# OUCH!
# SOCIAL MEDIA ETHICS FOR ESTATE PLANNERS

## Sioux Falls Estate Planning Council
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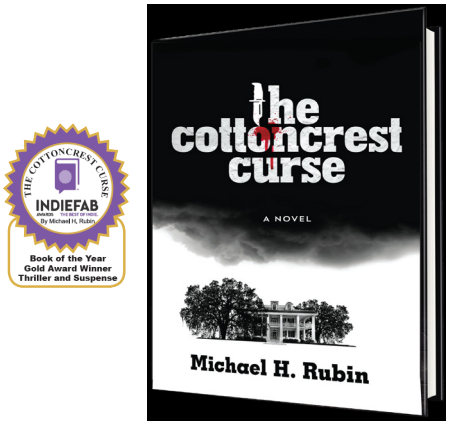
By
**Michael H. Rubin**[1]
MCGLINCHEY STAFFORD, PLLC
301 Main Street, Suite 1400
Baton Rouge, LA 70808
225.383.9000
mrubin@mcglinchey.com
with offices in
▪ New Orleans ▪ Houston ▪ Dallas ▪ Cleveland, OH ▪ New York, NY ▪ Washington, D.C. ▪ Albany, NY ▪
▪ Jackson, MS ▪ Monroe, LA ▪ Jacksonville, FL ▪ Fort Lauderdale, FL ▪ Nashville, TN ▪ Birmingham, AL Irvine, CA ▪

[1] Mike Rubin is one of the leaders of the multi-state law firm of McGlinchey Stafford PLLC and handles commercial litigation and transactions as well as real estate, finance, and banking matters. He heads his firm's appellate practice team and is a member of the ABA Standing Committee on Ethics and Professional Responsibility. He has presented over 450 major papers in the U.S., Canada, and England on real estate, ethics, professionalism, finance, appellate law, and legal writing. He is a past-President of the American College of Real Estate Lawyers, the Bar Association of the Fifth Federal Circuit, the Louisiana State Bar Association, and the Southern Conference of Bar Presidents. He serves as a Life Member of the American Law Institute and is a Commissioner on the Uniform Law Commission. For four decades, he also served as an Adjunct Professor teaching courses in finance, real estate, and advanced legal ethics at the law schools at LSU, Tulane, and Southern University.

Rubin is an author of, co-author of, and contributing writer to more than a dozen legal books and over forty articles; his works are used in law schools and have been cited as authoritative by state and federal trial and appellate courts, including the U.S. First and Fifth Circuits. He has been honored as the Distinguished Alumnus by the LSU Law School and as the Distinguished Attorney of Louisiana by the Louisiana State Bar Foundation. His latest legal book, on Louisiana finance and real estate, is THE LOUISIANA LAW OF SECURITY DEVICES, A PRÉCIS (Carolina Academic Press), now in its second edition.

Rubin also is a novelist. At the American Library Association's annual meeting in San Francisco, his debut novel, a historical thriller entitled THE COTTONCREST CURSE, received the IndieFab Gold Award Winner as the best thriller/suspense novel published by a university or independent press. Publishers Weekly calls it a "gripping debut mystery," and 225 Magazine writes that it is "not just a thrilling murder mystery, but also a compelling look at life in south Louisiana during its most tumultuous decades." His second novel, a contemporary legal thriller entitled "CASHED OUT," now in its second edition, won the Jack Eadon Award as the Best Contemporary Drama. The Providence Journal says: "*Cashed Out* features "a lawyer down and out enough to make John Grisham proud. He's culled from the likes of Michael Connelly by way of James Lee Burke. A gem of a tale." Both of Rubin's novels are available in your local bookstores, on the websites of Amazon and Barnes & Noble, and as eBooks in both Kindle and Nook formats.




## THE COTTONCREST CURSE

**When they know who you really are,
you're never safe.**

In this heart-racing thriller, a series of gruesome deaths ignite feuds that burn a path from the cotton fields to the courthouse steps, from the moss-draped bayous of Cajun country to the bordellos of 19th century New Orleans, from the Civil War era to the Civil Rights era and across the Jim Crow decades to the Freedom Marches of the 1960s and into the present.

At the heart of the story is the apparent suicide of an elderly Confederate Colonel who, two decades after the end of the Civil War, viciously slit the throat of his beautiful young wife however, believes that this may be a double homicide, and suspicion falls upon Jake Gold, an itinerant peddler who trades razor-sharp knives for fur and who has many deep secrets to conceal.

Jake must stay one step ahead of the law, as well as the racist Knights of the White Camellia, as he interacts with landed gentry, former slaves, crusty white field hands, crafty Cajuns, and free men of color all the while trying to keep one final promise before more lives are lost and he loses the opportunity to clear his name.

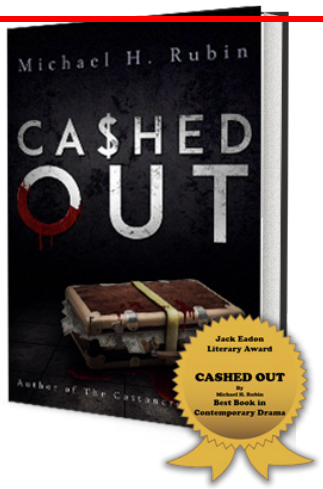
## CASHED OUT

**Holding $4 million in cash, given to you by your murdered client, makes you everyone's target.**

One failed marriage. Two jobs lost. Three maxed out credit cards. "Schex" Schexnaydre was a failure as a lawyer. Until three weeks ago, he had no clients and no cash. Well, no clients except for infamous toxic waste entrepreneur G.G. Guidry, who's just been murdered. And no cash, except for the $4,452,737 Guidry had stashed with him for safekeeping.

When Schex's estranged ex-wife, Taylor, is accused of Guidry's murder, she pleads with Schex to defend her. He refuses, but the more he says no to Taylor, the deeper Schex gets dragged into the fall-out from Guidry's nefarious schemes, ending up as the target of all those vying to claim Guidry's millions for themselves.

Schex careens from the swamps and marshes of Louisiana's chemical corridor to the deep water oil rigs in the Gulf of Mexico, from the river industries that pollute minority neighborhoods to the privileged playgrounds of New Orleans' crime syndicate bosses, and from a notorious alligator processing plant to the halls of political power, all in an attempt to clear his name and claim Guidry's cash for himself.




## Praise for "The Cottoncrest Curse"

"Rubin's **gripping debut mystery** depicts the bitter racial divides of post-Reconstruction South and its continuing legacy."
Publishers Weekly

"This historical thriller is thoroughly researched. It is literary fiction taking "readers on **an epic journey**."
Southern Literary Review

"The "**story is gripping, the writing is masterful**. Rubin has struck gold in his debut novel."
Chicago CBA Record

"Michael Rubin's debut novel, 'The Cottoncrest Curse,' introduces us to **a fresh new voice that weaves talented prose and tack-sharp detail into an intriguing story** set in Louisiana's bayou country."
*Alan Jacobson*,
USA Today national bestselling thriller author

"A **thrilling murder mystery**."
225 Magazine

## Praise for "Cashed Out"

"*Cashed Out* features **a lawyer down and out enough to make John Grisham proud**. He's culled from the likes of **Michael Connelly by way of James Lee Burke**. A gem of a tale."
– Providence Journal

"Cash in on this **thrilling read**. Set in the sweltering heat of the Louisiana bayou, ***Cashed Out* is enthralling. Fast-paced plot. Page turning.**"
Foreword Reviews

**If you like John Grisham and Michael Connelly's Lincoln Lawyer, you're gonna love "Schex" Schexnaydre** – an attorney who breaks all the rules looking for some kind of justice. **Fast, funny, and filled with twists and edge-of-your-seat suspense.** Michael H. Rubin really nails it!
R.G. Belsky, author of the Gil Malloy mystery series

# SOCIAL MEDIA ETHICS FOR ESTATE PLANNERS[2]

## 1. AN OVERVIEW OF THE ISSUES

When more than half of all in-house counsel report turning to social media for news and information, when the President tweets daily, when the fastest growing cohort on Facebook consists of those over 50, when the Association of Corporate Counsel, many national legal groups, when CPAs, CFPs, and lawyers maintain Facebook, Twitter, and Instagram sites, when judges around the country blog and when bloggers regularly break important stories and appear on television and radio news broadcasts, there can be no doubt that social media permeates society. No estate planner, judge, or lawyer can afford to ignore it.[3]

Estate planners, lawyers, and law firms are increasingly using social media to build their reputations, to inform their current clients, reach potential new clients, and "connect" with judges. A look at recent publications aimed at attorneys shows that lawyers are being told that they "must" be on social media, and there are online posts advising judges about the "ethics" of social media usage.[4]

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[2] A portion of this paper consists of adaptions of, inclusions from, and extracts from the author's prior publications, including: "Social Media for Estate Planners," National Association of Estate Planners Annual Conference, Fort Lauderdale, Florida, November 2019; "Social Media Ethics," Loyola Estate Planning Conference, New Orleans, Louisiana, December 2017; "Social Media Ethics," Lafourche Parish Bar Association, August 2017 (Thibodeaux, Louisiana), "Judges and the Social Media Thicket," Louisiana Judicial College, April 2017 (Lafayette, Louisiana); "The Social Media Thicket for Bankruptcy Lawyers and Judges," U.S. Fifth Circuit Bankruptcy Bench/Bar Conference, February 2016 (New Orleans, Louisiana), "Social Media Issues for Hospital Attorneys," Louisiana Hospital Association Legal Conference, November 5, 2015 (Baton Rouge, Louisiana); "The Social Media Thicket for Judges and Lawyers," Annual Texas Bar Association's Annual Bankruptcy Section's Bench/Bar Conference, May 29, 2015 (Cedar Creek, Texas); "What's A Bar Association To Do About Social Media? Social Media, Bar Associations, Bar Employees, And Lawyers," National Association of Bar Executives, August 6, 2014 (Boston, Massachusetts); "The Social Media Thicket for Lawyers and Judge," U.S. Fifth Circuit Judicial Conference, May 8, 2014 (San Antonio, Texas); "The Social Media Stage: Don't Trip In The Bright Lights. Ethical Issues Of Use Of Social Media By Lawyers And Judges," a presentation for the Louisiana State Bar Association's Fall in New York CLE, November 23, 2013 (New York, New York); "The Ethics of Social Media Usage for Lawyers," a presentation for the Louisiana Association of Defense Counsel, August 16, 2013 (New Orleans, Louisiana); "Flying High, In A Bubble Or A Hot Air Balloon, Over The Social Media Ethical Thicket," a Presentation for the Baton Rouge Bar Association's 2013 Bench/Bar Conference, August 3, 2013 (Orange Beach, Alabama); "Social Media Issues for In-House Counsel and Outside Counsel in Kansas and Missouri," a presentation to the 10th Annual Update on the Law Seminar (Kansas City, 2013); "Navigating the Thicket of the Social Media: The View from the Bench and the Bar of Professionalism Issues," a presentation given to the Louisiana State Bar Association in April, 2013; "Navigating the Ethics of Social Media," a presentation given for the Louisiana Bankers Association in December, 2012; "Ouch! Getting Bit Ethically and Professionally by the Interrelationship of Technology and Ethics," September 23, 2012 to the State Bar of Nevada (Las Vegas, Nevada); "What's So Unethical About Social Media? How To Avoid Getting Cornered," ABA Real Property Section 23rd Annual Spring Symposia (May 2012, New York); "The Social Media Thicket for Mississippi Lawyers: Surviving and Thriving In An Ethical Tangled Web," 31 Mississippi College Law Review 281 (2012); "The Social Media Thicket: Surviving and Thriving in a Tangled Web and the Ethical Issues this Raises for Lawyers," ACREL/ALI-ABA WEBINAR, produced in conjunction with the American College of Real Estate Lawyers, September 14, 2011; and Rubin and Gutierrez, "The Social Media Thicket: Surviving and Thriving in the Tangled Thorny Issues," 26 Probate and Property 62 (2012) (a publication of the ABA's Real Property Section), awarded the "2012 Outstanding Technology Article" by the ABA Real Property Section.

[3] *See*: Margaret M. DiBianca, "Ethical Risks Arising From Lawyers' Use Of (And Refusal To Use) Social Media," 12 Delaware Law Review 179 (2011).

[4] See, for, example:

Michael Crowell, "Judicial Ethics and Social Networking Sites," http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=Judicial%20Ethics%20Advisory%20Opinions%20on%20Social%20Media

[Footnote continued on the next page]

The National Center for State Courts has a webpage devoted to social media by judges[5], and one web site even contains a "quick survey of blogs written by judges."[6]

The ABA has a webpage devoted to social media usage by lawyers,[7] and there are on-line sites purporting to give lawyers a guide to "marketing" themselves through social media,[8] creating "personal branding."[9] The National Law Journal has reported that the

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(last visited 08/08/18)

Dana Littlefield, "Social Media and Judges: What are the Rules?" San Diego Union-Tribune, http://www.sandiegouniontribune.com/sdut-judges-lawyers-social-media-ethics-2016may14-story.html
(last visited 08/08/18)

John Browning, "Why Can't We Be Friends? Judges Use of Social Media," 68 University of Miami Law Review 487 (2014), also found at http://lawreview.law.miami.edu/wp-content/uploads/2011/12/Why-Cant-We-Be-Friends-Judges-Use-of-Social-Media.pdf
(last visited 08/08/18)

Jacob Gershman, "Some Judges 'Using Social Media Badly," Wall Street Journal (2/22/16), also found at
http://blogs.wsj.com/law/2016/02/22/some-judges-using-social-media-badly/
(last visited 03/01/17)

[5] "Social Media and the Courts," with links to judicial ethics opinions, on the website of the National Center for State Courts:
http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=Judicial%20Ethics%20Advisory%20Opinions%20on%20Social%20Media
(last visited 03/01/17)

[6] See: http://www.lawsitesblog.com/2013/04/a-quick-survey-of-blogs-written-by-judges.html (last visited 3/01/17).

Also see:

Kevin O'Keefe, "Judges Publishing and Reading Blogs,"
http://kevin.lexblog.com/2007/08/23/judges-publishing-and-reading-blogs/
(last visited 03/01/17), and

Kelly Knaub, "Judges Find Their Blogs Come with a Short Leash,
https://www.law360.com/articles/591318/judges-find-their-blogs-come-with-a-short-leash
(last visited 03/01/17).

[7] See:
http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/social_media.html (last visited 03/01/17)

[8] See:
http://www.attorneyatwork.com/wp-content/uploads/2015/01/Connected-A-Lawyers-Guide-to-Social-Media-Marketing_012815.pdf (last visited 03/01/17)

[9] See:
http://upwardaction.com/personal-branding-for-lawyers/ (last visited 03/01/17)

[Footnote continued on the next page]

"average lawyer pays the company $2,000 a year to attempt to influence the list or hits that come up when his or her name is punched into search engines."[10]

Not only has the Uniform Law Commission promulgated the Revised Uniform Fiduciary Access to Digital Assets Act, which has been adopted in over 40 states,[11] but many articles and Internet sites discuss the importance of including social media platforms in estate plans.[12]

Can the use of social media create professionalism and ethical problems for estate planners? Can social media posting inadvertently back estate planners into ethical corners? Many Internet resources on ethics and professionalism provide a resource for research and links to a number of useful sites.[13]

Use of social media triggers a number of potential ethical and professionalism concerns,[14] including:

- What are the ethical limitations (if any) on non-lawyer estate planners and on attorneys who engage in estate planning on:
  - posting information on social media?
  - answering questions posed on social media?
  - soliciting potential clients through social media?

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[10] National Law Journal, January 9, 2012, p.4.

[11] *See* the Uniform Law Commission site on this act, http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015) (last visited 08/08/18).

[12] *See, for example*, Yale Mandel, "Facilitating the Intent of Deceased Social Media Users," 39 Cardozo Law Review 1909 (2018); David Horton, "Tomorrow' Inheritance: The Frontiers of Estate Planning Formalism," 58 Boston College Law Review (2017), and also the following sites:

"Remembering Digital Assets in Estate Planning," https://cavitch.com/digital-assets-estate-planning/ (last visited 08/08/18)

"Social Media, Cloud Files, and More; Estate Planning for your Digital Assets," http://www.marksgray.com/social-media-cloud-files-estate-planning-digital-assets/ (last visited 08/08/18)

[13] *See, for example* the following sites:
The ABA Center for Professional Responsibility, http://www.abanet.org/cpr/links.html;
The Thomas Cooley Law School ethics site, http://www.cooley.edu/ethics/other_sites_of_interest.htm;
the Cornell Law School Professionalism web links page, http://ww3.lawschool.cornell.edu/faculty-pages/wendel/ethlinks.htm;
the Georgetown Law Library legal ethics link page, http://www.ll.georgetown.edu/guides/legal_ethics.cfm;
and the Santa Clara University business ethics links page, http://scu.edu/ethics/links/links.cfm?cat=BUSI.

[14] *See, e.g.,* Robert L. Shaver "*Legal Ethics Rules Apply To Attorneys' Social Media And Websites*," 53 Advocate (Idaho) 15 (2010).

- What are the implications of using social media to screen potential employees?
- What are implications on monitoring or creating rules concerning social media usage by employees?
- Are there (or should there be) limits on social media contacts between lawyers and judges?
- May an attorney ethically use social media to "research" witnesses and adverse experts, and can or should a court police or limit this?
- What First Amendment issues arise from the use of social media, and are these issues trumped by a lawyer's obligations as an officer of the court?

Further, the issue of whether there can or should be a social media relationship between lawyers and judges, and, if so, under what circumstances, has been the subject of state judicial ethics opinions as well as cases.[15]

This paper considers several examples which are based on or stem from real events. While a consideration of the admissibility of social media is beyond the scope of this paper,[16] the examples contained below explore professionalism issues as well as

[15] *See, e.g. Domville v. State*, 103 So. 3d 184 (Fla. Dist. Ct. App. 2012); and:
Florida Supreme Court Judicial Ethics Advisory Committee, Opinion Number 2009-20 (2009), available at http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html;
Florida Supreme Court Judicial Ethics Advisory Committee, Opinion Number 2010-04 (2010), available at http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-04.html;
Florida Supreme Court Judicial Ethics Advisory Committee, Opinion Number 2010-06 (2010), available at http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html;
Ethics Committee of the Kentucky Judiciary, Formal Judicial Ethics Opinion JE-119 (2010), available at http://courts.ky.gov/commissionscommittees/JEC/JEC_Opinions/JE_119.pdf;
Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Opinion 2010-7 (2010), available at http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2010/Op_10-007.doc;
Maryland Judicial Ethics Committee, Opinion Number 2012-7 (2012), available at http://www.courts.state.md.us/ethics/opinions/2000s/2012-07;
New York Judicial Ethics, Opinion 08-176, available at http://www.courts.state.ny.us/ip/judicialethics/opinions/08176.htm;
California Judges Association Judicial Ethics Committee, Opinion 66 (2010), available at http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf; and
Massachusetts Committee of Judicial Ethics, Opinion No. 2011-6 (2011), available at http://www.mass.gov/courts/sjc/cje/2011-6n.html.

[16] For more on social media and admissibility under state and federal law, see: Pamela W. Carter and Shelley K. Napolitano, "Social Media: An Effective Evidentiary Tool," 61 La. Bar Journal 331 (2014) and Grant J. Guillot, "Evidentiary Implications of Social Media: An Examination of the Admissibility of Facebook, MySpace and Twitter Postings in Louisiana Courts," 61 La. Bar Journal 338 (2014). Also see: Michael R. Holt and Victoria San Pedro, "Social Media Evidence: What You Can't Use Won't Help You: Practical Considerations for Using Evidence Gathered on the Internet," 88 Fl. Bar Journal 8 (20140. Also consider: Peter N. Thompson, 11 Minn. Prac., Evidence § 901.01 (4th ed.), §901.01, citing in FN 20 to "M. Anderson Berry and David Kiernan, 'Voodoo Information': Authenticating Web Pages in Federal Court, 8
[Footnote continued on the next page]

ethical issues. The purpose of these examples is not to dissuade anyone from using social media; rather, the purpose is to make us more aware of the issues involved and to think through why and how we use social media. As will be seen, this paper does not suggest that the answers to any of these difficult questions are easily ascertained, clear, or uniform across the nation.

## 2. SOCIAL MEDIA SCREENING OF JOB APPLICANTS

Every potential employee whom you interview is probably using social media. It has been reported that, in the second quarter of 2018, Facebook had 2.41 *billion* monthly active users.[17] An "active user" is someone who had logged into Facebook in the last thirty days.

And that's just Facebook. Twitter has over 330 million "active users" monthly, and of these, 134 million use Twitter daily[18] and there are 500 million Tweets per day.[19] Instagram also has one billion monthly users, with more than 77.6 million in the U.S., accessing it mainly through mobile devices.[20] Even Snapchat reports that it has 210 million daily active users as of the third quarter of 2019.[21]

It has been reported that that 73% of all adults use social media sites,[22] and almost 90% of 18-29 year olds use these sites.[23] The top 12 social media sites through September of 2019 are reported to be (in order of the estimated active monthly visitors[24]):

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No. 1 INTERNET L. & STRATEGY 1 (Jan. 2010) (discussing how to authenticate web pages); Deborah R. Eltgroth, Note, Best Evidence and the Wayback Machine: Toward A Workable Authentication Standard For Archived Internet Evidence, 78 FORDHAM L. REV. 181 (2009) (discussing admissibility of archived internet evidence); Jonathan D. Frieden and Leigh M. Murray, The Admissibility of Electronic Evidence Under the Federal Rules of Evidence, 17 RICH. J. L. & TECH. 5 (2010) (discussing admissibility of electronic evidence); Michelle Sherman, The Anatomy of A Trial With Social Media and the Internet, 14 No. 11 J. OF INTERNET L.1 (2011) (discussing admissibility of social media evidence); Randy Wilson, Admissibility of Web-Based Data, 52 THE ADVOC. 31 (2010) (discussing admissibility of web-based material)."

[17] https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ (last visited 11/13/19)

[18] https://www.oberlo.com/blog/twitter-statistics (last visited 11/13/19).

[19] See: https://www.oberlo.com/blog/twitter-statistics (last visited 11/13/19).

[20] See: https://www.statista.com/statistics/253577/number-of-monthly-active-instagram-users/ (last visited 08/08/18).

[21] See: https://www.statista.com/statistics/545967/snapchat-app-dau/ (last visited 11/13/19).

[22] See http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (last visited 08/08/18).

[23] *Id.*

[24] See: http://www.ebizmba.com/articles/social-networking-websites (last visited 11/13/19).

- Facebook
- YouTube
- Instagram
- Twitter
- WhatsApp
- Pinterest
- Reddit
- Ask.fm
- Tumblr
- Flickr
- Snapchat
- VK

So, it should come as no surprise that that almost all of your potential employees are on some form of social media.

Law review articles about using social media to screen potential job applicants[25] have common themes, including:

- Issues involved in whether to use social media checks;
  - Issues on selective use of social media checks;
  - Issues surrounding what you do with information you have found out using social media checks;
- Issues in having a third party do your social media checks of potential employees

### a. ISSUES INVOLVING USING SOCIAL MEDIA CHECKS ON POTENTIAL EMPLOYEES[26]

You're interested in finding out more about your potential employees. You have them fill out application forms, but you want to know what they're really like, even before they come in for the job interview. Doesn't it help to know more about them if you check out their social media sites?

[25] *See, for example:* James G. Paulson, "Social Media and Employment Law – NLRB Decisions," 20170310A NYCBAR 320 (2017); Thomas J. Lloyd III, "Recent Developments in Employment-Related Social Media Law," 22 No.3 Idaho Emp. L Letter 1 (2017); Charles J. Stiegler, "Developments in Employment Law and Social Media," 71 Bus. Law 321 (2016); Eric D. Bentley, "The Pitfalls of Using Social Media Screening for Job Applicants," 29 ABA Journal of Labor and Employment Law 1 (2014); Dorothy M. Bollinger, "Social Media and Employment Law: A Practitioners Primer," 20 Temple Political and Civil Rights Law Review" 323 (2011); Daniel R. Anderson, "Restricting Social Graces: The Implications of Social Media for Restrictive Covenants in Employment Contracts," 72 Ohio Stat. Law Journal 881 (2011).

[26] For more detail on this entire area, *see* the Eric Bentley article, footnote 25, above.

One problem that arises immediately is how you determine which potential employees' sites to check out. Do you do it before they come in for an interview? Do you use a social media check to figure out which applicants you want to invite in for an interview?

A pre-interview social media check may trigger a concern under Title VII if it is later alleged that you screened and then didn't interview someone based on their "race, color, religion, sex, or national origin."[27]

If you look at applicants' social media postings, it could reveal something about their age (either directly or through a picture), which could then raise issues under the Age Discrimination in Employment Act.[28]

What if social media postings reveal something about an applicant's potential disability? If you don't hire the applicant, that may raise concerns under the American with Disabilities Act[29] or even the Genetic Information Nondiscrimination Act.[30]

And these are just the federal laws. Many states also have anti-discrimination laws that need to be consulted. One commentator has stated that "[e]mployment conditioned on an employer's access to one's online social media is likely a violation of state anti-discrimination laws."[31]

Finally, what if your screening actually reveals that a potential employee might be a physical or safety threat? If you decide to hire that person and they later harm someone, there may be a "negligent hiring" claim brought.[32]

But, you say, what's the real harm? After all, who can tell what I've viewed?

Well, not only can your searches be traced, but metadata can even reveal how long you spent on the search for each individual applicant. Did you spend 5 minutes on all females but only 1 minute on all males? Did you spend 15 seconds on all African-American applicants but 5 minutes on each white applicant? Did the time you spent bear

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[27] 42 U.S.C. §2000e-2(a)(1).

[28] *Cf. McCann v. Tex. City Ref. Inc*., 984 F.2d 667 (5th Cir. 1993), cited by Bentley, *supra*.

[29] 42 U.S.C. §12112; see; Bently, *supra*, citing *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1999).

[30] 42 U.S.C. §2000ff-1(a). *See* Bently, *supra*, citing *Leone v. N.J. Orthopaedic Specialists, P.A*., 2012 WL 1535198 (D.N.J. 4/12/17).

[31] See Scheinman (*infra*, fn 45, 44 McGeorge L. Rev. at 734),

[32] See *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907 (Minn. 1983), discussed in Bently, *supra* at p. 10.

any relation to whom you called in for an interview or whom you hired, and would a jury believe you if there was a consistent disparity (or even one telling disparity)[33]?

More importantly, under Title VII, a disgruntled applicant may bring a disparate impact claim challenging the employer's allegedly facially neutral policy of screening all applicants' social media sites.[34]

What happens if you call applicants in and if, during the interview, you discuss the social media sites they're using so that you can later check them out? Is that "safer" than pre-screening applicants' social media sites before they're called in? The issues under Title VII may remain. Plus, if the applicants have privacy settings in place for their sites and you ask about those settings or ask to access those sites, you may be in the territory of the Stored Communications Act.[35]

And what if you find out, after the interview (during a social media check) that the applicant is a big supporter of unions and your applicant loves unions. Now you may have triggered the National Labor Relations Act, even in regard to those who are not yet employees.[36]

In addition to that, many states have special laws concerning employment and privacy that can be triggered by social media monitoring.

#### b. BOTTOM LINE ON SCREENING OF POTENTIAL EMPLOYEES:

The bottom line appears to be that law firms may want to consider putting in place standards and procedures concerning examining social media sites of potential employees.

## 3. SOCIAL MEDIA ISSUES FOR CURRENT EMPLOYEES

Once you've hired an employee, the concern about social media usage may only intensify. What are your employees doing on Internet-accessible devices you've supplied, be they laptops, smart-phones, or desktops? What sites are they accessing during working hours? Are they browsing sites you don't want them using? Are they sharing confidential information? Are they not working but rather shopping? After all, Cyber Monday (the first Monday after Thanksgiving) is huge because employees are back at work after the holidays and have the office's high speed internet access. In 2016, Cyber Monday

[33] *See* Bently, *supra*, at pp. 3-4.
[34] *See* Bently, *supra*. p. 4.

[35] *See*: Nicholas D. Beadle, "A Risk Not Worth the Reward: The Stored Communications Act and Employers' Collection of Employees' and Job Applicants' Social Networking Passwords, 1 Am. U. Bus. L. Rev. 397 (2012), cited by Bentley, *supra*.

[36] See *Parexel International,* 356 N.L.R.B. No. 82, 2011 WL 288784 (1/28/11), cited by Bentley, *supra*.

shattered all records with $3.45 billion spent with online retailers in just one day,[37] as 12.1 percent increase over 2015,[38] with almost a third of those orders coming via mobile devices.[39]

Monitoring your employees' social media usage is important to many businesses. It is a way of finding out whether your employees are working on the job or goofing off. It is a way to prevent employees from visiting web sites your business finds inappropriate. And this monitoring is big business, with many companies offering services that monitor everything, down to the keystroke, as well as providing tracking and blocking devices for your network.[40]

Some reports assert that 2/3 of employees regularly check social media while at work, with usage ranging from and hour and a quarter a week to 2.5 hours per week,[41] which means that for a law firm with 1-6 employees with an average wage of $20/hr., the loss amounts to thousands of dollars of unproductive time per month.

Some monitoring software will even detect keywords and take screenshots of the sites your employees are visiting,[42] even if the device is offline.[43] Others even claim to listen to what's being said on a phone call.[44]

The law review articles on social media issues involving employees[45] also have common themes, including:

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[37] See: https://www.digitalcommerce360.com/2017/09/27/black-fridays-online-sales-top-cyber-monday/ (last visited 11/7/17).

[38] See: https://www.usatoday.com/story/money/2016/11/28/cyber-monday-set-top-last-year-sales/94552948/ (last visited 11/7/17).

[39] *Id.*

[40] See, e.g., a listing of some of these services at: http://www.toptenreviews.com/business/software/best-employee-monitoring-software/ (last visited 11/7/17).

[41] See: http://www.marketingprofs.com/charts/2016/30736/how-much-time-do-employees-spend-on-social-media-at-work (last visited 11/07/17).

[42] See, for example: Spector 360, http://cms.spector360.com/lands/employee-monitoring-software/?utm_source=GOOGLE&utm_medium=PPC&refer=46643&cid=70170000000LvQc&keyword=Employee%20Monitoring%20Software&placement=&gclid=CJ3Zmf2it78CFQ-Cfgodrr4AyA (last visited 03/01/17).

[43] See: Spytech: http://www.spytech-web.com/index.shtml (last visited 04/01/17).

[44] See: Mobistealth: http://www.mobistealth.com/package-selection.php?phone_id=534&product_type=ALL (last visited 03/01/17)

[45] *See, for example:* the law review articles cited at footnote 25, above, plus: Eric Raphan and Sean Kirby, "Policing the Social Media Water Cooler: Recent NLRB Decisions Should Make Employers Think Twice Before Terminating an Employee for Comments Posted on Social Media Sites," 9 Journal of Business and Technology Law 75 (2014); Pat Lundvall and Megan Starich, "Employer Social Media Policies and the

[Footnote continued on the next page]

- Do you monitor social media access by employees?
    - How do employee privacy concerns interact with employer needs?
    - How do you monitor?
    - Must you give notice?
    - What can you monitor?
- What can you do if you find something that causes concern on an employee's social media post.

    - First Amendment Issues
    - Electronic Communications Privacy Act
- Fair Labor Standards Act Issues

### a. MONITORING SOCIAL MEDIA USAGE OF YOUR EMPLOYEES

Does your social media policy inform your employees that everything they do on the office-supplied device is monitored? If you haven't done that, do your employees have a reasonable expectation of privacy,[46] and if you have done that, does your policy implicate any state laws?[47]

If your monitoring software allows you to discern your employees' login and password information for their social media sites, then aspects of the federal Computer Fraud and Abuse Act[48] come into play.[49]

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National Labor Relations Act: Walking the Fine Line Between Prohibited Disparagement and Protected Employee Speech," 20 Nevada Lawyer 8 (2012); Darin M. Klemchut and Sita Desai, "Can Employer Monitoring of Employee Social Media Violate the Electronic Communications Privacy Act?" 20 Intellectual Property and Technology Law Journal (2014); Michelle Scheinman, "Cyberfrontier: New Guidelines for Employers Regarding Employee Social Media," 44 McGeorge L. Review 731 (2013); Saby Ghoshray, "Employer Surveillance Versus Employee Privacy: The New Reality of Social Media and Workplace Privacy," 40 North Kentucky Law Review 593 (2013).

[46] For a general discussion, see the Ghoshray article, *supra*. The privacy statutes implicated include the following, listed by Bollinger, *supra*, at fn; 17:

> "*See, e.g*., Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522 (2002) (Act protects the interception of communication, be it wire, oral, or electronic, while in transit); Stored Communications Act, 18 U.S.C. §§ 2701-2712 (2006) (Act makes it unlawful to intentionally gain unauthorized access to electronically stored wire or electronic communications); Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006) (Act makes it unlawful to knowingly, and without authorization, access computers for use by the federal government or financial institutions); Fair Credit Reporting Act, 15 U.S.C. § 1681 (Act is meant to insure the accuracy and fairness of credit reporting and establish reasonable procedures to meet these ends); Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809 (2006) (the purpose of this Act is to ensure that financial institutions "protect the security and confidentiality of ... customers' nonpublic personal information"); . . ."

[47] As an example of a state law that impacts on this area, see Louisiana R.S. 51:1951 et seq., the "Personal Online Account Privacy Protection Act.'

[48] 18 U.S.C. §1030.

### b. WHAT IF YOU DON'T LIKE WHAT YOUR EMPLOYEES ARE SAYING ON THEIR SOCIAL MEDIA SITES?

If you've monitored employee sites on office-owned equipment, what do you do with that information? If your employees are posting comments on their social media sites involving working conditions, then they may be protected by the N.L.R.B. as "protected, concerted activity"[50] or may be protected under whistle-blower statutes.

On the other hand, if you've monitored your employees' use of company-owned equipment and you've discovered that they've used this equipment outside of working hours on company business, do you now owe them overtime?

### c. BOTTOM LINE FOR EXISTING EMPLOYEES.

As can be seen, this is a developing area. Law firms may wish to create valid and enforceable social media policies both for their employees and for the company's use of the data that is obtained via surveillance of employee devices, and if such policies already exist, law firms may want to revisit and update them.

## 4. CAN THE USE OF SOCIAL MEDIA BY AN ATTORNEY CONSTITUTE THE PRACTICE OF LAW?

### a. THE CASE OF THE TECH-SAVVY LAWYER

Lucy Lawyer has a Facebook page linked to her Twitter account and her blog. She updates items daily. She posts her thoughts on recent cases, on legal issues, and even has a section of each post entitled "Practical Tips" where she gives specific advice related to the issues about which she is posting.

Lucy recently had a post on estate planning issues. Included in her "Practical Tips" section is this statement:

> You can sometimes do your own estate planning. Click on the link below to go to my blog that gives you all the information in your state that you'll need to start your own estate plan. [Link].

Is Lucy's post something that would constitute the "practice of law"?

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[49] *Cf.* Lothar Determann & Robert Sprague, "Intrusive Monitoring: Employee Privacy Expectations Are Reasonable in Europe, Destroyed in the United States," 26 Berkeley Tech. L. J., 979 (2011), cited by Scheinman, *supra*.

[50] *But see* Raphan's and Kirby's discussion about where the "protected concerted activity" line might be drawn. 9 J. Bus. & Tech. L. at 76-80. *Also see* Lundvall and Starich's article, *supra*.

What if Lucy's post also had a will and trust forms that readers could use to draft their own estate plans.

What if Lucy's post had instead read:

> Upset about how you've been treated in the will of your parents or grandparents? You can attack that will in court to regain your rights. Click on the link below to get sample forms of pleadings to attack a will that you don't like. [Link].

### b. DISCUSSION ABOUT "THE CASE OF THE TECH-SAVVY LAWYER"

The ABA Model Rules of Professional Conduct ("RPC") do not define the practice of law. Because lawyers are licensed in each state, one must look to each state's statutes and court rules to determine what constitutes the practice of law.

Many states have statutory provisions on the unlawful practice of law. The South Dakota Supreme Court has enjoined individuals from engaging in the unlawful practice of law,[51] and the Court has defined what constitutes unlawful practice by reference to an ALR citation.[52]

Examples of statutes and rules from other states include Missouri (which has statutory provisions on unlawful practice[53] as well as its own version of ABA Model

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[51] See: *Steele v. Bonner*, 728 N.W.2d 379 (S.D. 2010).

[52] See: *Persche v. Jones*, 387 N.W.2d 32, 36-37 (S.D. 1986):

> Practicing law "is not limited to conducting litigation, but includes giving legal advice and counsel, and rendering services that require the use of legal knowledge or skill and the preparing of instruments and contracts by which legal rights are secured, whether or not the matter is pending in a court." Annot., 22 A.L.R.3d 1112, § 2, at 1114 (1968). Thus, "drafting and supervising the execution of wills for others is clearly practicing law...." 7 Am.Jur.2d Attorneys at Law § 104, at 176 (1980)

[53] See Mo. Ann. Stat. §§ 484.010, 484.020.

§ 484.010:

> 1. The "practice of the law" is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.
> 2. The "law business" is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

§ 484.020:

> 1. No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association, partnership, limited liability company or corporation, except a professional corporation organized pursuant to the provisions of chapter 356, RSMo, a limited liability company organized and registered pursuant to the provisions of

[Footnote continued on the next page]

Rule 5.5, concerning multi-jurisdictional practice)[54] and Kansas (which does have a statutory definition of the practice of law but rather appears to follow the definition adopted by the Kansas Bar Association Unauthorized Practice of Law Committee).[55]

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chapter 347, RSMo, or[1] a limited liability partnership organized or registered pursuant to the provisions of chapter 358, RSMo, engage in the practice of the law or do law business as defined in section 484.010, or both.
2. Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association, partnership, limited liability company or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association, partnership, limited liability company or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri.
3. It is hereby made the duty of the attorney general of the state of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the
person, firm, association, partnership, limited liability company or corporation liable hereunder, to institute all suits necessary for the recovery by the state of Missouri of such amounts in the name and on behalf of the state.

[54] Mo. Rule 5.5:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:
(1) except as authorized by this Rule 4 or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
(c) A lawyer admitted and authorized to practice law in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in this jurisdiction that:
(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction if the lawyer or a person the lawyer is assisting is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted and authorized to practice law and are not services for which the forum requires pro hac vice admission;
(4) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
(5) are not within Rule 4-5.5(c)(2), (c)(3), or (c)(4) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted and authorized to practice law.
(d) A lawyer admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law and provide legal services in this jurisdiction that are provided to the lawyer's employer or its organizational affiliates if the lawyer has obtained a limited license pursuant to Rule 8.105 or a general license pursuant to other provisions of Rule 8.
(e) A lawyer shall not practice law in Missouri if the lawyer is subject to Rule 15 and, because of failure to comply with Rule 15, The Missouri Bar has referred the lawyer's name to the chief disciplinary counsel or the commission on retirement, removal and discipline.

[55] The Kansas definition can be found at:
http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/kansas.authcheckdam.pdf
(last visited 03/01/17).

DEFINITION OF THE PRACTICE OF LAW
A. General Definition: The practice of law is ministering to the legal needs of another person and the application of legal principles and judgment with regard to the circumstances or objectives of another person which require knowledge of legal principles or the use of legal skill or knowledge. This includes but is not limited to:
(1) Holding one's self out in any manner as an attorney, lawyer, counselor, advisor or in any other capacity which directly or indirectly represents, or creates any perception, that such person is either (a) qualified or capable of performing or (b) is engaged in the business or activity of performing any act constituting the practice of law as herein defined
(2) Giving advice, counseling or rendering services to any person concerning or with respect to their legal rights or any matter involving the application of legal principles to rights, duties, obligations or liabilities.
(3) Selecting, drafting, or completing any legal document or agreement involving or affecting the legal rights of a person.

[Footnote continued on the next page]

Further, the Kansas version of ABA Model Rule 5.5 appears not to contain all the provisions of either the Model Rules or of the equivalent Missouri Rule.[56]

While many cases deal with attempted unlawful practice of law issues from the standpoint of non-lawyers attempting to represent others in court, fewer cases deal with

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(4) Representing of another person in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
(5) Negotiating or settling of a claim, legal right or responsibility on behalf of another person.
(6) Engaging in an activity which has traditionally been performed exclusively by persons authorized to practice law, and
(7) Engaging in any other act which may indicate an occurrence of the unauthorized practice of law in the State of Kansas as established by case law, statute, ruling, or other authority.

"Documents" includes, but is not limited to, contracts. deeds, easements, mortgages, notes, releases, satisfactions, leases, options, articles of incorporation and other corporate documents, articles of organization and other limited liability company documents, partnership agreements, affidavits, prenuptual agreements, wills, trusts, family settlement agreements, powers of attorney, notes and like or similar instruments; and pleadings and any other papers incident to legal actions and special proceedings.
The term "person" includes a natural person, corporation, company, partnership, firm, association, organization, society, labor union, business trust, trust, financial institution, governmental unit and any other group, organization or entity of any nature, unless the context otherwise dictates.
The term "Kansas Lawyer" means a natural person who has been duly admitted to practice law in this State and whose privilege to do so is then current and in good standing as an active member of the bar of this State.

B. Exceptions. Whether or not it constitutes the practice of law, the following activity by a non-lawyer, who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted:
(1) Sale of a legal document form previously approved by a Kansas lawyer in any format.
(2) Acting as a lay representative authorized by administrative agencies or in administrative hearings solely before such agency or hearing where:
(A) Such services are confined to representation before such forum and other conduct reasonably ancillary to such representation;
(B) Such conduct is authorized by statute, or the special court, department or agency has adopted a rule expressly permitting and regulating such practice.
(3) Serving in a neutral capacity as a mediator or arbitrator.
(4) Participation in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements.
(5) Providing clerical assistance to another to complete a form provided by a court for protection under K.S.A. 60-3101 et seq. to provide protection from abuse when no fee is charged to do so.
(6) Acting as a legislative lobbyist.
(7) A real estate agent or broker, licensed by the State of Kansas, may complete forms previously approved by a Kansas lawyer including sales and associated contracts directly related to the sale of real estate and personal property for their customers.
(8) An abstractor or title insurance agent, licensed by the State of Kansas, issuing real estate title opinions and title reports and preparing deeds for their customers.
(9) Financial institutions and securities brokers and dealers licensed by the State of Kansas may inform customers with respect to their options for titles of securities, bank accounts, annuities and other investments made through such institution and lessee relationships of safe deposit boxes and access thereto.
(10) Insurance companies and agents, licensed by the State of Kansas, may recommend coverage, inform customers with respect to their options for titling of ownership of insurance and annuity contracts, naming of beneficiaries and may adjust claims under the company's insurance coverage outside of litigation.
(11) Health care providers may provide clerical assistance to patients in completing and executing durable powers of attorney for health care and natural death declarations when no fee is charged to do so.
(12) Certified Public Accountants, enrolled IRS agents, public accountants, public bookkeepers, and tax preparers may prepare tax returns.
(13) Such other activities that the Kansas Supreme Court has determined by published opinion or rule do not constitute the unlicensed or unauthorized practice of law or that have been permitted.

[56] Kansas Rule 5.5 states:

A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

transactional law issues. Nonetheless, it is instructive to look at a sampling of opinions on transactional law.

For example, the Rhode Island Bar Association has issued a report indicating that a non-lawyer who advertised on the Internet as a "low cost paralegal" for transactional document preparation had engaged in the unlawful practice of law.[57]

Massachusetts has held that certain matters involving real estate closings and transactional work constitute the practice of law.[58] This rule is broadly accepted in other states. See, for example, opinions in Arkansas,[59] Ohio,[60] Delaware,[61] and South Carolina.[62]

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[57] *See*: *In re Low Cost Paralegal Services,* 19 A.3d 1229 (R.I. 2011). Among the findings were that "Low Cost Paralegal Services and Dominique M. Salazar a/k/a Michelle Salazar have engaged in the unauthorized practice of law in Rhode Island in violation of G.L. 1956 § 11–27–12 by falsely holding itself/herself out to Rhode Islanders, through internet advertising targeting Rhode Island, as competent and qualified to prepare legal documents for uncontested divorce and to assist with a child support problem, which conduct constitutes "the practice of law" as defined in § 11–27–2(4)."

[58] *See*: *Real Estate Bar Ass'n for Massachusetts, Inc. v. National Real Estate Information Services*, 459 Mass. 512, 514, 946 N.E.2d 665 (Mass. 4/25/11): "Nevertheless, we conclude that the closing or settlement of the types of real estate transactions described in the record require not only the presence but the substantive participation of an attorney on behalf of the mortgage lender, and that certain services connected with real property conveyances constitute the practice of law in Massachusetts."

[59] *See, e.g.*: *Creekmore v. Izard*, 236 Ark. 558, 565, 367 S.W.2d 419, 423–24 (1963) (preparation of deeds, mortgages, and bills of sale constitutes the practice of law) and *Pope County Bar Ass'n, Inc. v. Suggs*, 274 Ark. 250, 256, 624 S.W.2d 828, 830–31 (1981).

[60] *See*: *Disciplinary Counsel v. Foreclosure Alternatives, Inc*., 127 Ohio St.3d 455, 940 N.E.2d 971,976 (Ohio 12/23/10): "Based upon the facts in this case, we have no difficulty concluding that FAI, Alexakis, and Lance Trester engaged in the unauthorized practice of law. The general business plan adopted by FAI as well as the specific handling of the Chandler matter and the foreclosure against the second homeowner demonstrate that FAI, Alexakis, and Lance Trester (1) gave advice to homeowners in the context of pending or threatened foreclosure proceedings, in particular, advice concerning whether to continue making mortgage payments and the wisdom of legal alternatives such as bankruptcy, (2) made representations to creditors on behalf of homeowners facing foreclosure, and (3) evaluated for and with homeowners the terms and conditions of settlement in the foreclosure proceedings."

[61] *See*, *e.g.*, *Nieves v. All Star Title, Inc*., 2010 WL 4227057 (Del.Super. 10/22/10), aff'd at 21 A.3d 597 (Del.Supr. 6/14/11) (text in WESTLAW, NO. 724, 2010), discussing the decision in *In re Mid-Atlantic Settlement Services, Inc*. 755 A.2d 389, 2000 WL 975062 (Del. May 31, 2000) (TABLE), "which adopted the conclusions of the Board on the Unauthorized Practice of Law that real estate settlements constitute the practice of law, and that the closing of a loan secured by Delaware real estate generally must be conducted by a Delaware attorney. All Star moved to dismiss Nieves' Complaint for failure to state a claim upon which relief could be granted. Specifically, All Star denied that Nieves' Complaint established that it had breached any legally-recognized duty or caused him cognizable damages. All Star also adopted the position that Nieves' suit constituted an attempt to secure private enforcement of this state's rules against the unauthorized practice of law.

[62] *See*: *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244, 247-48 (S.C.App. 5/6/10): "As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that

[Footnote continued on the next page]

Note, however, that in both Kansas and Missouri, certain types of activities related to real estate transactions are not considered the unauthorized practice of law, and may be performed by non-lawyers.[63]

Lucy's posting about the issue itself may not trigger "unlawful practice" under these cases, because she is not engaged in a closing, and because individuals have a right to represent themselves *pro se* in legal proceedings.

On the other hand, are Lucy's links to draft pleadings an attempt to "ghost-write" pleadings for a potential *pro se* litigant?[64]

Some courts have looked askance at this, indicating that "ghostwriting" pleadings may be sanctionable.[65] Some state bar associations have banned the "ghostwriting" of

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the loan closing had to be supervised by an attorney. See *State v. Buyers Serv. Co*., 292 S.C. 426, 431-434, 357 S.E.2d 15, 18-19 (1987) (holding that a commercial title company's employment of attorneys to review mortgage loan closing documents did not save the company's preparation of those documents from constituting the unauthorized practice of law and that the closings should be conducted only under an attorney's supervision), modified by *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003); see also *Doe Law Firm v. Richardson*, 371 S.C. 14, 17, 636 S.E.2d 866, 868 (2006) (citing Buyers and McMaster ) (clarifying that a lender may prepare legal documents for use in financing or refinancing a real property loan as long as an independent attorney reviews them and makes any corrections necessary to ensure their compliance with the law and reaffirming that mortgage loan closings should be conducted only under an attorney's supervision)."

However, in *Countrywide Home Loans, Inc. v. Kentucky Bar Ass'n*, 113 S.W.3d 105, 121 (Ky. 2003), the Kentucky Supreme Court declared: "We are asked today to decide an issue of first impression in this state. It is an issue of much less breadth than the evidence adduced by the parties would suggest: Is conducting a real estate closing the unauthorized practice of law? Based on our review of the evidence and arguments presented to us, we hold that it is not the unauthorized practice of law for a layperson to conduct a real estate closing for another party."

[63] *See* Mo. Ann. Stat. §§ 484.025; quoted in footnote 53, above.

[64] See: Carnathan, "The Ghostwriting Debate Continues," ABA Litigation News Vol. 40, p.9 (2014). *Also see*: Lindzey Schindler, "Skirting The Ethical Line: The Quandary Of Online Legal Forms," 16 Chapman Law Review 185 (2012).

[65] *See* the discussion in *Couch v. Jabe*, 2010 WL 1416730 (W.D.Va. Apr 08, 2010):

> "The court notes that plaintiff states in a footnote that he 'asked counsel for Prison Legal News to draft this motion on his behalf. They are Steven Rosenfield and Jeffrey Fogel . . . . [Plaintiff] then revised counsels' draft motion.' (Mot.(no.28) n. 1.) Although plaintiff's footnote may have saved counsel from violating an ethical duty of candor, Virginia Legal Ethics Opinion No. 1592 (1994), "ghostwriting" motions for a pro se plaintiff is contrary to the spirit of the Federal Rules of Civil Procedure and the privilege of liberal construction afforded to pro se litigants. See Fed.R.Civ.P. 11(a), (b). See also *Duran v. Carris*, 238 F.3d 1268, 1272-73 (10th Cir.2001); *Ellis v. Maine,* 448 F.2d 1325, 1328 (1st Cir.1971); *Johnson v. Bd. of County Comm'rs,* 868 F.Supp. 1226, 1230-32 (D.Co. Nov.17, 1994), result affirmed by on different reasoning and analysis on appeal, 85 F.3d 489 (10th Cir. 1996); *Klein v. H.N. Whitney. Goadby & Co*., 341 F.Supp. 699, 702-03 (S.D.N.Y. Nov.22, 1971); *Klein v. Spear, Leeds & Kellogg*, 309 F.Supp. 341, 342-43 (S.D.N.Y. Jan.20, 1970) (discussing ghostwriting and duty of candor). "When appropriate, the court can make an

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pleadings and letters. Texas appears to permit "ghostwriting" assistance for pro se parties, but places strict limitations on when and how this can be done.[66]

For example, West Virginia has an ethics opinion distinguishing between ghostwriting pleadings, which is deemed inappropriate, and assisting a client in filling out forms, which is deemed appropriate under certain circumstances.[67] The states that have issued opinions on this are split, with some banning the practice, some limiting the practice, and others agreeing it is permissible.[68]

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> additional inquiry in order to determine whether [ Rule 11 ] sanctions should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court." Fed.R.Civ.P. 11 advisory committee's note. For future reference, if an attorney wishes to notify the court of parallel proceedings after a pro se party contacts him or her, counsel is encouraged to file a letter with the court instead of drafting pleadings. Further inquiry by the undersigned into plaintiff's allegations is presently unnecessary. However, any additional instances or allegations of ghostwriting would be appropriately adjudicated."

*Authors note*: The *Johnson* case, discussed in the quotation above, was affirmed in part, although the appellate court disclaimed the reasoning of the district court on other parts of this case when it eventually went on appeal. See *Johnson v. Board of County Com'rs for County of Fremont*, 85 F.3d 489 (10th Cir. 1996). The appellate court, however, did not specifically disapprove of the district court's following statement:

> Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P.
>
> What we fear is that in some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, typified by F.R.Civ.P. 11, but which exists in all cases, criminal as well as civil, of representing to the court that there is good ground to support the assertions made. We cannot approve of such a practice. If a brief is prepared in any substantial part by a member of the bar, it must be signed by him. We reserve the right, where a brief gives occasion to believe that the petitioner has had legal assistance, to require such signature, if such, indeed, is the fact.* * * Such an evasion of the obligations imposed upon counsel by statute, code and rule is ipso facto lacking in candor."

[66] See Texas Ethics Opinion 635 (2013), found at http://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-635.aspx (last visited 4/22/14), which states, in its conclusion:

> Under the Texas Disciplinary Rules of Professional Conduct a lawyer is not permitted to advise, for a fee, a pro se litigant in a divorce or related family law matter concerning "self-help" forms prepared by the litigant if such services by the lawyer are conditioned on the litigant's signed agreement that that no lawyer-client relationship exists between the lawyer and the litigant. A lawyer is permitted under the Texas Disciplinary Rules to limit by agreement the scope of his services in such cases to advice concerning the "self-help" forms. A lawyer providing limited advice with respect to "self-help" forms in divorce and related cases is not permitted to advise both parties in such proceedings.

[67] *See* West Virginia L.E.O. 2010-01, "Ghostwriting or Undisclosed Representation: What is Permissible and What is Not Permissible," stating, in part, that "attorneys who write letters or other documents on behalf of an individual do not have to disclose their identities ***if the letter or document is not intended to be filed with a tribunal, or authorship is not otherwise required by law***" (emphasis supplied).

[68] See Peter Geraghty, "Ghostwriting,"

found at http://www.americanbar.org/publications/youraba/201103article11.html

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Compare, for example, the differing analysis of this issue by Missouri, Kansas, and the ABA. It has been reported that the online supplier of legal forms, "LegalZoom,"[69] entered into a settlement of a case in Missouri, where it had been accused of engaging in the unlawful practice of law[70] as well as in North Carolina.[71] On the other hand, the ABA has issued an ethics opinion indicating that ghostwriting is perfectly acceptable and does not violate the RPC,[72] and Kansas has issued an ethics

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(last accessed 5/17/13):

> "There have been a number of state bar ethics opinions that pre-date the ABA Formal Opinion. As discussed and cited in New Jersey Advisory Committee on Professional Ethics Opinion 713 (2008), some of these opinions do not require disclosure. See, Los Angeles County Bar Ass'n Professional Responsibility and Ethics Comm. Op. 502 (1999); Los Angeles County Bar Ass'n Professional Responsibility and Ethics Comm. Op. 483 (1995) and State Bar of Arizona Comm. on the Rules of Professional Conduct Op. 05-06 (2005).
>
> Other opinions have found that ghostwriting is unethical per se. See, Iowa Supreme Court Bd. of Professional Ethics and Conduct Op. 94-35 (1995); Iowa Supreme Court Bd. of Professional Ethics and Conduct Op. 96-31 (1997); Association of the Bar of the City of New York Comm. on Professional and Judicial Ethics Op. 1987-2 (1987); New York State Bar Ass'n Comm. on Professional Ethics Op. 613 (1990).
>
> Still other opinions find that there is a duty to disclose when the lawyer's assistance is extensive, substantial or significant. See, Alaska Bar Ass'n Ethics Comm. Op. 93-1 (1993); Connecticut Bar Ass'n Comm. on Professional Ethics Op. 98-5 (1998); Delaware State Bar Ass'n Comm. on Professional Ethics Op. 1994-2 (1994); Florida State Bar Ass'n Comm. on Professional Ethics Op. 79-7 (2000); Massachusetts Bar Ass'n Comm. on Professional Ethics Op. 98-1 (1998); New Hampshire Bar Ass'n Ethics Comm., Unbundled Services -- Assisting the Pro se Litigant (1999); Kentucky Bar Ass'n Op. E-343 (1991); Utah State Bar Ethics Comm. Op. 74 (1981)."

[69] For specific discussions about LegalZoom, see Brandon Schwarzentraub, "Electronic Wills & The Internet: Is LegalZoom Involved In The Unauthorized Practice Of Law Or Is Their Success Simply Ruffling The Legal Profession's Feathers?" 5 Estate Planning and Community Property Law Journal 1 (2013), found at http://www.thecodicil.org/home/comments/Schwarzentraub.pdf (last visited 6/26/13), and the Schindler article cited in footnote 64, above.

[70] *See* the report found at:
http://www.abajournal.com/news/article/legalzoom_can_continue_to_offer_documents_in_missouri_under_proposed_settle/
and
http://www.globenewswire.com/newsroom/news.html?d=230108
(both sites last accessed 5/17/13).
Also see footnote 75, below.

[71] See: https://www.legalzoom.com/press/press-mentions/no-turning-back-now-legalzoom-settlement-a-sign-of-the-times (last visited 11/13/19).

[72] ABA Formal Opinion 07-446, "Undisclosed Legal Assistance to Pro Se Litigants" (2007) (a lawyer can furnish ghostwriting assistance without disclosing to the court or to the opposing party under certain circumstances): "Whether the lawyer must see to it that the client makes some disclosure to the tribunal (or makes some disclosure independently) depends on whether the fact of assistance is material to the matter, that is, whether the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the part of the client, thereby involving the lawyer in conduct violative of Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c). In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation."
[Footnote continued on the next page]

opinion allowing ghostwriting as long as the document bears a notice that it was "prepared with assistance of counsel.[73]

The concept of "ghostwriting," as can be seen, overlaps with the issue of providing legal forms, whether those forms are used for litigation purposes or for transactional matters. At least one Florida court has held that selling legal forms is acceptable and does not constitute the unlawful practice of law.[74] On the other hand, courts have found there to be a distinction between merely supplying a form and helping someone fill out a form (even if the assistance is electronic and on-line) – the latter (in some states) may constitute the unlawful practice of law.[75]

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[73] *See* Kansas Bar Association Legal Ethics Opinion No. 09-01, Nov. 24, 2009, concluding that ghostwriting is permissible in Kansas as long as ghostwritten pleadings or documents clearly state that they were "Prepared with Assistance of Counsel", "the attorney's name, bar number, address or other identifying information need not be included."

[74] See: *Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1194 (Fla.1978):

> "We hold that Ms. Brumbaugh, and others in similar situations, may sell printed material purporting to explain legal practice and procedure to the public in general and she may sell sample legal forms.... In addition, Ms. Brumbaugh may advertise her business activities of providing secretarial and notary services and selling legal forms and general printed information. However, Marilyn Brumbaugh must not, in conjunction with her business, engage in advising clients as to the various remedies available to them, or otherwise assist them in preparing those forms necessary for a dissolution proceeding."

[75] *See, e.g., Janson v. LegalZoom.com, Inc*., 802 F.Supp.2d 1053 (W.D.Mo. 8/2/11):

> In its Motion for Summary Judgment, Defendant LegalZoom argues that, as a matter of law, it did not engage in the unauthorized practice of law in Missouri. Thus, the Court must decide whether a reasonable juror could conclude that LegalZoom did engage in the unauthorized practice of law, as it has been defined by the Missouri Supreme Court. See First Escrow, 840 S.W.2d at 843 n. 7 ("the General Assembly may only assist the judiciary by providing penalties for the unauthorized practice of law, the ultimate definition of which is always within the province of this Court"); Eisel, 230 S.W.3d at 338–39 (reaffirming that "[t]he judiciary is necessarily the sole arbiter of what constitutes the practice of law," and finding no conflict between § 484.020 and the Missouri judiciary's regulation of the practice of law).
>
> Plaintiffs argue that the Missouri Supreme Court has declared on multiple occasions that a non-lawyer may not charge a fee for their legal document preparation service. Defendant responds that its customers—rather than LegalZoom itself—complete the standardized legal documents by entering their information via the online questionnaire to fill the document's blanks, which it concedes that customers never see. While the parties dispute the proper characterization of the underlying facts, there is no dispute regarding how LegalZoom's legal document service functions.
>
> It is uncontroverted that Defendant LegalZoom's website performs two distinct functions. First, the website offers blank legal forms that customers may download, print, and fill in themselves. Plaintiffs make no claim regarding these blank forms. Indeed, this function is analogous to the "do-it-yourself" kit in Thompson containing blank forms and general instructions regarding how those forms should be completed by the customer. Such a "do-it-yourself" kit puts the legal forms into the hands of the customers, facilitating the right to pro se representation.
>
> It is the second function of LegalZoom's website that goes beyond mere general instruction. LegalZoom's internet portal is not like the "do-it-yourself" divorce kit in Thompson. Rather, LegalZoom's internet portal service is based on the opposite notion: we'll do it for you. Although

[Footnote continued on the next page]

## 5. INADVERTENT UNLAWFUL PRACTICE OF LAW ISSUES IF YOUR SOCIAL MEDIA POSTINGS ARE VIEWED IN A STATE WHERE YOU ARE NOT LICENSED TO PRACTICE

### a. THE CASE OF THE BROADLY-READ LAWYER

What if Lucy Lawyer (who made the postings described above) is licensed in State A, but her postings are read by many lawyers and non-lawyers across the country? Is Lucy engaged in the unlawful practice of law in States B, C, and D?

### b. DISCUSSION ON THE CASE OF THE BROADLY-READ LAWYER

As can be seen by the materials in in this paper, what constitutes the practice of law varies from state-to-state. Even if Lucy's activities are perfectly acceptable in State A, they may not be in States B, C, or D.[76]

## 6. INADVERTENT ATTORNEY-CLIENT RELATIONSHIPS

### a. THE CASE OF THE TOO-FAST-TO-RESPOND LAWYER

Arnie Attorney is a prolific user of Facebook, Linked-In, Twitter, PartnerUp,[77] Ryze,[78] Networking for Professionals,[79] Jase,[80] and Ziggs.[81]

Arnie rapidly responds to any queries or comments and prides himself on his fast turnaround and 24/365 availability. He wants to build his brand as an attorney and have his name and brand reach as many people as possible.

Arnie gets the following query on one of the sites he maintains:

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> the named Plaintiffs never believed that they were receiving legal advice while using the LegalZoom website, LegalZoom's advertisements shed some light on the manner in which LegalZoom takes legal problems out of its customers' hands. While stating that it is not a "law firm" (yet "provide[s] self-help services"), LegalZoom reassures consumers that "we'll prepare your legal documents," and that "LegalZoom takes over" once customers "answer a few simple online questions." [Doc. # 119 at 51–52.]

[76] *See, e.g.,* Lanctot, *"Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law,"* 30 Hofstra L. Rev. 811 (2002).

[77] http://www.partnerup.com/

[78] http://www.ryze.com/

[79] http://networkingforprofessionals.com/

[80] http://www.jasezone.com/

[81] http://www.ziggs.com/

> "My husband and I have over $20 million in assets. We hate paying taxes, especially state and federal estate taxes. Any ideas on how we can lessen or eliminate these taxes?
>
> Concerned Citizen"

Arnie quickly responds with information about estate planning with links to his blog that he maintains on his law firm's website.[82]

Has Arnie formed an attorney-client relationship with Concerned Citizen?

### b. DISCUSSION ON THE CASE OF THE TOO-FAST-TO-RESPOND LAWYER

The general rule is that the attorney-client relationship is formed by looking at what the client believed, not what the lawyer intended.[83]

Articles have cautioned about how the Internet can lead to inadvertent attorney-client relationships.[84]

Can Arnie prevent an inadvertent attorney-client relationship if he puts a disclaimer in every posting?[85] ABA Model Rule 1.2(c) (which was adopted verbatim in

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[82] *See* 16 C.F.R. Part 322: Mortgage Assistance Relief Services; Final Rule and Statement of Basis and Purpose.
Also see: http://www.ftc.gov/opa/2010/11/mars.shtm (last accessed 5/17/13).

[83] *See* Cydney Tune and Marley Degner, "Information Technology Law Institute 2009: Web 2.0 and the Future of Mobile Computing: Privacy, Blogs, Data Breaches, Advertising, and Portable Information Systems," Practising Law Institute, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, PLI Order No. 19051, 962 PLI/Pat 113 (2009):

> "In general, courts and other disciplinary bodies have found that an attorney-client relationship exists when the client reasonably relies on the advice of the attorney. The test focuses on the client's subjective perceptions and beliefs. Attorneys must take care that undesired attorney-client relationships are not unwittingly formed by blogging or maintaining a profile on a social networking site.
> Attorney blogs and social networking profiles should contain a disclaimer, making it clear that information provided on the blog or social networking site is not intended to create an attorney-client relationship. Disclaimers of any and all liability that might arise from the contents of the blog or social networking profile could also be used. However, such provisions may not be enforceable unless a user affirmatively accepts the terms. Disclaimers are also likely to be unenforceable if they are inconsistent with the subsequent conduct of the parties."

[84] *See, e.g.*, Carrie Pixler and Lori A. Higuera, "*Social Media: Ethical Challenges Create Need for Law Firm Policies,"* 47 Arizona Attorney 34 (2011); Abigail S. Crouse and Michael C. Flom, *"Social Media for Lawyers*," 67 Bench and Bar of Minnesota 16 (2010); Catherine J. Lanctot, "*Attorney-Client Relationships in Cyberspace: The Peril and the Promise*," 49 Duke Law Journal 147 (1999); and Nelson, "*Is a Visitor to Your Firm's Homepage Your Client*?" 69-SEP Wis. Law. 25 (1996).

[85] For more on this, see the quotation at footnote 83, above.
[Footnote continued on the next page]

Louisiana) states that "a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Can Arnie even craft an appropriate disclaimer? If he does, does it undermine his marketing efforts? Does it make his posting less likely to be read? Moreover, even if Arnie's disclaimer is deemed "reasonable," will a court or disciplinary authority (or the "Concerned Citizen, who later sues Arnie for alleged malpractice) believe that it is reasonable to expect that someone who reads the post and responds has given "informed consent"?

Moreover, if Arnie has created an attorney-client relationship, he now has at least five additional problems.

First, his "public" posting of advice to Concerned Citizen may have created a breach in Arnie's duty of confidentiality to the client. [86] *See* ABA Model Rule 1.6. This Rule cautions that 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."

Second, Arnie's posting may have violated rules on contacts with prospective clients, although ABA Model Rule 7.3(a) was amended in 2013 to deal primarily with "live person-to-person contact,"[87] and ABA Model Rule 7.2 permits communication "regarding a lawyer's services through any media.[88]

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[86] For more on this, see: Andrea Utecht and Abraham C. Reich, *"Successful Partnering Between Inside and Outside Counsel*," Chapter 31, footnote 10:

> *See, e.g., Cal. State Bar Comm. on Prof'l Responsibility and Conduct Op. No*. 2005-168 (when lawyer maintains a web site allowing visitors who are seeking legal advice a means of communicating with him, lawyer owes a duty of confidentiality to the visitors unless a disclaimer exists in sufficiently plain terms to defeat visitors' reasonable belief that the lawyer is consulting confidentially with the visitor); *Nev. Comm. on Ethics and Prof'l Responsibility*, Op. 32 (Mar. 25, 2005) (attorney/client relationship may be created by a unilateral act in response to an advertisement or e-mail to an attorney's website); and *S.D. State Bar Ethics Op.* . 2002-2 (April 22, 2002) (e-mail from prospective client can create attorney/client relationship).

- Changes in technology have also complicated this issue. For instance, several opinions have considered attorney postings on listservs, N.M. Ad. Op. 2001-1 and Los Angeles County Bar Assoc. Prof'l Responsibility and Ethics Comm. Op. No. 514 (2005).

[87] ABA Model Rule 7.3 currently reads:

> Information About Legal Services
>
> (a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.
>
> (b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:
>
> (1) lawyer;

[Footnote continued on the next page]

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

[88] ABA Model Rule 7.2 currently reads:

Information About Legal Services

(a) A lawyer may communicate information regarding the lawyer's services through any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

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Contrast this, for example, with South Dakota's versions of rules 7.1-7.3. which require that communications be "predominantly informational" and that they contain "the name and address" of the lawyer whose services are described in the communication.[89]

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(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

[89] South Dakota's versions of Rules 7.1-7.3 provide (emphasis supplied):

Rule 7.1. Communications Concerning a Lawyer's Services

(a) Definitions. For the purpose of this Rule 7.1, the following terms shall have the following meanings:
(1) "communication" means any message or offer made by or on behalf of a lawyer concerning the availability of the lawyer for professional employment which is directed to any former, present, or prospective client, including, but not limited to, the following:
(i) any use of firm name, trade name, fictitious name, or other professional designation of such lawyer;
(ii) any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such lawyer;
(iii) any advertisement, regardless of medium, of such lawyer, directed to the general public or any significant portion thereof; or
(iv) any unsolicited correspondence from a lawyer directed to any person or entity; and
(2) "lawyer" means an individual lawyer and any association of lawyers for the practice of law, including a partnership, a professional corporation, limited liability company or any other association.
(b) Purpose of Communications. ***All communications shall be predominantly informational***. As used in this Rule 7.1, "predominantly informational" means that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and that the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication.
(c) False or Misleading Communications. 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:
(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading;
(2) contains a prediction, warranty or guarantee regarding the future success of representation by the lawyer or is likely to create an unjustified expectation about results the lawyer can achieve;
(3) contains an opinion, representation, implication or self-laudatory statement regarding the quality of the lawyer's legal services which is not susceptible of reasonable verification by the public;
(4) contains information based on the lawyer's past success without a disclaimer that past success cannot be an assurance of future success because each case must be decided on its own merits;
(5) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;
(6) states or implies that the lawyer actually represents clients in a particular area of practice when the lawyer refers a significant number of such clients to other lawyers for representation with respect to all or a significant aspect of the particular practice area;
(7) states or implies that the lawyer is experienced in a particular area of practice unless significant experience in such practice area can be factually substantiated;
(8) states or implies that the lawyer is in a position to improperly influence any court or other public body or office;
(9) states or implies the existence of a relationship between the lawyer and a government agency or instrumentality;
(10) states or implies that a lawyer has a relationship to any other lawyer unless such relationship in fact exists and is close, personal, continuous and regular;
(11) fails to contain the name and address by city or town of the lawyer whose services are described in the communication;
(12) contains a testimonial about or endorsement of the lawyer, unless the lawyer can factually substantiate the claims made in the testimonial or endorsement and unless such communication also contains an express disclaimer substantively similar to the following: "This testimonial or endorsement does not constitute a guaranty, warranty, or prediction regarding the outcome of your legal matter";
(13) contains a testimonial or endorsement about the lawyer for which the lawyer has directly or indirectly given or exchanged anything of value to or with the person making the testimonial or giving the endorsement, unless the communication conspicuously discloses that the lawyer has given or exchanged something of value to or with the person making the testimonial or giving the endorsement;
(14) contains a testimonial or endorsement which is not made by an actual client of the lawyer, unless that fact is conspicuously disclosed in the communication;
(15) contains any impersonation, dramatization, or simulation which is not predominantly informational and without conspicuously disclosing in the communication the fact that it is an impersonation, dramatization, or simulation;

[Footnote continued on the next page]

(16) fails to contain disclaimers or disclosures required by this Rule 7.1 or the other Rules of Professional Conduct;

(17) contains any other material statement or claim that cannot be factually substantiated.

(d) Lawyers Responsible for Communication. Every lawyer associated in the practice of law with or employed by the lawyer which causes or makes a communication in violation of this rule may be subject to discipline for the failure of the communication to comply with the requirements of this rule.

Rule 7.2. Advertising

(a) Definition. "Lawyer" is defined in Rule 7.1(a)(2).

(b) Permitted Advertising. Subject to the requirements of Rules 7.1 and 7.3, 7.4 and 7.5, a lawyer may advertise legal services through written, recorded, internet, computer, e-mail or other electronic communication, including public media, such as a telephone directory, legal directory, newspapers or other periodicals, billboards and other signs, radio, television and other electronic media, and recorded messages the public may access by dialing a telephone number, or through other written or recorded communication. This rule shall not apply to any advertisement which is broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and is reasonably expected by the lawyer not to be received or disseminated in the State of South Dakota.

(c) Record of Advertising. ***A copy or recording of an advertisement shall be kept by the advertising lawyer for two years after its last dissemination along with a record of when and where it was used***.

(d) Prohibited Payments. Except as provided in Rule 1.17 and except as provided in subparagraph (c)(13) of Rule 7.1, a lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may:

(1) Pay the reasonable costs of advertisements or communications permitted by this Rule and for-profit legal service organization;

(2) Pay the usual charges of a not-for-profit 501(c)(3) or 501(c)(6) qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) Pay for a law practice in accordance with Rule 1.17; and

(4) Refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) The reciprocal referral agreement is not exclusive, and

(ii) The client is informed of the existence and nature of the agreement.

Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

(e) Prohibited Cost Sharing. No lawyer shall, directly or indirectly, pay all or part of the cost of an advertisement by another lawyer with whom the nonadvertising lawyer is not associated in a partnership, professional corporation or limited liability company for the practice of law, unless the advertisement conspicuously discloses the name and address of the nonadvertising lawyer, and conspicuously discloses whether the advertising lawyer contemplates referring all or any part of the representation of a client obtained through the advertisement to the nonadvertising lawyer.

(f) Permissible Content. The following information in advertisements and written communications shall be presumed not to violate the provisions of this Rule 7.2:

(1) Subject to the requirements of Rule 7.5, the name of the lawyer, a listing of lawyers associated with the lawyer for the practice of law, office addresses and telephone numbers, office and telephone service hours, and a designation such as "lawyer," "attorney," "law firm," "partnership" or "professional corporation," or "limited liability company."

(2) Date of admission to the South Dakota bar and any other bar association and a listing of federal courts and jurisdictions where the lawyer is licensed to practice.

(3) Technical and professional licenses granted by the State of South Dakota or other recognized licensing authorities.

(4) Foreign language ability.

(5) Fields of law in which the lawyer is certified subject to the requirements of Rule 7.4.

(6) Prepaid or group legal service plans in which the lawyer participates.

(7) Acceptance of credit cards.

(8) Information concerning fees and costs, or the availability of such information on request, subject to the requirements of this Rule 7.2 and the other Rules of Professional Conduct.

(9) A listing of the name and geographic location of a lawyer as a sponsor of a public service announcement or charitable, civic or community program or event. Such listings shall not exceed the traditional description of sponsors of or contributors to the charitable, civic or community program or event or public service announcement, and such listing must comply with the provisions of this rule and the other Rules of Professional Conduct.

(10) Schools attended, with dates of graduation, degree and other scholastic distinctions.

(11) Public or quasi-public offices.

(12) Military service.

(13) Legal authorships.

(14) Legal teaching positions.

(15) Memberships, offices and committee assignments in bar associations.

(16) Memberships and offices in legal fraternities and legal societies.

(17) Memberships in scientific, technical and professional associations and societies.

(18) Names and addresses of bank references.

(19) With their written consent, names of clients regularly represented.

[Footnote continued on the next page]

The South Dakota Rules do not seem to address how this is to be done in a Tweet, on Facebook, or on LinkedIn. Further, any internet posting that is considered an advertisement must be kept for two years, and all ads must include the fact that the lawyer is not covered by malpractice insurance if that is the case.[90]

Mississippi's version of Rule 7.3 appears to track the ABA Model Rule. The Texas Rule is far more detailed and expansive than the ABA Model Rule.[91] While

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(20) Office and telephone answering service hours.

(g) Permissible Fee Information.

(1) Advertisements permitted under this Rule 7.2 may contain information about fees for services as follows:

(i) The fee charged for an initial consultation;

(ii) Availability upon request of a written schedule of fees or an estimate of fees to be charged for specific legal services;

(iii) That the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery, provided that the advertisement conspicuously discloses whether percentages are computed before or after deduction of costs, and only if it specifically and conspicuously states that the client will bear the expenses incurred in the client's representation, regardless of outcome, except as permitted by Rule 1.8(e);

(iv) The range of fees for services, provided that the advertisement conspicuously discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client, that the quoted fee will be available only to clients whose legal representation is within the services described in the advertisement, and the client is entitled without obligation to an estimate of the fee within the range likely to be charged;

(v) The hourly rate, provided that the advertisement conspicuously discloses that the total fee charge will depend upon the number of hours which must be devoted to the particular matter to be handled for each client, and that the client is entitled without obligation to an estimate of the fee likely to be charged;

(vi) Fixed fees for specific legal services, provided that the advertisement conspicuously discloses that the quoted fee will be available only to a client seeking the specific services described.

(2) A lawyer who advertises a specific fee, range of fees or hourly rate for a particular service shall honor the advertised fee or rate for at least ninety (90) days unless the advertisement conspicuously specifies a shorter period; provided, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

(h) ***Electronic Media***. Advertisements by electronic media, such as television and radio, may contain the same information as permitted in advertisements by print media, subject to the following requirements:

(1) If a lawyer advertises by electronic media and a person appears in the advertisement purporting to be a lawyer, such person shall in fact be the advertising lawyer or a lawyer employed full-time by the advertising lawyer; and

(2) If a lawyer advertises a particular legal service by electronic media, and a person appears in the advertisement purporting to be or implying that the person is the lawyer who will render the legal service, the person appearing in the advertisement shall be the lawyer who will actually perform the legal service advertised unless the advertisement conspicuously discloses that the person appearing in the advertisement is not the person who will perform the legal service advertised.

(3) Advertisements disseminated by electronic media shall be prerecorded and the prerecorded communication shall be reviewed and approved by the lawyer before it is broadcast.

(i) Law Directories. Nothing in this Rule 7.2 prohibits a lawyer from permitting the inclusion in reputable directories intended primarily for the use of the legal profession or institutional consumers of legal services and contains such information as has traditionally been included in such publications.

(j) Acceptance of Employment. A lawyer shall not accept employment when he knows or should know that the person who seeks his services does so as a result of conduct prohibited under this Rule 7.2.

(k) Lawyers Responsible for Advertising. Every lawyer associated in the practice of law with or employed by the lawyer which causes or makes an advertising in violation of this rule may be subject to discipline for the failure of the advertisement to comply with the requirements of this rule.

(l) ***Mandatory Disclosure. Every lawyer shall, in any written or media advertisements, disclose the absence of professional liability insurance if the lawyer does not have professional liability insurance having limits of at least $100,000, using the specific language required in Rule 1.4(c)(1) or (2).***

[90] *Id.*

[91] Texas Rule 7.03 (found at https://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct/VII--INFORMATION-ABOUT-LEGAL-SERVICES/7-03-Prohibited-Solicitations---Payments.aspx last visited 04/22/14) deals with electronic contact. While it appears to exempt web sites, some may claim that it may be broadly read to reach blogs and tweets, because it speaks to "live, interactive" electronic communications. Rule 7.03 provides (emphasis supplied):

(a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f), seek professional employment concerning a matter arising out of a particular occurrence or event, or series of

[Footnote continued on the next page]

Louisiana does not have Rule 7.3, it does have provisions in Rule 7.4 concerning "direct solicitation" that can be triggered by electronic communications,[92] for Louisiana Rule 7.6 concerns electronic communications.[93]

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occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in-person or telephone or other electronic contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:

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

(2) the communication contains information prohibited by Rule 7.02(a); or

(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by Rule 1.04(f) or by paragraph (b) of this Rule.

(d) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).

(e) A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(f) As used in paragraph (a), "regulated telephone or other electronic contact" means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. ***For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.***

[92] Louisiana Rule 7.4 provides (emphasis supplied):

Rule 7.4. Direct Contact With Prospective Clients

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

(b) Written Communication Sent on an Unsolicited Basis.

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

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

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

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

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

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

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

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

[Footnote continued on the next page]

Other states have taken different approaches than either adopting the Model Rules verbatim in this regard or going the route that Louisiana took.[94]

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

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

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

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

(D) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, any unsolicited written communication concerning a specific matter shall include a statement so advising the client.

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

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

[93] La. Rule 7.6 states (emphasis supplied):

Rule 7.6. Computer-Accessed Communication

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

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

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

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

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

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

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

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

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

* * *

[94] For example, Kansas Rule 7.3(a) differs only slightly from the Model Rule and provides:

Kansas Rule:7.3 Information about Legal Services: Direct Contact with Prospective Clients

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

(1) is a lawyer; or

[Footnote continued on the next page]

Third, Arnie's response to Concerned Citizen may have triggered a conflict of interest.[95] Without knowing exactly who the Concerned Citizen is, Arnie cannot clear conflicts and thus may have violated Model Rules 1.7 and 1.9.

Fourth, Arnie's quick response may constitute the unlawful practice of law in the state where the Concerned Citizen resides, a state where Arnie is not licensed to practice. If Arnie quickly responds to Concerned Citizen's query without obtaining more information, how can Arnie know where Concerned Citizen is domiciled? The failure to consider these issues may further implicate Rule 1.1 (competence) and Rule 1.3 (diligence).

Fifth, if Arnie is held to have created attorney-client relationship but has given bad advice, will he be covered by his malpractice insurance?[96]

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

Kansas merely adds the phrase "from a prospective client", and uses "closer" rather than "close" in (a)(2). Contrast this with Missouri Rule 7.3(a), which does not use the Model Rule's wording but deals with the same issue:

> Missouri Rule 7.3: Direct Contact with Prospective Clients
> This Rule 7.3 applies to in-person and written solicitations by a lawyer with persons known to need legal services of the kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment.
> (a) In-person solicitation. A lawyer may not initiate the in-person, telephone, or real time electronic solicitation of legal business under any circumstance, other than with an existing or former client, lawyer, close friend, or relative.

[95] *See, e.g.*, James Q. Walker, "Ethical Issues For Corporate Lawyers: Social Media, Multiple Representation And Conflict Waivers," 214 PLI/NY 285, Practising Law Institute, New York Practice Skills Course Handbook Series, PLI Order No. 29598 (Dec. 2011).

[96] *See* a discussion of this issue by Christine D. Petruzzell, "Don't Go Blindly Into That Law Blog," 20 New Jersey Lawyer, the Magazine 80 (2008):

> In New Jersey, this is illustrated by the controversy triggered in early 2007 by the Chubb Group of Insurance Companies, one of the largest carriers of lawyers' professional liability insurance. Initially, upon learning of a law blog proposed by a New Jersey firm, Chubb declined to provide coverage, stating that "this is not a risk they are interested in undertaking." Shortly thereafter, Chubb modified its position, stating that it would insure this new form of communication "within select parameters."
> Chubb distinguished between what it described as an "informational blog," that presents information or provides a forum for the discussion of issues in a neutral way, and an "advisory blog," by which a law firm offers advice, for example through a question and answer format, and often being interactive, potentially establishing attorney-client relationships that can lead to malpractice suits. Although Chubb stated that its underwriters would evaluate each submission on its own merits, Chubb suggested that it may not provide coverage on what it deemed to be an "advisory blog," which, by its nature, increases the risk of a malpractice lawsuit against the firm. Referencing the risks presented by advisory blogs, Chubb noted it is often difficult to perform conflict checks, and that comments/questions are posed by consumers in states where the attorney may not be licensed to practice. In contrast, Chubb noted that informational blogs, which it defined as a forum for discussion of issues in a neutral unbiased way, "pose a minimal level of risk from Chubb's underwriting perspective."

## 7. WHEN DOES USE OF SOCIAL MEDIA CONSTITUTE ADVERTISING?

### a. THE CASE OF THE CLEVER URL

Billie Barrister maintains a website for his firm, Barrister, Barrister, and Solicitor. The URL for the website is "avoidtaxandprobate.com" and on the front page of the website is this statement:

> "You hate taxes? You want to avoid probate? Call us! Barrister, Barrister, and Solicitor are lawyers you want to avoid taxes and keep your property out of probate.

There is no indication on Billie's firm's homepage of the states in which its lawyers are licensed to practice.

Every one of Billie's Tweets[97] and Facebook responses has this signature:

> Billie Lawyer, an expert in avoiding taxes and probate.
> www.avoidtaxandprobate.com.

Does Billie's signature line constitute improper advertising? Does the link to his website create any ethical problems? Is the URL itself a violation of any rule?

### b. DISCUSSION ON THE CASE OF THE CLEVER URL

While the ABA Rules of Professional Conduct permit advertising "through any media,[98] the ABA Rules do not specifically address the form or contents of such advertising, other than prohibiting false and deceptive advertising.[99]

Louisiana has specific rules on advertising and a detailed procedure for pre-approval of ads. See, for example, Louisiana's Rule 7.6, quoted at footnote 93, above. Nothing in Louisiana's rule seems to exempt postings on Facebook or Linked-In, tweets on Twitter, or blogs. Texas likewise has detailed advertising provisions contained in its Rules 7.01 *et seq.*

Louisiana and Texas are only two of many states that regulate advertising on websites. Each state's rules are distinct,[100] and many state bar associations have issued

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[97] *See*: Tom Mighell, "Avoiding A Grievance In 140 Characters Or Less: Ethical Issues In Social Media And Online Activities," 52 The Advocate (Texas) 8 (2010).

[98] ABA RPC Rule 7.2(a).

[99] ABA RPC 7.1.

[100] *See, for example*, Adam R. Bialek, Paris A. Gunther, and Scott M. Smedresman, "Attorney Web Sites: Ethical Issues Are Only the Beginning," 81 New York State Bar Journal 10 (2009).
[Footnote continued on the next page]

formal opinions on the use of the Internet and advertising. See, for example, state bar advertising rules in Arizona,[101] Virginia,[102] and Florida.[103] In the words of a California Bar Formal Opinion: "There is no certain method or form of notice that provides assurance that an attorney's Internet web site will not be found to be an advertisement, holding oneself out as available to practice law or the unauthorized practice of law in other jurisdictions."[104]

New Jersey has issued an ethics opinion stating that a lawyer who participates in a web service that directs potential clients to a local lawyer violates the state bar's advertising prohibitions.[105]

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[101] State Bar of Arizona Ethics Opinion 97-04: Computer Technology; Internet; Advertising and Solicitation; Confidentiality 04/1997.

[102] Virginia State Bar Rule 7.2, See: http://www.vsb.org/pro-guidelines/index.php/rules/information-about-legal-services/rule7-2/ (last accessed 5/17/13).

[103] *See* Rules Regulating the Florida Bar, Rules 4-7.4 through 7.8: http://www.floridabar.org/divexe/rrtfb.nsf/WContents?OpenView&Start=1&Count=30&Expand=4.8#4.8 (last accessed 12/09/15).

[104] *See*: The State Bar of California Standing Committee on Professional Responsibility And Conduct Formal Opinion No. 2001-155, which includes this statement (emphasis supplied):

> This leaves two options for California attorneys who maintain Internet web sites for their law practices. They can choose to use their web site to advertise in multiple jurisdictions. This is not necessarily inappropriate, but it requires that they assure themselves that they are complying with any applicable rules of the different jurisdictions involved, including rules governing the unauthorized practice of law (assuming that there is no inconsistency in the applicable rules that would make this impossible). Alternatively, they can take steps to make clear that they are not advertising in other jurisdictions.
>
> There is no certain method or form of notice that provides assurance that an attorney's Internet web site will not be found to be an advertisement, holding oneself out as available to practice law or the unauthorized practice of law in other jurisdictions. We make the following suggestions as examples of the kind of statements which, if accurate, might assist in avoiding regulation in other jurisdictions: 1) an explanation of where the attorney is licensed to practice law, 12 2) a description of where the attorney maintains law offices and actually practices law, 3) an explanation of any limitation on the courts in which the attorney is willing to appear, and 4) a statement that the attorney does not seek to represent anyone based solely on a visit to the attorney's web site.

[105] See: Opinion #43, New Jersey Committee on Advertising (June 2011), found at: https://www.judiciary.state.nj.us/notices/2011/n110629a.pdf (last accessed 12/9/15)
The opinion states:

> The Internet company offers a group of websites concerning bankruptcy. The websites include general information about what debts may be discharged and the difference between a chapter 7 and chapter 13 bankruptcy, and offers to connect visitors to the website ("Users") with a bankruptcy attorney. Respondents stated that the company takes actions to ensure that its websites have a high ranking on various Internet search engines ("search engine optimization"). The Committee focused on one specific website with which the New Jersey attorneys were

[Footnote continued on the next page]

In addition, some states have indicated that a URL itself may constitute a violation of the advertising rules.[106]

The federal courts have gotten involved, and there are two decisions in the last two years from the U.S. Second[107] and Fifth Circuits[108] on what form of regulation of lawyer advertising is permissible.

The Virginia Supreme Court in the *Hunter* case[109] squarely faced the interrelationship of blogging, advertising, First Amendment rights, and Bar discipline.

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> participating. Attorneys who participate in this website pay for the exclusive rights to a geographical area, by zip code. When a User seeking an attorney provides his or her zip code and contact information, the website will identify the sole participating attorney for the pertinent geographical area. The website does not inform the User that the search for a bankruptcy attorney is completed the moment he or she inputs a zip code. Rather, the website home page invites the User to "get a free evaluation from a local bankruptcy attorney" by filling out a form. The website states that "step 1 of 5" for the free evaluation is to provide the User's zip code and select a reason for considering bankruptcy. The website explains that the User must provide the zip code because "the law varies from state to state."

[106] *See*: Georgetown University Law Center Continuing Legal Education, 16th Advanced Computer and Internet Law Institute 2003 Washington, DC March 6, 2003 *"Ethics: Managing Today's New Internet Risks*," 2003 WL 22002074. This article states (footnotes omitted, emphasis supplied):

> "The ethical rules governing a law firm's use of a domain name draw from the rules applicable to the use of "trade names." Under Rule 7.5(a) a "trade name" used by a private law firm cannot imply a connection with a government agency or with a public or charitable legal services organization. Domain names may be regarded as "professional designations" subject to Rule 7.5 (a). Therefore, it would be improper for a private firm to use the primary domain of ".org" or ".gov." Instead, a private law firm must use a URL with the ".com" designation. Virginia's Standing Committee on Lawyer Advertising and Solicitation (SCOLAS) has stated that it is misleading and deceptive for an attorney or attorneys to advertise using a corporate, trade or fictitious name unless the attorney or attorneys actually practice under such name. The usage of a corporate, trade, or fictitious name should include, among other things, displaying such name on the letterhead, business cards, and office sign.
>
> By using the domain name to identify the firm's website, the domain name is a form of public communication regarding the lawyers' services and therefore the domain name is subject to Rule 7.1's prohibition against false, fraudulent, misleading or deceptive claims or statements. The Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline issued Ethics Opinion 99-4 (June 4, 1999) which specifically addresses domain names. The opinion states that it is not improper for an attorney to use a domain name different from the law firm's actual name, provided that the domain name is not a "false, fraudulent, misleading, deceptive, self-laudatory or unfair statement." ***In addition, the domain name cannot "imply special competence or experience." Thus, for example, a domain names such as "divorcesquickandcheap.com" or "personalinjuryspecialists.com" would violate the cited rules.***

[107] *Alexander v. Cahill*, 598 F.3d 79, 92–95 (2d Cir.2010), *cert. denied*, 464 U.S. 417, 131 S.Ct. 820, 178 L.Ed.2d 576, 79 U.S.L.W. 3102 (2010).

[108] *Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd*., 632 F.3d 212 (5th Cir. 1/31/11).

Hunter maintained a blog on his firm's website; the blog primarily focused on cases that Hunter handled successfully for his criminal clients. The blog gave the name of the cases (which revealed the name of the clients). While the blog was not interactive, the website had a link where readers could click to "contact us."

The Virginia Bar Association brought disciplinary charges against Hunter, claiming that the blog was advertising, that the blog did not have the required advertising disclaimers and must have them to be valid, and that revealing client information and names (even though these were publicly available) without the client's consent violated the confidentiality provisions of Rule 1.6.

The Virginia Supreme Court ruled for the Virginia State Bar in holding:

- The blog was commercial speech.
- The blog was advertising that could be regulated by the Virginia State Bar.
- The Virginia State Bar's requirement of a disclaimer on every ad was reasonable and applied to every blog post.

On the other hand, the Virginia Supreme Court held that the Bar overstepped Hunter's First Amendment rights when it alleged that his discussion of cases (with case names that revealed the client's identity) violated the confidentiality provisions of Rule 1.6.

The result of that case was only the imposition of the disclaimers on every blog post; no other disciplinary action was apparently sought.

*Hunter*, however, is but one state's interpretation of these issues. It can be expected that other states' disciplinary officials may bring similar actions and urge that the Virginia Supreme Court was correct on all issues but its First Amendment holding.

Other commentators, prior to the *Hunter* case, had reached the same conclusion that blogs could be treated as advertising.[110]

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[109] *Hunter v. Virginia State Bar*, 285 Va. 485, 744 S.E.2d 611 (Va. Supreme Court, Feb. 18, 2013), 2013 WL 749494.

[110] *See*: Leigh Jones, "*Will Law Firm Blogs Be Regulated as Advertising*?" The National Law Journal, October 11, 2006, http://www.law.com/jsp/article.jsp?id=1160471119300 (last accessed 5/17/13). Also see Judy M. Cornett, "*The Ethics of Blawging: A Genre Analysis*," 41 Loyola University Chicago Law Journal 221 (2009), which cites, among other sources: Sarah Hale, *"Lawyers at the Keyboard: Is Blogging Advertising and If So, How Should It Be Regulated*?," 20 Geo. J. Legal Ethics 669 (2007); Connor Mullin, "*Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers*," 20 Geo. J. Legal Ethics 835 (2007); Adrienne E. Carter, "*Blogger Beware: Ethical Considerations for Legal Blogs*," 14 Rich. J.L. & Tech. 5 (2007); and Justin Krypel, "*A New Frontier or Merely a New Medium? An Analysis of the Ethics of Blawgs*," 14 Mich. Telecomm. & Tech. L. Rev. 457 (2008).

## 8. CONTROL OF SPECTATOR USE OF SOCIAL MEDIA

The use of smart phones is ubiquitous. It has been said that a typical smart phone has more technological capacity than all the computers that guided the Apollo space program.[111]

Not only attorneys, but also courtroom observers come to court with the power to independently research the witnesses, the attorneys, and all business entities and their owners and officers who may be involved as Debtor or as a creditor.

If "courts frequently find it difficult to prevent jurors from participating in social media during trials,"[112] then how difficult is it for courts to control the use of social media in the courtroom by observers, litigants, and attorneys? Judges who seek to control cell phone and Internet usage may be faced with the prospect of banning such devices from the courtroom, or issuing warnings (stern or not) ranging from "don't use it in my courtroom" to "don't get on social media during this trial, even if you're only viewing it and not posting on it," to "don't get on the Internet during this trial." And then there is the problem of policing such admonitions.

No warning or confiscation of equipment, however, will necessarily prevent a courtroom observer, witness, or attorney from going to his or her smart phone or computer in the evening and logging onto social media. Courts are divided on how to deal with this. Even in cases involving social media usage by juries, courts reach difference conclusions.[113]

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[111] thenextweb.com claims that "one Google search uses the computing power of the entire Apollo space mission." http://thenextweb.com/google/2012/08/28/fun-fact-one-google-search-uses-computing-power-entire-apollo-space-mission/ (last visited 5/17/13).

[112] George B. Delta and Jeffrey H. Matsuura, "Law of the Internet," Aspen Publishers, Copyright © 2014 CCH Incorporated., 2014-1 Supplement, Chapter 17: E-Government.

[113] *See, e.g.*, Hon. Amy St. Eve, Hon. Charles P. Burns, & Michael A. Zuckerman, "More from the #Jury Box: The Latest on Juries and Social Media," 1 Duke Law & Technology Review 65 (2014):

> *"United States v. Fumo*, 655 F.3d 288, 306 (3d Cir. 2011), as amended (Sept. 15, 2011) (Juror's Facebook comments on the case were "vague" and "virtually meaningless." They did not prejudice the defendant and did not amount to grounds for a mistrial.).
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> *Khoury v. ConAgra Foods, Inc.*, 368 S.W.3d 189 (Mo.App. W.D. 2012), reh'g denied (May 1, 2012) (Removal of juror due to possibility of anti-corporate bias was not abuse of trial court's discretion, when during voir dire juror was asked a question that reasonably could have been interpreted as soliciting disclosure of possible bias against corporations, juror did not disclose any such bias in response to the question, and juror's social network page and blog allegedly contained material relating to "corporate criminals, credit rating agencies, economic warfare, and socialism").
>
> *Juror No. One v. Superior Court*, 206 Cal. App. 4th 854, 142 Cal. Rptr. 3d 151 (2012), reh'g denied (June 21, 2012), review denied (Aug. 22, 2012) (Juror made various postings to Facebook about the trial during the course of the trial. The court then conducted an investigation to determine if there was misconduct. The court of appeal ruled that the Stored Communications

[Footnote continued on the next page]

## 9. USE OF SOCIAL MEDIA BY JUDGES

### a. THE CASE OF THE TECH-SAVVY JUDGE

Judge Eileen Tudor Senter is knowledgeable about social media. Her teenage children are on Facebook, Pinterest, Twitter, Tumblr, Foursquare, Identi.ca, and Plurk, and she is too, so that she can monitor what they are doing.

Judge Senter has received invitations from lawyers to "friend" her on Facebook. Should she accept those invitations?

Should Judge Senter send "friend" invitations to those whom she knows and sees on a regular basis (including colleagues as well as classmates from college and law school and non-profit groups), and does it matter whether any of these individuals are lawyers?

### b. DISCUSSION ABOUT "THE CASE OF THE TECH-SAVVY JURIST"

There is a growing body of "judicial ethics" opinions giving guidance to state and federal judges about the use of social media, but there is no unanimity on the proper answer to the questions of how, when and under what circumstances a judge may join, participate in, or be active in social media sites. The National Center for State Courts tries to track this information. According the NCSC,[114] the answers range from:

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Act did not prohibit ordering a subpoena to produce juror's Facebook records from the time the trial was conducted.).

*Sluss v. Com*., 2012 WL 4243650 (Ky. 2012) (Status of two jurors as "friends" of minor victim's mother on a social-networking website was not, standing alone, a ground for a new murder trial based on juror bias; it was the closeness of the relationship and the information that the jurors knew that framed whether the jurors could reasonably be viewed as biased.).

*Dimas-Martinez v. State*, 2011 Ark. 515, 2011 WL 6091330 (2011) (Juror's posts to micro-blog in defiance of court's specific instruction not to make such Internet posts denied defendant a fair trial in prosecution for capital murder and aggravated robbery, where, after juror admitted to the misconduct and was again admonished not to discuss the case, he continued to make posts, including during sentencing deliberations, and one of the followers of juror's micro-blog was a reporter who had advance notice that the jury had completed its sentencing deliberations before an official announcement was made to the court.).

*State v. Abdi*, 2012 VT 4, 191 Vt. 162, 45 A.3d 29 (2012) (Juror's acquisition of information on the internet concerning Somali culture, a subject that played a significant role at trial, had the capacity to affect jury's verdict, and as such, juror's exposure to this extraneous information was not harmless.).

*Com. v. Werner*, 81 Mass. App. Ct. 689, 967 N.E.2d 159, 161 *review denied*, 463 Mass. 1104, 972 N.E.2d 1057 (2012) (The court ruled that juror's Facebook postings involved the type of "attitudinal expositions" on jury service, protracted trials, and guilt or innocence that fall far short of the prohibition against extraneous influence.)."

[114] The NCSC site, last visited 5/17/13, contains the following information (quoted verbatim from the site, emphasis supplied): http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=Judicial%20Ethics%20Advisory%20Opinions%20on%20Social%20Media

*California*

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California Judges Association Formal Opinion No. 66 - Online Social Networking. (2011). This judicial ethics opinion addresses three questions: 1) May a judge be a member of an online social networking community? 2) May a judge include lawyers who may appear before the judge in the judge's online social networking? and 3) May a judge include lawyers who have a case pending before the judge in the judge's online social networking? *The answer to questions 1) and 2) is a very qualified yes. The answer to question 3) is no.*

*Florida*
Opinion Number: 2009-20. Florida Supreme Court, Ethics Advisory Committee (November 2009). This opinion addressed several questions concerning judicial use of social networking sites, including whether a judge may add lawyers who may appear before the judge as "friends" on a social networking site, and permit such lawyers to add the judge as their "friend." *The Committee concluded that this is not permitted* because, "The Committee believes that listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge."

*Kentucky*
Kentucky Judicial Ethics Opinion JE-119, Judges` Membership on Internet-Based Social Networking Sites. Ethics Committee of Kentucky Judiciary (Jan. 20, 2010). This ethics opinion addresses the question, "May a Kentucky Judge or Justice, consistent with the Code of Judicial Conduct, participate in an internet-based social networking site, such as Facebook, LinkedIn, MySpace, or Twitter, and be "friends" with various persons who appear before the judge in court, such as attorneys, social workers, and/or law enforcement officials?" *The Ethics Committee concluded that the current answer is a "qualified yes."* See the full opinion for details.

*Maryland*
Published Opinion #2012-07. Judge Must Consider Limitations on Use of Social Networking Sites. Maryland Judicial Ethics Advisory Opinion (June 12, 2012). This opinion addressed the question of what are the restrictions on the use of social networking by judges?" and whether the "mere fact of a social connection creates a conflict." *The answer was "A judge must recognize that the use of social media networking sites may implicate several provisions of the Code of Judicial Conduct and therefore, proceed cautiously.*"

*Massachusetts*
Massachusetts Committee on Judicial Ethics, Opinion No. 2011-6 (Dec. 28, 2011). This advisory opinion provides guidance on the parameters of Code-appropriate judicial use of Facebook for a judge who is making the transition from private practice to a judgeship with the Trial Court. The opinion concludes, "*The Code does not prohibit judges from joining social networking sites*, thus you may continue to be a member of Facebook, taking care to conform your activities with the Code. A judge's "friending" attorneys on social networking sites creates the impression that those attorneys are in a special position to influence the judge. Therefore, the Code does not permit you to "friend" any attorney who may appear before you."
New York
Advisory Opinion 08-176. Advisory Committee on Judicial Ethics (Jan. 29, 2009). This opinion states, "Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, *he/she may join and make use of an Internet-based social network.* A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."

*Ohio*
Ohio Judicial Ethics Advisory Opinion 2010-7. Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline (Dec. 3, 2010). This opinion answers the question, "May a judge be

[Footnote continued on the next page]

- No, a judge may not "friend" a lawyer who may appear before the judge;
- Yes, a judge may "friend" a lawyer who might one day appear before the judge;
- Maybe a judge can "friend" a lawyer, but proceed with caution;
- It's great that a judge joins a social networking site because being a "member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge."[115]

There are fewer reported cases than there are ethics opinions, but do not appear to use a consistent analysis and appear to reach differing conclusions, including:[116]

- It is possible to bring disqualification proceedings against a judge who has "friended" on Facebook a lawyer who is representing a client in a case that the judge is handling.[117]

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a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge?" Ohio's Board of Commissioners on Grievances & Discipline finds that *a judge may be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge*, but cautions, "As with any other action a judge takes, a judge's participation on a social networking site must be done carefully in order to comply with the ethical rules in the Code of Judicial Conduct."

*Oklahoma*
Judicial Ethics Opinion 2011-3. Oklahoma Judicial Ethics Advisory Panel (July 6, 2011). This opinion addresses the questions (1) May a Judge hold an internet social account, such as Facebook, Twitter, or Linkedin without violating the Code of Judicial Conduct? and (2) May a Judge who owns an internet based social media account add court staff, law enforcement officers, social workers, attorneys and others who may appear in his or her court as "friends" on the account? *The panel concluded to the first question, yes with restrictions. However, the panel concluded that the answer to question 2 is no.*

*South Carolina*
Opinion No. 17-2009, Re: Propriety of a magistrate judge being a member of a social networking site such as Facebook. South Carolina Advisory Committee on Standards of Judicial Conduct (October 2009). This advisory opinion addresses the propriety of a magistrate judge being a member of Facebook. The Committee concluded that "*Allowing a Magistrate to be a member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge. Thus, a judge may be a member of a social networking site such as Facebook.*"

[115] See NCSC's web page reporting on South Carolina's Opinion No. 17-2009, footnote 114, above.

[116] For a more detailed look at this area, see Judge Craig Estlinbaum, "Social Networking and Judicial Ethics, 2 St. Mary's Journal on Legal Malpractice and Ethics 2 (2012).

[117] *See: Domville v. State*, 103 So. 3d 184 (Fla. Dist. Ct. App. 2012), reh'g denied (Jan. 16, 2013), reh'g denied, 4D12-556, 2013 WL 163429 (Fla. Dist. Ct. App. Jan. 16, 2013) (allegations in defendant's motion to disqualify trial judge, that the judge was a social networking website "friend" of the prosecutor assigned to his case, were sufficient to create impression in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial, and thus, motion was legally sufficient to require disqualification.) The Court noted an earlier Florida Judicial Ethics opinion indicating that that "when a judge lists a lawyer who
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- A judge should not "friend" a witness in a case.[118]

- The fact that a judge has a lawyer listed as a "friend" on a Facebook page is not sufficient, in and of itself, to require disqualifying the judge in a case in which the lawyer is appearing for a client.[119]

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appears before him as a "friend" on his social networking page this 'reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge.'"

[118] See *Ynclan v. Woodward*, 237 P.3d 145, 151 (OK 2010), stating:

> We note that is it never a good idea for a trial judge to give the children [who are witnesses] his or her phone number, email, or invite the child to contact them on social networking websites after an in camera interview is conducted in case the child wants to communicate further with the judge. See *Frengel v. Frengel*, 880 So.2d 763, 764 (Fla.App.2004)(trial judge disqualified for such conduct).

[119] *Law Offices of Herssein and Herssein v. United Services Automobile Ass'n* (D. Ct. App. Fl. 3rd District, 8/23/17), unpublished as of the date of writing this paper, 2017 WL 3611661 (emphasis supplied):

> We agree with the Fifth District that "[a] ***Facebook friendship does not necessarily signify the existence of a close relationship***." We do so for three reasons. ***First, as the Kentucky Supreme Court noted, "some people have thousands of Facebook 'friends***.' " *Sluss v. Commonwealth*, 381 S.W.3d 215, 222 (Ky. 2012). In *Sluss*, the Kentucky Supreme Court held the fact that a juror who was a Facebook "friend" with a family member of a victim, standing alone, was not enough evidence to presume juror bias sufficient to require a new trial. In *Sluss*, the juror in question had nearly two thousand Facebook "friends." Id. at 223. Another recent out-of-state case involved a trial judge with over fifteen hundred Facebook "friends" who was allegedly a Facebook friend with a potential witness, a local university basketball coach, who himself had more than forty-nine hundred Facebook "friends." *State v. Madden*, No. M2012-02473-CCA-R3-CD, 2014 WL 931031, at *1–2 (Tenn. Crim. App. Mar. 11, 2014) (holding trial judge did not abuse his discretion under Tennessee law in refusing to recuse himself because he was allegedly Facebook "friends" with potential witness).
>
> ***Second, Facebook members often cannot recall every person they have accepted as "friends" or who have accepted them as "friends***." * * *
>
> ***Third, many Facebook "friends" are selected based upon Facebook's data-mining technology rather than personal interactions***. Facebook data-mines its members' current list of "friends," uploaded contact lists from smart phones and computers, emails, names tagged in uploaded photographs, internet groups, networks such as schools and employers, and other publicly or privately available information. This information is analyzed by proprietary algorithms that predict associations. Facebook then suggests these "People You May Know" as potential "friends." The use of data mining and networking algorithms, which are also revolutionizing modern marketing and national security systems, reflects an astounding development in applied mathematics; it constitutes a powerful tool to build personal and professional networks; and it has nothing to do with close or intimate friendships of the sort that would require recusal. This common method of selecting Facebook "friends" undermines the rationale of *Domville* and the 2009 Ethics Opinion that a judge's selection of Facebook "friends" necessarily "conveys or permits others to convey the impression that they are in a special position to influence the judge." To be sure, some of a member's Facebook "friends" are undoubtedly friends in the classic sense of person for whom the member feels particular affection and loyalty. The point is, however, many are not. A random name drawn from a list of Facebook "friends" probably belongs to casual

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- The fact that a judge's name is mentioned in a party's Facebook posting as having met with that party's father is not enough to require recusal of the judge.[120]

- The fact that a judge had a Facebook "friend" who was a witness is not enough to disqualify the judge, although it was a basis to "scrutinize the judge's impartiality.[121]

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friend; an acquaintance; an old classmate; a person with whom the member shares a common hobby; a "friend of a friend;" or even a local celebrity like a coach. An assumption that all Facebook "friends" rise to the level of a close relationship that warrants disqualification simply does not reflect the current nature of this type of electronic social networking.

In fairness to the Fourth District's decision in *Domville* and the Judicial Ethics Advisory Committee's 2009 opinion, electronic social media is evolving at an exponential rate. Acceptance as a Facebook "friend" may well once have given the impression of close friendship and affiliation. Currently, however, the degree of intimacy among Facebook "friends" varies greatly. The designation of a person as a "friend" on Facebook does not differentiate between a close friend and a distant acquaintance. ***Because a "friend" on a social networking website is not necessarily a friend in the traditional sense of the word, we hold that the mere fact that a judge is a Facebook "friend" with a lawyer for a potential party or witness, without more, does not provide a basis for a well-grounded fear that the judge cannot be impartial or that the judge is under the influence of the Facebook "friend.***" On this point we respectfully acknowledge we are in conflict with the opinion of our sister court in *Domville*.

[120] See *Lacy v. Lacy*, 740 S.E.2d 695, 701 (Ga.App. 3/25/13):

In support of his argument that Judge Parrott was required to recuse under Canon 3, the father points to a photocopy of a comment on his Facebook page, purportedly made by the mother several weeks after the hearing occurred, in which she boasted: "[ J]udge [P]arrott and my dad ha[d] a meeting the week before our case and guess what you lost your kids." Even if this is competent evidence that Judge Parrott met with the mother's father at some time before the hearing, the mother's father is not a party to this case, and the Facebook comment does not show, as the father asserts, that Judge Parrott gleaned any personal knowledge of the facts involved in this case from a meeting between the two. The comment provides no information at all about the circumstances of the meeting or what, if anything, was discussed. Although, in the comment, the mother suggested that there was a connection between the meeting and the outcome of the hearing, neither her perception nor the perception of the father is dispositive on this issue

[121] State v. Madden, 2014 WL 931031 (Ct. Crim. App. TN, 3/11/14), cert. den. 135 S.Ct. 1509 (2015):

In this case, although one Facebook "friendship" was sufficient to scrutinize the judge's impartiality, the record does not demonstrate more than a "virtual" acquaintance between the trial judge and the prospective witness. To the extent that any appearance of impropriety arose from this acquaintance, it was diminished by the trial court's action in fully disclosing his ties with MTSU and his concession that he had once met the witness in-person and had been Facebook friends with the prospective witness. It also bears noting that this witness was 1 of 1500 Facebook friends of the trial judge. He was not a witness to the murder and his testimony at trial focused primarily on the team's zero-tolerance drug policy. Appellant's frustration with the trial judge's action in "defriending" the Facebook connections without her knowledge, however, is understandable. Certainly, the better practice would have been for the trial judge to acknowledge the Appellant's discovery of the Facebook connections and consult with the parties prior to deleting them. However, given that Tennessee permits trial judges to engage in social media, deleting or "defriending" a potential witness before trial is the best remedy to avoid passive receipt of unwanted online communications during trial. A reasonable person in possession of the same facts and circumstances would conclude that there was no basis to question the judge's impartiality in this case; therefore, the judge did not abuse his discretion in denying the motion to recuse.

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- A hearing examiner's inappropriate comments on a social networking site did not mandate recusal.[122]

- A judge should not "text" a prosecutor during a trial about a witness on the stand.[123]

- A "designation of trial judge as 'friend' of victim's father on social media website was insufficient to show bias, as basis for recusal."[124]

- In a case involving abortion law, the fact that the judge's wife had posted information on Facebook indicating that she supported abortion services was not enough to disqualify the judge.[125]

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[122] See *Doe v. Sex Offender Registry Board*, 81 Mass.App.Ct. 904, 906, 959 N.E.2d 990, 993 (Mass. App. 2012)

> We agree with the Superior Court judge that certain comments that the hearing examiner had posted on a coworker's page on the social networking Web site Facebook, while inappropriate,[FN4] did not require her recusal. Nonetheless, we emphasize that citizens confined pursuant to G.L. c. 123A, and their counsel, are entitled to a quasi judicial proceeding conducted with the utmost dignity and attention to law.
>
> > FN4. In the words of the Superior Court judge, "[t]his argument [for recusal] brings forward a most unfortunate episode wherein the hearing officer in this case was publicly reported as writing remarks on a social net-working website that diminished the seriousness of her work as a SORB officer."

[123] See the discussion in Carson Guy, "Get Smart: How cellphones and social media are impacting the law – from jurors tweeting during trial to prosecutors texting judges," 76 Texas Bar Journal 972 (2013).

[124] This quote is from the Westlaw summary of *Youkers v. State*, 400 S.W.3d 200 (Tex.App.-Dallas May 15, 2013) petition for discretionary review refused (Aug 21, 2013).

[125] *National Abortion Federation v. Center for Medical Progress*, ___ F. Supp. 3d, 2017 WL 2766173 (N.D. Calif. 6/26/17) (emphasis supplied):

> Defendants seek disqualification on the basis of three instances of Facebook activity by Judge Orrick's wife. In one instance, defendants say she "pinkified" her Facebook page and added "I stand with Planned Parenthood" as a Facebook profile picture overlay sometime in the summer or fall of 2015. Dkt. No. 428 at 3. Mrs. Orrick's profile picture for this instance featured her alone. * * *
>
> For the two other instances, defendants say she "liked" a Facebook post by "Keep America Pro–Choice" that appears to have linked to an article by the National Abortion Rights Action League (NARAL). . . . The article mentioned, ostensibly in reference to Daleiden and CMP's work, the "highly publicized release of heavily edited videos by a sham organization run by extremists who will stop at nothing to deny women legal abortion services." *Id*. Mrs. Orrick also "liked" another Facebook post by "Keep America Pro–Choice" that reported Daleiden's criminal indictment in Texas as a positive development. . . . Both of these "likes" appeared with a profile picture that showed her together with Judge Orrick.
>
> ***That is the sum total of defendants' concerns with respect to Mrs. Orrick, and they do not amount to a reason to disqualify Judge Orrick. This is so because the premise of defendants' argument is the faulty and anachronistic assumption that a wife's communicative activity***

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## 10. USE OF SOCIAL MEDIA BY LITIGATORS BEFORE OR DURING LITIGATION

### a. THE CASE OF THE TECH-SAVVY PLAINTIFF'S LITIGATOR

Well-established plaintiffs' counsel, T. Veead Vertizing, has a client who was seriously injured in an automobile/truck accident. The driver of the truck, Dee Stracted, works for Big Rigs, Inc.

T. Veead asks his paralegal to go on all the social media websites and try to find out as much about Dee as can be found, and then to "friend" on Facebook and follow Dee on Twitter to see if something turns up that they can use in the lawsuit that T. Veead plans to file.

Does T. Veead encounter any ethical problems in doing this?

### b. THE CASE OF THE TECH-SAVVY DEFENDANT'S LITIGATOR

Hard-driving defense attorney, Noah Holsbarred, is defending the suit that T. Veead brought against Big Rigs for the accident in which Big Rig's driver, Dee Stracted, was involved.

Noah doesn't believe that Dee caused the accident, and Noah doesn't believe that the plaintiff is injured as much as she claims.

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***necessarily represents the views of, or should be attributed to, her husband.*** Defendants' counsel extended this idea even further at the hearing by stating that Mrs. Orrick should not be deemed an independent speaker and thinker because Judge Orrick had not expressly vouched for that. * * * These are not credible arguments for disqualification. While marriage imposes some limits on each partner's personal autonomy, spouses do not give up their freedom of thought and expression. It is beyond question that a woman's right to speak out on the issues she cares about does not end when she says "I do," and her status as an independent actor does not depend on her husband's express declaration of that fact. No thoughtful or well-informed person would simply assume that one spouse's views should always be ascribed or attributed to the other in the absence of an express disclaimer. *See, e.g., Perry*, 630 F.3d at 916 (wife "is an independent person who need not obtain my approval or agreement to advocate for whatever social causes she chooses. The views are hers, not mine"); *Akins v. Knight*, No. 2:15-cv-4096-NKL, 2016 WL 127594, at *3 (W.D. Mo. Jan. 11, 2016) (husband "is an independent person ... [whose] views are his own. The average person on the street would not reasonably believe the undersigned would approach a case in a partial manner due to Mr. Kelly's independent views regarding a subject, whether those views are publicly expressed or not.").

Consequently, defendants bear the burden of showing that there is a particular reason in this case to believe that Mrs. Orrick's Facebook posts may in fact express Judge Orrick's views. They have not identified a single fact that supports that conclusion. That two of the posts featured a generic photo of the couple is of no moment. Only Mrs. Orrick's name was stated with her "likes" and her image is clearly visible and identifiable as the female half of the pictured couple. . . . Even assuming a reasonable observer were to recognize Judge Orrick by sight in the picture, there is no realistic likelihood that the observer might then confuse the "like" as having come from Judge Orrick.

Noah files a discovery request asking for:

(a) access to all of the plaintiff's social media accounts;

(b) copies of all social media postings (including photos) by the plaintiff for a period of one year prior to the accident through the date of the discovery request;

(c) a list and complete copy of everything that the plaintiff has deleted from her social media sites for a period of one year prior to the accident through the date of the discovery request;

(d) the plaintiff's passwords to her social media accounts;

Is this proper? What should a court do with this kind of discovery request?

### c. DISCUSSION ABOUT THE CASES OF THE TECH-SAVVY PLAINTIFF'S AND DEFENDANT'S LITIGATORS

The use of social media by the tech-savvy plaintiff's lawyer, T. Veead Vertizing, to investigate "public" statements by Big Rig's driver, Dee Stracted, would seem to be the same kind of action that a private investigator might undertake.

On the other hand, Veead's asking his paralegal to "friend" Dee on Facebook may lead to problems under Rule 4.2[126], which prohibits an attorney from contacting someone whom the lawyer knows or has reason to know is represented by counsel.

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[126] ABA Model Rule 4.2 states:

> Rule 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 person 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 to do so by law or a court order.

While Mississippi's version of Rule 4.2 essentially tracks the ABA's Model Rule, both Louisiana's and Texas' versions differ.

Louisiana Rule 4.2 states:

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

Texas Rule 4.02 states:

> (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by

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A New Jersey court has refused to dismiss an ethical complaint against a defense lawyer who instructed his paralegal to "friend" the plaintiff in a lawsuit that lawyer was defending,[127] and an Ohio court has sanctioned a prosecutor who used a fictitious social networking account to contact the defendant's alibi witnesses.[128]

Moreover, in this example, the paralegal's trying to "friend" Dee without revealing that the paralegal is doing this for an attorney who will be suing Dee and Dee's employer raises questions under Rule 8.4.[129]

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another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
(b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

[127] *Robertelli v. New Jersey Office of Attorney Ethics,* 2014 WL 7735836 (Sup. Ct. N.J. App. Div. 2/3/15) (unreported):

> Robertelli directed a paralegal employed by his law firm to search the Internet to obtain information about Hernandez. On multiple occasions, the paralegal accessed Hernandez's Facebook page, which at first was public and then became private. Using her true identity, but not disclosing her employment with Robertelli's law firm, the paralegal requested to "friend" Hernandez, and he agreed. The paralegal obtained information from Hernandez's private Facebook page that could be used to impeach him, including a video recording of him wrestling.

[128] *Disciplinary Counsel v. Brockler*, 48 N.E. 3d 557, 558-59 (Ohio 2016):

> Recalling a Facebook ruse he had used in a prior case, Brockler planned to create a fictitious Facebook identity to contact Mossor. He attempted to obtain assistance from several Cleveland police detectives and the chief investigator in the prosecutor's office, but they were not available. Believing that time was of the essence, Brockler decided to proceed with the Facebook ruse on his own approximately one hour after he heard the recording of Mossor and Dunn's conversation. He created a Facebook account using the pseudonym "Taisha Little," a photograph of an African–American female that he downloaded from the Internet, and information that he gleaned from Dunn's jailhouse telephone calls. He also added pictures, group affiliations, and "friends" he selected based on Dunn's telephone calls and Facebook page.
>
> Posing as Little, Brockler simultaneously contacted Mossor and Lewis in separate Facebook chats. He falsely represented that Little had been involved with Dunn, that she had an 18–month–old child with him, and that she needed him to be released from jail so that he could provide child support. He also discussed Dunn's alibi as though it were false in an attempt to get Mossor and *272 Lewis to admit that they were lying for Dunn (or would lie for him in the future) and to convince them to speak with the prosecutor.

[129] ABA Model Rule 8.4 states (emphasis supplied)

Maintaining The Integrity Of The Profession: Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;

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(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

While the Mississippi version of Rule 8.4 appears to track the ABA model Rule, the Louisiana version of Rule 8.4 differs from the Model Rule. As explained by Professor Dane Ciolino on his website (http://lalegalethics.org/louisiana-rules-of-professional-conduct/article-8-maintaining-the-integrity-of-the-profession/rule-8-4-misconduct/, last visited 4/22/14):

> Background
>
> The Louisiana Supreme Court adopted this rule on January 21, 2004. It became effective on March 1, 2004, and has not been amended since. This rule is identical to ABA Model Rule of Professional Conduct 8.4 (2002) with two substantive differences.
>
> First, Model Rule 8.4(b) brands a criminal act as "misconduct" only if the crime "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." See Model Rules of Prof'l Conduct R. 8.4(b). In contrast, Louisiana Rule 8.4(b) (2002) casts a wider net by branding as "misconduct" any criminal act by a lawyer–irrespective whether it casts doubt on the lawyer's honesty, trustworthiness or fitness to practice. The rule has this effect as a result of the inclusion of the language "especially one that" between "criminal act" and "that reflects."[1]
>
> Second, paragraph (g) is not found in the Model Rules. This paragraph prohibits Louisiana lawyers from threatening to present criminal or disciplinary charges "solely to obtain an advantage in a civil matter." Although no similar provision exists in Model Rule 8.4, see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992), the ABA has issued a formal ethics opinion condemning the practice, see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-383 (1994).

The Texas version, Rule 8.04, is substantially different from the ABA Model Rule. Texas Rule 8.04 provides:

> (a) A lawyer shall not:
> (1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;
> (2) commit a serious crime or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
> (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
> (4) engage in conduct constituting obstruction of justice;
> (5) state or imply an ability to influence improperly a government agency or official;
> (6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
> (7) violate any disciplinary or disability order or judgment;
> (8) fail to timely furnish to the Chief Disciplinary Counsel's office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so;
> (9) engage in conduct that constitutes barratry as defined by the law of this state;
> (10) fail to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorney's cessation of practice;
> (11) engage in the practice of law when the lawyer is on inactive status or when the lawyer's right to practice has been suspended or terminated, including but not limited to situations where a lawyer's right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with Article XII of the State Bar Rules relating to Mandatory Continuing Legal Education; or
> (12) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.
> (b) As used in subsection (a)(2) of this Rule, serious crime means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent or reckless misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing crimes

Other states also have different approaches. For example, Kansas and Missouri Rules 8.4 are substantially similar to the Model Rule. Kansas adds a catch-all provision at 8.4(g), under which "engag[ing] in any other conduct that adversely reflects on the lawyer's fitness to practice law" constitutes professional misconduct, while Missouri's 8.4(c) includes language regarding to undercover government investigations and 8.4(g) prohibits "manifest[ing] by words or conduct, in representing a client, bias or prejudice based

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There is a growing body of legal literature on this subject,[130] and Bar Associations reach different conclusions in their published ethics opinions.

For example, the Missouri Bar has issued an Informal Advisory Opinion stating that an "attorney's request to be invited as a friend of Plaintiff's Facebook/MySpace account would be a 'communication' for the purpose of Rule4-4.2. Attorney may not send such a communication directly to plaintiff, in light of that rule."[131] The San Diego County Bar has come out with an opinion barring any ex parte contact through social media with a potential witness without revealing the "reason" for the contact."[132] On the

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upon race, sex, religion, national origin, disability, age, or sexual orientation," except when those or "similar factors" are issues.

[130] See, for example: Allison Clemency, *"Friending," "Following," and "Digging" Up Evidentiary Dirt: The Ethical Implications of Investigating Information on Social Media Websites*, 43 Ariz. St. L. J. 1021 (2011); Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. Mem. L. Rev. 355 (2010).; Margaret M. DiBianca, *Ethical Risks Arising from Lawyers' Use of (and Refusal to Use) Social Media*, 12 Del. L. Rev. 179 (2011); Steven C. Bennett, *When Lawyers Troll for "Friends"*, 36-APR Mont. Law. 25 (Apr. 2011) (discussing state ethical opinions which consider whether an attorney should ethically be allowed to "friend" relevant parties to a case on Facebook). Also see the following materials, gathered in FN14 of Jay E. Grenig and , William C. Gleisner, III, 1 eDiscovery & Digital Evidence § 6:8: "Akin, How to Discover and Use Social Media-Related Evidence, Litigation, Winter 2011, at 32; Wallace, The Discoverability of Social Media Evidence, 79 U.S.L.W. 2531 (May 17, 2011); Murray, Electronically Stored Information: How E-Mail, Texting, and Your Facebook Friends Can Affect Your Divorce, 34 Family Advocate 26 (2011); Lynn, Social Media Discovery: What You Need to Know to Be Prepared, 79 U.S.L.W. 2415 (Apr. 26, 2011); Demay, The Implications of the Social Media Revolution on Discovery in U.S. Litigation, The Brief, Summer 2011, at 55; Witte, Your Opponent Does Not Need a Friend Request to See Your Page: Social Networking Sites and Electronic Discovery, 41 McGeorge L. Rev. 891 (2010); Viscounty & Barry, How Discoverable Is Social Media Content?, Los Angeles & San Francisco Daily Journal, Dec. 10, 2010; Menzies & Polischuk, Is Your Client an Online Social Butterfly?, Trial, Oct. 2010, at 23, 24; Kisthardt & Handschu, Using Social Network Site Evidence in Family Law Cases: Finding Posts Impeaching the Credibility of a Spouse May Be Easy, but Ensuring Their Admissibility Often Is Not, Nat'l L.J., Sept. 2010, at 28."

[131] Missouri Bar Informal Advisory Opinion 20090003.

[132] See San Diego County Bar Association Op. 2011-2, found at https://www.sdcba.org/index.cfm?pg=LEC2011-2 (last visited 04/22/14):

> Social media sites have opened a broad highway on which users may post their most private personal information. But Facebook, at least, enables its users to place limits on who may see that information. The rules of ethics impose limits on how attorneys may obtain information that is not publicly available, particularly from opposing parties who are represented by counsel.
>
> We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have "friends" like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship. In our view, this strikes the

[Footnote continued on the next page]

other hand, the Oregon Bar appears to permit "friend" contacts under certain conditions[133] and the New Hampshire Bar notes that there is a split in authority on this issue.[134]

The broad-ranging social media discovery requests by defense attorney Noah Holdsbard raise a different set of issues. Now the questions revolve around the relevancy of the information sought and whether the discovery requests are overbroad. This is a rapidly developing field, and courts are just beginning to grapple with these issues. Some

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right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented.

[133] See Oregon Bar Op. 2013-189, found at https://www.osbar.org/_docs/ethics/2013-189.pdf (last visited 04/22/14):

> Facts:
> Lawyer wishes to investigate an opposing party, a witness, or a juror by accessing the person's social networking website. While viewing the publicly available information on the website, Lawyer learns that there is additional information that the person has kept from public view through privacy settings and that is available by submitting a request through the person's website.
>
> Questions:
> 1. May Lawyer review a person's publicly available information on a social networking website?
> 2. May Lawyer, or an agent on behalf of Lawyer, request access to a person's non-public information?
>
> 3. May Lawyer, or an agent on behalf of Lawyer, use a computer username or other alias that does not identify Lawyer when requesting permission from the account holder to view non-public information?
>
> Conclusions:
> 1. Yes.
> 2. Yes, qualified.
> 3. No, qualified

[134] New Hampshire Bar Ethics Advisory Opinion 2012-13/05, found at http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp (last visited 04/22/14):

> The Rules of Professional Conduct do not forbid use of social media to investigate a non-party witness. However, the lawyer must follow the same rules which would apply in other contexts, including the rules which impose duties of truthfulness, fairness, and respect for the rights of third parties. The lawyer must take care to understand both the value and the risk of using social media sites, as their ease of access on the internet is accompanied by a risk of unintended or misleading communications with the witness. The Committee notes a split of authority on the issue of whether a lawyer may send a social media request which discloses the lawyer's name - but not the lawyer's identity and role in pending litigation - to a witness who might not recognize the name and who might otherwise deny the request.1 The Committee finds that such a request is improper because it omits material information. The likely purpose is to deceive the witness into accepting the request and providing information which the witness would not provide if the full identity and role of the lawyer were known.

courts have set a high standard for relevancy[135] and others have indicated that an *in camera* review is appropriate.[136] Many attorneys contend that information on social media sites is no different than any other letter or document that a party has in his or her possession that must be disclosed during litigation if it has potential relevancy or can lead to the discovery of relevant evidence.[137]

On the other hand, can an attorney for someone who might be a litigant or witness tell the client to "cleanse" his or her social media sites. Several Bar Associations have issued opinions on the issue indicating that this is not a problem as long as "there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence."[138] But, of course the critical question always is, why is the client cleansing a

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[135] *See, e.g.*, *Kregg v. Maldonado*, 98 A.D.3d 1289, 951 N.Y.S.2d 301 (2012) (Discovery request, by manufacturer and distributor of motorcycle that motorcyclist was driving when he was involved in accident, which sought entire contents of social media internet accounts maintained by or on behalf of motorcyclist, was overbroad, in personal injury action against manufacturer and distributor seeking recovery for motorcyclist's injuries; defendants' request for access to accounts was made without factual predicate with respect to relevancy of the evidence, as there was no contention that information in accounts contradicted motorcyclist's claims for diminution of enjoyment of life.).

[136] See, e.g., *Offenback v. L.M. Bowman, Inc*., 1:10-CV-1789, 2011 WL 2491371 (M.D. Pa. June 22, 2011) (Plaintiff sued relating to a vehicular accident claiming physical and mental injuries. Defendant sought discovery of his Facebook and MySpace accounts. Plaintiff claimed those accounts were irrelevant to his cause of action and beyond the scope of discovery. After an *in camera* review, the court ordered Plaintiff to produce information from his Facebook account.).

[137] *See*, for example, the articles listed in footnote 130, above.

[138] *See*

Opinion 14-1 (6/25/15), Professional Ethics of the Florida Bar
http://www.floridabar.org/tfb/TFBETOpin.nsf/b2b76d49e9fd64a5852570050067a7af/98e16dd49286008585257ee3006cf9df!OpenDocument (last visited 12/09/15);

New York County Law Association Ethics Opinion 745 (7/2/13),
https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf (last visited 03/01/17), stating that: "An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages, consistent with the principles stated above. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on "private" social media pages, and what may be "taken down" or removed."

The Philadelphia Bar Association appears to have differing views on the subject.
See: Formal Opinion 2014-300
http://www.danieljsiegel.com/Formal_2014-300.pdf
(last visited 03/01/17) states (emphasis supplied):

> This Committee concludes that:
> 1. Attorneys may advise clients about the content of their social networking websites, ***including the removal or addition of information***.
> 2. Attorneys may connect with clients and former clients.
> 3. Attorneys may not contact a represented person through social networking websites.
> 4. Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.

[Footnote continued on the next page]

page upon the advice of a lawyer. Thus far, these ethics opinions appear to duck the issue, using phrases such as: "What constitutes an "unlawful" obstruction, alteration, destruction, or concealment of evidence is a legal question, outside the scope of an ethics opinion."[139] There is at least one reported case of a lawyer being disciplined for advising a client to delete material from a Facebook page after a request for production had been sent.[140]

## 11. POSSIBLE "INAPPROPRIATE" OR EVEN SANCTIONABLE USAGE OF SOCIAL MEDIA IMPACTING LITIGATORS; FIRST AMENDMENT ISSUES VS. A LAWYER'S OBLIGATIONS AS AN OFFICER OF THE COURT

### a. THE CASE OF THE DISGRUNTLED LITIGATOR

Billie Barrister is in the midst of a lengthy trial involving the validity of a will and probate proceedings. Judge Eileen Tudor Sentor, at the close of the day's hearing, has issued a ruling that Bulldog is convinced is dead wrong and constitutes obvious reversible error.

Bulldog, on his way out of the courthouse, pauses on the courthouse steps to Tweet (which is linked to his Facebook page):

> "Judge Sentor today demonstrated what everyone knows; her rulings will always be overturned on appeal."

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5. Attorneys may use information on social networking websites in a dispute.
6. Attorneys may accept client reviews but must monitor those reviews for accuracy.
7. Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
8. Attorneys may generally endorse other attorneys on social networking websites.
9. Attorneys may review a juror's Internet presence.
10. Attorneys may connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his or her official duties

On the other hand, Professional Guidance Committee Opinion 2014-5 (July 2014), http://philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2014-5Final.pdf (last visited 03/01/17), states that a "lawyer may instruct a client to make information on the social media website 'private' but may not instruct or permit the client to delete/destroy a relevant photo, link, text or other content, so that it no longer exists.

[139] Florida Bar Opinion 14-1, footnote 138, above. Also see the statement in the NYCLA Op. 745 (footnote 138, above): "Attorneys' duties not to suppress or conceal evidence involve questions of substantive law and are therefore outside the purview of an ethics opinion."

[140] *In the Matter of Matthew B. Murray*, 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422 (Virginia State Bar Disciplinary Board July 17, 2013). Among the stipulated facts were:

> On March 26, 2009, Respondent sent his client, Plaintiff, an email that suggested that Plaintiff deactivate his Facebook page on April 14, 2009. Respondent's legal assistant sent Plaintiff an email of March 26, 2009, stating: "The pic Zunka has is on your facebook. You have something (maybe plastic) on your head and are holding a bud with your I Love Hot Moms shirt on. There are 2 couples in the background ....both girls have long blond hair. Do you know the pic? There are some other pics that should be deleted."

That evening, in his office, Bulldog angrily posts the following statement on his Facebook page:

> Judge Sentor issues rulings that are either the result of her ignorance of the law or her incompetence.

Has Bulldog done anything for which he can be sanctioned by the Court? Has he done anything that violates the Rules of Professional Conduct? Are his statements protected by the First Amendment?

What if Bulldog had put the following on his Facebook page?

> There is a judge in this state who issues rulings that always demonstrate her ignorance of the law or her incompetence. Email me if you want more information.

### b. DISCUSSION OF THE CASE OF THE DISGRUNTLED LITIGATOR

Courts clearly have the inherent powers to punish lawyers for behavior that does not violate state or federal statutes or court rules.[141]

Courts have sanctioned and disbarred lawyers for improperly accusing a judge of incompetence and bias.[142] On the other hand, at least one court has held that prejudice

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[141] *Chambers v. Nasco, Inc*., 501 U.S. 32 (1991).

[142] See: *In re Evans*, 801 F.2d 703 (4th Cir.1986), where a lawyer was disbarred for criticizing a judge without investigating the basis of the charge. *Evans* stated that the "failure to investigate, coupled with his unrelenting reassertion of the charges ... convincingly demonstrates his lack of integrity and fitness to practice law." *Evans* also stated: (emphasis supplied):

> A court has the inherent authority to disbar or suspend lawyers from practice. *In re Snyder*, 472 U.S. 634, 105 S.Ct. 2874, 2880, 86 L.Ed.2d 504 (1985). This authority is derived from the lawyer's role as an officer of the court. Id. Moreover, as an appellate court, we owe substantial deference to the district court in such matters:
>
> On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 529-30, 6 L.Ed. 152 (1824). See also, *In re: G.L.*S., 745 F.2d 856 (4th Cir.1984). In this case, we can only conclude that the district court's disbarment of Evans, based on his violation of the rules of professional conduct, is amply supported by the record and did not exceed the limits of the court's discretion.

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does not occur to a criminal defendant if the press gives live updates of a trial on social media.[143]

There is always a tension between the "robust debate" that the First Amendment allows and improper criticism of the court by an officer of the court.[144] Lawyers, however, have a duty under RPC 8.2 not to make false or reckless statements about a judge,[145] and courts have tended to enforce Rule 8.2 sanctions even when the lawyer has claimed that his or her activities or words were protected by the First Amendment.[146] Other courts also have found that, as an officer of the court, an attorney's First Amendment rights may be more limited than those of the public,[147] and the U.S. Supreme

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> Evans' letter, accusing Magistrate Smalkin of incompetence and/or religious and racial bias, was unquestionably undignified, discourteous, and degrading. Moreover, it was written while the Brown case was on appeal to this Court and was thus properly viewed by the district court as an attempt to prejudice the administration of justice in the course of the litigation.

[143] *Compton v. State*, 58 N.E.3d 1007, 1011-12 (In. Ct. App. 2016):

> As noted above, it is unnecessary to decide whether Twitter is "broadcasting," because even assuming it is, broadcasting is not inherently prejudicial and Compton has shown no specific prejudice to him in this case. Similar to *Willard*, the evidence against Compton, including his inculpatory statements, is overwhelming, see infra Part II.B; prior to trial, the trial court instructed the jury not to receive information about the case from any source, including internet sources; the jury was sequestered during the Twitter discussion; the trial court instructed the media not to Tweet in a manner that would disrupt proceedings; the trial court instructed the attorneys to notify their respective witnesses not to use Twitter until after they testified; and there is no evidence any witnesses or jurors viewed any Tweets pertaining to the trial. We conclude Compton was not deprived of due process when the media was allowed to Tweet live updates of his criminal trial from the courtroom.

[144] See, for example, the statement in *Fieger v. Thomas,* 872 F.Supp. 377, 385 (E.D. Mich. 1994), quoting with approval from another opinion:

> It is a rare and unfortunate day when the judges of this district must sanction an attorney for conduct involving criticism of the bench. Robust debate regarding judicial performance is essential to a vital judiciary. If an attorney, after reasonable inquiry, has comments about a judicial officer's fitness for service, he or she may and should express them publicly. Conversely, baseless factual allegations contribute nothing to judicial accountability and undermine public trust in the courts.

[145] ABA RPC 8.2(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.

[146] *See, e.g., Board of Professional Responsibility, Wyoming State Bar v. Davidson*, 205 P.3d 1008 (Wyo.,2009); and *Notopoulos v. Statewide Grievance Committee*, 277 Conn. 218, 890 A.2d 509 (Conn.,2006).

[147] *See, e.g. In re Pyle*, 283 Kan. 807, 821, 156 P.3d 1231 (Kan. 2007):
*In re Johnson*, 240 Kan. 334, 729 P.2d 1175 (1986), was a contested case in which this court found that Johnson should be disciplined for false, unsupported criticisms and misleading statements about his opponent in a county attorney election campaign. In its discussion of the First Amendment and lawyer speech, this court said:
[Footnote continued on the next page]

Court has cautioned lawyers who have argued that their First Amendment rights may not be circumscribed by their status as attorneys.[148]

For example, lawyers have been sanctioned for language used in their court filings, including unfounded allegations of *ex parte* contacts,[149] for statements accusing courts of ignoring the law to achieve a result,[150] for statements in a letter that a judge is

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> "A lawyer, as a citizen, has a right to criticize a judge or other adjudicatory officer publicly. To exercise this right, the lawyer must be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms. Unrestrained and intemperate statements against a judge or adjudicatory officer lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified." *Johnson*, 240 Kan. at 336, 729 P.2d 1175.
> Our *Johnson* case also stands for the proposition that a lawyer cannot insulate himself or herself from discipline by characterizing questionable statements as opinions.

[148] *See: In re Cobb*, 445 Mass. 452, 838 N.E.2d 1197, 1210 (Mass. 2005):

> The Supreme Court has said that "[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed.... Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In re Sawyer*, [360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959),] observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be." *Gentile v. State Bar of Nev*., 501 U.S. 1030, 1071, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). The Court went on to say that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of" other kinds of speech protected by the First Amendment.

[149] *See, e.g*., *Board of Professional Responsibility, Wyoming State Bar v. Davidson*, 205 P.3d 1008, 2009 WY 48 (Wyo. 4/7/09, where a lawyer was sanctioned for, among other things, putting the following language into a court filing:

> "How can an attorney have gotten a trial date from a judge who was not assigned to the case? That could only be done by having engaged in improper ex parte communications with the court. * * * It is obvious enough that Respondent filed his reassignment motion to achieve a procedural and tactical advantage. Yet no one notified the Petitioner of opposing counsel's communications with [the] Judges . . . at the time those communications occurred much less took any action to determine whether Petitioner would stipulate to the reassignment of the case or to the trial date. * * * It has been rumored that if one is affiliated with [opposing counsel's law firm], favoritism may be accorded her by [the] or those in his office. Because opposing counsel is with the law firm [ ], Petitioner believes that favoritism was at play here."

[150] See: *In re Wilkins*, 777 N.E.2d 714, 715-716 (Ind. 10/29/02), where an appellate lawyer stated in a brief (and received a sanction, which was reduced on rehearing, 782 N.E.2d 985 (Ind.2003)):

> The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.
> Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was

[Footnote continued on the next page]

"an embarrassment to this community,"[151] and for Internet postings containing unfounded accusations against a judge.[152]

## 12. "OWNERSHIP" OF SOCIAL MEDIA INFORMATION WHEN A LAWYER LEAVES A FIRM.

### a. THE CASE OF THE FIRM-HOPPING LAWYER

Jenn Exer is a hotshot young attorney who has been an outstanding associate. In her first three years of practice she reworked the firm's blog and made hundreds of postings to it. Some of the postings she wrote were unattributed while others carried her byline. In addition, the firm has a Facebook page, and Jenn worked with the firm's marketing staff on it.

Jenn has now been recruited by and moved to a huge, multi-state firm. She wants to "take" all her blog postings with her and put them on her new firm's website. She says, "After all, the ones with my byline are mine, right?"

What do you advise Jenn? What would you advise her former law firm?

Would it matter if the firm had a policy that everything a lawyer did in the legal arena while an employee was for the firm? Would it matter if, while she was an associate at the firm, Jenn also maintained her own, private blog where she put additional "legal" postings?

### b. DISCUSSION OF THE CASE OF THE FIRM-HOPPING LAWYER

Some have asserted the ownership "of a material in a blog should be assessed no differently from ownership of any other works of authorship."[153] Thus, many authors on the subject look to general copyright law.[154]

Therefore questions that arise include:

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necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).

[151] *Notopoulos v. Statewide Grievance Committee*, 277 Conn. 218, 890 A.2d 509 (Conn.,2006).

[152] See: *Office of Disciplinary Counsel v. Wrona,* 589 Pa. 337, 908 A.2d 1281 (Pa.,2006).

[153] Lisa M. Brownlee, "Assets & Finance: Audits and Valuation of Intellectual Property, Internal Controls, Materiality, and Investment," Chapter 5, Section 5:85.

[154] See: Jon M. Garon, "Wiki Authorship, Social Media and the Curatorial Audience," 1 Harv. J. Sports & Ent. L. 95 (2010).

- Did the firm have a rule on access to and use of the blog and its Facebook page?
- What were the expectations of the authors of each posting?
- How can a "poster" to a blog or firm Internet site protect his or her interest in what is posted?
- What are the reasonable expectations of the firm and what are the contractual or other obligations it imposes on its employees?

## 13. JUDGES' CONTROL OF ATTORNEYS USE OF SOCIAL MEDIA TO CHECK OUT POTENTIAL JURORS

The leading case in the country[155] on a court's restrictions on attorneys using social media to investigate jurors is the case involving *Oracle* against Google.[156] The trial judge, while noting that social media searches on jurors could turn up "information useful to lawyers,"[157] also observed that there a reasons to restrict such searches.[158] The Court concluded by creating a procedure by which jurors would be informed that searches

[155] At the time of the writing of this paper, it was the only case the author could located directly on point, but it has been cited a number of times in publications and periodicals.

[156] *Oracle America, Inc. v. Google, Inc*., 172 F.Supp.3d 1100 (N.D. Calif. 2016).

[157] *Oracle*, 172 F.Supp. 3d at 1101-02:

> The Court, of course, realizes that social media and Internet searches on the venire would turn up information useful to the lawyers in exercising their three peremptory challenges, and, might even, in a very rare case, turn up information concealed during voir dire that could lead to a for-cause removal. While the trial is underway, ongoing searches might conceivably reveal commentary about the case to or from a juror.

[158] *Oracle*, 172 F.Supp.3d at 1102-04

> Nevertheless, in this case there are good reasons to restrict, if not forbid, such searches by counsel, their jury consultants, investigators, and clients.
>
> The first reason is anchored in the danger that upon learning of counsel's own searches directed at them, our jurors would stray from the Court's admonition to refrain from conducting Internet searches on the lawyers and the case. * * *
>
> A second danger posed by allowing counsel to conduct research about the venire and the jury is that it will facilitate improper personal appeals to particular jurors via jury arguments and witness examinations patterned after preferences of jurors found through such Internet searches. For example, if a search found that a juror's favorite book is *To Kill A Mockingbird*, it wouldn't be hard for counsel to construct a copyright jury argument (or a line of expert questions) based on an analogy to that work and to play upon the recent death of Harper Lee, all in an effort to ingratiate himself or herself into the heartstrings of that juror. The same could be done with a favorite quote or with any number of other juror attitudes on free trade, innovation, politics, or history. Jury arguments may, of course, employ analogies and quotations, but it would be out of bounds to play up to a juror through such a calculated personal appeal, all the more so since the judge, having no access to the dossiers, couldn't see what was really in play. See *United States v. Nobari*, 574 F.3d 1065, 1077 (9th Cir.2009). * * *
>
> A third reason is to protect the privacy of the venire. They are not celebrities or public figures. The jury is not a fantasy team composed by consultants, but good citizens commuting from all over our district, willing to serve our country, and willing to bear the burden of deciding a commercial dispute the parties themselves cannot resolve. Their privacy matters.

would be conducted and would have a chance to alter their privacy settings before the searches begin.[159]

The Louisiana Supreme Court, in *State v. Clark*, 2012-0508, 220 So.3d 583) (La. 12/19/16), , noted in passing a trial court's "imposition of a strict no-contact order" concerning a prosecutor becoming a Facebook friend with a juror, but the court did not directly rule on the violation of these orders.

Several courts in other states have standing orders concerning an attorney's ability to do social media research on potential jurors.[160] Florida courts, however, have held that judges have no such power: "There is no prohibition in Florida law against an attorney researching jurors before, during, and throughout a trial so long as the research does not lead to contact with a juror. An attorney is not obligated to inform the court of such research unless it affects the fairness of the trial and the administration of justice."[161]

Likewise, Texas courts seem to approve of social media investigation of jurors, and one Texas court has held that an attorney's inadvertent sending of a LinkedIn invitation to a juror (and the juror's ultimate acceptance of it) was not sufficient to trigger a new trial.[162] A Tennessee court has ruled to the same effect, holding that a juror being a

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[159] *Oracle*, 182 F.Supp.3d at 1103-04:

> In the absence of complete agreement on a ban, the following procedure will be used. At the outset of jury selection, each side shall inform the venire of the specific extent to which it (including jury consultants, clients, and other agents) will use Internet searches to investigate and to monitor jurors, including specifically searches on Facebook, LinkedIn, Twitter, and so on, including the extent to which they will log onto their own social media accounts to conduct searches and the extent to which they will perform ongoing searches while the trial is underway. Counsel shall not explain away their searches on the ground that the other side will do it, so they have to do it too. Nor may counsel intimate to the venire that the Court has allowed such searches and thereby leave the false impression that the judge approves of the intrusion. Counsel may simply explain that they feel obliged to their clients to consider all information available to the public about candidates to serve as jurors. Otherwise, counsel must stick to disclosing the full extent to which they will conduct searches on jurors. By this disclosure, the venire will be informed that the trial teams will soon learn their names and places of residence and will soon discover and review their social media profiles and postings, depending on the social media privacy settings in place. The venire persons will then be given a few minutes to use their mobile devices to adjust their privacy settings, if they wish. The venire persons will also be given the normal admonition that they cannot do any research about the case, the parties, or the lawyers and that they cannot speak to anyone about the case, including by making any social media postings about it. Only the names and places of residence of those called forward to the box shall be provided to counsel (so the identities of venire persons still in the gallery will remain private).

[160] *See*, for example, Local Rule 47.4 of the Federal Court for the Eastern District of Louisiana (emphasis supplied):

> LR 47.4 Contacting Prospective Jurors
>
> Prospective jurors must not be contacted, ***either directly or indirectly***, in an effort to secure information concerning the background of any member of the jury panel.

[161] *Tenev v. Thurston*, 198 S.3d 798, 802 (Fl. D.C. App. 2nd District, 2016).

[162] *Texas Capital Bank v. Asche*, (unreported), 2017 WL 655923 (Tx. Ct. App. Dallas (2017).

Facebook friend with the defendant is not sufficient to overturn the verdict when he was "friends" because of other "friends" and didn't know the defendant personally.[163]

A court in Georgia has found that jurors are properly dismissed from a case, even after jury deliberations have begun, when it is discovered that the juror was a Facebook friend of the defendant.[164] Yet, the Indiana Supreme Court has held that if juror has over 1,000 Facebook friends that she uses primarily for business networking purposes, the fact that juror has friended a relative of the victim is not necessarily a basis for a mistrial,[165]

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[163] *State v. Christie* (unreported), 2016 WL 7495187 (Ct. Crim. Appl. Tenn. 2016):

> Defendant argues on appeal that Michael Robinson's presence on the jury violated her right to a fair trial and impartial jury because Juror Robinson revealed after trial that he was "friends on Facebook" with Mr. Christie and had heard people talk about Mr. Christie's case. The State counters that Defendant failed to show that Juror Robinson was biased on a material question in this case.
>
> During voir dire, counsel asked prospective jurors if they knew Mr. Christie. Juror Robinson did not indicate that he knew Mr. Christie. Juror Robinson did inform counsel that he had previously served on a jury. About two weeks after trial, Juror Robinson signed an affidavit indicating that he "knew of" Mr. Christie through Pop's Music because they are "both musicians." Juror Robinson explained that he had no knowledge of ever meeting Mr. Christie or Defendant in person but explained that he was "Facebook friends" with Mr. Christie because they had mutual friends in common.
>
> Every criminal defendant has a constitutional right to a trial "by an impartial jury." * * * The Supreme Court has observed that "[q]ualified jurors need not ... be totally ignorant of the facts and issues involved" in a trial. *Murphy v. Florida*, 421 U.S. 794, 799–800 (1975). Instead, " '[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' " *Id.* at 800 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The defendant must "demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' "* * * The defendant must establish a prima facie case of bias or partiality. *Akins*, 867 S.W.2d at 355 "When a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror's lack of impartiality, a presumption of prejudice arises." *Id*. Silence by a juror when asked a question reasonably calculated to produce an answer is tantamount to a negative answer. *Id*. "Therefore, failure to disclose information in the face of a material question reasonably calculated to produce the answer or false disclosures give rise to a presumption of bias and partiality ...." Id. at 356 (footnotes omitted). "The test is whether a reasonable, impartial person would have believed the question, as asked, called for juror response under the circumstances." *Id*. at n.13. The juror's intent is not dispositive of the issue of bias. Id. at n.15.

[164] *Smith v. State*, 335 Ga. App. 491, 782 S.E.2d 305 (Ga. Ct. App. 2016).

[165] *Slaybaugh v. State*, 47 N.E.3d 607, 607-08 (In. 2016):

> After Kastin Slaybaugh was convicted of rape, he moved for mistrial on grounds there had been juror misconduct. His motion asserted that in voir dire, a juror had denied knowing the victim or her family, but Slaybaugh discovered that a relative of the victim was a "Facebook friend" of that juror. The trial court ordered the juror deposed. The juror testified she was a realtor, had more than 1000 "friends" on Facebook—most of whom she had "friended" for networking purposes—but she had not recognized the victim's name during voir dire, did not recognize the victim when she testified, and did not know the victim or her family. The trial court determined that the juror had been truthful when answering that she had no knowl edge of the victim or her family, and denied Slaybaugh's motion for mistrial. Noting the novel issue involving a juror's "expansive list of Facebook friends," the Court of Appeals affirmed in Slaybaugh v. State, 44 N.E.3d 111, 111, 2015 WL 5612205, *1 (Ind.Ct.App.2015).
>
> We agree with the result reached by the Court of Appeals, grant transfer, expressly adopt and incorporate by reference the Court of Appeals opinion in accordance with Indiana Appellate Rule 58(A)(1), and affirm the trial court.

and another Indiana court has stated that no presumption of bias should be made merely because a juror is has friended someone close to the case on Facebook.[166]

As can be seen, this is a developing area of the law.

## 14. CONCLUSION

Because social media seems to permeate everything, both in and out of the courtroom, lawyers and judges need to be aware the potential problems (ethical, professional, and otherwise) that are raised when they use social media, when attorneys who appear before them use social media, and when jurors and witnesses use social media.

[166] *Wilkinson v. State*, __ N.E.3d ___, 2017 WL 382741 (In. Ct. App. 1/27/17).

> "... [M]erely being friends on Facebook does not, per se, establish a close relationship from which bias or partiality on the part of a juror may reasonably be presumed." See Slaybaugh v. State, 44 N.E.3d 111, 118 (Ind. Ct. App. 2015) (quoting McGaha v. Commonwealth, 414 S.W.3d 1, 6 (Ky. 2013)), aff'd, 47 N.E.3d 607 (Ind. 2016).