Social Media: Pitfalls and Pratfalls

Client-Lawyer Relationship

ER 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See ER 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, ER 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and ERs 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.. . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.. . . ***Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.***

[4] Paragraph (a) ***prohibits a lawyer from revealing information relating to the representation of a client***. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but ***could reasonably lead to the discovery of such information by a third person***. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is ***no reasonable likelihood*** that the listener will be ***able to ascertain the identity of the client*** or the situation involved.

ER 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ER 1.18. Duties to Prospective Client

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

FaceBook Consultation

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response.

Other Concerns:

Third, if an attorney acquires confidential information about a prospective client, . . . 1.18 prohibits that attorney from using or revealing the information learned in the consultation. Acquiring information from a prospective client on a social networking site could create a conflict with a current client under . . . 1.7, if the representation of the current client would be "materially limited" by the attorney's duty under Rule 1.18 to the prospective client. In addition, under Rule 1.18, a firm may be disqualified from representing a client with interests adverse to a prospective client in the same or a substantially similar matter. Therefore, if an attorney obtains confidential information about a prospective client on a social media site, the whole firm may be conflicted out of representing a client adverse to the prospective client.

http://mnbenchbar.com/2010/11/social-media-for-lawyers/

ER 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

ER 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Where can this go wrong?

1. At all times alleged in this complaint, Respondent was an assistant public defender in Winnebago County, Illinois. In the course of her duties, she had access to information about clients that would otherwise be confidential or secret.

https://www.iardc.org/09CH0089CM.html

2. Between June 2007, and April 2008, Respondent wrote and published an Internet web log ("blog") entitled "The Bardd (sic) Before the Bar - Irreverant (sic) Adventures in Life, Law, and Indigent Defense." ***Approximately one-third of the blog was devoted to discussing Respondent's work at the public defender's office and her clients***, and the remaining content of the blog concerned Respondent's health issues and her photography and bird-watching hobbies. In the work-related blogs, Respondent referred to her clients by either their first name, a derivative of their first name, or by their jail identification number.

3. Respondent's blog was ***open to the public*** and was not password-protected. Respondent knew or should have known that the contents of her blog were continuously available to anyone with access to the Internet, and she maintained a site meter on the blog that counted the number of visits to the blog. At some point, Respondent posted the following language on her blog:

Commentary is Both Invited and Appreciated. Let's Get Some Dialogue Going!

4. On or about March 14, 2008, Respondent represented a college student in relation to allegations that he possessed a controlled substance. On March 14, 2008, Respondent published the following entry on her blog:

#127409 (the client's jail identification number)

This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.

6. On or about March 28, 2008, Respondent represented a diabetic client in relation to his drug charges. On March 28, 2008, Respondent published the following entry on her blog:

"Dennis," the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what?

It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.

8. On or about April 9, 2008, Respondent represented a woman in relation to allegations that she had violated the terms of a previous order of probation. On April 9, 2008, Respondent published the following entry on her blog:

"Laura" was a middle aged woman with 7 children, 2 of them still adolescents. She was a traditional housewife. Her husband, a recovering alcoholic, worked. She stayed at home, and home schooled her child who was handicapped amd (sic) learning disabled. In her favor, her original offense was a matter of sheer stupidity. She had forged a doctor's name on a prescription form, in order to obtain Ultram from a pharmacy. Ultram is a painkiller with weak opiate effects and some effect of the serotonin system as well.

It is prescription only, but it is not a controlled substance. It's a moderately decent painkiller, but after a day or 2, any opiate-type "high" is long gone - at least for most people I know. I've used it off and on for years and I've never noted any "craving" or any other significant effect when I stop. I can't imagine why someone would get "addicted" to the stuff. Further, from spam comments and e-mails, I gather that you can get the stuff over the Internet with ease and without a prescription at a not unreasonable price if you really want to, so why she would have forged a prescription form for that drug is beyond me. Still, that's what she did, and she got caught, and she claimed to have stopped using. She claimed, per her pre-sentence report, not to be using any drugs at this time.

And she had not been rearrested for anything other than 1 ticket for driving without a license in the intervening 5 years. On the other hand, while sentenced to the diversionary program, she had been referred to two different agencies and had never attended or completed any treatment program, and she had not been in contact either with her case supervisor or her probation officer since 2005, despite reminders and letters. She swore up and down to me that she was clean, she was no longer addicted, she had gone through a period of depression and had fallen out of touch and not known how to rectify the situation without risking jail. She was scared, and not experienced in the system. It seemed plausible. Neither I nor the prosecutor had any information on hand that would contradict the PSI and her statement in allocution.

The judge was lenient, given her family situation, her relative lack of criminal history, her good behavior other than status violations of omission, and the lack of any evidence of a current drug porblem (sic). He sentenced her to an additional term of 1 year probation, and ordered her to serve 90 days in jail, the first 5 immediately, and the balance held suspended. It was a gift. I felt I'd done my job well.

The bailiffs took her back to holding, pending transport to booking. In no more than 3 minutes, they came back. "Laura" wanted to talk to the judge. They advised her to talk to me first.

So I went back there to see what her concerns were. "But I'm on Methadone!" she tells me.

Huh? You want to go back and tell the judge that you lied to him, you lied to the pre-sentence investigator, you lied to me? And you expect what to happen if you do this? I'll tell you what would happen; the sentence just pronounced would be immediately vacated and you'd go to prison, that's what would happen.

"Can I get my methadone while I'm in jail?" she asks me.
No! Geez, what do you think jail is? Of course they're not going to give you narcotics up there. You'll be lucky to get Tylenol for a broken bone.
"What am I going to do," she asks me. "I can't go 5 days without methadone."

Responding to on line criticism

4. On September 6, 2012, Respondent agreed to represent Richard Rinehart ("Rinehart") in matters related to Rinehart's securing unemployment benefits from his former employer, American Airlines. American Airlines had terminated Rinehart's employment as a flight attendant because Rinehart allegedly assaulted a fellow flight attendant during a flight. Rinehart paid Respondent $1,500 towards her fee.

5. Between September 6, 2012 and January 16, 2013, Respondent met with Rinehart on at least two occasions and obtained information from Rinehart concerning both his employment history at American Airlines and the alleged incident involving the other flight attendant. Respondent also reviewed Rinehart's personnel file, which she had obtained from American Airlines.

7. On January 16, 2013, Respondent represented Rinehart at a telephonic hearing before the Illinois Department of Employment Security ("IDES"), at the conclusion of which the IDES determined to deny Rinehart unemployment benefits. Shortly thereafter, Rinehart terminated Respondent's representation of him.

8. On or about February 5, 2013, Rinehart posted a client review of Respondent's services on the legal referral website AVVO, in which he discussed his dissatisfaction with Respondent's services. On February 7, 2013 and February 8, 2013, Respondent contacted Rinehart by email and requested that Rinehart remove the February 5, 2013 posting about her from the AVVO website. Rinehart responded that he refused to remove the posting unless he received a copy of his files and a full refund of the $1,500 he had paid Respondent as fees.

9. Sometime between February 5, 2013 and April 10, 2013, AVVO removed Rinehart's posting from its online client reviews of Respondent.

10. On April 10, 2013, Rinehart posted a second negative client review of Respondent on AVVO. Respondent replied to his post and revealed confidential information about his case. Respondent's reply to Rinehart's second posting contained information relating to her representation of Rinehart and exceeded what was necessary to respond to Rinehart's accusations.

Tsamis' Avvo revelation occurred as a result of a negative online review by an American Airlines flight attendant who hired Tsamis in an unsuccessful effort to secure unemployment benefits. The attendant had been fired for allegedly assaulting a co-worker. Tsamis asked the former client to remove his first review, posted in February 2013, and he responded that he would do so if Tsamis returned his files and the $1,500 he had paid in attorney fees.

Avvo removed the post, spurring a second negative review by the former client. This time, Tsamis responded to the post and revealed confidential information about the case, according to the stipulated facts.

"I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about."

http://www.abajournal.com/news/article/lawyers_alleged_response_to_bad_avvo_review_leads_to_disciplinary_complaint

FaceBook?

Facebook Friend Earns Judge a Reprimand

Opposing counsel are sitting with the judge in his chambers during a child-custody trial when the lawyer for the husband brings up Facebook. The other lawyer says she is a non-user, but the judge quickly agrees to "friend" the lawyer who is on Facebook. As the trial proceeds, the judge and the lawyer comment about it to each other through their Facebook pages, with the lawyer writing in one post, "I have a wise Judge."

Hmmm. Wise in the ways of social networking, perhaps, but lacking something in the judicial-ethics department. When the hearing ended and the judge entered his order, the wife's lawyer found out about their "friendship" and quickly moved for a new trial and for the judge's disqualification. The judge promptly removed himself from the case and the wife got a new trial.

http://legalblogwatch.typepad.com/legal_blog_watch/2009/06/facebook-friend-earns-judge-a-reprimand.html

The socially networked North Carolina judge, B. Carlton Terry Jr., also earned himself a public reprimand from the state's Judicial Standards Commission. The judge now agrees "that he will not repeat such conduct in the future" and "will promptly read and familiarize himself with the Code of Judicial Conduct."

Part of the Facebook exchange between the judge and the lawyer involved the weight to be given testimony that one spouse had been unfaithful. During a meeting in chambers the day after the Judge Terry had friended lawyer Charles A. Schieck, Terry told the lawyers he believed the testimony but did not see that it made any difference in deciding custody. Schieck responded, "I will have to see if I can prove a negative."

That evening, Schieck posted on his Facebook account, "How do I prove a negative?" Judge Terry saw it and responded that he had "two good parents to choose from," to which Schieck posted his "wise judge" remark. The next day, the two shared additional messages on Facebook. In one, Schieck wrote, "I hope I'm in my last day of trial." Judge Terry responded, "You are in your last day of trial."

All well and good, if not for that irksome little prohibition against a judge engaging in ex parte communications involving a matter pending before him. And that was not the only way in which this Internet-loving judge went astray of the rules in the case. As the trial started, he took it upon himself to conduct independent research. He Googled the wife and found his way to her business Web site, where he viewed her photographs and read her poems. He even read one of her poems into the record as he announced his findings in the case. It did not seem to trouble him that none of what he saw or read was in evidence.

Lawyers accused of using paralegal to friend litigant on Facebook are facing ethics probe
Posted Apr 20, 2016 07:45 am CDT
By Debra Cassens Weiss

The lawyers, John Robertelli and Gabriel Adamo are accused of using the paralegal to obtain private Facebook information about a plaintiff in a personal injury case who was represented by counsel. The plaintiff was injured after being struck by a police car; Robertelli and Adamo represented the governmental body being sued.

After the plaintiff changed his privacy setting, the paralegal allegedly obtained access by friending the plaintiff. The paralegal used her real name but didn't disclose that she worked for the Rivkin Radler law firm in Hackensack, ethics officials say. The litigant learned his private Facebook information had been accessed after the lawyers sought to add the paralegal as a trial witness and disclosed Facebook printouts.

http://www.abajournal.com/news/article/lawyers_accused_of_using_paralegal_to_friend_litigant_face_ethics_probe_aft

Lawyer Disciplined for Sending Facebook Message to Adverse Party

December 15, 2014 · by Venkat Balasubramani · in Content Regulation

An 18 year old had sex with a co-worker and ended up pregnant. She gave up the baby for adoption, but the biological father did not consent. The mother had signed an adoption consent form. Prior to the date of the hearing to terminate the father's parental rights, the biological father's lawyer sent the following Facebook message to the mother:

http://blog.ericgoldman.org/archives/2014/12/lawyer-disciplined-for-sending-facebook-message-to-adverse-party.htm

‘I wish to offer you some reasons why you should stand up and fight for your daughter. As you know, I am the attorney for [the biological father]. We held your deposition in my office. I wanted to give you the chance to make things right. This may be your last opportunity to be a mom for [the baby]. As I told you after your deposition in my office, it is not too late. You still have a wonderful opportunity to have a real relationship with your daughter if you so choose. I have attached a document for you to consider signing and bringing to court or to my office. It is a revocation of your consent to adopt. If you sign this document there is a very good chance that you will be able to call [the baby] your own and [the baby] will call you her mom.

I have a little girl myself and she is my world just like you are your dad's world. [The baby] deserves to know her parents. She deserves to know that you love her and care for her as well. Do not let this opportunity pass you by because you will live with this decision the rest of your life and [the baby] will know someday what happened. [The adoptive parents] do not legally have to ever let you see her again after court (although they are probably trying to convince you otherwise with the idea of an 'open adoption'). The reason why you don't know about the trial was because they don't want you there because that doesn't help [the adoptive parents'] case. This is your time to get rid of the guilt and standup and do what is right and what [the baby] deserves.

Preserving Evidence: Social Media and Spoliation

Spoliation in the world of social media renders obsolete classic images of paper shredders or backdoor dumpsters. Today, a simple, single-click request can extinguish evidence permanently or morph it into something it was not the second before. Consider the seminal spoliation case of *Allied Concrete Co. v. Lester*, 736 S.E. 2d 699 (Va. 2013). There, the plaintiff's attorney told his client to remove several photos from his Facebook account for fear that they would prejudice his wrongful death case brought after his spouse's fatal automobile accident. The attorney instructed his client through his assistant to "clean up" his Facebook account to avoid "blow-ups" of those photos at trial, and this instruction was followed.

http://apps.americanbar.org/litigation/committees/professional/articles/spring2016-0616-attorney-ethics-age-social-media.html

In *Gatto v. United Air Lines, Inc.*, 2013 U.S. Dist. LEXIS 41909 (D.N.J. Mar. 25, 2013), the plaintiff alleged that he suffered permanently disabling injuries while employed as a ground operations supervisor with an airline. He claimed that his injuries prevented him from working and limited his physical and social activities. ***In July 2011, during discovery, the defendants sought the plaintiff's social media information dating back to 2008***.

The plaintiff later claimed that he ***inadvertently deactivated his account*** after receiving a notice that someone was trying to access it (and Facebook later deleted the account in line with its internal policy). The defendants moved for sanctions, arguing that the plaintiff intentionally deleted his account because the postings on his page related to his damages claim. The court opined . . . there was no dispute that the plaintiff intentionally deactivated the account and thus had failed to preserve the relevant evidence. Thus, the ***court held that the plaintiff engaged in spoliation, thereby entitling the defendants to an adverse inference instruction at trial***.

Social Media and Advertising
Do You YouTube?

ER 7.1. Communications Concerning a Lawyer's Services

A lawyer shall not make or knowingly permit to be made on the lawyer's behalf 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.

ER 7.2. Advertising

(a) Subject to the requirements of ERs 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

ER 7.3. Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from the person contacted or employ or compensate another to do so when a motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

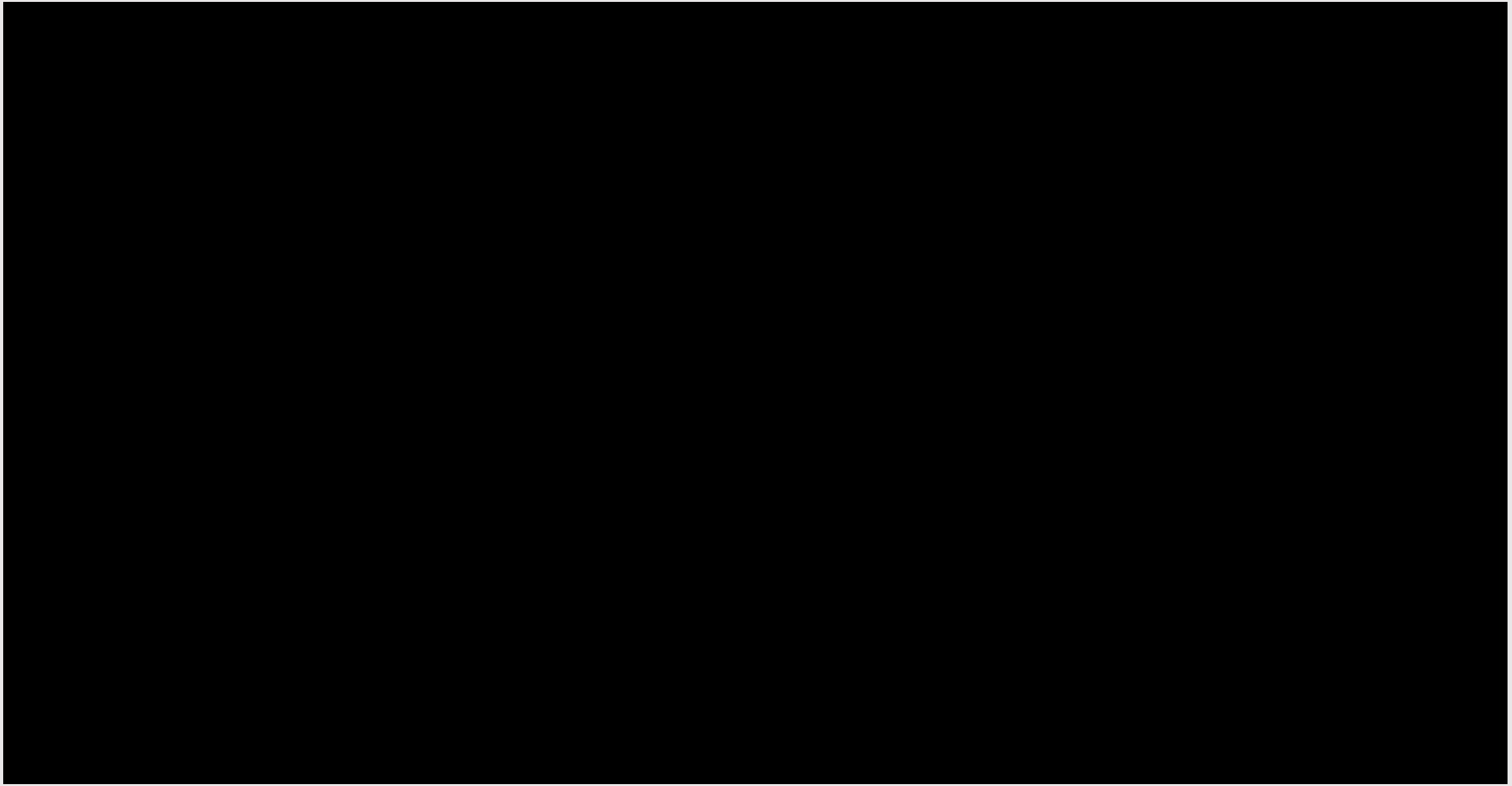
(1) is a lawyer; or

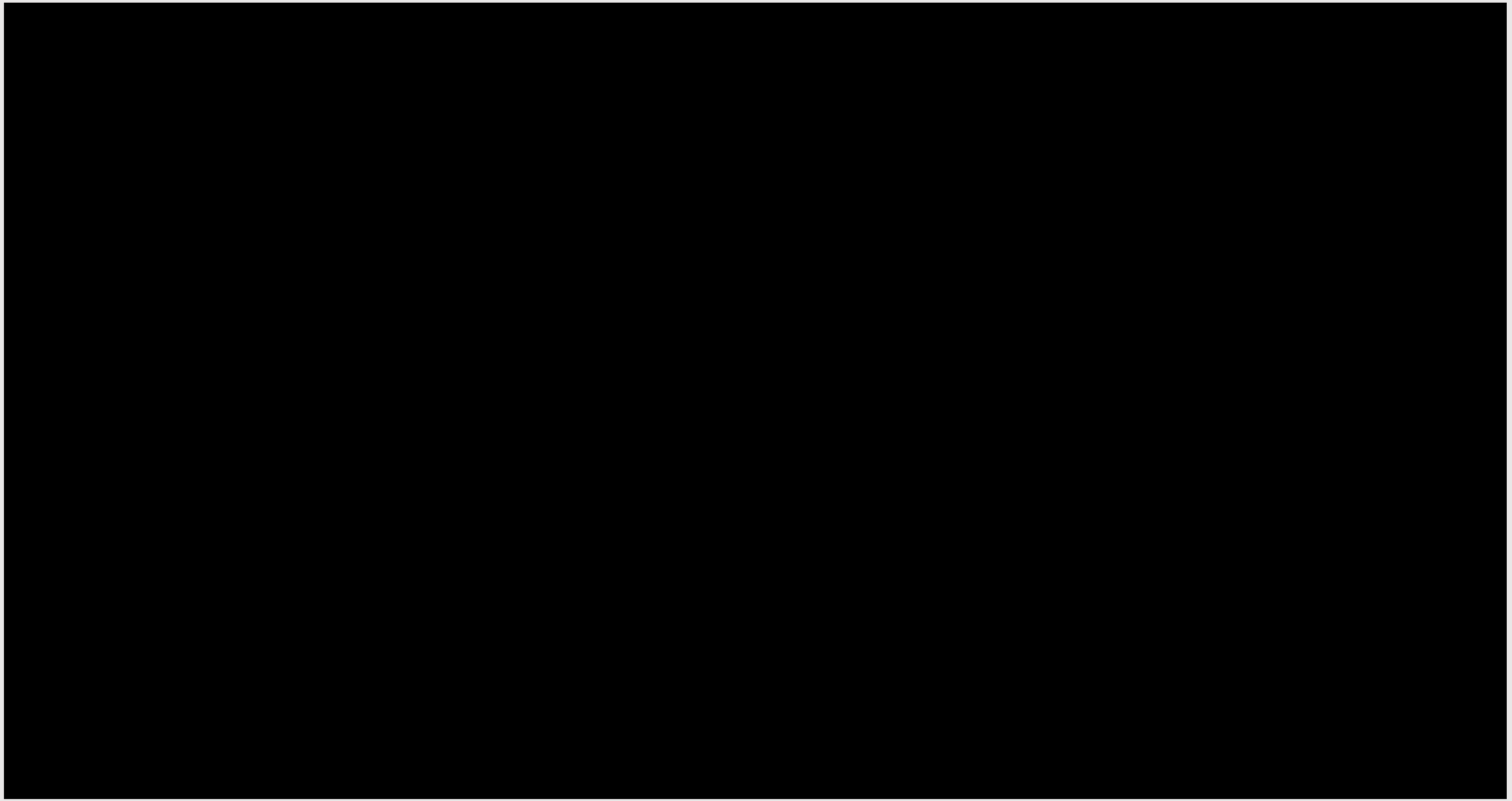
(2) has a family, close personal, or prior professional relationship with the lawyer.

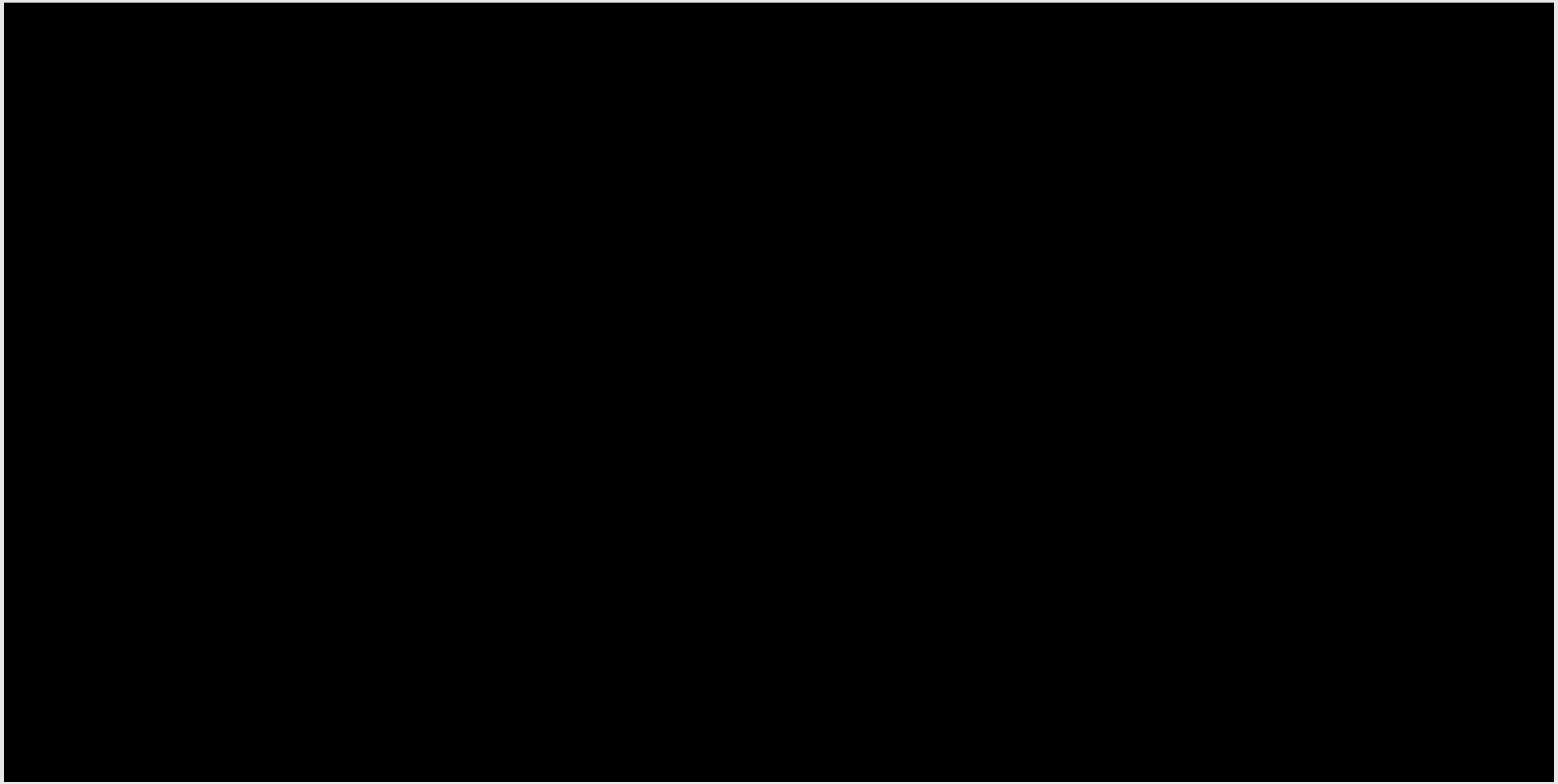
(b) A lawyer shall not solicit professional employment or knowingly permit solicitation on the lawyer's behalf from the person contacted by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer;
(2) the solicitation involves coercion, duress or harassment; or
(3) the solicitation relates to a personal injury or wrongful death and is made within thirty (30) days of such occurrence.

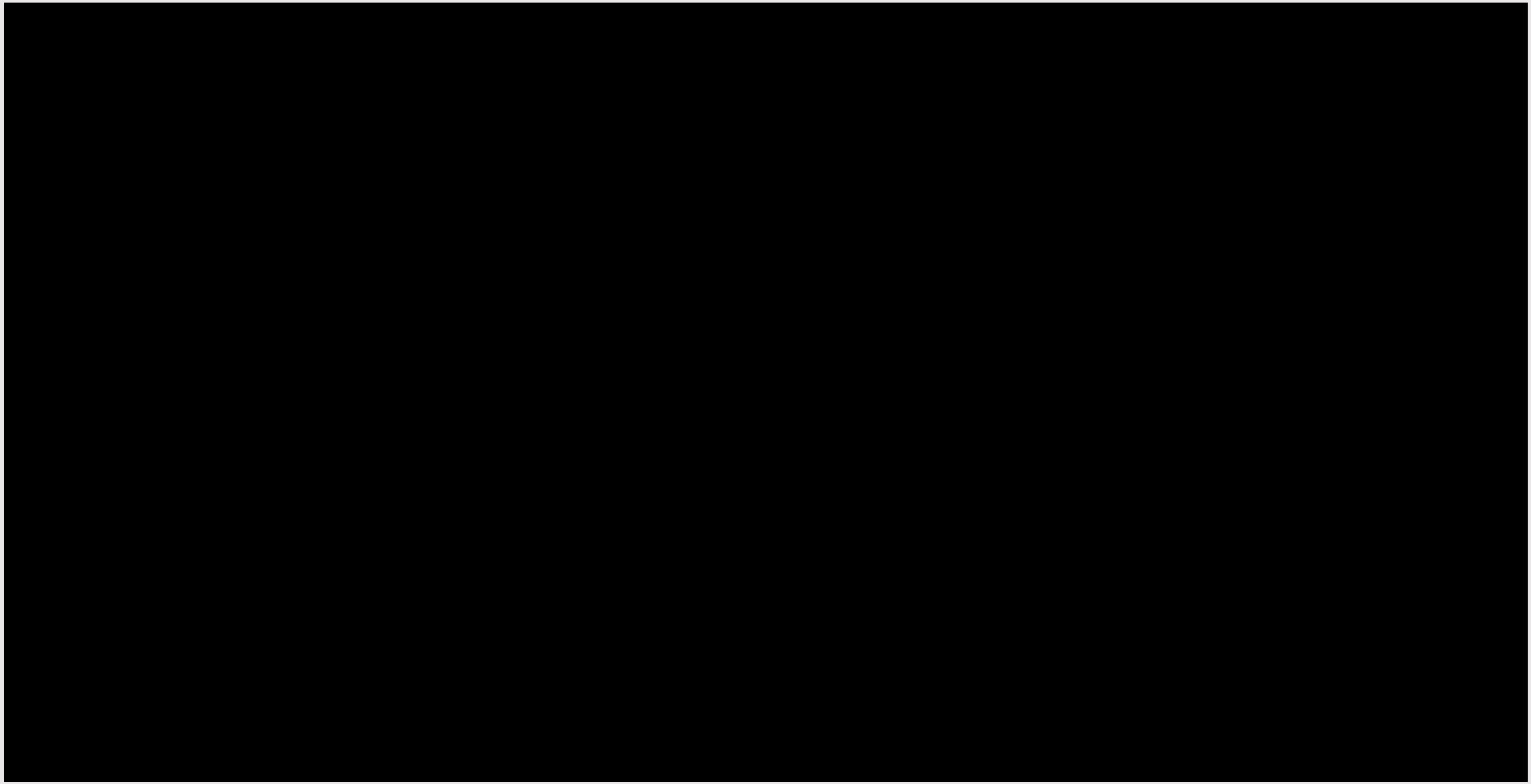
(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known or believed likely to be in need of legal services for a particular matter shall include the words "Advertising Material" in twice the font size of the body of the communication on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
(1) At the time of dissemination of such written communication, a written copy shall be forwarded to the State Bar of Arizona at its Phoenix office.
(2) Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery.
(3) If a contract for representation is mailed with the written communication, the contract shall be marked "sample" in red ink and shall contain the words "do not sign" on the client signature line.

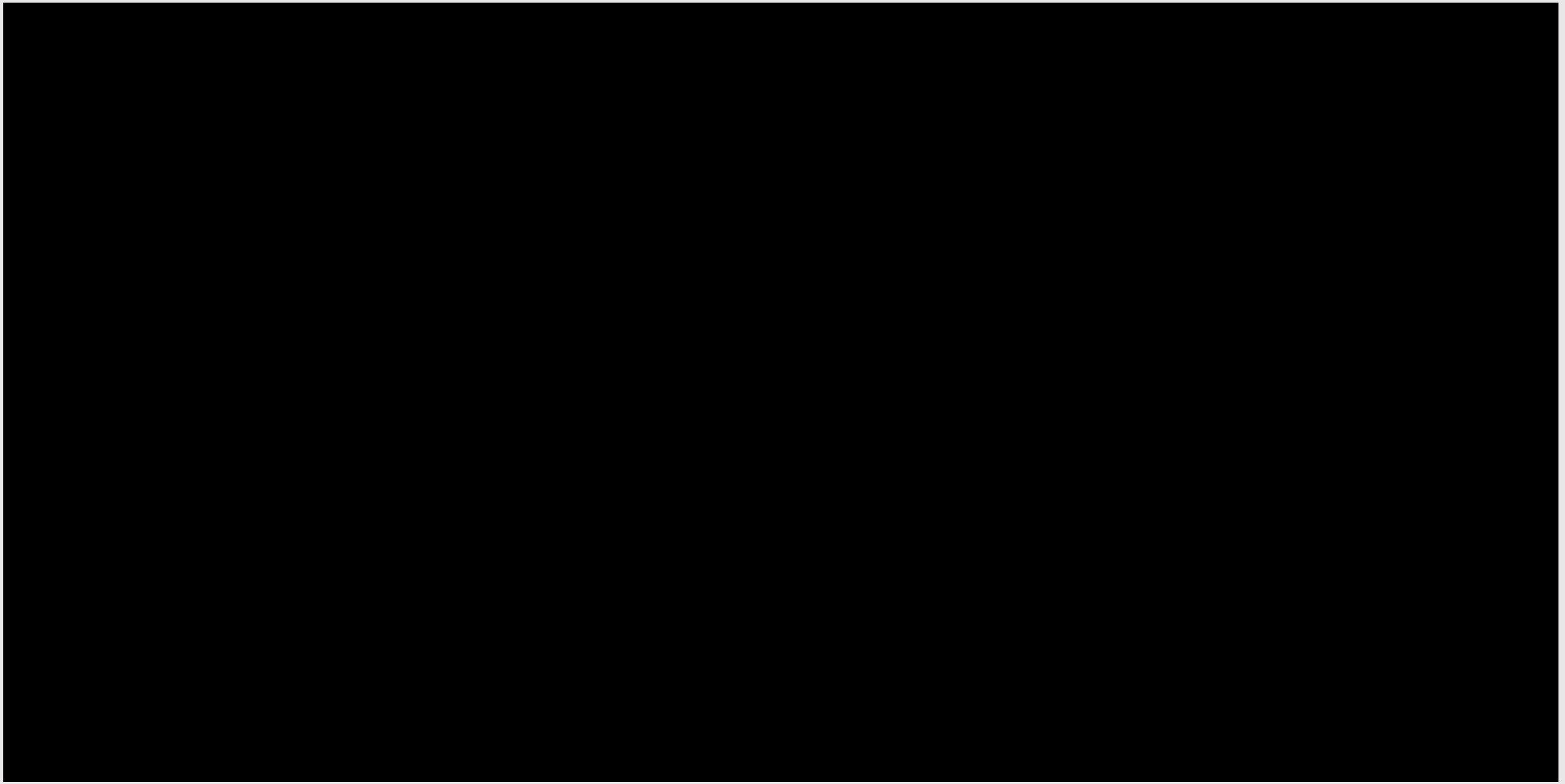
[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches. See ER 8.4 (duty to avoid violating the ERs through the actions of another).











To Twit, er uh, Tweet or not to Tweet

ER 8.2. Judicial and Legal Officials

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

Research Lawyer Is Fired for Tweeting About 'Naughty Boy' Ex-AG During Ethics Hearing
Posted Nov 19, 2012 01:33 pm CST
By Debra Cassens Weiss

Updated: A research lawyer for a Kansas appeals court was fired on Monday after ***posting critical tweets*** about the state's former anti-abortion attorney general ***during a supreme court ethics hearing***.
The lawyer, Sarah Peterson Herr, posted tweets calling former Attorney General Phill Kline a "naughty, naughty boy" and criticizing his facial expression, the Associated Press, the Topeka Capital-Journal and WND report. "Why is Phil Klein [sic] smiling?" she wrote. "There is nothing to smile about, douchebag." AP reported on her firing in a later story.
Herr predicted Kline would be disbarred for seven years as a result of charges claiming he or his subordinates misled others during an investigation of abortion providers. WND describes Herr's tweets as "snarky" and "self-satisfied."
The comments have since been removed. Herr sent the AP a statement of apology. "I didn't stop to think that in addition to communicating with a few of my friends on Twitter I was also communicating with the public at large, which was not appropriate for someone who works for the court system," Herr said. "I apologize that because the comments were made on Twitter—and thus public—that they were perceived as a reflection on the Kansas courts."

https://twitter.com/JusticeWillett/status/857815061129158656

https://twitter.com/JusticeWillett/status/858679681523916804

https://twitter.com/JusticeWillett/status/858705825853980673

Justice Don Willett (@JusticeWillett) | Twitter