LinkedIn creates ambiguity. While LinkedIn does not include the word "specialist" on a profile, the inquirer is concerned about listing practice areas in the "Skills and Expertise" section since use of the term "expertise" might be considered akin to use of "specialist." The Committee finds that listing under that heading, which cannot be changed by an individual placing a profile there, is merely listing the areas in which an attorney practices, similar to such listings on many law firm websites.

However, turning to the specific categories under that listing, in which the inquirer can specifically indicate that she is an "expert" in a certain field, the Committee finds that this could reasonably lead a consumer to believe that the lawyer is a "specialist," despite the fact that the lawyer's expertise does not invoke any of the provisions of Rule 7.4a which would allow such a description by the inquirer of herself. Thus, while the inquirer may list her practice area under the general category of "Skills and Expertise" the Committee finds that the inquirer **may not** categorize herself as expert or herself as an "expert" or for that matter "experienced" outside of the parameters of Rule 7.4.

This conclusion is consistent with the plain language of the Rules and long standing ethical guidance. For example, in Formal Opinion 85-170 the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility noted that the use of subjective terms such as "experienced," "expert," "highly qualified," or "competent" are difficult for laymen to understand and interpret and should be used sparingly, if at all. The Opinion noted that "Attorneys must use objective information to convey their experience, such as the number of cases handled in a particular area, the number of cases handled in a particular field, or the number of years in practice."

In addition, since third parties are permitted to post comments about an individual on that individual's linked in page, the Committee cautions that the inquirer must monitor those posting to assure that any statements about her qualifications are truthful, do not convey unreasonable or unquantifiable expectations, and are not misleading. If any of them are, the inquirer should immediately remove them from her LinkIn page.

Finally, the inquirer is cautioned to evaluate all advertising both in the context in which it is presented, as well as the context in which it will be viewed by clients and potential clients, to ensure that the use of subjective terms does not make false or misleading communication about the lawyer's services. Thus, it is suggested that the Inquirer consider using more objective examples of the lawyer's services rather than the broad, subjective categories provided by LinkedIn.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

H

Supreme Court of Virginia.
Horace Frazier HUNTER
v.
VIRGINIA STATE BAR, ex rel. THIRD DISTRICT COMMITTEE.

Record No. 121472.
Feb. 28, 2013.

Background: Attorney appealed from decision of State Bar finding violations of disciplinary rules and imposing a public admonition. A appointed three-judge panel of the Circuit Court, City of Richmond, Kenneth R. Melvin, Alfred D. Swersky, and Von L. Piersall, Jr., Judges Designate, upheld the alleged violations in part and imposed a public admonition. Attorney appealed as of right.

Holdings: The Supreme Court, Cleo E. Powell, J., held that:
(1) attorney's blog posts were commercial speech, as opposed to political speech, for purposes of determining any First Amendment protection for those posts;
(2) professional conduct rules that permitted an attorney to make blog posts that discussed specific or cumulative case results, but required a disclaimer to explain to the public that no results were guaranteed, directly advanced substantial government interest in protecting public from potentially misleading lawyer advertising and were not more extensive than was necessary to serve that interest;
(3) State Bar's interpretation of professional conduct rule relating to confidentiality of information, as barring attorney from reporting on his blog what transpired in concluded public judicial proceedings, violated First Amendment; and
(4) circuit court erred in failing to require that one disclaimer imposed on attorney's blog posts be formatted and presented in the manner required under rule of professional conduct.

Decision of circuit court affirmed in part and reversed in part; matter remanded.

Lemons, J., filed an opinion dissenting in part in which McClanahan, J., joined.

West Headnotes

[1] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which appellate court exercises de novo review. U.S.C.A. Const.Amend. 1.

[2] Appeal and Error 30 ⚿840(3)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k840 Review of Specific Questions and Particular Decisions
30k840(3) k. Review of constitutional questions. Most Cited Cases

An appellate court must independently examine the entire record in First Amendment cases to ensure that a forbidden intrusion on the field of free expression has not occurred. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ⚿1535

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)2 Commercial Speech in General
92k1535 k. In general. Most Cited Cases

The existence of commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 ⚿1537

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)2 Commercial Speech in General
92k1537 k. Difference in protection given to other speech. Most Cited Cases

Constitutional Law 92 ⚿1681

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1681 k. Political speech, beliefs, or activity in general. Most Cited Cases

When speech that is both commercial and political is combined, the resulting speech is not automatically entitled to the level of protections afforded political speech. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚿2049

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(S) Attorneys, Regulation of
92k2049 k. Advertising. Most Cited Cases

Attorney advertising is commercial speech, in context of analyzing constitutional protection afforded to such advertising. U.S.C.A. Const.Amend. 1.

[6] Attorney and Client 45 ⚿46

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k46 k. Defenses. Most Cited Cases

Constitutional Law 92 ⚿2049

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(S) Attorneys, Regulation of
92k2049 k. Advertising. Most Cited Cases

Attorney's blog posts were "commercial speech," as opposed to political speech, for purposes of determining any First Amendment protection for those posts in bar disciplinary proceedings, though blog contained some political commentary, where attorney admitted that his motivation for blog was at least in part economic, posts predominately described cases where he had received a favorable result for his client, 22 of his 25 case-related posts described cases that he had successfully handled, blog was on his law firm's commercial website, it was non-interactive and did not permit readers to post comments, and it invited readers to "contact us" the same way one seeking legal representation would contact firm. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ⚿1535

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)2 Commercial Speech in General
92k1535 k. In general. Most Cited Cases

Constitutional Law 92 ⚿1541

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)2 Commercial Speech in General
92k1541 k. Reasonableness; relationship to governmental interest. Most Cited Cases

For commercial speech to come within protection of First Amendment, it at least must concern lawful activity and not be misleading; next, court asks whether the asserted governmental interest in regulating that speech is substantial; and if both inquiries yield positive answers, court must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ⚿1539

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)2 Commercial Speech in General
92k1539 k. False, untruthful, deceptive, or misleading speech. Most Cited Cases

In regulating commercial speech, while the states may place an absolute prohibition on inherently misleading advertising, they may not place an absolute prohibition on certain types of potentially misleading information if the information also may be presented in a way that is not deceptive. U.S.C.A. Const.Amend. 1.

[9] Attorney and Client 45 ⚿32(9)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(9) k. Advertising or soliciting. Most Cited Cases

Constitutional Law 92 ⚿2049

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(S) Attorneys, Regulation of
92k2049 k. Advertising. Most Cited Cases

Professional conduct rules that permitted an attorney to make blog posts that discussed specific or cumulative case results, but required a disclaimer to explain to the public that no results were guaranteed, directly advanced State Bar's substantial government interest in protecting the public from potentially misleading lawyer advertising, thus meeting a First Amendment requirement for regulation of commercial speech. U.S.C.A. Const.Amend. 1; Rules of Prof.Conduct Rules 7.1(a)(4), 7.2 (a)(3).

[10] Attorney and Client 45 ⚿2

45 Attorney and Client
45I The Office of Attorney
45I(A) Admission to Practice
45k2 k. Rules of court. Most Cited Cases

Attorney and Client 45 ⚿37.1

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k37.1 k. In general. Most Cited Cases

Constitutional Law 92 ⚿2049

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(S) Attorneys, Regulation of
92k2049 k. Advertising. Most Cited Cases

Professional conduct rules that permitted an attorney to make blog posts on specific or cumulative case results, but required disclaimer to explain to the public that no results were guaranteed, were not more extensive than was necessary to serve State Bar's substantial government interest in protecting

public from potentially misleading lawyer advertising, thus satisfying a First Amendment requirement for regulation of commercial speech; rules required that disclaimer be in bold type face and uppercase letters in a font size at least as large as, and in the same color and against the same background, the text used to advertise specific or cumulative case results. U.S.C.A. Const.Amend. 1; Rules of Prof.Conduct Rules 7.1(a)(4), 7.2 (a)(3).

[11] Constitutional Law 92 ⚷2041

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(S) Attorneys, Regulation of
92k2041 k. Clients' rights in general. Most Cited Cases

Under First Amendment, the state may not prohibit an attorney from discussing, without express consent from client or former client, information about a client or former client that is not protected by attorney-client privilege. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 ⚷2040

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(S) Attorneys, Regulation of
92k2040 k. In general. Most Cited Cases

Constitutional Law 92 ⚷2095

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)1 In General
92k2092 Publicity Regarding Proceedings
92k2095 k. Attorney speech about pending proceedings. Most Cited Cases

Constitutional Law 92 ⚷2114

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)2 Criminal Proceedings
92k2111 Publicity Regarding Proceedings
92k2114 k. Attorney speech about pending proceedings. Most Cited Cases

Attorney speech about public information from cases is protected by the First Amendment, but it may be regulated if it poses a substantial likelihood of materially prejudicing a pending case. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 ⚷2044

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(S) Attorneys, Regulation of
92k2044 k. Professional conduct regulations in general. Most Cited Cases

Disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 92 ⚷1490

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1490 k. In general. Most Cited Cases

State action that punishes the publication of truthful information can rarely survive scrutiny under the First Amendment. U.S.C.A. Const.Amend. 1.

[15] Attorney and Client 45 ⚷2

45 Attorney and Client
45I The Office of Attorney
45I(A) Admission to Practice
45k2 k. Rules of court. Most Cited Cases

Attorney and Client 45 ⚿32(9)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(9) k. Advertising or soliciting. Most Cited Cases

Attorney and Client 45 ⚿44(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k44 Misconduct as to Client
45k44(1) k. In general. Most Cited Cases

State Bar's interpretation of professional conduct rule relating to confidentiality of information, as barring attorney from reporting on his blog what transpired in concluded public judicial proceedings on basis that such disclosure would be embarrassing to clients, violated First Amendment. U.S.C.A. Const.Amend. 1; Rules of Prof.Conduct Rule 1.6.

[16] Attorney and Client 45 ⚿32(9)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(9) k. Advertising or soliciting. Most Cited Cases

Attorney and Client 45 ⚿59.2

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.2 k. In general. Most Cited Cases

Circuit court erred in attorney disciplinary proceeding in failing to require that the disclaimer imposed on attorney's blog posts concerning results achieved in specific cases be formatted and presented in the manner required under rule of professional conduct relating to advertising. Rules of Prof.Conduct, Rule 7.2(a)(3).

****613** Rodney A. Smolla (Horace F. Hunter, Hunter & Lipton, Richmond, on briefs), for appellant.

Renu M. Brennan, Assistant Bar Counsel (Edward L. Davis, Bar Counsel, on brief), for appellee.

Amicus Curiae: Virginia Association of Broadcasters (George W. House; Brooks, Pierce, McLendon, Humphrey & Leonard, on brief), in support of appellant.

Amici Curiae: Virginia Press Association, Newspaper Association of America, Gannett Co., Inc., The New York Times Company, and The Washington Post (Clifford M. Sloan; Frank E. Correll, Jr.; Paul M. Kerlin; Skadden, Arps, Slate, Meagher & Flom, on brief) in support of appellant.

Amicus Curiae: The Thomas Jefferson Center for the Protection of Free Expression (Deana Kessler; J. Joshua Wheeler, Charlottesville; Baker & Hostetler, on brief) in support of appellant.

Present: All the Justices.

OPINION BY Justice CLEO E. POWELL.

***491** In this appeal of right by an attorney from a Virginia State Bar ("VSB") disciplinary proceeding before a three judge panel appointed pursuant to Code § 54.1–3935, we consider whether an attorney's blog posts are commercial speech, whether an attorney may discuss public information related to a client without the client's consent, and whether the

panel ordered the attorney to post a disclaimer that is insufficient under Rule 7.2(a)(3) of the Virginia Rules of Professional Conduct.

I. FACTS AND PROCEEDINGS

Horace Frazier Hunter, an attorney with the law firm of Hunter & Lipton, PC, authors a trademarked blog [FN1] titled "This Week in Richmond Criminal Defense," which is accessible from his law firm's website, www. hunterlipton. com. This blog, which is not interactive, contains posts discussing a myriad of legal issues and cases, although the overwhelming majority are posts about cases in which Hunter obtained favorable results for his clients. Nowhere in these posts or on his website did Hunter include disclaimers.

> FN1. A "blog" is a shortened, colloquial reference for the term "weblog," and is defined as " 'a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer; *also*: the contents of such a site.' " *White v. Baker,* 696 F.Supp.2d 1289, 1310 (N.D.Ga.2010) (quoting Merriam–Webster Online Dictionary, http:// www. merriam- webster. com/ dictionary/ blog (last visited January 31, 2013)).

As a result of Hunter's blog posts on his website, the VSB launched an investigation. During discussions with the VSB about whether his blog constituted legal advertising, Hunter wrote a letter to the VSB offering to post *a disclaimer* on *one page* of his website:

> "*This Week in Richmond Criminal Defense* is not an advertisement[;] it is a blog. The views and opinions expressed on this blog are solely those of attorney Horace F. Hunter. The purpose of these articles is to inform the public regarding various issues involving the criminal justice system and should not be construed to suggest a similar outcome in any other case."

However, the negotiations stalled and no disclaimers were posted at that time.

****614 *492** On March 24, 2011, the VSB charged Hunter with violating Rules 7.1, 7.2, 7.5, [FN2] and 1.6 by his posts on this blog. Specifically, the VSB argued that he violated rules 7.1 and 7.2 because his blog posts discussing his criminal cases were inherently misleading as they lacked disclaimers.[FN3] The VSB also asserted that Hunter violated Rule 1.6 by revealing information that could embarrass or likely be detrimental to his former clients by discussing their cases on his blog without their consent.

> FN2. The District Committee ultimately did not find by clear and convincing evidence that Hunter violated Rule 7.5 and dismissed that charge.

> FN3. Although some of Hunter's blog posts now contain disclaimers, not all do and the disclaimers that are present were not added until after the VSB brought disciplinary charges against Hunter.

In a hearing on October 18, 2011, the VSB presented evidence of Hunter's alleged violations. The VSB presented a former client who testified that he did not consent to information about his cases being posted on Hunter's blog and believed that the information posted was embarrassing or detrimental to him, despite the fact that all such information had previously been revealed in court. The VSB investigator testified that other former clients felt similarly. The VSB also entered all of the blog posts Hunter had posted on his blog to date. At that time, none of the posts entered contained disclaimers. Of these thirty unique posts, only five discussed legal, policy issues. The remaining twenty-five discussed cases. Hunter represented the defendant in twenty-two of these cases and identified that fact in the posts. In nineteen of these twenty-two posts, Hunter also specifically named his law firm. One of these posts described a case where a family hired Hunter to represent them in a wrongful death suit and the remaining twenty-one of these

posts described criminal cases. In every criminal case described, Hunter's clients were either found not guilty, plea bargained to an agreed upon disposition, or had their charges reduced or dismissed.

At the hearing, Hunter testified that he has many reasons for writing his blog—including marketing, creation of a community presence for his firm, combatting any public perception that defendants charged with crimes are guilty until proven innocent, and showing commitment to criminal law. Hunter stated that he had offered to post a disclaimer on his blog, but the offered disclaimer was not satisfactory to the VSB. Hunter admitted that he only blogged about his cases that he won. He also told the VSB that he ***493** believed that using the client's name is important to give an accurate description of what happened. Hunter told the VSB that he did not obtain consent from his clients to discuss their cases on his blog because all the information that he posted was public information.

Following the hearing, the VSB held that Hunter violated Rule 1.6 by "disseminating client confidences" obtained in the course of representation without consent to post. Specifically, the VSB found that the information in Hunter's blog posts "would be embarrassing or be likely to be detrimental" to clients and he did not receive consent from his clients to post such information. The VSB further held that Hunter violated Rule 7.1. The VSB's conclusion that Hunter's website contained legal advertising was based on its factual finding that "[t]he postings of [Hunter's] case wins on his webpage advertise[d] cumulative case results." Moreover, the VSB found that at least one purpose of the website was commercial. The VSB further held that he violated Rule 7.2 by "disseminating case results in advertising without the required disclaimer" because the one that he proposed to the VSB was insufficient. The VSB imposed a public admonition with terms including a requirement that he remove case specific content for which he has not received consent and post a disclaimer that complies with Rule 7.2(a)(3) on all case-related posts.

Hunter appealed to a three judge panel of the circuit court and the court heard argument. The court disagreed with Hunter that *de novo* was the proper standard of review and instead applied the following standard: "whether the decision is contrary to the law or whether there is substantial evidence in the record upon which the district committee could reasonably have found as it did." The ****615** court further ruled that the VSB's interpretation of Rule 1.6 violated the First Amendment and dismissed that charge. The court held VSB's interpretation of Rules 7.1 and 7.2 do not violate the First Amendment and that the record contained substantial evidence to support the VSB's determination that Hunter had violated those rules. The court imposed a public admonition and required Hunter to post the following disclaimer: "Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case." This appeal followed.

***494** II. ANALYSIS

A. Whether "[t]he Ruling of the Circuit Court finding a violation of Rules 7.1(a)(4) and 7.2(a)(3) conflicts with the First Amendment to the Constitution of the United States."

Rule 7.1(a)(4), which is the specific portion of the Rule that the VSB argued that Hunter violated, states:

> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> ....
>
> (4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Con-

duct or other law.

The VSB also argues that Hunter violated the following subsection of Rule 7.2(a)(3):

> (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:
>
> .....
>
> (3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication ***495** is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

In response to these allegations, Hunter contends that speech concerning the judicial system is "quintessentially 'political speech' " which is within the marketplace of ideas. Hunter asserts that the Supreme Court of the United States has twice declined to answer whether political speech is transformed into commercial speech simply because one of multiple motives is commercial. Specifically, he argues that his blog posts are not commercial because

> (1) the [Supreme Court of the United States'] formal commercial speech definitions focus heavily on whether the speech does *no more* than propose a commercial transaction; (2) the [Supreme Court of the United States'] commercial speech decisions, to the extent that they discuss motivation at all, have focused on whether the speech is *solely* driven by commercial interest; (3) the [Supreme Court of the United States] has repeatedly insisted that the existence of a commercial motivation does not disqualify speech from the heightened scrutiny protection it would otherwise deserve; (4) the [Supreme Court of the United States] has warned that when commercial and political elements of speech are inextricably intertwined, the heightened protection applicable to the political ****616** speech should be applied, lest the political speech be chilled; and (5) the constitutional policy arguments that undergird the reduction of protection for commercial speech have no persuasive force when the content of the speech is political.

The VSB responds that Hunter's blog posts are inherently misleading commercial speech.

[1][2] "Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which ... this Court ... exercise[s] de novo review." *Peel v. Atty. Registration & Disciplinary Comm'n,* 496 U.S. 91, 108, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990). An appellate Court must independently examine the entire record in First Amendment cases to ensure that " 'a forbidden intrusion on the ***496** field of free expression' " has not occurred. *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 284–86, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)).

[3][4] Turning to Hunter's argument that his blog posts are political, rather than commercial, speech, we note that "[t]he existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by

the First Amendment.' " *Bigelow v. Virginia,* 421 U.S. 809, 818, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) (quoting *Ginzburg v. United States,* 383 U.S. 463, 474, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966)). However, when speech that is both commercial and political is combined, the resulting speech is not automatically entitled to the level of protections afforded political speech. *Board of Trustees of the State University of New York v. Fox,* 492 U.S. 469, 474, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989).

[5] While it is settled that attorney advertising is commercial speech, *Bates v. State Bar of Arizona,* 433 U.S. 350, 363–64, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), *Bates* and its progeny were decided in the era of traditional media. In recent years, however, advertising has taken to new forms such as websites, blogs, and other social media forums, like Facebook and Twitter. *See generally Spirit Airlines, Inc. v. United States Dep't of Transp.,* 687 F.3d 403 (D.C.Cir.2012); *QVC Inc. v. Your Vitamins Inc.,* 439 Fed.Appx. 165 (3d Cir.2011); *Athleta, Inc. v. Pitbull Clothing Co.,* 2013 WL 142877, 2013 U.S. Dist. LEXIS 6867 (C.D.Cal. Jan. 7, 2013).

Thus, we must examine Hunter's speech to determine whether it is commercial speech, specifically, lawyer advertising.

> Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

Bigelow, 421 U.S. at 826, 95 S.Ct. 2222 (internal citations omitted). Simply because the speech is an advertisement, references a specific product, or is economically motivated does not necessarily mean that it is commercial speech. ***497** *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 67, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). "The combination of *all* these characteristics, however, provides strong support for the ... conclusion that [some blog posts] are properly characterized as commercial speech" even though they also discuss issues important to the public. *Id.* at 67–68, 103 S.Ct. 2875 (emphasis in original).

Certainly, not all advertising is necessarily commercial, e.g., public service announcements. *See id.* at 66, 103 S.Ct. 2875 (holding "[t]he mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech"). However, all commercial speech is necessarily advertising. *See* Webster's Third New International Dictionary 31 (1993) (defining "advertisement" as "a calling attention to or making known[;]an informing or notifying[;] a calling to public attention[;] a statement calling attention to something[;] a public notice; esp[ecially] a paid notice or announcement published in some public print ****617** (as a newspaper, periodical, poster, or handbill) or broadcast over radio or television"). Indeed, the Supreme Court of the United States has said that "[t]he diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." *Bigelow,* 421 U.S. at 826, 95 S.Ct. 2222.

[6] Here, Hunter's blog posts, while containing some political commentary, are commercial speech. Hunter has admitted that his motivation for the blog is at least in part economic. The posts are an advertisement in that they predominately describe cases where he has received a favorable result for his client. He unquestionably references a specific product, i.e., his lawyering skills as twenty-two of his twenty-five case related posts describe cases that he has successfully handled. Indeed, in nineteen of these posts, he specifically named his law firm in addition to naming himself as counsel.

Moreover, the blog is on his law firm's com-

mercial website rather than an independent site dedicated to the blog. *See* Howard J. Bashman, How Appealing Blog (Feb. 11, 2013, 9:40 AM), http:// howappealing. law. com (an independent blog by a Pennsylvania appellate attorney that is accessible through Law.com at http:// legalblogwatch. typepad. com/). The website uses the same frame FN4 for the pages openly soliciting clients as it does for the blog, including the ***498** firm name, a photograph of Hunter and his law partner, and a " contact us" form. The homepage of the website on which Hunter posted his blog states only:

> **Do you need Richmond attorneys?**
>
> Hunter & Lipton, CP [sic] is a law practice in Richmond, Virginia specializing in litigation matters from administrative agency hearings to serious criminal cases. As experienced Richmond attorneys, we bring a genuine desire to help those who find themselves in difficult situations. Our partnership was founded on the idea that everyone, no matter what the circumstance, deserves a zealous advocate to fight on his or her behalf.
>
> People make mistakes, and may even find themselves in situations not of their own making. And for these people, the system can be extraordinarily unforgiving and unjust—but you do not have to face this system alone.
>
> **If you find yourself in a difficult legal situation, the Richmond attorneys of Hunter & Lipton, LLP would consider it a privilege to represent you. Please contact our office with any questions or to schedule a consultation.**

FN4. *See* Joan M. Reitz, Online Dictionary for Library and Information Science, http:// www. abc- clio. com/ ODLIS/ odlis_ F. aspx?# frame (last visited February 25, 2013) (defining frame as "[a] separately scrollable area in the window of a computer application or in a Web page that has been divided into more than one scrollable area").

This non-interactive blog does not allow for discourse about the cases, as non-commercial commentary often would by allowing readers to post comments. *See, e.g.,* Law.com Legal Blog Watch, http:// legalblogwatch. typepad. com/; Above the Law, http:// abovethelaw. com/. *See also* June Lester & Wallace C. Koehler, Jr., Fundamentals of Information Studies 102 (2d ed.2007) (observing that "[i]n contrast to the interaction possible in some other forms of web-published information, blog readers are most frequently permitted to leave comments and create threads of discussion"). Instead, in furtherance of his commercial pursuit, Hunter invites the reader to "contact us" the same way one seeking legal representation would contact the firm through the website.

Thus, the inclusion of five generalized, legal posts and three discussions about cases that he did not handle on his non-interactive blog, no more transform Hunter's otherwise self-promotional blog posts into political speech, "than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." *Fox,* 492 U.S. at 474–75, 109 S.Ct. 3028. Indeed, unlike situations***499** and topics where the subject matter is inherently, inextricably intertwined, Hunter chose to comingle sporadic political statements within his self-promoting blog posts in an attempt to camouflage the true commercial nature of his blog. " Advertisers should not be permitted ****618** to immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger,* 463 U.S. at 68, 103 S.Ct. 2875. When considered as a whole, the economically motivated blog overtly proposes a commercial transaction that is an advertisement of a specific product.

[7] Having determined that Hunter's blog posts discussing his cases are commercial speech,

> we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least

> must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *Adams Outdoor Advertising v. City of Newport News,* 236 Va. 370, 383, 373 S.E.2d 917, 923 (1988).

[8] The VSB does not contend, nor does the record indicate, that Hunter's posts do not concern lawful activity; rather, the VSB argues that the posts are inherently misleading. While we do not hold that the blog posts are inherently misleading, we do conclude that they have the potential to be misleading. "[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Bates,* 433 U.S. at 383, 97 S.Ct. 2691. Of the thirty posts that were on his blog at the time of the VSB hearing, twenty-two posts named himself as counsel and discussed cases that he handled. With one exception, in all of these posts, he described the successful results that he obtained for his clients.[FN5] While the States may place an absolute prohibition on inherently misleading advertising, "the States may not place an absolute prohibition on certain***500** types of potentially misleading information, ... if the information also may be presented in a way that is not deceptive." *In re R.M.J.,* 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982). Here, the VSB's own remedy of requiring Hunter to post disclaimers on his blog posts demonstrates that the information could be presented in a way that is not misleading or deceptive.

> FN5. In the one case that he does not describe favorable results he has received, he discusses how he has been retained by a family in a wrongful death lawsuit against a police department.

Thus, we must examine whether the VSB has a substantial governmental interest in regulating these blog posts. *Central Hudson,* 447 U.S. at 566, 100 S.Ct. 2343. The Supreme Court of the United States has recognized that " '[i]f the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.' " *Peel,* 496 U.S. at 110, 110 S.Ct. 2281 (quoting *Bates,* 433 U.S. at 375, 97 S.Ct. 2691). Indeed, the Supreme Court of the United States expressed concern that the public may lack the sophistication to discern misstatements as to the quality of a lawyer's services. *Bates,* 433 U.S. at 383, 97 S.Ct. 2691. Therefore, the VSB has a substantial governmental interest in protecting the public from an attorney's self-promoting representations that could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire Hunter.

[9] Because the VSB's governmental interest is substantial, we must now determine "whether the regulation directly advances the governmental interest asserted." *Central Hudson,* 447 U.S. at 566, 100 S.Ct. 2343. The VSB's regulations permit blog posts that discuss specific or cumulative case results but require a disclaimer to explain to the public that no results are guaranteed. Rules 7.1 and 7.2. This requirement directly advances the VSB's governmental interest.

[10] Finally, we must determine whether the VSB's regulations are no more restrictive than necessary. ****619***Central Hudson,* 447 U.S. at 566, 100 S.Ct. 2343. The Supreme Court of the United States has approved the use of disclaimers or explanations. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 651, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *In re R.M.J.,* 455 U.S. at 203, 102 S.Ct. 929; *Bates,*

433 U.S. at 384, 97 S.Ct. 2691. The disclaimers mandated by the VSB

> shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and upper-case letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative***501** case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Rule 7.2(a)(3). This requirement ensures that the disclaimer is noticeable and would be connected to each post so that any member of the public who may use the website addresses to directly access Hunter's posts would be in a position to see the disclaimer. Therefore, we hold that the disclaimers required by the VSB are "not more extensive than is necessary to serve that interest." *Central Hudson,* 447 U.S. at 566, 100 S.Ct. 2343.

Hunter's blog posts discuss lawful activity and are not inherently misleading, but the VSB has asserted a substantial governmental interest to protect the public from potentially misleading lawyer advertising. *See Central Hudson,* 447 U.S. at 566, 100 S.Ct. 2343. These regulations directly advance this interest and are not more restrictive than necessary, unlike outright bans on advertising. *Id.* We thus conclude that the VSB's Rules 7.1 and 7.2 do not violate the First Amendment. As applied to Hunter's blog posts, they are constitutional and the panel did not err.

B. Whether the circuit court erred in holding that the VSB's application of Rule 1.6 to Hunter's blog violated his First Amendment rights.

[11] Rule 1.6(a) states, that with limited exceptions,

> [a] lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation....

The VSB argues that the circuit court erred in holding that its interpretation of Rule 1.6 violates the First Amendment and that Hunter violated that rule by disclosing potentially embarrassing information about his clients on his blog "in order to advance his personal economic interests." VSB argues that lawyers, as officers of the Court, are prohibited from engaging in speech that might otherwise be constitutionally***502** protected. Thus, the VSB's interpretation of Rule 1.6 involves two types of information: 1) that which is protected by the attorney-client privilege, and 2) that which is public information but is embarrassing or likely to be detrimental to the client. Hunter is charged with disseminating the later type of information. In response to these allegations, Hunter argues that the VSB's interpretation of Rule 1.6 is unconstitutional because the matters discussed in his blogs had previously been revealed in public judicial proceedings and, therefore, as concluded matters, were protected by the First Amendment. Thus, we are called upon to answer whether the state may prohibit an attorney from discussing information about a client or former client that is not protected by attorney-client privilege without express consent from that client. We agree with Hunter that it may not.

[12] The cases cited by VSB in support of its position differ from this case in a substantial way; the cases relied upon by VSB involve pending proceedings. It is settled that attorney speech about public information from cases is protected by the First Amendment, but it may be regulated if it poses a substantial likelihood of materially prejudicing a *pending* case. *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1076, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991).

[13][14] "[A] presumption of openness inheres

in the very nature of a criminal trial ****620** under our system of justice." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 573, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). Moreover,

> [a] trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947). All of Hunter's blog posts involved cases that had been concluded. Moreover, the VSB ***503** concedes that all of the information that was contained within Hunter's blog was public information and would have been protected speech had the news media or others disseminated it. In deciding whether the circuit court erred, we are required to make our "own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). "At the very least, [the] cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." *Gentile,* 501 U.S. at 1054, 111 S.Ct. 2720. The VSB's interpretation of Rule 1.6 fails these standards even when we

> balance "whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved,' "

Id. (quoting *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 32, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)). State action that punishes the publication of truthful information can rarely survive constitutional scrutiny. *Smith v. Daily Mail Pub. Co.,* 443 U.S. 97, 102, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979)

[15] The VSB argues that it can prohibit an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession. Such concerns, however, are unsupported by the evidence. To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB's interpretation of Rule 1.6 violated the First Amendment.

***504** C. Whether the circuit court erred in requiring Hunter to post a disclaimer on his website that does not comply with the requirements of Rule 7.2(3) and therefore does not eliminate the misleading nature of his blog posts.

The VSB argues that the single disclaimer that the circuit court ordered Hunter to post on his blog was insufficient to comport with Rule 7.2(a)(3) because it did not eliminate the misleading nature of the posts.

As we have already concluded, Hunter's blogs are commercial speech and, thus, constitute lawyer advertising. When advertising cumulative or specif-

ic case results, Rule 7.2 requires that a disclaimer

> shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to ****621** advertise the specific or cumulative case results.
>
> Rule 7.2(a)(3).

Here, the VSB required Hunter to post a disclaimer that complies with Rule 7.2(a)(3) on *all* case-related posts. This means that Hunter's disclaimers "shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results." Rule 7.2(a)(3). The circuit court, however, imposed the following disclaimer to be posted once: "Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case."

[16] While the substantive meaning of the imposed disclaimer may conform to the requirements stated in Rule 7.2(a)(3)(i) through (iii), it nevertheless is less than what the rule requires. In contrast to the committee's determination, there is no provision in the circuit court's order requiring that the disclaimer be formatted and presented in the manner required by Rule 7.2(a)(3), and the text of the disclaimer prescribed by the circuit court is not itself formatted and presented in that manner. Even so, Hunter does not argue that the disclaimer required by the circuit court is an appropriate, less restrictive means ***505** of regulating his speech and, therefore, we decline to so hold. Based on the arguments presented to it, the circuit court erred by imposing a disclaimer that conflicted with the rule. *See, e.g., Rosillo v. Winters,* 235 Va. 268, 272, 367 S.E.2d 717, 719 (1988) (concluding that a circuit court abuses its discretion by "enter[ing an] order ... dispens[ing] with the requirements of [a] Rule"); *Zaug v. Virginia State Bar,* 285 Va. 457, ——, 737 S.E.2d 914, 917, 2013 WL 749501 (2013) (this day decided) ("The Virginia Rules of Professional Conduct are Rules of this Court.").

III. CONCLUSION

For the foregoing reasons, we hold that Hunter's blog posts are potentially misleading commercial speech that the VSB may regulate. We further hold that circuit court did not err in determining that the VSB's interpretation of Rule 1.6 violated the First Amendment. Finally, we hold that because the circuit court erred in imposing one disclaimer did not fully comply with Rule 7.2(a)(3), we reverse and remand for imposition of disclaimers that fully comply with that Rule.

Affirmed in part, reversed in part, and remanded.

Justice LEMONS, with whom Justice McCLANAHAN joins, dissenting in part.

I agree with the majority's resolution of the Rule 1.6 issue. However, I dissent from the majority's determination that Hunter is guilty of violating Rules 7.1(a)(4) and 7.2(a)(3) and that Hunter must post a disclaimer that complies with Rule 7.2(a)(3).

Rule 7.1 governs communications concerning a lawyer's services. Rule 7.1(a)(4) states:

> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> ....
>
> ***506** (4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2 is only applicable to advertisements. Rule 7.2(a)(3) states:

> (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of ****622**Rule 7.1, an advertisement violates this Rule if it:
>
> ....
>
> (3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Hunter's blog contains articles about legal and policy issues in the news, as well as detailed descriptions of criminal trials, the majority of which are cases where Hunter was the defense attorney. The articles also contain Hunter's commentary and critique of the criminal justice system. He uses the case descriptions to illustrate his views.

***507** *The First Amendment*

I believe that the articles on Hunter's blog are political speech that is protected by the First Amendment. The Bar concedes that if Hunter's blog is political speech, the First Amendment protects him and the Bar cannot force Hunter to post an advertising disclaimer on his blog.

Speech concerning the criminal justice system has always been viewed as political speech. "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 575, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). As political speech, Hunter uses his blog to give detailed descriptions of how criminal trials in Virginia are conducted. He notes how the acquittal of some of his clients has exposed flaws in the criminal justice system.

The majority asserts that because Hunter only discusses his victories, his blog is commercial. The majority does not give sufficient credit to the fact that Hunter uses the outcome of his cases to illustrate his views of the system. Hunter testified that one of the reasons he maintained the blog was to combat "the public perception that is clearly on the side that people are guilty until they're proven innocent." For example, when discussing one of the cases where his client was found not guilty, he concludes the post by explaining that this case is an "example of how innocent people are often accused of committing some of the most serious crimes. That is why it is important not to judge the guilt of an individual until all the evidence has been presented both for and against him."

The majority compares Hunter's detailed discussion of criminal trials and how these outcomes illustrate the need to hold government to its burden of proof, with "opening [a] sales presentation[ ] with a prayer or a Pledge of Allegiance." The majority proposes that his blog is not transformed into political speech simply because he included eight posts about legal issues and cases he was not involved in. However, the twenty-two posts discussing criminal trials in Virginia are political speech in their own right, and are not dependent upon the content of the other eight posts.

The majority also focuses on the location of Hunter's blog, and asserts that because the blog is accessed through the law firm's website and is not interactive, that demonstrates the blog is commercial in nature. While going through the law firm's website is one way to ***508** access the blog, it is also possible to go directly to the blog without navigating through the firm's website. Further, the fact that the blog is not interactive in no way commercializes the speech.

Many businesses have websites. It is not uncommon for websites to include links to related news articles or editorials. Merely because an article may be accessed through a commercial portal does not change the content of the article. It is the content of speech and the motivation of the speaker ****623** that determines the level of protection to which speech is entitled.

Hunter conceded that one of the purposes of the blog was marketing. Although the United States Supreme Court has never clearly decided whether political speech is transformed into commercial speech because one of the multiple motivations of the speaker is marketing and self-promotion, its jurisprudence leads to the conclusion that Hunter's speech is not commercial.

The traditional test for determining whether speech is commercial is if the speech "[does] *no more than* propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 385, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973)(emphasis added); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Board of Trustees of the State Univ. of N.Y. v. Fox,* 492 U.S. 469, 473–74, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Hunter's articles clearly do more than propose a commercial transaction. They contain detailed discussions of criminal trials in this Commonwealth, and Hunter's commentary and critique of the criminal justice system.

The United States Supreme Court has held that commercial speech is "expression related *solely* to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.,* 447 U.S. 557, 561, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (emphasis added). Marketing is not Hunter's sole motivation for maintaining this blog. As discussed above, one of Hunter's motivations in maintaining the blog is to disseminate information about "the criminal justice system, the criminal trials and the manner in which the government prosecutes its citizens."

Even if marketing was Hunter's sole motivation, economic motivation cannot be the basis for determining whether otherwise political speech is protected. The United States Supreme Court recognized in *Pittsburgh Press Co.* that merely having some economic motivation does not create a basis for regulation. "If a newspaper's profit motive were determinative, all aspects of its operations—from the ***509** selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment." 413 U.S. at 385, 93 S.Ct. 2553.

The mere existence of some commercial motivation does not change otherwise political speech into commercial speech. "[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." *Virginia Pharmacy,* 425 U.S. at 761, 96 S.Ct. 1817. In discussing the economic motivations at issue in *Sorrell v. IMS Health, Inc.*, 564 U.S. ——, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) , the United States Supreme Court recognized that "[w]hile the burdened speech results from an economic motive, so too does a great deal of vital expression." *Id.* at 2665.

Even if there is some commercial content to Hunter's speech, any commercial content is intertwined with political speech. When commercial and political elements are intertwined in speech, the

heightened scrutiny test must apply to all of the speech.

> It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking. But even assuming, without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.

Riley v. National Federation of the Blind of N.C., Inc., 487 U.S. 781, 795–96, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (internal citation omitted).

In this case, the policies the Bar advances have no persuasive force when applied to Hunter's blog. The purposes of Rules 7.1 and 7.2 are to protect the public from misleading****624** communications and advertisements concerning a lawyer's services. Hunter's articles contain detailed descriptions of the trials, along with his commentary on the criminal justice system. The Bar produced no evidence that anyone has found Hunter's articles to be misleading. There appears to be little benefit, if any, to the public by requiring Hunter to post a disclaimer***510** that concedes his articles are advertisements. Hunter disagrees that his articles are advertisements, and claims they are political speech. He objects to cheapening his political speech by denominating it as advertisement material.

Accordingly, I would hold that Hunter's speech is political, is entitled to the heightened scrutiny test, and that he cannot be forced to include the advertising disclaimer under Rule 7.2 that the Bar seeks to force upon his writings.

Va.,2013.
Hunter v. Virginia State Bar ex rel. Third Dist. Committee

285 Va. 485, 744 S.E.2d 611

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THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2010-6
(June 2010)

The inquirer seeks guidance as to the propriety under the Pennsylvania Rules of Professional Conduct (the "Rules") of interacting with prospective clients on blogs and via other electronic media. The inquirer asks if a lawyer may participate in a "blog" in which prospective clients are discussing a legal problem they are having with a particular product or service by announcing that the inquirer is an attorney and inviting the bloggers to respond to the lawyer if they have an interest in discussing the matter further. If so, the inquirer asks whether or not it would be appropriate to simply provide contact information or other information, such as jurisdictions in which one is licensed. If responding is improper, the inquirer asks if the result would be different if the complaining bloggers were actually discussing the possibility of some affirmative type of litigation. Finally, the inquirer asks if it is permissible to simply invite the complaining bloggers to go to his firm's blog which might address the issue further.

This inquiry poses questions raised by the ongoing development of different kinds of social interactive media and the propriety of using those to solicit clients. Rule 7.3, **Direct Contact with Prospective Clients**, applies and provides as follows:

(a) A lawyer shall not solicit in-person or by intermediary professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. ***The term "solicit" includes contact in-person, by telephone or by real-time electronic communication, but, subject to the requirements of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements***. (Emphasis added.)

(b) A lawyer may contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment unless:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

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

The purpose behind this Rule is to prohibit what is referred to as "direct solicitation" because of the concern about an inherent potential for abuse where a non-lawyer is engaged by a trained advocate in a direct, interpersonal encounter and, potentially feeling overwhelmed and not able to fully evaluate all the available alternatives before immediately retaining the offending lawyer, feels pressured to engage the lawyer. Specifically, comment [1] to the Rule states as follows:

> [1] There is a potential for abuse inherent in direct solicitation, including in-person, telephone or real-time electronic communication, by a lawyer of prospective clients known to need legal services. These forms of contact subject the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

Also relevant is Rule 7.2, dealing with Advertising, which provides in part that:

> (a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through written, recorded or electronic communications, including public media, not within the purview of Rule 7.3.
>
> (b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used. This record shall include the name of at least one lawyer responsible for its content.

The provisions of this Rule which require that a copy of the advertisement or written communication be retained for two years is referenced in a comment to Rule 7.3, in which the requirement to retain a copy of the communication is explained in the context of Rule 7.3's prohibition on direct solicitation.

> [3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1 The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are

much more likely to approach (and occasionally cross) the dividing line between accurate representations from those that are false and misleading.

Until January 1, 2005, Rule 7.3 did not include the phrase, or any reference to, "real-time electronic communication." That phrase was added to the Pennsylvania Rule on January 1, 2005. It was incorporated in the ABA Model Rules in 2002 on the recommendation of the ABA's Ethics 2000 Commission. The notion behind the adoption of the words "real-time electronic communication" plainly was to ensure the rule would apply to what were then referred to as "chat rooms," website communication forums where one might interact on a real-time basis with other persons having access to the same website. It was also clear, however, that "real-time electric communications" did not refer to e-mail.[1]

The question of whether or not Rule 7.3 barred electronic communication arose before this body before. We opined in late 2004 -- applying the then current, now ***former*** Rule 7.3 -- that participation in chat rooms was not barred by 7.3(a), reasoning that the kind of risk inherent in direct communication via telephone or personal interaction was not present in the social medium of a chat room. See, **Philadelphia Bar Association Formal Opinion 2004-5**. It seemed clear at the time, however, that the opinion would not survive the amendment to the Rule.

The current structure and interpretation of the Rule 7.3 is also affected to some degree by constitutional limitations on exercise of commercial speech. In *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), the Supreme Court held that the first amendment to the United States Constitution prohibited a ban on a lawyer engaging in commercial speech by sending targeted, direct mail solicitations to prospective clients. The opinion distinguished between overbearing solicitation of an interpersonal nature that might be conducted in person from targeted, direct mail solicitations, as follows:

"In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference. Our decision in *Ohralik* that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as 'a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud.'...Second,

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[1] The foregoing observations as to the intent behind adding the words are drawn from the "Reporter's Explanation of Changes" explaining the change when made by the ABA, which provided as follows:

Paragraph (a): Extend prohibition to "real-time electronic contact." The Commission, in accord with the ABA Commission on Responsibility in Client Development, ***is recommending that lawyer solicitation by real-time electronic communication (e.g., an Internet chat-room) be prohibited***. Differentiating between e-mail and real-time electronic communication, the Commission has concluded that the interactivity and immediacy of response in real-time electronic communication presents the same dangers as those involved in live telephone contact. (Emphasis added.)

We recognize that the Reporter's Explanations are not part of the Rule and are not binding on the ABA, let alone the Pennsylvania Supreme Court, but nevertheless consider it worth noting in attempting to make sense of what the rule means in practice.

'unique...difficulties,'...would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is 'not visible or otherwise open to public scrutiny.'...Targeted, direct-mail solicitation is distinguishable from the in-person solicitation in each respect.

Like print advertising, petitioner's letter -- and targeted, direct-mail solicitation generally – 'poses much less risk of overreaching or undue influence' than does in-person solicitation...Neither mode of written communication involves 'the coercive force of the personal presence of a trained advocate' or the 'pressure on the potential client for an immediate yes-or-no answer to the offer of representation.'...Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the 'reader of an advertisement...can effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes,'...A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation 'conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney.'...Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.

Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. It could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case, or could implicitly suggest that the recipient's legal problem is more dire than it really is....Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice....

But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech....The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency,...giving the State ample opportunity to supervise mailings and penalize actual abuses. The 'regulatory difficulties' that are 'unique' to in-person lawyer solicitation,... -- solicitation that is 'not visible or otherwise open to public scrutiny' and for which it is 'difficult or impossible to obtain reliable proof of what actually took place,'... -- do not apply to written solicitations." *486 U.S. at 475-76* (citations omitted).

Shapero was decided in 1988, generations ago in the development of electronic modes of communication. There are now many more methods of communication available that lend themselves to solicitation. Among the different modes of interaction are the following:

E-mail is electronic communication which appears instantly the moment it is sent in the inbox of the recipient. The recipient, of course, need not be sitting at his or her desk at the time it is sent, and indeed it might be days, weeks or months, before it is even looked at. Furthermore, even assuming that the recipient is sitting at his or her desktop when the e-mail comes in, he or she can exercise a choice of whether or not to open it; once opened, whether or not to read it carefully; and once read, to either respond at the moment, or later, or never.

Blogging is a different mode of interaction. It occurs on a "website" at which "posts" are selectively placed for reading by the person who maintains the blog. There is a host that maintains the content of the blog and decides what is "posted" on the blog. That might be done by posting content sent to the host by a blog reader or from any other source. Depending upon the attentiveness of the host, it is possible that something sent by a lawyer to the blog host, with a suggestion that it be posted, could be received by the host and posted in "real-time," and that if other blog readers were watching the blog when it was posted, then that blog reader could immediately respond and effectively have a real-time communication with the lawyer. However, as with e-mail, which can also be "real-time," the participant watching a blog controls the response. He or she can read it, or not, and, after having read it, decide to respond, or not, and when.

Chat rooms are electronic forums where individuals generally participate simultaneously with each other having a kind of typed out "conversation" in real-time. An electronic chat room, however, where the individuals participate by typing in their messages and having them appear on a screen, requires each individual to affirmatively type out a message and then hit the send button thereby exercising the choice to either respond or not. Like simultaneous e-mail and blogs, it offers protection not present in a personal interaction in real-time because a participant is separated with an electronic "wall" and has the ability to simply leave the chat room at any time, solely within the participant's discretion. By definition, there is no in-person or telephonic presence of any other individuals participating in the chat.

In this respect, each of these kinds of electronic communication is different from in-person direct communication and telephone calls. In the latter kinds of in-person communications with an overbearing lawyer, the prospective client can walk away or hang up the phone, but it is socially awkward to do so in the face of a determined advocate. In the former, however, as the Supreme Court found even in the case of individually targeted direct mail solicitations, a recipient can readily and summarily decline to participate in the communication. Moreover, each of these kinds of social interactions enables the lawyer using it to make and retain a copy of the communication, as required by Rule 7.2.

The Committee believes that the rationale of the prohibition on direct solicitation, both as explained in the Rule itself and the accompanying comments, and by the Supreme Court's opinion in *Shapero*, lead to the conclusion that usage of these kinds of social media for solicitation purposes is acceptable under Rule 7.3. All of these kinds of social interactions are characterized by an ability on the part of the prospective client to "turn off" the soliciting lawyer and respond or not as he or she sees fit, and an ability to keep a record of its contents.

We do recognize that Rule 7.3 does specifically refer to "real-time electronic communication," and that the ABA Reporter's Explanation states that those words were intended to refer to "chat rooms." But we do not feel bound to apply them as the Reporter's Explanation may have intended. First, we think it significant that the writers of the revised Rule did not choose to refer specifically to "chat rooms" **in the Rule itself** or to any other mode of electronic communication, and thereby recognized that Rule would be applied, or not, to such modes of communication as they developed and their usages and susceptibility for abuse became more settled. They established in the Rule the principle that real-time electronic communications are covered by the Rule, but left to others the issue of what that means, given the technology of the day and the purposes behind the Rule.[2] Second, even assuming that the technological abilities of chat rooms are the same today as they were in 2000, we think it also relevant that the social attitudes and developing rules of internet etiquette are changing. It seems to us that with the increasing sophistication and ubiquity of social media, it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures, and that everyone realizes that, like targeted mail, e-mails, blogs and chat room comments can be readily ignored, or not, as the recipient wishes.

Thus, the Committee concludes that Rule 7.3 does not bar the use of social media for solicitation purposes where the prospective clients to whom the lawyer's communication is directed have the ability, readily exercisable, to simply ignore the lawyer's overture, just like they could a piece of directed, targeted mail. Where that is the case **those risks which might be inherent in an individualized, overbearing communication are not sufficiently present** to bar the use of such methods of social interaction for any solicitation purposes. Under this view of Rule 7.3, "real-time electronic communication" is limited to electronic modes of communication used in a way in which it would be socially awkward or difficult for a recipient of a lawyer's overtures to not respond in real time. The Committee also concludes that even on line chat rooms of the sort where discussion occurs by typed communications do not constitute real-time electronic media.

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[2] That the rules governing professional conduct have not kept pace with technology is evidenced by the preliminary agenda promulgated by the ABA Commission on Ethics 20/20, the Commission charged by the ABA with a comprehensive review of the Model Rules and Codes that form the basis of most states' attorney regulation. In a letter dated November 19, 2009 from the Commission's Co-Chairs, outlining the Commission's preliminary agenda, it is stated that, "With respect to technology, the profession faces not merely the proliferation of personal computing, e-mail, 'smart-phone' technology, enhanced personal digital assistants, and the internet, but the likelihood that on the horizon is a potential new or second internet as well as technologies that cannot now be fully anticipated."

Applying this analysis to the questions posed by the inquirer, the Committee finds that it is appropriate for a lawyer who encounters persons "blogging" about complaints, indicating they might need legal assistance, to attempt to communicate with them via the blog or via any other electronic method, provided it is not real-time electronic communication in which the prospective clients are compelled to respond immediately. This would mean, for example, that the lawyer observing this discussion via a blog could submit a "post" to the blog or could send an e-mail if the posters to the blog have supplied their e-mails, and the lawyer could invite the bloggers to visit the lawyer's firm's website.

A few cautionary notes are necessary, however.

First, there might be some types of social media, not directly involved in this inquiry, that are so similar to an in-person communication or telephone call that use of them for solicitation is barred. For example, it is possible to conduct chat rooms over the internet in which the participants communicate in real-time by voice over IP. That could be, and likely is, real-time electronic communication.

Second, simply because use of e-mail blogs or chat rooms for solicitation is not categorically barred by Rule 7.3(a) does not mean it might not be utilized in an ethically inappropriate way, where the lawyer suggests by the content of his writing or other methods that the recipient should or must immediately respond. That is, we believe that if the recipient has the ability to not respond, it is not real-time electronic communication, but if the sender of the e-mail suggests in the content of what he sends that it is important or critical to the recipient's interests that he or she immediately respond in real-time and then they do so, that could become a factor that would lead us to believe that the lawyer would be using a mechanism that is not necessarily a real-time electronic communication as one that is in fact a real-time electronic communication in the specific manner of its use.

Third, the contents of communications, whether sent by real-time electronic communication or otherwise, are of course subject to a whole array of important Rules of which the inquirer must be watchful. Those Rules include 7.1, 7.2 and 7.4 (regarding content of communications), 7.3(b) (limitations on solicitations), 4.2 (admonishment against communicating with persons already represented) and 1.7 (conflicts of interest).

Finally, the inquirer should retain for no less than two years the contents of any such communications, as required by Rule 7.2(b).

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

H

United States District Court,
E.D. Pennsylvania.
Linda EAGLE, Plaintiff,
v.
Sandi MORGAN, Haitham Saead, Joseph Mellaci, Elizabeth Sweeney, Lisa Arnsperger, Qamar Zaman, and Edcomm, Inc., Defendants.

Civil Action No. 11–4303.
March 12, 2013.

Linda Eagle, New York, NY, pro se.

Philip Hirschhorn, Buchanan Ingersoll & Rooney PC, New York, NY, Samantha L. Southall, Buchanan Ingersoll & Rooney PC, Philadelphia, PA, for Defendants.

Haitham Saead, Willow Grove, PA, pro se.

MEMORANDUM

BUCKWALTER, Senior District Judge.

I. FINDINGS OF FACT

***1** The following consists of the facts of this case upon which Part II, the Conclusions of Law, are based.

Plaintiff Linda Eagle is a resident of the State of New York and received her triple doctorate in communications, business, and psychology from Temple University in 1980. (Stipulation 6; N.T. 20:13–16.) Together with Clifford Brody, she founded Defendant Edcomm, Inc. ("Edcomm"), which is a banking education company that provides services on-line and in person to the banking community. David Shapp was also a shareholder. (N.T. 40:5–22; 43:13–44:17.) Defendant has admitted that Dr. Eagle was well-published in banking industry publications, was quoted in newspapers and magazines, and presented at industry conferences around the world. (N.T. 17:3–11.) Further, Clifford Brody testified as to Plaintiff's extensive experience with multiple corporations in the banking education industry and about her repeated generation of substantial annual sales. (N.T. 107:2–112:6.)

On October 7, 2010, a company named Sawabeh information Services Company ("SISCOM") entered into a term sheet with Eagle, Brody and Shapp wherein SISCOM purchased all of the outstanding common shares of Edcomm. The three individuals remained employed by Edcomm as executives, but they were involuntarily terminated by defendant Haitham Saead on June 20, 2011. (N.T. 54:2–17.) This lawsuit followed soon thereafter, the principal thrust of which is the alleged illegal use of Eagle's LinkedIn account by Edcomm, to her economic detriment.

The background of this allegation essentially starts with Brody's decision, made sometime in or before May of 2009, to use LinkedIn as a sales and marketing tool for the Edcomm business. LinkedIn is a business-oriented social networking site accessible through the internet for contacting current and potential business acquaintances and allowing users to invite other LinkedIn users to "connect" and communicate directly via e-mail. (N.T. 100:3–101:11; 105:19–25.) As the CEO at the time, Brody found that "LinkedIn was awesome" for marketing, and he testified enthusiastically about it. (N.T. 100:7–23; 101:3–11.) On May 3, 2009, Plaintiff created her own LinkedIn account using her Edcomm e-mail address. (N.T. 49:18–51:5.) Per the LinkedIn "User Agreement," however, the account belonged to Eagle alone and she was individually bound by the User Agreement.[FN1] (Defs.' Ex. E.)

FN1. Specifically, this User Agreement states, "If you are using LinkedIn on behalf of a company or other legal entity, you are nevertheless individually bound by this Agreement even if your company has a separate agreement with us." (Defs.' Ex. E.)

As time passed, it became the policy for Edcomm not only to urge employees to create LinkedIn accounts, but also to become involved in the account content. (N.T. 128:2–9; 130:23–131:23.) To this end, Edcomm developed employee policies covering on-line content. Notably, however, Edcomm did not require that employees have LinkedIn accounts. (N.T. 125:10–117.) Moreover, at no time did Edcomm pay for its employees'—including Dr. Eagle's—LinkedIn accounts. (N.T. 124:13–125:9.) In other words, although Edcomm did not require employees to maintain LinkedIn accounts or subsidize the maintenance of such accounts, it provided guidelines if an employee wanted to participate. (N.T. 132:11–18.) It is also clear that Edcomm became concerned about LinkedIn accounts and former employees. An email chain on March 2, 2010, encapsulates this concern:

***2** From: Cliff Brody

Sent: Tuesday, March 2, 2010 1:36 PM

To: Linda Eagle; David Shapp; Kathy Luczak

Subject: few loose ends

David....

Can you look into what our requirements/responsibilities are as far as LinkedIn accounts and former employees.

CB

Clifford G. Brody

Founder & Chief Executive Officer

The Edcomm Group Banker's Academy

From: David Shapp

Sent: Tuesday, March 2, 2010 2:17 PM

To: Cliff Brody; Linda Eagle; Kathy Luczak

Subject: few loose ends

I think we can leave it up forever and mine the information contained within as long as we do not pretend to be her. The company/employer owns all data on its hardware, including email archives. The employee has no rights at all in his email identity. Ordinarily, as a courtesy, employers tend to keep old accounts active for a limited time in order to avoid rejecting business-related communications, and forward personal emails to the former employee. There would potentially be an issue if the employer used the former employee's email to perpetuate a false impression that the employee remained with the company, but simply mining the incoming traffic is certainly within the employer's rights. David

David Shapp

Partner & Senior Vice President

The Edcomm Group Banker's Academy

From: Cliff Brody

Sent: Tuesday, March 2, 2010 3:23 PM

To: David Shapp; Linda Eagle; Kathy Luczak

Subject: few loose ends

What about LinkedIn—not on our hardware. The question is who really owns that account? Ideally it would be us. We could leave it up as-is and she would have to create a new one.

CB

Clifford G. Brody

Founder & Chief Executive Officer

The Edcomm Group Banker's Academy

From: David Shapp

Sent: Tuesday, March 2, 2012 3:53 PM

To: Cliff Brody; Linda Eagle; Kathy Giola

Subject: few loose ends

We do. It was created with an email account that is ours, on our computers, on our time and at our direction. She cannot use that account because she does not own the email address that opened it. I think as long as we just read from it and do not write to it, we are not breaking any laws. Same thing with her email account—as long as we only read and do not write, we are within our rights to do so.

David

David Shapp

Partner & Senior Vice President

The Edcomm Group Banker's Academy

(Defs.' Ex. T.)

While these emails and other Edcomm actions evidence an intense interest in the issue involving ownership of LinkedIn accounts, it is clear that on June 20, 2011—the day on which Edcomm terminated Dr. Eagle—no policy had been adopted to inform the employees that their LinkedIn accounts were the property of the employer. Whether such a policy would be legally valid under the contract created between LinkedIn customer and an individual user is obviously not an issue before the Court in light of the finding made in this case that no such policy existed.

***3** Sometime prior to her termination, Dr. Eagle gave her password to the LinkedIn account to certain Edcomm employees.[FN2] (N.T. 58:24–59:17.) The primary purpose of sharing her password seems to have been to enable those employees to respond to certain matters in Dr. Eagle's account, such as invitations, and also to permit updating of the account. (N.T. 57:21–58:14.) When Dr. Eagle was terminated, Edcomm employees accessed her LinkedIn account and changed its password, effectively locking her out of the account. The parties stipulated that from June 20, 2011 to July 6, 2011, Edcomm had full control of the account. (Stipulation 2.) On July 7, 2011, LinkedIn took over the account and, by July 14, 2011, Dr. Eagle had regained access to the account. (Stipulation 3.) It appears, however, that, due to some unknown events occurring while the account was in the hands of LinkedIn, Eagle lost messages from June 20, 2011 to October 7, 2011, although this is not totally clear. (N.T. 63:2–15; 69:7–13.) Dr. Eagle's Exhibit 9 contains a self-serving statement from her claiming she had not received messages since July. (Pl.'s Ex. 9.) This conflicts somewhat with the stipulation that, while LinkedIn did in fact take control of the account on July 7, 2011, and neither Edcomm or Eagle could use it, LinkedIn provided access to the account to Eagle by July 14, 2011. (N.T. at 14:7–11.) In any event, neither party disputes that, from at least October 7, 2011, Plaintiff has had full access to and control over her LinkedIn account. (N.T. 93:8–16.)

FN2. This was contrary to the agreement with LinkedIn by which the user agrees to keep her password secure and confidential and not permit others to use her account.

It is clear that Edcomm gave public notice that Eagle was no longer affiliated with the company within a week of her termination. (Defs.' Ex. H; N.T. at 54:2–11.) This information, however, did not appear on what had been Dr. Eagle's LinkedIn account. Although it is not entirely clear from the testimony or the Exhibits what someone accessing Dr. Eagle's LinkedIn page saw when Edcomm had control of the LinkedIn account from June 20, 2011 to July 6, 2011, both parties appeared to concede that the page reflected the name, picture, education, and experience of Sandi Morgan, the newly-appointed Interim CEO of Edcomm. (Pl.'s Ex. 51.) The evidence reflects, however, that some information related to Dr. Eagle had not been fully deleted from the site, such as her honors and awards. (N.T. 72:5–10.) It further appears that either a Google search for "Linda Eagle" or a search for "Linda Eagle" on LinkedIn during the time Edcomm had

control of the account would direct the searcher to a LinkedIn account named "Linda Eagle" at the URL "http://www.linkedin.com/in/lindaeagle." Clicking on that link would bring the user to Eagle's Linked-In account, which now bore the name, picture, and credentials of Sandi Morgan. (Pl.'s Ex. 49, 50, & 51; N.T. 72:23–73:4.)

Ultimately, as referred to previously, Edcomm had exclusive control of the Linda Eagle LinkedIn account from June 20, 2011 to July 6, 2011. In the Conclusions of Law which follow, the significance of such conduct by Edcomm will be discussed.

***4** By way of explaining her damages, Eagle offered testimony of Clifford Brody to explain her average number of sales over the past five years and how, even using the lowest number, she would have damages of $248,000 (*see generally* N.T. 114–121). Specifically, the following exchange constitutes the extent of Plaintiff's effort to quantify the damages causally related to Edcomm's tortious actions:

> Q. So, Mr. Brody, before lunch we were talking about my sales, and now I want to go back to my sales numbers for a moment and ask you to tell the court what my average sales per year were for about the last five years.
>
> ....
>
> A. Your average sales over the last five years—
>
> Q. Annual sales, right.
>
> A. —was over $3 million a year.
>
> Q. Okay. And I'm going to ask you how you know this. Where you get this number from for the record, please?
>
> A. That's my job to know. I analyzed our sales numbers on a weekly basis, and you were, of course, our, by far leading sales person, and so I do know.
>
> Q. Do you have a recollection of what my strongest year; my highest year looked like?
>
> A. Yes, I do. It was $6.6 million.
>
> Q. Okay. So you have a recollection of what my lowest year, looking at the last five years was?
>
> A. $1.6 million.
>
> Q. And do you have-and I know that this is something that was tracked, but do you know in those sales, what percentage was to existing clients as opposed to non-existing clients?
>
> A. Yes, I do.
>
> Q. Or contacts, let me not even say clients.
>
> A. Yes, I do. Your sales to existing contacts was over 70% of our total sales.
>
> Q. Okay. And how do you know that?
>
> A. Again, as you said, we track that very closely because that tells us exactly how we should be reaching out; whether we should be reaching out primarily to new clients-or to new contacts, to existing contacts.
>
> Q. Thank you. And I ask that specifically-you're not just pulling a number, you're stating something that was tracked?
>
> A. That's correct.
>
> Q. So, then, if I were to say that I was averaging 70%, just using our number, of 3 million per year to existing contacts, that would be 2.1 million per year in sales to existing contacts.
>
> A. That's correct.
>
> Q. Is that correct? If we used my lowest number, my lowest year.
>
> A. 1.6 million
>
> Q. 1.6 million, and if we took 70%, and let's even

say 70% of 1.5 million—

...

Q. So, would you say that's $1.05 million per year that I sold to existing contacts in my lowest sale year?

A. Correct.

Q. Okay. How many contacts did I have in LinkedIn at the point at which my account was no longer mine?

A. About 4,000.

Q. So, is it fair to say that I sold, and I'm going to round it here, but is it fair to say that I sold a million dollars' worth of work to this population of 4,000 contacts.

A. Exactly.

Q. So, I'm going to divide yet further. I have 4,000 contacts. I have a million dollars. So, that divides to $250 in sales per year per contact? I'm trying to get at the value of the contact. I'm not saying that I sold $250 to every contact. I'm asking you as a person who was evaluating the data if that is what that data means?

***5** ...

Q. Right. So I have a million dollars, and I'm dividing it by 4,000 contacts, because it's in those 4,000 contacts that I sold a million dollars and I'm trying to put a dollar value on that contact. And so, when I do that division, I come up with $250 per contact.

A. Per contact, per year.

Q. Per contact, per year.

A. Correct. Exactly.

...

Q. Okay. Now, going back to my LinkedIn account, which you were very close to, and when my LinkedIn account was taken away from me and you were helping me to determine how to—what needed to be done to get it back, how long did I not have full working LinkedIn?

A. Over three months.

Q. Okay. So, if each of those contacts is worth four months, a quarter of 250—

A. Three months.

Q. For three months. Thank you. A quarter of $250—if we can do that math, I am saying that each of those contacts is worth $62 per three months.

A. Correct.

Q. So, if you follow my math, I can go through the math again. So, I'm saying $250 per year. *Id* didn't have it for three months, $62 per contact.

A. Yes.

Q. And you stated that I had approximately 4,000 of them, and you used—or I used my lowest—I asked you to use my lowest year when you were looking at my math there; the year that I sold 1.5 million as opposed to when I sold 6.5 million plus. And so, using that number, if I calculate that, I'm going to calculate a loss of approximately 4,000 people at $62, the lowest possible number I could use, which is $248,000.

A. Correct.

Q. And I mean, we can check the math. You can trust my—I'm doing the math here. And if we had used my average sale instead of my low number, that would go up considerably?

A. About twice that.

Q. It would be about twice that. So, instead of 248, it would be close to 500,000?

A. Correct.

Q. Would be—twice that would be $496,000 that I was denied by not having my LinkedIn for three months. So, are you saying that—are you suggesting that if you were trying to quantify in our role in charge of sales and sales strategy, that there's a loss of between $248,000 and 496,000 in three months to existing contacts?

A. Correct.

Q. Okay. And does that include new contacts who did not come to LinkedIn?

A. No, it does not. New contacts would not have been part of this calculation.

Q. Okay.

A. We were just using existing contacts.

Q. Could you quantify relationships that were permanently damaged as a result of my lack of responsiveness?

A. Really, there is no way to quantify how many relationships were damaged, how many were completely destroyed, how many were harmed just a little bit. There's really no way to quantify that.

(N.T. 114:11–121:2.) Notably, Plaintiff presented no evidence of a connection of this figure to her loss of the LinkedIn account for the above-mentioned time. Moreover, Plaintiff presented no damage calculation in response to written discoveries. As such, it would be pure guesswork for the Court to determined damages based on the evidence or lack of evidence presented.

***6** On July 1, 2011, just prior to contacting LinkedIn in an effort to regain access to the account, Plaintiff initiated the present litigation against Defendants in this Court setting forth eleven causes of action, as follows: (1) violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030(a)(2)(C); (2) violation of the CFAA, 18 U.S.C. § 1030(a)(5)(C); (3) violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1 125(a)(1)(A); (4) unauthorized use of name in violation of 42 Pa.C.S. § 8316; (5) invasion of privacy by misappropriation of identity; (6) misappropriation of publicity; (7) identity theft under 42 Pa.C.S. § 8315; (8) conversion; (9) tortious interference with contract; (10) civil conspiracy; and (11) civil aiding and abetting. (*Id.* ¶ 61–141.) Via Memorandum issued October 4, 2012, the Court granted Defendant Edcomm's Motion for Summary Judgment as to Plaintiff's claims under the Computer Fraud and Abuse Act (Counts I and II) and as to Plaintiff's Lanham Act claim (Count III). Accordingly, Plaintiff's sole remaining causes of action sound in state law. Additionally, Defendant Edcomm proceeds on its own counterclaims of misappropriation and unfair competition.[FN3]

FN3. At trial, defense counsel voluntarily withdrew Edcomm's conversion claim. (N.T. 199:20–200:15.) The Court, therefore, addresses it no further in this Memorandum.

II. CONCLUSIONS OF LAW

Having made the foregoing findings of fact, the Court is now tasked with reaching conclusions of law on the various causes of action at issue. Plaintiff brings eight separate causes of action, while Defendants raise three individual counterclaims. The Court addresses each individually.

A. *Plaintiff's Causes of Action Against Defendant Edcomm*[FN4]

FN4. Notably, Plaintiff has presented no evidence regarding the individual actions of Defendants Sandy Morgan, Haitham Saed, Joseph Mellaci, Elizabeth Sweeney, Lisa Arnsperger, or Qamar Zaman. They were not called as witnesses. Indeed, there was scarce if any mention of their names during the trial of this case. Plaintiff attempted to introduce into evidence some

email exchanges among Defendants Lisa Arnsperger, Elizabeth Sweeney, Sandy Morgan, and Brandy Long regarding their participation in the accessing of Eagle's LinkedIn account. (N.T. 31:8–32:9 (referencing Pl's Exs., 30, 40, 41, & 42).) Aside from the fact that these emails were never authenticated, they constitute pure hearsay and, thus, may not be considered. Accordingly, the Court cannot find the individual Defendants liable on any ground and must enter judgment in their favor, thereby leaving Edcomm as the sole remaining Defendant.

1. *Unauthorized Use of Name in Violation of 42 Pa.C.S. § 8316*

Plaintiff's first cause of action arises under 42 Pa.C.S. § 8316, which states that "[a]ny natural person whose name or likeness has commercial value and is used for any commercial or advertising purpose without the written consent of such natural person or the written consent of any of the parties authorized in subsection (b) may bring an action to enjoin such unauthorized use and to recover damages for any loss or injury sustained by such use." 42 Pa. Cons.Stat. § 8316(a). The statute defines "Name" or "Likeness" as "[a]ny attribute of a natural person that serves to identify that natural person to an ordinary, reasonable viewer or listener, *including,* but not limited to, *name,* signature, photograph, image, likeness, voice or a substantially similar imitation of one or more thereof." *Id.* § 8316(e) (emphasis added). It goes on to note that "Commercial value" means "[v]aluable interest in a natural person's name or likeness that is developed through the investment of time, effort and money." *Id.; see also Facenda v. N.F.L Films, Inc.,* 542 F.3d 1007, 1027 (3d Cir.2008). Finally, the statute explains that "commercial or advertising purpose" means:

> (1) Except as provided in paragraph (2),[FN5] the term shall include the public use or holding out of a natural person's name or likeness:
>
> FN5. Paragraph (2) of this definition states that:
>
> > The term shall not include the public use or holding out of a natural person's name or likeness in a communications medium when:
> >
> > (I) the natural person appears as a member of the public and the natural person is not named or otherwise identified; (ii) it is associated with a news report or news presentation having public interest; (iii) it is an expressive work; (iv) it is an original work of fine art; (v) it is associated with announcement for a commercial or advertising purpose for a use permitted by subparagraph (ii), (iii) or (iv); or (vi) it is associated with the identification of a natural person as the author of or contributor to a written work or the performer of a recorded performance under circumstances in which the written work or the recorded performance is lawfully produced, reproduced, exhibited or broadcast.
> >
> > *Id.*
>
> *7 (I) on or in connection with the offering for sale or sale of a product, merchandise, goods, services or businesses;
>
> (ii) for the purpose of advertising or promoting products, merchandise, goods or services of a business; or
>
> (iii) for the purpose of fundraising.
>
> 42 Pa. Cons.Stat. § 8316(e).

Based on the foregoing findings of fact, the Court concludes that Plaintiff has met her burden of proving all the elements of this claim. Plaintiff presented ample testimony that the name "Dr. Linda Eagle" has commercial value due to her investment of time and effort in developing her repu-

tation in the banking education industry. She testified that she is a published authority, has been quoted in others' publications, and has presented at conferences. (N.T. 33:12–16.) Further, Mr. Clifford Brody testified that Plaintiff had extensive experience in the banking education industry and generated substantial annual sales. (N.T. 107:2–112:6.) Defendants, on the other hand, offered no rebuttal to such testimony and made no effort to show that the name "Dr. Linda Eagle" lacked in commercial value.

Moreover, Plaintiff established that Defendant Edcomm used her name, without her consent, for commercial or advertising purposes. Plaintiff's Exhibits 49 and 50 demonstrate that an individual conducting a search on either Google or LinkedIn for Dr. Eagle, during the time period when Defendant Edcomm had control of Dr. Eagle's account, by typing in "Linda Eagle," would be directed to a URL for a web page showing Sandi Morgan's name, profile, and affiliation with Edcomm Group Banker's Academy. (Pl.'s Exs. 49 & 50 .) In other words, by looking for Dr. Eagle, an individual would unwaringly be put in contact with Edcomm despite the fact that Dr. Eagle was no longer affiliated with Edcomm and did not consent to Edcomm's use of her name. In turn, Edcomm obtained the commercial benefit of using Eagle's name to promote the services of its business. Such actions by Edcomm reflect its improper use of her name for the purpose of advertising and/or promotion. Ultimately, this set of events constitutes a violation of 42 Pa.C.S. § 8316.

2. *Invasion of Privacy by Misappropriation of Identity*

"For claims of invasion of privacy, Pennsylvania has adopted the tort of intrusion upon seclusion as set forth in the Restatement (Second) of Torts § 652B and its comments." *Feinberg v. Eckelmeyer*, No. Civ.A.09–1536, 2009 WL 4906376, at *8 n. 5 (E.D.Pa. Dec.16, 2009). "To be liable for appropriation of name or likeness under the Restatement (Second) of Torts, 'a defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of plaintiff's name or likeness.' " *Wallace v. MediaNews Grp., Inc.*, No. Civ.A.12–872, 2013 WL 214632, at *4 (M.D.Pa. Jan. 18, 2013) (quoting Restatement (Second) of Torts § 652C cmt. c). The Restatement (Second) of Torts describes a tortfeasor who has committed an invasion of privacy by appropriation of name or likeness as "[o]ne who appropriates to his own use or benefit the name or likeness of another." Restatement (Second) of Torts § 652C. "Invasion of privacy by appropriation of name or likeness does not require the appropriation to be done commercially." *Rose v. Triple Crown Nutrition, Inc.*, No. Civ.A.07–0056, 2007 WL 707348, at *3 (M.D.Pa. Mar. 2, 2007) (citing Restatement (Second) of Torts § 652C cmt. b. (1977)).

***8** Attempting to defend against this claim, Defendant Edcomm focuses on the fact that it did not attempt to use Dr. Eagle's likeness and credentials on the account page during the two-week period in which Edcomm had control of Plaintiff's LinkedIn account. This argument, however, disregards its use of her name to initially direct users to that page. As noted above, Plaintiff had a privacy interest not just in her picture and resume, but in her name. There is sufficient evidence that the name "Dr. Linda Eagle" had the benefit of reputation, prestige, and commercial value within the banking education industry. While Defendant updated the home page of the LinkedIn account to mostly reflect Sandi Morgan's information, Defendant maintained that home page under a URL containing Dr. Eagle's name. Thus, someone searching for Dr. Eagle on LinkedIn would be unwittingly directed to a page with information about Ms. Morgan and Edcomm. Such a scenario could be deemed to be "appropriat[ing] to [Edcomm's] own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of plaintiff's name." Accordingly, the Court finds that Defendant has committed the tort of invasion of privacy by misappropriation of identity.

3. *Misappropriation of Publicity*

Plaintiff's third cause of action alleges that Defendant Edcomm committed misappropriation of publicity. Pennsylvania recognizes a right of publicity. *Rose,* 2007 WL 707348, at *2–3; *World Wrestling Fed'n Entm't Inc. v. Big Dog Holdings, Inc.,* 280 F.Supp.2d 413, 443–44 (W.D.Pa.2003); *Brockum Co. v. Blaylock,* 729 F.Supp. 438, 445 (E.D.Pa.1990); *Eagle's Eye, Inc. v. Ambler Fashion Shop, Inc.,* 627 F.Supp. 856, 862 (E.D.Pa.1985). "A defendant violates a plaintiff's right of publicity by 'appropriating its valuable name or likeness, without authorization, [and using] it to defendant's commercial advantage.' " *World Wrestling* Fed'n, 280 F.Supp.2d at 443–44 (quoting *Phila. Orchestra Ass'n v. Walt Disney Co.,* 821 F.Supp. 341, 349 (E.D.Pa.1993)). This right grants a person an exclusive entitlement to control the commercial value of his or her name or likeness and to prevent others from exploiting it without permission. *Eagle's Eye Inc.,* 627 F.Supp. at 862. "[A]lthough similar, the right of publicity is not identical to invasion of privacy by appropriation of name or likeness." *Rose,* 2007 WL 707348, at *3. "[T]he right of publicity protects against commercial loss caused by appropriation of a name or likeness. In other words, the invasion of privacy by appropriation of name or likeness is a personal right created to protect one's privacy, while the right of publicity more closely resembles a property right created to protect commercial value." *Id.*

For the same reasons set forth regarding the two previous torts, the Court likewise finds that Defendant has committed the tort of misappropriation of publicity. Plaintiff maintains an exclusive right to control the commercial value of her name and to prevent others from exploiting it without permission. By using Plaintiff's password to enter her LinkedIn account, changing the password to block Dr. Eagle from entering it, and then altering her account to reflect Sandi Morgan's information—in lieu of simply creating a new LinkedIn account for Ms. Morgan—Defendant Edcomm deprived Plaintiff of the commercial benefit of her name. As stated previously, as a result of Edcomm's actions, a person who was specifically searching for Dr. Eagle in connection with business opportunities would unwittingly be directed to an Edcomm webpage with Sandi Morgan's name, picture, and credentials. This result clearly provided promotional benefit for Edcomm and constitutes the appropriation of a name for commercial use. Such actions therefore rise to the level of tortious activity.

4. *Identity Theft*

***9** Plaintiff next alleges that Defendant Edcomm committed the crime of identity theft for which she is entitled to civil damages under 42 Pa.C.S. § 8315. The crime of identity theft is defined as follows: "A person commits the offense of identity theft of another person if he possesses or uses, through any means, identifying information of another person without the consent of that other person to further any unlawful purpose." 18 Pa. Cons.Stat. § 4120(a). "Identifying information" is defined as "[a]ny document, photographic, pictorial or computer image of another person, or any fact used to establish identity, including, but not limited to, a name, birth date, Social Security number, driver's license number, nondriver governmental identification number, telephone number, checking account number, savings account number, student identification number, employee or payroll number or electronic signature." *Id.* at § 4120(f).

Unlike with the prior causes of action, the Court does not find that Plaintiff has established this cause of action by a preponderance of the evidence. First, unlike the previous causes of action, identity theft requires some unlawful possession of a person's identifying information. *Wallace v. MediaNews Grp., Inc.,* No. Civ.A.12–872, 2013 WL 214632, at *6 (M.D.Pa. Jan. 18, 2013) ("To be in violation of this statute, one must be in possession of identifying information of another without their consent and use that information to further an unlawful purpose ... There is no evidence the Wallace's mug shot was 'stolen.' The mug shot was apparently obtained for police files and was part of

the public record."). Dr. Eagle's name was publicly available and thus not unlawfully possessed. Moreover, the mere use of Plaintiff's name to direct a user to an Edcomm-related website and to "keep [Eagle] from her personal account," (N.T. 35:23–24), while perhaps unscrupulous, is not so clearly an "unlawful" purpose under the meaning of the statute such that it constitutes identity theft.

As to the actual account page, both parties agree that the LinkedIn home page to which users searching for Dr. Eagle were directed contained Sandi Morgan's name, photograph, profile summary, experience, and education. (Pl.Ex. 51.) Although Defendant concedes that the "Honors and Awards" portion of the profile was actually that of Dr. Eagle, this information is not "identifying information" such that it could have been used to establish Dr. Eagle's identity. Indeed, in all logic, a person directed to this page could not reasonably believe that the page was intended to identify Dr. Eagle. Rather, a reasonable individual, while perhaps confused as to *how* he or she arrived at this page, would have no doubt that the page belonged to Ms. Morgan and was describing Ms. Morgan's resume. Even assuming Plaintiff's "honors and awards" could be deemed identifying information, Plaintiff presented no testimony to show that that information was taken and used for an "unlawful purpose." Rather, the evidence reflects that this information was inadvertently left on the profile page despite Defendant Edcomm's efforts to delete all of Plaintiff's other identifying information. Accordingly, the Court finds no merit to this cause of action.

5. *Conversion*

***10** Plaintiff's next claim alleges that by "hijacking" her LinkedIn account, Defendant has effectively committed the tort of conversion. "Conversion is a tort by which the defendant deprives the plaintiff of his right to a chattel or interferes with the plaintiff's use or possession of a chattel without the plaintiff's consent and without lawful justification.... A cause of action in conversion is properly asserted if the plaintiff had actual or constructive possession of a chattel or an immediate right to possession of a chattel at the time of the alleged conversion. Money may be the subject of conversion." *Ueberroth v. Goldner, Papandon, Childs & DeLuccia, LLC,* No. Civ.A.11–3119, 2012 WL 834737, at *3 (E.D.Pa. Mar.12, 2012). Under Pennsylvania law, the elements of conversion are: "[(1)] the deprivation of another's right of property, or use or possession of a chattel, or other interference therewith; [(2)] without the owner's consent; and [(3)] without legal justification." *Universal Premium Acceptance Corp. v. York Bank & Trust Co.,* 69 F.3d 695, 704 (3d Cir.1995) (quotations omitted). "While courts in other states have expanded the tort of conversion to apply to intangible property, in Pennsylvania this expansion is limited 'to the kind of intangible rights that are customarily merged in, or identified with, a particular document (for example, a deed or a stock certificate).' " *Giordano v. Claudio,* 714 F.Supp.2d 508, 524 (E.D.Pa.2010) (quoting *Apparel Bus. Sys., LLC v. Tom James Co.,* No. Civ.A.06–1092, 2008 WL 858754, at *18 (E.D.Pa. Mar.28, 2008)).

The sole item converted in this case is the LinkedIn account. Numerous courts, however, have found that items such as software, domain names, and satellite signals are intangible property not subject to a conversion claim. *See, e.g., Apparel Bus. Sys.,* 2008 WL 858754, at *18–19 ("Software is not the kind of property subject to a conversion claim); *DirecTV, Inc. v. Frick,* No. Civ.A.03–6045, 2004 WL 438663, at *2–3 (E.D.Pa. Mar.2, 2004) (finding that satellite signals constitute intangible property which cannot be converted under Pennsylvania law); *Famology.com Inc. v. Perot Sys. Corp.,* 158 F.Supp.2d 589, 591 (E.D.Pa.2001) (holding that domain names are not the type of tangible property that may be converted).

As the LinkedIn account is not tangible chattel, but rather an intangible right to access a specific page on a computer, Plaintiff is unable to state a cause of action for conversion. Therefore, the Court

finds in favor of Defendant Edcomm on this claim.

6. *Tortious Interference With Contract*

In her next cause of action, Plaintiff asserts that Defendant Edcomm tortiously interfered with her contract with LinkedIn. Pennsylvania courts, following the Restatement (Second) of Torts, define the tort of intentional interference with existing contractual relations as:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss to the other from the third person's failure to perform the contract.

***11** *Binns v. Flaster Greenberg, P.C.*, 480 F.Supp.2d 773, 778 (E.D.Pa.2007) (quoting Restatement (Second) Torts § 766). In order to prevail on a claim for interference with contractual relations, the plaintiff must plead and prove four elements: (1) the existence of a contractual relation; (2) the defendant's purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of any privilege or justification on the part of the defendant; and (4) damages resulting from the defendant's conduct. *Gundlach v. Reinstein*, 924 F.Supp. 684, 693 (E.D.Pa.1996).

Although Plaintiff was unable to offer into evidence the contract with LinkedIn to which she agreed when establishing her account, (N.T. 75:7–77:9), the Court can reasonably infer from the existence of her account that Plaintiff had in fact entered into a contractual relationship with LinkedIn. Moreover, Plaintiff has established that, by entering her account and changing her password, Defendant Edcomm acted with purpose or intent to harm Plaintiff by preventing that relationship from continuing. Edcomm asserts that it had a privilege to enter Dr. Eagle's account under Edcomm's policy that it "owned" its employees' LinkedIn accounts and could "mine" them for information upon departure of those employees. As set forth above in the Findings of Fact, however, no such official policy existed. Moreover, the LinkedIn User Agreement clearly indicated that the individual user owned the account.

Were these the sole elements of the tort, Plaintiff would likely be able to succeed on her cause of action against Edcomm. A key element of this tort, however, is damages. Reserving the Court's lengthier discussion of damages for a separate section below, it suffices—for purposes of this section—to conclude that Plaintiff has failed to prove actual legal damage or pecuniary loss flowing from the alleged interference by Edcomm. Indeed, to date, Plaintiff maintains her contract with LinkedIn. Thus, the Court finds in favor of Edcomm on this claim.

7. *Civil Conspiracy*

In her seventh remaining cause of action, Plaintiff alleges that all Defendants conspired to gain unauthorized access to and misappropriate her LinkedIn account. To state a cause of action for civil conspiracy, the plaintiff must demonstrate: "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do an lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage." *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 313 (3d Cir.2003) (citation and internal quotations omitted). An " 'actionable civil conspiracy must be based on an existing independent wrong or tort that would constitute a valid cause of action if committed by one actor.' " *Levin v. Upper Makefield Twp.*, 90 F. App'x 653, 667 (3d Cir.2004) (quoting *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 789 (3d Cir.1999)). Ultimately, "only a finding that the underlying tort has occurred will support a claim for civil conspiracy." *Alpart v. Gen. Land Partners, Inc.*, 574 F.Supp.2d 491, 506 (E.D.Pa.2008) (quotation omitted). Importantly, "[p]roof of malice, i.e., an intent to injure, is essential in proof of a conspiracy."

Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466, 472 (Pa.1979). Malice requires that the sole purpose of the conspiracy was to injure the plaintiff and that this intent to injure be without justification. *Doltz v. Harris & Assoc.*, 280 F.Supp.2d 377, 389 (E.D.Pa.2003) (emphasis added). As such, a showing that a person acted for professional reasons, and not solely to injure the plaintiff, negates a finding of malice. *See Bro–Tech Corp. v. Thermax, Inc.*, 651 F.Supp.2d 378, 419 (E.D.Pa.2009); *Thompson Coal Co.*, 412 A.2d at 472 (noting that the intent to injure must be without justification, which cannot exist when an act is merely done "with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights") (quoting *Rosenblum v. Rosenblum*, 320 Pa. 103, 181 A. 583, 585 (Pa.1935)).

***12** Plaintiff's conspiracy claim fails on multiple grounds. Primarily, as noted above, Plaintiff has not put forth any evidence regarding any of the actions of any of the individual Defendants. Because the very nature of conspiracy requires "two or more persons," this claim cannot succeed. Moreover, even if claims against the individual Defendants remained, Edcomm and its employees/directors/shareholders cannot legally conspire under the well-established intracorporate conspiracy doctrine. *Duffy v. Lawyers Title Ins. Co.*, No. Civ.A. 11–4503, 2012 WL 602192, at *4 (E.D.Pa. Feb.24, 2012) (noting that it is "well-settled that a corporation cannot conspire with its subsidiaries, its agents, or its employees"). Third, while Plaintiff has established that Defendants acted improperly, she has not proven that the *sole* purpose of the conspiracy was to injure Plaintiff, as opposed to maintaining what Edcomm deemed to be proprietary company information. Thus, she cannot show the malice element of a conspiracy claim. Finally, as will again be discussed in more detail below, Plaintiff is unable to prove actual legal damage. Therefore, Plaintiff shall not be entitled to recover on her civil conspiracy claim.

8. *Civil Aiding and Abetting*

Finally, Plaintiff alleges a cause of action against the individual defendants for aiding and abetting in the misappropriation of her identity. "The elements of a claim for common law aiding and abetting are: '(1) that an independent wrong exist; (2) that the aider or abettor know of that wrong's existence and (3) that substantial assistance be given in effecting that wrong.' " *Kranzdorf v. Green*, 582 F.Supp. 335, 337 (E.D.Pa.1983) (quoting *Walck v. Am. Stock Exchange, Inc.*, 687 F.2d 778, 791 (3d Cir.1982)).

Plaintiff asserts that while only a few of the Defendants took the physical actions necessary to access and misappropriate her LinkedIn account, all Defendants provided substantial assistance and encouragement to the offending Defendants by suggesting that the account be accessed, providing her LinkedIn account password for that purpose, providing Ms. Morgan's photograph for Dr. Eagle's account, and suggesting or drafting changes to Dr. Eagle's LinkedIn account. However, although Plaintiff has clearly established the existence of an independent wrong—i.e., misappropriation of publicity, invasion of privacy, and unauthorized use of name—she has again failed to provide sufficient evidence on which this Court can make any findings as to any of the individual Defendants. For example, while Plaintiff suggested her belief that her assistant, Lisa Arnsperger, provided the password to her LinkedIn account, she offered no first-hand evidence regarding the circumstances of these alleged actions. Indeed, not one of these individual Defendants was called upon to testify in this matter. Judgment on this claim is therefore entered in favor of Defendants.

9. *Compensatory Damages*

***13** Having succeeded on three of her causes of action, the question then becomes the amount of compensatory relief to which Plaintiff is entitled. Through the testimony of Clifford Brody—the co-founder of Edcomm and Plaintiff's current business partner—Plaintiff put forward evidence of prior

"deals" she closed for her various companies. She then attempted, through Mr. Brody, to establish a damages calculation caused by the two-week complete loss of her LinkedIn account and approximate three-month partial loss of access to messages on LinkedIn. As set forth in detail above, Plaintiff, through Mr. Brody, used her average sales per year divided by the number of contacts she maintained on LinkedIn to arrive at a dollar figure per contact, per year. She then divided that dollars per contact per year figure by four to represent that for one-quarter of the year, or approximately three months, she did not have full access to her LinkedIn account. Based on those calculations, Plaintiff arrived at a damages figure of somewhere between $248,000 and $500,000 depending on the annual sales figure used.

Under Pennsylvania law, lost profits may be recovered when: (1) there is evidence to establish the damages with reasonable certainty; (2) they were the proximate cause of the alleged wrong; and (3) they were reasonably foreseeable. *See Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 680 (3d Cir.1991); *Delahanty v. First Pa. Bank, N.A.*, 318 Pa.Super. 90, 464 A.2d 1243, 1258 (Pa.Super.Ct.1983). "While a plaintiff's proof of damages need not be mathematically precise, the evidence must establish the fact of damages 'with a fair degree of probability.' " *Mun. Revenue Serv., Inc. v. Xspand, Inc.*, 700 F.Supp.2d 692, 711 (M.D.Pa.2010) (quoting *Advent*, 925 F.2d at 680 (further citations omitted)). The law requires that a "claim for damages ... be supported by a reasonable basis for calculation; mere guess or speculation is not enough." *Stevenson v. Econ. Bank of Ambridge*, 413 Pa. 442, 197 A.2d 721, 727 (Pa.1964). "If the facts afford a reasonably fair basis for calculating how much plaintiff's entitled to, such evidence cannot be regarded as legally insufficient to support a claim for compensation." *AMCO Ins. Co. v. Emery & Assoc., Inc.*, No. Civ.A.09–904, 2013 WL 625436, at *11 (W.D.Pa. Feb.20, 2013) (quoting *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027, 1030 (Pa.1980) (further quotations omitted)).

In the present matter, Plaintiff's request for damages is legally insufficient in multiple respects. Primarily, Plaintiff has not established *the fact* of damages with reasonable certainty. Aside from her own self-serving testimony that she regularly maintained business through LinkedIn, Plaintiff failed to point to one contract, one client, one prospect, or one deal that could have been, but was not obtained during the period she did not have full access to her LinkedIn account. Indeed, the very real possibility exists that even with full access to her LinkedIn account, she would have not made any deals with any of her contacts during the time period in question. This possibility negates her ability to establish the fact of damages with a "fair degree of probability."

***14** Moreover, even if Plaintiff had made a showing of a "fair probability" that she sustained some damages during the loss of her LinkedIn account, she failed to provide a reasonably fair basis for calculating such damages. While the Court is certainly cognizant of Plaintiff's *pro se* status and financial limitations on retaining a damages expert, we remain equally aware that Plaintiff originally pursued this lawsuit under the learned guidance of counsel and was well aware of her burden to establish her damages. Yet, Plaintiff chose only to present Clifford Brody who, prior to trial, had never been identified as an expert witness and, during trial, was never properly qualified as an expert in the area of damages. Thereafter, Mr. Brody, without referencing any documentation, reports, or other financial figures, "guesstimated" Plaintiff's annual sales over the last five years based on his weekly analysis of sales numbers in the various companies with which he worked with Dr. Eagle. Mr. Brody offered no concrete foundation for these numbers. More importantly, Mr. Brody failed to connect Dr. Eagle's successful sales with any use of LinkedIn, even conceding at one point that when Edcomm was first started, "[t]here was no online." (N.T. 128:6–8.) He further admitted that during Dr. Eagle's highest sales years, she was not even using LinkedIn, meaning that her success was not predicated on the availability of this resource. (N.T.

138:16–140:16.) Subsequently, using a methodology that seemingly has no basis in general accounting principles, he took Plaintiff's lowest year of sales and divided that number by the number of contacts that Dr. Eagle maintained in her LinkedIn account (again a figure that was not documented in any papers, printouts, or testimony from a LinkedIn employee) to arrive at a profit per contact per year number. He again made no efforts to account for the fact that some of these contacts may have generated sales regardless of the availability of the LinkedIn account. Moreover, he worked of the mere assumption that each of these contacts would have unfailingly generated a certain amount per year. Thereafter, using her "average" sales figure per year, in lieu of her "lowest" sales figure, he doubled her damages amount to $496,000. Even the most liberal review of this mathematical calculation and its underlying numbers reveal it to be nothing more than creative guesswork based on mere speculation.

Finally, and perhaps most importantly, even if Plaintiff could prove some damages, she fails to connect such damages with Defendant's actions. For the period of June 20, 2011 to July 6, 2011, the period during which Edcomm maintain exclusive control over Eagle's LinkedIn account, Plaintiff cannot even name, let alone document, a single lost customer, deal, or transaction. Although the Court is aware of the hardship in Plaintiff's efforts to prove who attempted to contact her during this time period when no records were maintained, the Court nonetheless notes that any reasonable person seeking Dr. Eagle and aware of her self-proclaimed prompt responsiveness would have sought out other ways to reach her or, at a minimum, informed her that they had tried to reach her. Yet, not one individual or company was identified at any point in this litigation. This is particularly troubling in light of clear fact that Edcomm very publicly indicated that Dr. Eagle was no longer affiliated with Edcomm.

***15** As for the period from July 6, 2011 to October 7, 2011, when Plaintiff claims she had access to her LinkedIn account, but was still not receiving messages, the Court fails to see how that loss is attributable to any actions of Defendant. From July 6, 2011, Defendant no longer had any control over the account. Any inability of Plaintiff to fully access it or to receive certain messages resulted from LinkedIn's own failure to restore the account to Plaintiff. Other than change the password and modify the information on the home page, Plaintiff has identified no other action by Defendant Edcomm that would have disrupted the functioning of the account or prevented Plaintiff from fully using it once she was re-granted access to it.

In sum, while Plaintiff has clearly identified some tortious and statutory wrongdoing on the part of Defendant Edcomm, she bears the additional burden of establishing with some reasonable certainty the damages she sustained from that wrongdoing. Despite the lengthy discovery period on this case, despite her retention of counsel for a substantial amount of time, and despite this Court's prior grant of an extension of time for the sole purpose of the allowing Plaintiff to issue trial subpoenas to potential witnesses, Plaintiff has simply failed to put forth any legally sufficient evidence on which this Court can award any damages. Accordingly, while finding that Defendant is liable on three causes of action, the Court must award Plaintiff compensatory damages of $0.[FN6]

FN6. In her Proposed Findings of Fact and Conclusions of Law, Plaintiff claims an entitlement to legal fees as part of the direct damage caused by Defendants' action. At trial, however, Plaintiff submitted no evidence in support of her claim for legal fees. Indeed, only after trial and after oral argument on the Proposed Findings of Fact and Conclusions of Law did Plaintiff submitted a self-created chart listing her legal fees. This chart, aside from not being admitted into evidence, was never substantiated with bills from any of the law firms

> listed. Accordingly, the Court declines to consider it and will not award any legal fees.

10. ***Punitive Damages***

In her Complaint, Pretrial Memorandum, and Proposed Findings of Fact and Conclusions of Law, Plaintiff also seeks punitive damages. The standard for awarding punitive damages under Pennsylvania law is well-established:

> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others ... [a]s the name suggests, punitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct.

Hutchinson v. Lundy, 582 Pa. 114, 870 A.2d 766, 770 (Pa.2005) (quotations omitted). "A defendant acts recklessly when 'his conduct creates an unreasonable risk of ... harm to another [and] such risk is substantially greater than that which is necessary to make his conduct negligent.' " *Id.* at 771 (quoting Restatement (Second) of Torts § 500).

In the present case, the Court could certainly make a reasonable inference that Defendant Edcomm's actions were taken with the direct intent to harm Plaintiff and impede her ability to compete in the banking education industry. By the same token, however, the Court could just as easily make a reasonable inference that Defendant Edcomm's actions were taken under a well-intentioned belief that the LinkedIn account and its contents belonged to Edcomm and that, in light of Plaintiff's willing surrender of her password to her assistant, it was entitled to enter the account upon her departure and alter the account as it saw fit. At the end, Plaintiff bears the burden of proving by a preponderance of the evidence that her theory—that of maliciousness and reckless indifference on the part of Edcomm—is, in fact, the correct theory. Nonetheless, at trial, Plaintiff failed to call any Defendant, any other employee of Edcomm, or anyone with any personal knowledge of the events surrounding the taking of Eagle's LinkedIn account who could provide some evidence, be it direct or circumstantial, regarding the Defendants' state of mind and the circumstances under which these events occurred. All evidence being equal, the Court must find in favor of Defendant on the punitive damages claim.

B. ***Defendant Edcomm's Counterclaims***

1. ***Misappropriation***

***16** Edcomm first contends that Eagle misappropriated the LinkedIn account as her own. The tort of misappropriation of an idea has only two elements: (1) the plaintiff had an idea that was novel and concrete and (2) the idea was misappropriated by the defendant. *Blackmon v. Iverson,* 324 F.Supp.2d 602, 607 (E.D.Pa.2003). To determine whether an idea has been misappropriated, Pennsylvania courts look to the three elements of common law misappropriation:

> (1) the plaintiff "has made substantial investment of time, effort, and money into creating the thing misappropriated such that the court can characterize the 'thing' as a kind of property right," (2) the defendant "has appropriated the 'thing' at little or no cost such that the court can characterize the defendant's actions as 'reaping where it has not sown,' " and (3) the defendant "has injured the plaintiff by the misappropriation."

Riordan v. H.J. Heinz Co., No. Civ.A.08-1122, 2009 WL 4782155, at *8 (W.D.Pa. Dec.8, 2009) (quoting *Sorbee Int'l Ltd. v. Chubb Custom Ins. Co.,* 35 A.2d 712, 716 (Pa.Super.Ct.1999) (further quotations omitted)).

Edcomm argues that in May 2009, Edcomm decided to use LinkedIn as an indispensable sales and marketing tool and initiated a process by which its management would approve the content of Edcomm employee's LinkedIn accounts. To that end, Edcomm invested substantial time and effort into

its employees' LinkedIn account and their development of contacts on those accounts. As such, it claims that Eagle's re-acquisition of her account on July 14, 2011 constituted a misappropriation of Edcomm's idea.

In light of the aforementioned Findings of Fact, however, the Court must disagree. Edcomm never had a policy of requiring that its employees use LinkedIn, did not dictate the precise contents of an employee's LinkedIn account, and did not pay for its employees' LinkedIn accounts. Indeed, as noted above, the LinkedIn User Agreement expressly states that Plaintiff's account is between LinkedIn and the individual user. Edcomm did not itself maintain any separate account. Moreover, Edcomm failed to put forth any evidence that Eagle's contacts list was developed and built through the investment of Edcomm time and money as opposed to Eagle's own time, money, and extensive past experience. Accordingly, the Court finds in favor of Eagle on this claim.

2. *Unfair Competition*

Defendant Edcomm's final counterclaim—unfair competition—asserts that Eagle improperly misappropriated the content and connections of the LinkedIn account and has improperly used that content to actively and directly compete with Edcomm.

Although Pennsylvania law traditionally defines unfair competition as the "passing off" of a rival's goods as one's own, thus creating confusion between one's own goods and the rival's goods, *Scanvec Amiable Ltd. v. Chang,* 80 F. App'x 171, 180 (3d Cir.2003), the doctrine of unfair competition in Pennsylvania has been extended to other types of conduct. *Granite State Ins. Co. v. Aamco Transmissions, Inc.,* 57 F.3d 316, 319 (3d Cir.1995) (citing *Carl A. Colteryahn Dairy, Inc. v. Schneider Dairy,* 415 Pa. 276, 203 A.2d 469, 473 (Pa.1964)). "Pennsylvania courts have recognized a cause of action for the common law tort of unfair competition where there is evidence of, among other things, trademark, trade name, and patent rights infringement, misrepresentation, tortious interference with contract, improper inducement of another's employees, and unlawful use of confidential information." *Synthes (U.S.A.) v. Globus Med ., Inc.,* No. Civ.A.04–1235, 2005 WL 2233441, at *8 (E.D.Pa. Sept. 14, 2005) (citations omitted). The Pennsylvania common law tort of unfair competition is coextensive with the definition set forth in the Restatement (Third) of Unfair Competition. *See Bldg. Materials Corp. of Am. v. Rotter,* 535 F.Supp.2d 518, 526 n. 4 (E.D.Pa.2008) (citations omitted); *ID Sec., Sys. Of Canada, Inc. v. Checkpoint Sys., Inc.,* 249 F.Supp.2d 622, 688 (E.D.Pa.2003). Section 1 of the Restatement [FN7] indicates that, "[a]s a general matter, if the means of competition are otherwise tortious with respect to the injured party, they will also ordinarily constitute an unfair method of competition." Restatement (Third) of Unfair Competition § 1 cmt. g. "The Pennsylvania Supreme Court has noted that in addition to the traditional scope of 'unfair competition' ... the concept has been extended in some business settings to include misappropriation as well as misrepresentation." *Hill v. Best Med. Int'l, Inc.,* Nos. Civ.A.07–1709, 08–1404, 09–1194, 2011 WL 5082208, at *17 (W.D.Pa. Oct.25, 2011) (citing *Pottstown Daily News Publ'g Co. v. Pottstown Broad. Co.,* 411 Pa. 383, 192 A.2d 657, 662 (Pa.1963)).

FN7. The Restatement (Third) of Unfair Competition provides, in relevant part, as follows:

> One who causes harm to the commercial relations of another by engaging in a business or trade is not subject to liability to the other for such harm unless:
>
> (a) the harm results from acts or practices of the actor actionable by the other under the rules of this Restatement relating to:
>
> (1) deceptive marketing, as specified in Chapter Two;

> (2) infringement of trademarks and other indicia of identification, as specified in Chapter Three;
>
> (3) appropriation of intangible trade values including trade secrets and the right of publicity, as specified in Chapter Four;
>
> or from other acts or practices of the actor determined to be actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public....
>
> Restatement (Third) of Unfair Competition § 1.

***17** As detailed above, Defendant's Counterclaim Complaint has no other cognizable claim for relief. Its only other remaining counterclaim cause of action—misappropriation—has not been adequately proven by Defendant. Because Edcomm's unfair competition claim rests entirely on the misappropriation allegations, and because the evidence presented in support of those allegations fails to show Edcomm's entitlement to relief, the unfair competition claim likewise fails. Thus, the Court enters judgment in favor of Plaintiff on this claim.

III. CONCLUSION

Overall, the outcome of this case results in a somewhat mixed bag for both sides. First, as to the individual Defendants, Plaintiff has failed to establish any tort liability against any of them. Second, with respect to Plaintiff's claims against Defendant Edcomm for identity theft, conversion, tortious interference with contract, civil conspiracy, and civil aiding and abetting, Plaintiff has failed to meet her burden of proving all elements of these claims by a preponderance of the evidence. Third, as to her claims for unauthorized use of name in violation of 42 Pa.C.S. § 8316, invasion of privacy by misappropriation of identity, and misappropriation of identity, the Court finds that Plaintiff has successfully proven her claims such that Defendant Edcomm is liable on these causes of action. Plaintiff has not, however, put forth any legally sufficient evidence of compensatory damages that were causally connected to Defendant's improper activity, nor has she proven her entitlement to punitive damages. Finally, the Court holds that Defendant Edcomm has not met its burden on proof on either of its remaining counterclaims.

An appropriate Judgment Order follows.

ORDER

AND NOW, this *12th* day of *March,* 2013, following a non-jury trial, it is hereby **ORDERED** that **JUDGMENT IS ENTERED** on the claims and counterclaims remaining in this case as follows:

1. With respect to all claims against individual Defendants Sandi Morgan, Haitham Saead, Joseph Mellaci, Elizabeth Sweeney, Lisa Arnsperger, and Qamar Zaman, **JUDGMENT IS ENTERED** in favor of Defendants.

2. With respect to Counts IV (Unauthorized Use of Name in Violation of 42 Pa.C.S. § 8316), V (Invasion of Privacy by Misappropriation of Identity), and VI (Misappropriation of Publicity), **JUDGMENT IS ENTERED** in favor of Plaintiff and against Defendant Edcomm, Inc.

3. With respect to Counts VII (Identity Theft), VIII (Conversion), IX (Tortious Interference With Contract), X (Civil Conspiracy), and XI (Civil Aiding and Abetting), **JUDGMENT IS ENTERED** in favor of Defendant Edcomm, Inc. and against Plaintiff.

4. With respect to Plaintiff's request for punitive damages, **JUDGMENT IS ENTERED** in favor of Defendant Edcomm, Inc. and against Plaintiff.

5. Plaintiff is awarded compensatory damages in the amount of zero dollars ($0).

6. With respect to Counterclaim Complaint

Counts III (Misappropriation), IV (Unfair Competition), and V (Conversion), **JUDGMENT IS ENTERED** in favor of Counterclaim Defendant Eagle and against Counterclaim Plaintiff Edcomm, Inc.

***18** This case is now marked **CLOSED.**

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