Memorandum

To: Participants in the April 5 Symposium

Ron Rotunda
Louise Hill
William Hornsby
Ted Allen
Tom Spahn
William Spruill

Associate Dean Kristine Marzolf

From: Rod Smolla

Date: March 23, 2001

Re: Plans for the Symposium

I. The Schedule Overview

Our symposium is approaching, on Thursday, April 5th. It has two parts, all of you are invited to both the informal afternoon “roundtable” and the evening program. (However, I understand that some of you may not be able to participate in the roundtable or will arrive late for that.)

2:30 - 4:30 p.m. Informal Roundtable (Faculty Lounge)
4:30 - 5:50 p.m. Buffet for Participants (Faculty Lounge)
6:00 - 8:30 p.m. Public Role Play/Moot Court Program (Courtroom)
8:30 p.m. Reception (Atrium/Lobby)
II. Travel

I believe everyone is set for travel. However, our Associate Dean for Administration, Kristine Marzolf, will be happy to assist our out-of-town guests with any travel arrangements that still need to be made. We have reservations for our guests at the Jefferson Hotel. For your convenience, her number is (804) 289-8186. My secretary, Carolyn Riley, can also help you if you have questions on anything. Her number is (804) 289-8192. And of course, don’t hesitate to call me (804) 289-8197.

III. Format for the Roundtable

Our roundtable discussion is extremely informal and collegial. Ron, Louise, and William will present their papers, taking about 15 minutes each, followed by informal discussion. Others present will be all our participants, faculty colleagues here, students from the law school, and perhaps a few other guests. This will be in the faculty lounge of the law school. We will serve a buffet in the lounge starting at about 4:30, to give you sustenance for the long public event.

For those of you who cannot make the roundtable, please feel welcome to join us late, and certainly to join us for the buffet.

IV. Format for the Role Play Evening Event.

The evening event will center around a mock disciplinary hearing against a large law firm, arising from its web page advertising, and related matters. William Hornsby has been gracious enough to draft a fictional scenario. I am attaching to this document Will’s draft.

We have two students producing a mock web site fitting the description of the web site in the problem. We will be editing and “touching up” the problem shortly, and then putting together a packet of program materials for the audience.

Here are the roles I would like for all of you to play:

Will Hornsby: “Prosecutor” from the state bar’s disciplinary Council
Tom Spahn: Defense lawyer for the law firm
Ted Allen: Chair of Disciplinary Council
Louise Hill: Disciplinary Council Member
Ron Rotunda: Disciplinary Council Member
William Spruill: Disciplinary Council Member
Rod Smolla: Moderator

Here is the format I have in mind: After we open the symposium, I will ask Will Hornsby to present the case against the firm. In the course of this, he will take the audience and the council through the firm’s web page. He will make his various claims, and briefly argue as to why the firm is guilty of the various violations alleged. Members of the council can interrupt to ask him questions. *Remember that Will is a volunteer in this exercise, so don’t be too rough on him!*

Tom Spahn will present the firm’s defense, point by point. Again, *don’t be too rough on him!*

For both Will and Tom, I think about 25 minutes each should suffice. Ted Allen will serve as chair of the proceedings.

We will then take an intermission break.

After the intermission, I would like for each council member to offer up comments. Ted is the Chair, and can moderate the various comments by the council members, offer his own views, and generally superintend the conversation. This will not involve formal presentations, but will rather be a “deliberation,” in which all of us, including the audience, get to eavesdrop on what the council members have to say. This should run about 30 minutes total.

I will then step in, before the council takes any formal “vote,” and spend about 30 minutes moderating the entire audience, the council members, and the advocates in a “town meeting” discussion of the issues.

At the very end, I’ll ask the council to “vote” on the outcome of the hearing.

I’ll poll the audience for how it would have voted.

We’ll adjourn and enjoy the reception.

**VI. Conclusion**

Please send to me via mail or e-mail a brief biographical sketch, for inclusion in our program. My secretary Carolyn will also be in touch with you soon to remind you to send the sketch.

I hope this covers things for now. Don’t hesitate to call me or others here if we can help with anything. I’m looking forward to seeing everyone and to a stimulating and enjoyable day.
The law firm of Marlboro & Haye was founded 90 years ago. It has 700 lawyers, who are admitted in 46 states. It has six offices in the U.S., four in Europe, and two in Asia. The firm serves business interests, but has diversified into a few personal legal services, such as white collar criminal defense. It does not provide routine personal legal matters such as divorce and housing issues. Starting in 1990, the firm began to lose market share. In 1994, the firm selected Governor Robertson to be its managing partner. Governor Robertson was a young, popular governor of the state where M & H has its main office.

One of the first things the Governor did was to create the position of director of client services. He hired a high level public relations manager who had never worked for a law firm before to fill this position. Based on an aggressive marketing campaign, the firm emerged with a renewed image that began to generate increased business. The firm adopted a stylish logo and the slogan “M & H: Going where other law firms don’t dare.”

By 1996, the firm began to expand into the international marketplace and, consistent with its slogan, began to offer innovative services. In order to support its client development, expanding global scope and innovations, the firm invested heavily into information technology. It has been a leader in website development and has won marketing awards for the design of its site.

The M & H website’s home page is graphically intense.
- It features a revolving globe,
- with people of various nationalities coming into view as the globe turns. The implication is that these are the firm’s lawyers.
- The text of the home page also includes the firm’s logo and slogan “Going where other law firms don’t dare.”

Viewers are then invited to click on options, taking them to
- a message from the managing partner,
- bios to the firm’s top notch lawyers,
- a page of client testimonials that says “See what others are saying about M & H”,
- a sign up for firm newsletters and
- information about the firm’s participation in a network of firms designed to meet every legal need around the world.

The main office of M & H is in a state that has adopted the ABA Model Rules. The office of the state’s disciplinary counsel has notified M & H that its lawyers who are admitted in that state are in violation of several state ethics rules. In addition, two other states, Texas and Alabama, have asked the home state to bring disciplinary actions against the firm’s lawyers admitted in those states, under the choice of laws doctrine, for alleged violations in their states.
The specific allegations and M & H's defenses are as follows:

1. **A. Allegation:** On its home page, the firm refers to itself as a full service law firm, even though it does not provide all legal services. It does not provide and does not have lawyers who are competent to provide most aspects of family law, traffic law, housing law and consumer matters. This is a violation of Rule 7.1(b), which prohibits a lawyer from communicating in a way that is false or misleading. Under Rule 7.1(b), a communication is false or misleading if it creates an unjustified expectation about the outcome of a case. As its applied to transactional matters, the use of full service would overstate the capacity and be a violation.

   **B. Defenses:** “Full service” is a euphemism for a broad range of services. It is widely used among law firms, none of which provide each and every possible legal service that anyone could possibly request. The majority of international law firms use it and its potential clients are not misled in fact. The term is similar to a general practitioner, who communicates availability in a range of services, but not all services.

2. **A. Allegation:** The home page includes a graphic image of a revolving globe. This creates an unjustified expectation that the firm has the ability to provide services in all geographic areas, when it does not. Even though the firm is international, in that it maintains offices in several countries, it is not global. Therefore, the illustration is a violation of Rule 7.1(b). Since the globe does not identify the locations where the firm has offices, it is also a violation of Rule 7.1(a), in that it has omitted a fact necessary to make a statement considered as a whole not materially misleading.

   **B. Defense:** The globe is not intended to be a literal representation of the firm’s geographic scope of services, but rather a symbolic representation of its international capacity. It is impractical to demonstrate this capacity with something less than a globe.

3. **A. Allegation:** The people representing various nationalities implicitly being the lawyers in the firm are models that give a false impression of the imagery of the members of the firm, again violating the standard of creating an unjustified expectation. The ethnic balance of the representation is disproportionate to the actual ethnic balance of the lawyers in the firm.

   **B. Defenses:** Even though the people are models, they represent the diversity and multiculturalism that is reflected in the make-up of the firm. Potential clients who form the belief that the firm includes racial and gender diversity are not misled, regardless of whether that belief is formed by the use of models or of actual lawyers for the firm.

4. **A. Allegation:** The slogan “Go where other law firms don’t dare” is a violation of Rule 7.1(c) in that it compares the lawyer’s services with other lawyers’ services in ways that are not factually substantiated.

   **B. Defense:** Potential clients expect the firm to differentiate itself from other firms and
create its identity. The statement is factually substantiated because other firms lack the capacity to bring certain types of actions in certain locales around the world.

5. A. Allegation: When a viewer clicks on to the “message from the managing partner,” it is signed by “Governor James Robertson.” The use of the title “Governor” is a violation of that portion of Rule 7.1(b) indicating it is misleading to imply that the lawyer can achieve results by means that violate the rules or other laws. Like other titles of former positions, such as judge or commissioner, the use of the title when the person is no longer in the position, suggests that the lawyer is able to bring influence that either is not the case or would be inappropriate if it were the case.

B. Defense: The position is a title of honor and respect for the public services provided to the citizens of that state while the Governor was in office. Potential clients are not lead to the belief that the Governor remains in office. If the Governor were in office, the firm would be in violation of Rule 7.5-c, and the use of the title would not be permissible. The Governors request that people refer to him as such in his positions outside of the firm and it would be inconsistent and confusing to do differently within the firm. The firm also brings a defense for all allegations outside of the home page that viewers are inviting the information by actively clicking through and the obligation to protect those viewers is more like an invited solicitation or someone who comes to the law office for information, than those who rely on advertising materials that may not be invited.

6. A. Allegation: Viewers are invited to click on a page that says “see what others are saying about M & H.” These are client testimonials that are prohibited under the provisions of Rules 7.1(b) and 7.1(c).

B. Defenses: The Rules do not prohibit testimonials, but only those that create an unjustified expectation or an unsubstantiated comparison. The testimonials are crafted in a way that they speak to the client’s value in their relationship with the firm. They do not speak about any specific representation, or the abilities vis a vis any other firm. Additionally, the rules do not restrain the clients from exercising their First Amendment rights to talk about their level of representation.

7. A. Allegation: The firm invites people to sign up for a newsletter, but the newsletter is not labeled an advertisement as required by Rule 7.3(c).

B. Defenses: Rule 7.3 requires that solicitations be labeled when they are sent to potential clients known to be in need of legal services in a particular matter. The newsletters are available to anyone who requests them and the firm has no way to know who among those requesting the information are potential clients in need of legal services in particular matters.

8. A. Allegation: M & H is a member of GlobalPlus, an international network of law firms that participate in the mutual referral of clients and potential clients when they are unable to provide the legal services the clients need. This is a violation of Rule 7.2 (c), prohibiting a lawyer from giving anything of value to a person for recommending
the lawyer’s services (with exceptions that do not apply here).

B. Defense: Participation in GlobalPlus is a client service that is intended to expand the capacity to serve clients in ways that assure quality control cost efficiently. Participation provides no assurance that the firm will receive client referrals and no money changes hands when and if a referral is made or received. Virtually all international law firms participate in similar networks.

9. A. Allegation: The State Bar of Texas Office of Disciplinary Counsel has made a request to prosecute those members of M & H who are members of the State Bar of Texas under the doctrine of choice of laws for violation of Texas Rule 7.04(b)(3), which requires that a lawyer who advertises a field of practice that is the subject of certification by the Texas Board of Specialty Certification and who is not certified states that he or she is not so certified on that advertisement. See http://www.texasbar.com/attyinfo/adreq/rules.pdf

The Texas Bar has also requested prosecution for the failure of the firm to submit copy of its web site for review as required by Rule 7.07: Filing Requirements for Public Advertisements and Written Solicitations.

B. Defenses: Choice of laws applies here only where the lawyers have multiple admission. Those lawyers in the firm who are admitted in Texas, but not admitted in this state are not subject to disciplinary proceedings in this state. The lawyers admitted to practice in Texas were not part of the decision-making for the content of the web site and therefore unable to comply. The site provides biographical information about its lawyers and potential clients can discern whether any particular lawyer is certified as a specialist. The firm has no office in Texas and should not have to comply with filing requirements intended to apply to law firms with offices there.

10. A. Allegation: Alabama has made a similar request to prosecute those members of the firm admitted to that state because the web site does not contain the required disclaimer, under Rule 7.2(e), which states: “No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.”

B. Defenses: It is the position of the lawyers of M & H that the quality of the services they provide is greater than the quality of the legal services performed by other lawyers. If the firm included this disclaimer, its communication would be a misleading representation in violation of Rule 7.1.