PROGRAM MATERIALS
Program #3145
March 8, 2021

Social Media and the Lifecycle of the Attorney/Client Relationship

Celesq® AttorneysEd Center
www.celesq.com

5255 North Federal Highway, Suite 310, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

MODERATOR

Dr. Sharon Meit Abrahams
sharon@legaltalentadvisors.com

Dr. Sharon Meit Abrahams is a legal talent development expert helping lawyers improve their productivity and profitability through skill assessments, coaching, and interactive workshops. Dr. Abrahams has three books published by the American Bar Association and over 100 articles related to professional and business development in the legal profession.

Dr. Abrahams has over twenty-five years of experience in client relationship building, business development techniques, communication skills, and management/leadership development training. She has conducted over 200 seminars on a wide variety of topics for esteemed audiences at the ABA, ALA, NALP, local bar associations, Harvard, Yale, Cornell, Northwestern, University of Virginia, University of Chicago and Duke Law Schools as well as others.

She was appointed to the Professional Development Committee of the Law Practice Division of the ABA and served as the chair of the Professional Development Advisory Committee of the Association of Legal Administrators. She gives back to the community by conducting workshops gratis for 501(c)(3) organizations across the country.

SPEAKERS

Jan L. Jacobowitz
jan@jacobowitzlaw.com

Jan L. Jacobowitz is a legal ethics, social media, and technology expert who is the founder and owner of Legal Ethics Advisor. For over a decade, she was the Director of the Professional Responsibility and Ethics Program (PREP) at the University of Miami's School of Law. Under Jan's direction, PREP was a 2012 recipient of the ABA's E Smythe Gambrell Award---the leading national award for a professionalism program.

Jan provides legal ethics consulting, opinion letters, and CLE training to law firms and legal organizations. She also serves as a legal ethics expert in litigation matters. Recently, she has been involved in cases involving issues such as attorney fees, conflicts of interest, and the unauthorized practice of law.

She is the immediate Past President of the Association of Professional Responsibility Lawyers (APRL) and the co-chair of its Future of Lawyering Committee (FOL). As a co-chair of FOL, Jan participates in the ongoing national conversation concerning rethinking attorney regulation to address issues of access to legal services, the unauthorized

practice of law, and lawyers partnering with nonlawyers.

Jan is the co-author of the book, Legal Ethics And Social Media, A Practitioner's Handbook, and is among the first law school faculty throughout the country to teach Social Media and the Law.

Jan served as one of five members of the Miami-Dade Commission on Ethics and the Public Trust from 2018-2020. She was the Vice Chairman of Broward County's Committee on Oversight of the Inspector General from 2011 until May 2018.

Jan has presented at hundreds of Ethics CLE Seminars and has been a featured speaker on topics such as Social Media and Advertising, Lawyer's First Amendment Rights, Cultural Awareness Cybersecurity, Mindful Ethics, Litigation Funding, eDiscovery, Attorney Fees, and Artificial Intelligence.

Prior to devoting herself to legal education and legal ethics consulting, Jan practiced law for over twenty years. She began her career as a Legal Aid attorney in the District of Columbia; prosecuted Nazi war criminals at the Office of Special Investigations of the U.S. Department of Justice; and was in private practice with general practice and commercial litigation firms in Washington and Miami.

Jan has a J.D. from George Washington University and a B.S. in Speech from Northwestern University. She is an active member of the Florida Bar, the D.C. Bar and the California Bar. She is also a certified civil court mediator.

Lucian T. Pera
lucian.pera@arlaw.com

Lucian T. Pera is a partner with the Memphis, Tennessee, office of Adams and Reese LLP. His practice includes civil trial work, including commercial litigation and media law, and he counsels and represents lawyers, law firms, and others on questions of legal ethics and the professional responsibility of lawyers. A Memphis native, he is a graduate of Princeton University and Vanderbilt University School of Law and served as a law clerk for U.S. Court of Appeals for the Sixth Circuit Harry W. Wellford. Pera joined Adams and Reese in 2006 to help open the firm's Memphis office, after practicing law for 20 years with Armstrong Allen, PLLC.

Pera has served as president of the Association of Professional Responsibility Lawyers (APRL), the national membership organization of lawyers who work in the legal ethics arena. He has chaired and served as a member of the editorial board of the ABA/BNA Lawyers' Manual on Professional Conduct. He has chaired ethics committees for the ABA Section of Business Law and the Media Law Resource Center Defense Counsel Section. He recently completed a three-year term as chair of the governing board of the ABA Center for Professional Responsibility. He currently serves as President of the Tennessee Coalition for Open Government.

He is a member of the American Law Institute, the American Bar Foundation, and is recognized in The Best Lawyers in America in the areas of First Amendment Law, Ethics and Professional Responsibility Law, Commercial Litigation, Health Care Law, and Legal Malpractice Law.

Pera is a former American Bar Association Treasurer and has served on the ABA Board of Governors and Executive Committee. With the exception of three years in the late 1990s, he has been a member of the ABA House of Delegates since 1991. He is also a past President of the Tennessee Bar Association.

Social Media in the Lifecycle of an Attorney-Client Relationship

Social media has become an integral part of our society. The Pew Research Center reports that approximately 70% of the adult population uses social media, and it even impacts the lives of those who elect not to engage.

Lawyers' clients are awash in social media, so it is no surprise that every stage of the life cycle of an attorney-client relationship may involve a lawyer's need not only to explore the social media terrain, but also to understand both the benefits and dangerous landmines that await the uninformed.

Join our discussion with two seasoned legal ethics lawyers to explore the both the necessity of employing social media and the potential ethical perils of lawyers on social media. Topics include the use of social media in advertising; investigating all aspects of a case from a potential client's claim to discovering information about the opposing parties, witnesses, jurors, and judges; and finally, responding to that unwelcome negative review.

CLE OUTLINE

Social Media in the Lifecycle of an Attorney-Client Relationship

I. Ethical Implications of Advising Clients About Social Media

- Analysis of Model Rules of Professional Conduct

Rule 1.1 Competence
Rule 1.3 Diligence
Rule 1.4 Communications
Rule 1.6 Confidentiality of Information

Rule 3.1 Meritorious Claims and Contentions

- Relevant Ethics Advisory Opinions
  - Fla. Bar Ethics Op. 14-1
  - Pa. Bar Ass'n, Formal Op. 2014-300 (2014)
  - D.C. Bar Ethics Opinion 371 (2016)
  - New York Cty. Law. Ass'n, Ethics Op. 745 (2013)
  - Wash. St. B. Ass'n, Advisory Op. 2014-02 (2014)
  - B. Ass'n of San Francisco, Ethics Op. 2014-1 (2014)
  - Bar Ass'n of Nassau Cty. Comm. on Prof'l. Ethics, Op. No. 2016-01 (2016)

- Related Resources:
    - Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U. MIAMI L. REV. 445, 469-476 (2014)
    - Jan L. Jacobowitz and John G. Browning, Legal Ethics and Social Media: A Practitioners Guide American Bar Association (July 2017) (Citing state ethics advisory opinions throughout the country.)

II. Ethical Implications and Model Rules Governing Investigating Opposing Parties, Witnesses, and Jurors on Social Media

- Analysis of Model Rules of Professional Conduct

Rule 1.1	Competence
Rule 1.3	Diligence
Rule 1.4	Communications
Rule 1.6	Confidentiality of Information
Rule 3.1	Meritorious Claims and Contentions
Rule 3.2	Expediting Litigation
Rule 3.3	Candor toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 4.1	Truthfulness in Statements to Others
Rule 4.2	Communication with Person Represented by Counsel
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons
Rule 5.1	Responsibilities of a Partner or Supervisory Lawyer
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistance
Rule 8.4	Misconduct

- **Related Resource:**

    Jan L. Jacobowitz and John G. Browning, Legal Ethics and Social Media: A Practitioners Guide American Bar Association (July 2017) (Citing state ethics advisory opinions throughout the country.)

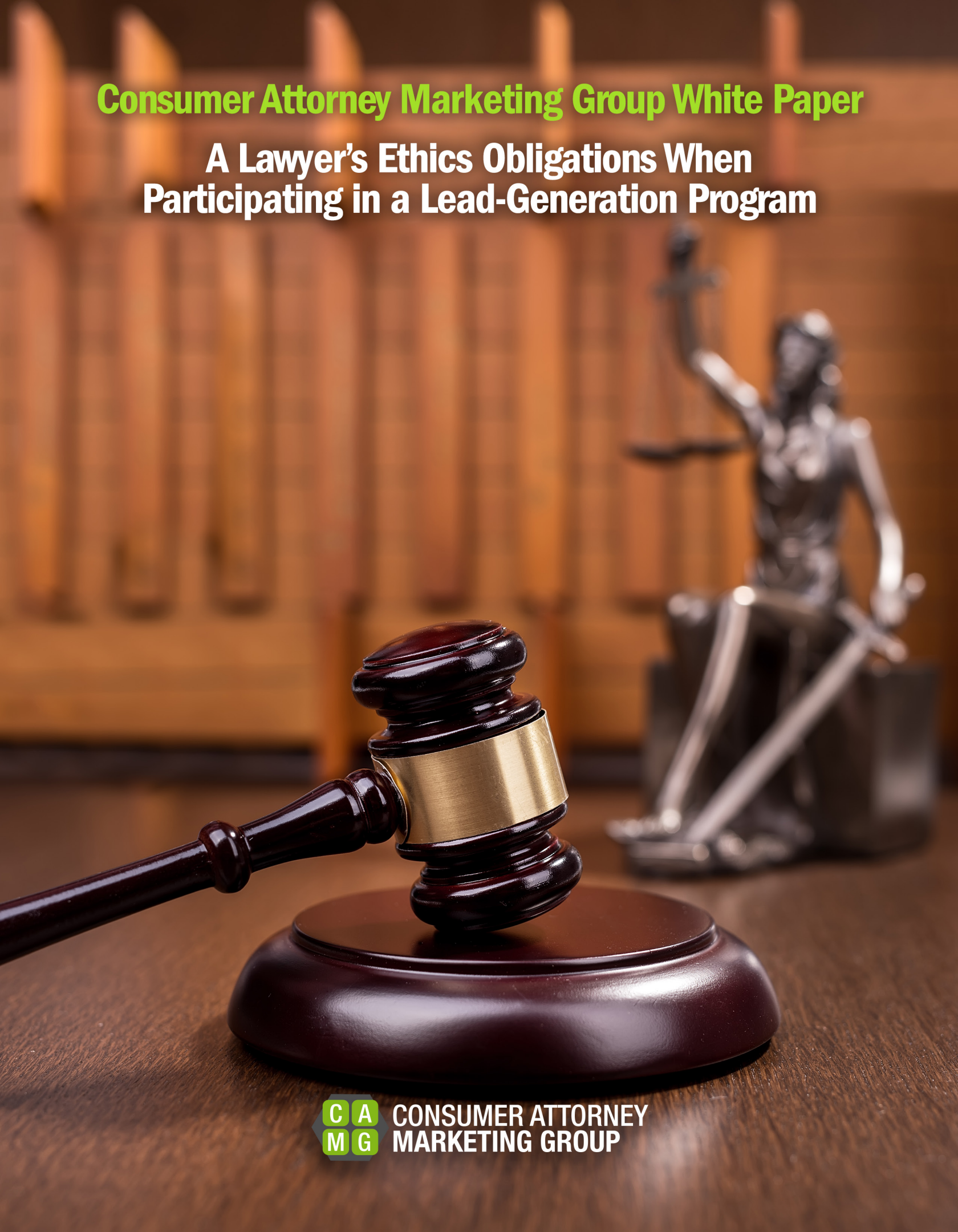
III. Ethical Implications and Model Rules Governing Social Media Advertising, Blogging, and Responding to Negative Online Reviews

- Analysis of Model Rules of Professional Conduct

Rule 1.1	Competence
Rule 1.3	Diligence
Rule 1.4	Communications
Rule 1.6	Confidentiality of Information
Rule 7.1	Communication Concerning a Lawyer's Services
Rule 7.2	Communications Concerning a Lawyer's Services: Specific Rules
Rule 7.3	Solicitation of Clients
Rule 8.4	Misconduct

Related Resources:

- Lucien T. Pera, *Responding Intelligently to Negative Online Reviews*, ABA Law Practice Magazine (May/June 2020)
- Jan L. Jacobowitz and John G. Browning, Legal Ethics and Social Media: A Practitioners Guide American Bar Association (July 2017) (Citing state ethics advisory opinions throughout the country.)
- Debra L. Bruce, *How Lawyers Can Handle Bad Reviews and Complaints on Social Media*, 75 Tex. D.J. 402, 403 (May 2012)
- Laurel Rigertas, *How do You Rate Your Lawyer? Lawyers' Responses to Online Reviews of Their Services*; 4 St. Mary's J. Legal Mal. & Ethics 242 (2014)
- Cassandra Burke Robertson, *Online Reputation Management in Attorney Regulation*, 29 Geo. J. Legal Ethics 97 (2016)



Consumer Attorney Marketing Group White Paper

A Lawyer's Ethics Obligations When Participating in a Lead-Generation Program

CAMG CONSUMER ATTORNEY MARKETING GROUP

A White Paper on A Lawyer's Ethics Obligations When Participating in a Lead-Generation Program

William Hornsby, Peter Jarvis and Lucian Pera*
September 24, 2019

See the State Ethics Rules regarding lead-generation for every state: camginc.com/state-rules/

Abstract

This memo addresses some of the issues or questions that a prudent lawyer should consider before participating in a particular type of lead-generating model. In this model, lawyers or firms (referred to for simplicity as "lawyers") contract with a lead-generating entity to accept leads that result from the advertisements of the lead generator. The advertising is usually done on television or the Internet, including through social media, and is generally done under the brand name of the lead-generator and not the lawyers. In this model, participating lawyers often sign up to receive leads that are generated from a particular geographic area (such as a zip code or area code), from a particular field of practice (such as mortgage foreclosures, bankruptcies or mass torts), or from a combination of geographic areas and fields of practice.

This memo highlights specific areas of potential ethical concern. We caution, however, that there may also be other concerns. In addition, the applicable rules, applicable statutes and applicable interpretations of rules and statutes can vary from jurisdiction to jurisdiction. Consequently, the information provided in this memo presents a starting point rather than an end point of analysis. We also note that the information is current as of the date of this memo, but subject to change as courts and legislatures amend policies.

As you will see, these ethical concerns stem primarily from the fact that lawyers who market their services with or through the help of others may themselves be at disciplinary risk if the actions taken by others on their behalf fail to meet the requirements for what lawyers may do for themselves. In other words, "I hired what I thought was a reputable lead generator" will not be a complete defense if, in fact, the conduct of the lead generator causes the lawyer to fall short of what applicable statutes and rules of professional conduct require. One overriding concern for any lawyer participating in this kind of venture is that the lawyer will likely be found personally responsible for compliance with the ethics rules of the lawyer's jurisdiction, including all aspects of advertising and client-contact activity, from ad content to contact with prospective clients, even if the lawyer has hired a separate lead-generating service. That need for compliance, and the personal accountability of the participating lawyer, drives virtually all the ethics concerns discussed here.

*See author bios at the end of this memo

Issue #1: Does the lead generator recommend the services of the participating lawyers?

The Rules of Professional Conduct generally allow lawyers to pay the reasonable costs of advertising. There is a difference, however, between advertisements in which lawyers speak about their own abilities on the one hand and advertisements in which someone other than a lawyer speaks about the particular suitability of lawyers to handle specific kinds of tasks. Group advertisements as a category are certainly ethically permissible. When, however, a communication that looks at first glance like a group advertisement of multiple firms goes too far in the direction of recommending specific lawyers for specific assignments or praising or complimenting individual lawyers or firms for their special skills or accomplishments, that communication may well lose its protection as a permissible group advertisement and instead be considered to be an impermissible for-profit lawyer referral service. Almost every state prohibits a lawyer from paying to participate in for-profit lawyer referral services or regulates those services fairly heavily.

Where this line is crossed may vary from jurisdiction to jurisdiction. In our view, however, the line would be crossed fairly clearly by statements including, but not limited to, "We have hand-picked these lawyers for you" or "These are the right lawyers for your case" or "You won't find better lawyers anywhere."

Issue #2: Does the lead generator advertise in any way that is false or misleading?

Every state prohibits lawyer ads that are false or misleading. However, all states do not agree on what constitutes a misleading communication. The American Bar Association amended Model Rule 7.1 on this issue in 2002. That amended rule states:

> *A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.*

About half the states have adopted this rule. Most of the other states have retained the older version, which is more restrictive. The older version prohibits a lawyer from advertising in a way that creates "unjustified expectations" of an outcome or makes "unsubstantiated comparisons" with other lawyers. "We can help" is an example of a communication that, when said by or on behalf of a lawyer may be thought by some bar regulators to create an unjustified expectation about what a lawyer can do since it is not always clear that a lawyer can in fact help. A more likely target for bar regulators is found in the use of superlatives (such as "best" or "most experienced") and secondarily in terms that while not superlatives nonetheless suggest a relatively high place in any ranking ordering system (such as "highly experienced for someone newly out of law school).

Details about misleading advertisements are set out in the full memo. Lawyers should satisfy themselves that their lead generators' ads are not likely to be deemed false or misleading in their states, and need to be fully aware of any changes in their ads that might raise questions about whether they are true and non-misleading..

Issue #3: Does the lead generator include all disclaimers and disclosures required by the marketing rules of the participating lawyer's jurisdiction?

Most states have additional rules that go beyond the "truthful and not misleading requirement and that contain content limitations or require that disclaimers or other express language be added to lawyer marketing materials in certain contexts.

These may include, for example, required content pertaining to flat or contingent fees, limits on the portrayal of lawyers and clients by actors and limits on the representations of prior results that have been achieved. Many of the specific rules are set out in the full memo below. Since the rules of professional conduct require it, lawyers must satisfy themselves that their lead generators' ads meet all the requirements in each state in which a lawyer in the firm practices and hopes to obtain leads.

Issue #4: Does the lead generator meet transparency requirements set out by the state rules?

Most states have a rule requiring advertisements to identify a lawyer who is responsible for the communication. For example, ABA Model Rule 7.2(d) requires advertisements to include the name and contact information or law firm responsible for the content of the rule. This rule is intended not only to protect potential clients but also to assist bar disciplinarians in knowing whom to investigate or hold responsible in the event of a problem.

Some states go further and require advertisements to identify specific lawyers who will provide specific advertised services. A few states also impose limitations specifically regarding group advertisements. These rules impose hurdles that lawyers will want to be sure their lead generators meet.

A few states include specific requirements that if a lawyer offers to represent clients under specific economic terms, the lawyer must continue to make those terms available to new clients for a stated period of time after the ad ceases to run. It is likely that a lawyer who fails to honor terms set out in an ad for a reasonable time after the ad runs violates the ban against misleading statements in every jurisdiction.

Issue #5: Does the lead generator comply with the state operational requirements?

In its 2002 revisions, the ABA Model Rules eliminated the obligation of lawyers to retain advertisements. However, quite a number of states continue to require a lawyer to retain copies of their ads if not also a record of the use of each ad. The time period for the retention appears to vary from two to six years from the last time it is distributed.

Lawyers who participate in lead-generation programs should be certain they have the ability to archive the program's communications and their distribution or, at a minimum, that they can rely on their lead generators to do so.

In addition, some states require ads to be filed with the jurisdiction's regulator. Some of these states do not routinely review these materials but do retain them in the event of future disciplinary complaints.

Florida, Louisiana, Nevada and Texas, however, presently screen filed ads for compliance with their rules. Lawyers who participate in lead-generation programs should be certain those programs comply with the filing and screening requirements of their states.

Issue #6: Are payments lawyers make to a lead generator compliant with the state rules?

While a lawyer can obviously pay to advertise, that payment must be a reasonable one, according to ABA Model Rule 7.2 and the corresponding rules of the vast majority of states. Also, unlike a non-profit referral service, lawyers generally cannot share a portion of their fees with a lead generator. Some states have gone farther and concluded that fees lawyers pay to the service must be flat or fixed fees and cannot be predicated in any way on the results of the advertising.

As a general proposition, the safest approach is likely to be flat fees which are typical of those paid by others—perhaps with some increase in price if the quality of leads from some lead generators exceeds the quality of leads from others. It is generally a violation of the rules, however, to make the amount paid dependent on whether a lead results in an attorney-client relationship, let alone on the kind of relationship that results or the amount of fee received.

Issue #7: What else should lawyers consider?

We believe it will be best for all concerned if the lead generator is a free-standing and independent business in which the lawyers who use it have no interest and that there be no other economic ties between the two. Even when the lead generator is a free-standing and independent business, however, we believe it is very much in the interest of the lawyers that they make sure that the lead generator is not using the information being gathered as a part of the lead generating process for any purpose other than the stated lead generating activities.

If the lead generator were doing so, that could easily constitute a form of deception in which the lawyers could be complicit. Alternatively, it could be said that the lawyers owe a duty of confidentiality to the prospective clients who may contact them through the lead generating service and that this duty would be violated if other uses were made of the information.

This last point also raises one other and further consideration. Assuming, as should be the case, that the lead generator is not engaged in any other activity with the information that is being gathered, the lawyers will still want to make sure that confidentiality of potential client information is protected.

Resources

Under the guidance of William E. Hornsby, Jr. Consumer Attorney Marketing Group has created a convenient resource for attorneys to easily access the advertising rules of all 50 states.

To find the rules for your state and/or any states in which you plan to advertise, access the link below.

State Ethics Rules

A Lawyer's Ethics Obligations When Participating in a Lead-Generation Program

Businesses known as lead generators have emerged in the legal ecosystem in a variety of formats, ranging from matching services, referral services, bidding sites, and deal-of-the-day promotions. The analysis provided in this memo addresses the model in which an entity advertises, primarily on television and the Internet, including social media, under its own brand name and often does not include the names of the participating lawyers or firms that have contracted to receive the leads. Prior to generating referrals or leads, the lead generator identifies and contracts with lawyers who are interested in receiving those leads. In this model, once a prospective client responds to an advertisement, the lead generator then routes that prospective client to a participating lawyer or firm and that lawyer or firm then pays a fee for each of those leads. Lawyers may sign up for a geographic territory, such as a zip code or area code, or a field of practice, such as mortgage foreclosures, bankruptcies or mass torts. Essentially, the lawyer is outsourcing this marketing activity to the lead-generating entity, which serves as an agent of the lawyer, much like the outsourcing of other legal service functions.

This memo does not address issues that may arise in other types of lead-generating models, such as one where the lead generator obtains leads and markets them to lawyers who are not under any existing agreement to supply any particular lead generated to any particular lawyer.

Before examining specific issues, we note a series of predicates to this memo. First, one overriding concern for any lawyer participating in this kind of venture is that the lawyer will likely be found personally responsible for compliance with the ethics rules of the lawyer's jurisdiction, including all aspects of advertising and client-contact activity, from ad content to contact with prospective clients, even if the lawyer has hired a separate lead-generating service.

That need for compliance, and the personal accountability of the participating lawyer, drives virtually all the ethics concerns discussed here.

Second, we frequently refer to the ABA Model Rules of Professional Conduct in this memo. Note, however, that lawyers must comply with the state rules governing their activities. Those rules are often based on the ABA Model Rules, but do vary from one jurisdiction to another, sometimes in significant ways.

Next, we discuss ethics opinions from various jurisdictions throughout this memo. Ethics opinions apply the rules to specific circumstances and generally come to conclusions about the propriety of the lawyer's conduct under those circumstances. With few exceptions, ethics rules provide guidance, but are not binding and lawyers will need to make their own decisions about their conduct. On the other hand, lawyers can glean direction from the ethics opinions of jurisdictions where the lawyer is not admitted if that jurisdiction has rules identical or similar to those of the lawyer's jurisdiction.

In addition, we stress that ethics rules and the opinions interpreting them, as well as legislation governing lawyer advertising change with some frequency. The information provided in this memo is accurate, to the best of our beliefs, as of the date of the memo, but not be accurate when states amend their rules or adopt subsequent legislation.

Therefore, notwithstanding the focus of this memo, lawyers are encouraged to conduct their own due diligence regarding ethical compliance when considering participation in any lead-generating model.

[1]See https://www.isba.org/ibj/2016/04/avvoandtheethicsofleadgeneration and https://www.attorneyatwork.com/ethics-lead-generation-services/

[2]Note that the District of Columbia and Puerto Rico also have ethics rules.

We stress that while lawyers who contemplate participating in a lead-generation program must determine for themselves whether the program is in compliance with their state rules, they must also consider whether they have the ability to require the program to come into compliance if the program or its messaging does not meet the state rules.

Lawyers can be caught in a Catch-22 situation if the terms of participation with a program impose a duty on the lawyer to meet his or her ethical obligations, but do not enable the lawyer to amend the operations or communications in a way that is compliant.

[3]Comment 5 of Rule 7.2 of the ABA Model Rules for Professional Conduct indicates that a lawyer may pay for leads as long as the lawyer follows the ethics rules.

In particular, a lawyer may not pay lead generators that recommend the participating lawyers' services or that communicate the services in ways that are false or misleading.

In addition, the participating lawyers have a duty to supervise the conduct of the lead-generating entity and have a duty to avoid violating the rules through the acts of the lead generator. While the ethics rules do not directly govern lead generators, if the program does not comply with the rules, the participating lawyers are subject to disciplinary action in their states. While many states have not adopted Comment 5, it seems likely those states would come to the same conclusion about the propriety of a lawyer's participation with a lead-generating program as described here.

This memo discusses the following issues:

- Does the lead generator recommend the services of the participating lawyers?
- Does the lead generator advertise in ways that are false or misleading?
- Does the lead generator provide all disclaimers/disclosures and content requirements set out in the state rules?
- Does the lead generator meet transparency requirements set out by the state rules?
- Does the lead generator comply with the operational obligations, such as filing and screening requirements, set out by some state rules?
- Are payments the lawyer makes to the program compliant with the state rules?

[3]See Comment 5 to Rule 7.2 of the ABA Model Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising/comment_on_rule_7_2/

[4]See Rule 8.4(a) of the ABA Model Rules of Professional Conduct, stating that a lawyer may not violate the rules through the acts of another. See /https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/

I

Does the lead generator recommend the services of participating lawyers?

ABA Model Rule 7.2(b) is in place either verbatim or with slight modifications in nearly every state. The rule prohibits a lawyer from giving anyone anything of value for recommending the lawyer's services, but creates exceptions for payments for advertising and non-profit or state-qualified lawyer referral services. The rule implicitly prohibits a lawyer from paying to participate in a for-profit lawyer referral service that has not been approved by the state.

Obviously, it is important for a for-profit lead-generating model to avoid being deemed a referral service under the rules of the vast majority of states. Comment 2 to ABA Model Rule 7.2 and a series of ethics opinions have centered this determination on whether the model recommends the participating lawyers to the prospective clients. The Comment states in part, "A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities." On the other hand, if a delivery model does not make a recommendation as set out here, but instead makes a random or arbitrary designation among the participating lawyers or leaves that decision to the potential client, that service would most likely not be deemed a referral service.

North Carolina State Bar 2004 Formal Ethics Opinion 1 indicates that a group advertising model gives the prospective client the choice of participating lawyers and states, "Unlike the passive recipient of a referral from a lawyer referral service, a user of the company's website must evaluate the information and offers he receives from potentially suitable lawyers and decide for himself which lawyer to contact. Thus, the potential harm to the consumer of a pure lawyer referral service is avoided because the company does not decide which lawyer is right for the client."

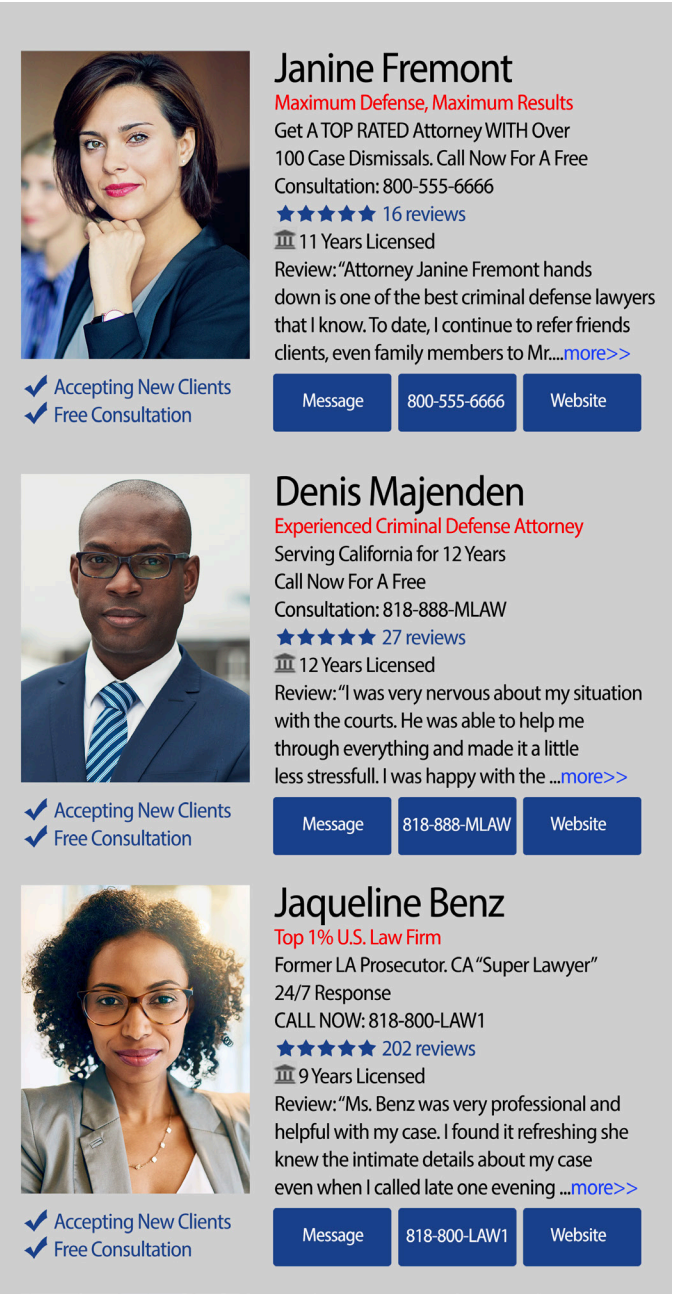
Maine Opinion 174 (2000) examines a slightly different model but comes to the same conclusion on this issue. It states, in part, "We note that WebSite does not recommend any specific lawyer to a User. Rather, it provides the User with a list of lawyers who do work in the area of the law of interest to the User, and who are in geographic proximity to the User… The User is not 'steered' by WebSite to any particular lawyer, but makes his or her own decision."

[5]See https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising/
[6]Note that very few states have a mechanism for the approval of for-profit lawyer referral services.

The Bar Association of Nassau County Opinion 01-4 similarly draws the distinction between an advertising model and a referral service by noting "the AmeriCounsel user chooses the attorney from among those who advertise on AmeriCounsel's website. AmeriCounsel does not influence or control that choice." Consequently, this model would not be an impermissible referral service.

Other state ethics opinions assess the dichotomy between lawyer referral services and advertising models and rely on this issue of whether there is a recommendation or endorsement. Ohio Ethics Op. 2001-02 indicates that a group advertisement provides ministerial functions while lawyer referral services go beyond ministerial functions of placing the lawyer's information into the public view. Texas Ethics Op. 573 concludes that an intermediary is not a referral service unless it selects or recommends lawyers. Rhode Island Advisory Panel Op. 2005-01 concludes that a service was not a lawyer referral service because the intermediary did not "recommend, refer or electronically direct consumers."

Therefore, a lead-generating model that enables a prospective client to make a decision about which among its participating lawyers to engage is likely to be deemed an acceptable group advertising vehicle. Likewise, a model that passes a lead on to a particular lawyer without any sort of central decision-making or discretion – for example, as determined by zip code – is considered group advertising rather than a lawyer-referral service.



On the other hand, a model that steers a prospective client to a specific lawyer or firm, through some other method such as the discretion of the lead-generating service operator, faces the distinct possibility of being deemed a lawyer referral service, which if unapproved or operated on a for-profit basis would be impermissible.

[7]See also NY State Bar Ethics Opinion 1131 (8-8-17) at http://www.nysba.org/EthicsOpinion1131/;/
Washington State Bar Advisory Opinion 2014-01, at http://mcle.mywsba.org/IO/print.aspx?ID=1680 and State Bar of Arizona Ethics Opinion 11-02 (10-2011).

II

Are the messages from lead generators false or misleading?

Every state prohibits communications that are false or misleading. However, states do not agree on what constitutes a misleading communication. The American Bar Association amended its Model Rule on this issue (MR 7.1) in 2002. That amended rule states:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Twenty-one states have adopted this rule.[8]

The rule has three provisions. The first is the prohibition of false communications. Communications for legal services rarely fail to meet that burden. However, a representation that services are available "nationwide," for example, could be false if, in fact, they are not available in every state.

The second provision is the prohibition of misleading communications. This is explained below when viewing MR 7.1 as it existed prior to 2002 and is still in place in several states.

The third part is the most subtle obligation, prohibiting a communication that omits something that causes the statement to be misleading. Three examples illustrate this.

First, an ad that states to the effect "no recovery, no fee" is considered misleading when the firm in fact assesses the client litigation expenses associated with the representation in the event there is no recovery. The notion here is that clients do not generally discern the distinction between fees and costs and simply view them together as financial obligations.

A second example is an advertisement that omits the lawyer's jurisdiction(s) of admission. Even though a firm may be competent to provide legal services under various arrangements in states in which the members are not admitted, some ethics opinions concluded that an ad must identify the states in which the firm's members are admitted and the omission of this identification makes the communication misleading. It is possible that advertisements from a lead-generating service would violate this part of Rule 7.1 if the ads do not indicate the states of admission for the participating lawyers.

If a lawyer participates in a group-advertising model where the lawyer or firm has geographic exclusivity -- for example, the lawyers is provided all incoming prospective client leads from a particular zip code or area code -- ethics opinions have concluded that the program's advertisements must disclose this information about the model. Arizona Opinion 2011-02, New Jersey Opinion 43, and North Carolina Opinion 2013-10 indicate that the ads must inform viewers that the participating lawyers are selected based on a geographic area, the program does not assess the prospective client's legal needs, and that the program does not vouch for the qualifications of the participating lawyers. In those jurisdictions, if this information is omitted, the advertisement is considered misleading.

[8] See Rule 7.1 of the following states: AZ, CA, CT, DE, IL, IA, KY, ME, MA, NE, NM, OH, OK, OR, PA, TN, WA, VT, VA, WV, and WY.

The rules of several states continue to follow, either verbatim or in a substantially similar form, ABA Model Rule 7.1 as the rule existed prior to amendments made by the ABA in 2002. Under this standard, communications are false or misleading if they (1) include a material misrepresentation, or (2) omit information that is necessary for the communication not to be misleading, or (3) create an "unjustified expectation" about the outcome of a case, or (4) state or imply that the lawyer or firm can achieve results through violations of the rules, or (5) communicate "unsubstantiated comparisons" with other lawyers.

The creation of unjustified expectations about outcomes and making unsubstantiated comparisons with other lawyers can be the most challenging of these prohibitions. Some jurisdictions take the position that an ad may create unjustified expectations if they include representations of success in prior cases, for example, "We can help." Prospective clients may be led to believe that they have a meritorious claim that will result in a financial benefit, when that will not be the case for everyone.

Likewise, some jurisdictions take the position that unsubstantiated comparisons involve claims that are not quantified, e.g. "superior representation" or "high expertise." Even truthful representations as benign as "experienced attorneys," without any quantification, can be deemed a violation of this rule.

Seventeen states have maintained the older version of ABA Model Rule 7.1, governing false or misleading communications.[9]

Other states include the five restrictions in the older ABA rule and add to it. For example, these rules prohibit or limit dramatizations or the use of models that portray lawyers or clients. These limitations are set out below under the content analysis. Finally, a few states, e.g. New York, are simply different from the ABA model in this regard.

In order to assure compliance with the rules of the states of all participating lawyers, advertisements, including websites, by lead generators should comply with the most restrictive state rules governing false or misleading communications of its participating lawyers.

[9] AL, AK, AR, CO, HI, ID, KS, MD, MI, MN, MS, NV, NH, NC, ND, UT, and WI.

III

Do the advertisements of the lead generator include all disclaimers and disclosures required by the state rules, as well as compliance with restrictions on and requirements of the content of the advertisements?

In addition to the prohibitions of false or misleading communications, states have additional rules governing advertising, which impose additional limitations to the communications of both lawyers and their agents, including lead generators. These issues include ubiquitous disclaimers, as well as disclaimers that are triggered by the specific content of an ad, and limits on portrayals of lawyers and clients by actors and dramatizations.

Ubiquitous Disclaimers

A few states require disclaimers regardless of the content of the ad. These are ubiquitous disclaimers. They include the following:

Alabama requires advertisements to state: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers." The statement must be clearly legible or audible. The rule is ambiguous as to whether a TV commercial must include an audible disclaimer or whether a legible written disclaimer complies.

Missouri requires advertisements to state: "The choice of a lawyer is an important decision and should not be based on advertisements alone." The statement must be conspicuous.

Mississippi requires advertisements to state: "FREE BACKGROUND INFORMATION AVAILABLE UPON REQUEST." The statement must be prominently displayed.

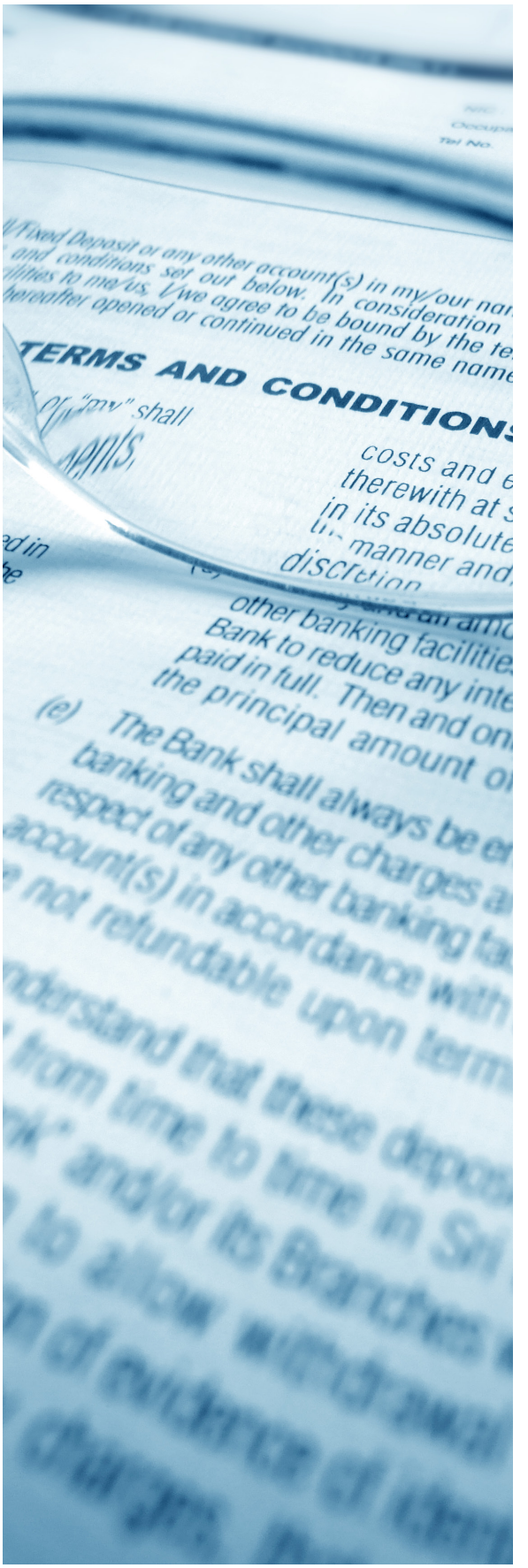
New York requires websites advertising legal services to be labeled "Attorney Advertising."

A recent Tennessee statute requires that the beginning of advertisements be labeled as "a paid advertisement for legal services."

Similarly, Texas enacted a statute that requires television commercials to begin with the statement, "This is a paid advertisement for legal services". The statement must be both visual and verbal. The visual portion must be clear, conspicuous and presented for a sufficient time for viewers to read it. Verbal disclaimers must be audible, intelligible and presented with equal prominence to other parts of the commercial.

Triggered Disclaimers

Some states obligate firms to include disclaimers if the content of the ad addresses certain information, including for example, mention of the availability of contingency fees, the use of testimonials and endorsements, and references to prior successes.



Contingency fees

Several states require firms that advertise contingency fees to inform potential clients whether they will be responsible for costs or expenses.[10]

South Carolina, South Dakota and Texas require the lawyer to indicate whether fees will be calculated before or after costs are deducted.

Georgia requires specific disclaimers. One states "Contingent attorneys' fees refers only to those fees charged by attorneys for their legal services. Such fees are not permitted in all types of cases. Court costs and other additional expenses of legal action usually must be paid by the client." When the ad includes language to the effect of "no fee unless you win or collect," the ad must state, "No fee unless you win or collect" [or insert the similar language used in the communication] refers only to fees charged by the attorney. Court costs and other additional expenses of legal action usually must be paid by the client. Contingent fees are not permitted in all types of cases."

Nevada requires the following disclaimer if the client may be liable for the opposing parties' fees and costs: "You may have to pay the opposing parties' attorney fees and costs in the event of a loss."

Endorsements and Testimonials

Some states impose limitations on endorsements and testimonials.

Arkansas prohibits them.

Louisiana, New York, Pennsylvania, South Carolina, and Wisconsin require disclosures if endorsements or testimonials are paid.

[10] AZ, CT, MD, MO, MT, PA, RI and UT

Rhode Island elaborates on this by requiring that ads that contain any testimonial about, or endorsement of, the lawyer must identify the fact that it is a testimonial or endorsement, and if payment for the testimonial or endorsement has been made, that fact must also be disclosed. If an actual client is not making the testimonial or endorsement, that fact must also be identified. If the testimonial or endorsement appears in a televised advertisement, these disclosures and identifications must appear continuously throughout the advertisement.

South Dakota prohibits ads that contain 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;" or 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; or 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.

Prior Results

Missouri and Montana both require ads that proclaim results obtained on behalf of clients, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts or settlements to also state that "past results afford no guarantee of future results and that every case is different and must be judged on its own merits."

New York requires the disclaimer, "Prior results do not guarantee a similar outcome" when the communication includes outcomes or comparisons.

South Dakota prohibits ads that contain 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.

If an advertisement in Nevada contains any reference to past successes or results obtained, the communicating lawyer or member of the law firm must have served as lead counsel in the matter giving rise to the recovery, or have been primarily responsible for the settlement or verdict. The ad must also contain a disclaimer that past results do not guarantee, warrant, or predict future cases.

Similarly, Texas requires any ad that contains references to past successes or results obtained must meet the following requirements:

(i) the communicating lawyer or member of the law firm served as lead counsel in the matter giving rise to the recovery, or was primarily responsible for the settlement or verdict,
(ii) the amount involved was actually received by the client,
(iii) the reference is accompanied by adequate information regarding the nature of the case or matter and the damages or injuries sustained by the client, and
(iv) if the gross amount received is stated, the attorney's fees and litigation expenses withheld from the amount are stated as well.

Expertise

Illinois requires that any communication using the terms "certified," "specialist," "expert," or similar terms states that the Illinois Supreme Court "does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois."

Portrayals and Dramatizations

Several states have prohibitions or limitations on dramatizations, including the use of stock photos.

Arkansas and New Jersey prohibit dramatizations. New Jersey also prohibits television ads containing drawings, animations, music, or lyrics.

Indiana, Louisiana, Missouri, Montana, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota and Utah require dramatizations be accompanied by disclaimers informing potential clients that the content includes a dramatization, simulation or reenactments. In Rhode Island, if the dramatization or simulated description appears in a television commercial, the fact that it is a dramatization or simulated description must appear continuously throughout the advertisement.

Actors may not be used to portray clients in Arkansas. Actors may not be used to portray clients or lawyers in Pennsylvania and Texas. In Louisiana, non-lawyers may not portray lawyers and, if non-clients portray clients, the ad must include a disclaimer to that effect.

In Arizona, only full-time lawyers in the firm may appear as lawyers in an ad disseminated through electronic media. If the person purports to be the lawyer providing the service, they must provide the service or otherwise indicate they will not provide the services. Similarly, in South Dakota, if a lawyer advertises by electronic media and a person appears in the advertisement purporting to be a lawyer, such person has to be the advertising lawyer or a lawyer employed full-time by the advertising lawyer; and 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.

In Texas, any person who portrays a lawyer whose services or whose firm's services are being advertised, or who narrates an advertisement as if he or she were such a lawyer, shall be one or more of the lawyers whose services are being advertised.

Actors must be identified as such in Arkansas, Montana, Nevada, Rhode Island and Utah. Note that Nevada requires a disclaimer to appear for the duration of time in which the actor appears.

Georgia requires that "[A]ny advertisement that includes a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of a client by a non-client, or any paid testimonial or endorsement, shall include prominent disclosure of the use of a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, or of a client by a non-client."

Obligation to provide background material

Mississippi and Nevada require lawyers who advertise to have bios available to provide prospective clients upon request.

MS Rule 7.4 (a) provides that each lawyer or law firm that advertises his, her or its availability to provide legal services shall have available in written form for delivery to any potential client:

> (1) A factual statement detailing the background, training and experience of each lawyer or law firm.
> (2) If the lawyer or law firm claims special expertise in the representation of clients in special matters or publicly limits the lawyer's or law firm's practice to special types of cases or clients, the written information shall set forth the factual details of the lawyer's experience, expertise, background, and training in such matters.

Further, any advertisement or written communication shall advise any potential client of the availability of the above information by prominently displaying in all such advertisements and communications the following notice: **FREE BACKGROUND INFORMATION AVAILABLE UPON REQUEST.**

Nevada Rule 1.4(c) is even more specific, detailing the information that is required to be included in a Lawyer's Biographical Data Form and made available to a client or prospective client upon request.

Advertisements for Medical or Pharmaceutical Matters

Tennessee requires that advertisements involving approved medical devices or prescription drugs state, "Do not stop taking a prescribed medication without first consulting with your doctor. Discontinuing a prescribed medication without your doctor's advice can result in injury or death." The ad must also state that the drug or device has been approved unless it has been recalled.

Texas requires television commercials for FDA-approved prescription drugs to state, "Do not stop taking a prescribed medication without first consulting a physician." The statement must be both visual and verbal. The visual portion must be clear, conspicuous and presented for a sufficient time for viewers to read it. Verbal disclaimers must be audible, intelligible and presented with equal prominence to other parts of the commercial.

Again, advertisements by a lead generator must comply with the rules of all of the states in which its participating lawyers provide services.

IV

Do advertisements by a lead generator meet transparency requirements?

State rules and statutes impose a requirement for advertisements to identify a lawyer who is responsible for the communication. These rules and laws assure that potential clients know who may be representing them and assure that the state disciplinary offices know whom to contact when the state pursues disciplinary action because of the ad. Some states go further and require advertisements to identify the lawyer who will be providing the services, while a few states impose limitation specifically regarding group advertisements. These rules may impose difficult hurdles for advertisements by lead generators.

Identification of a lawyer responsible for the ad

Prior to the 2002 revisions, ABA Model Rule 7.2 required advertisements to include the name of at least one lawyer responsible for the content of the ad. This rule does not permit the name of a law firm to substitute for the name of a lawyer. Eleven states continue to have this rule in place.[11]

The ABA rule was revised to permit the name of the firm to substitute for the name of an individual lawyer. Under this rule, the ad also must include the address. Thirty states now have this rule either verbatim or with a slight variation. [12]

The rule was revised again in 2018 to require the name and contact information of a lawyer or the firm instead of the address. Contact information includes a website address, email, telephone number or physical office address. Note, however, that only a few states have adopted this change to date, although several other states are considering it.

A few states have variations on this rule and impose additional obligations.

Arkansas Rule 7.2(d) requires a communication to include the name of a lawyer who is licensed in Arkansas, along with the location of the office of the lawyer or firm in which the lawyer who will perform the services principally practices law.

Connecticut Rule 7.2(e) requires ads to include the name of at least one lawyer admitted in Connecticut who is responsible for the content of the ad. For television advertisements, the name, address and telephone number of a lawyer admitted in Connecticut must be displayed in bold for at least 15 seconds or the duration of the commercial, whichever is less and must be prominent enough to be readable.

Georgia Rule 7.2(c)(1) provides: Any advertisement shall include the name, physical location and telephone number of each lawyer or law firm who paid for the advertisement and who takes full personal responsibility for the advertisement. In disclosing the physical location, the responsible lawyer shall state the full address of the location of the principal bona fide office of each lawyer who is prominently identified pursuant to this paragraph.

[11] AL, GA, HI, KS, LA, MD, MS, MO, NV, SC (with an address), and TX.

[12] AK, AZ, CA, CO, DE, ID, IL, IN, IA, KY, ME, MA (address not required); MN (address not required), MT, NE, NH, NM, NC, ND, OH, OK, OR (contact information instead of address), RI, TN, WA, UT, VT, WV, WI, and WY.

A Texas statute requires a television commercial to identify both visually and verbally either the identity of the lawyer or firm primarily responsible for providing the services or the manner in which a case is referred to a lawyer if the sponsor of the ad is not authorized to provide legal services. The visual portion must be clear, conspicuous and for a sufficient time for viewers to read it. Verbal disclaimers must be audible, intelligible and presented with equal prominence to other parts of the commercial.

Disclosure of Lawyers who will provide the services

A few states require advertisements to disclose the lawyer or the geographic location of the lawyer who will actually perform the services. These include the following:

Arkansas requires communications to disclose the geographic location of the office or offices of the attorney or the firm in which the lawyer or lawyers who actually perform the services advertised principally practice law. Florida requires advertisements to include the name of at least one lawyer, the law firm, or the lawyer directory if the advertisement is for the lawyer directory, responsible for the content of the advertisement; and the city, town, or county of one or more bona fide office locations of the lawyer who will perform the services advertised.

In Pennsylvania and South Carolina, advertisements must disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside the city or town, the county in which the office is located must be disclosed. A Tennessee statute requires advertisements to identify the lawyer or firm that will represent the client or disclose that the matter will be referred to a lawyer or firm if the sponsor of the ad does not represent those who respond to the ad.

Group Advertising Requirements

A few states specifically govern or provide direction on a lawyer's participation in group advertising models, which would include lead-generation models as discussed in this memo.

Section 6155(h)(1) of the California Business and Professions Act states, "Permissible joint advertising, among other things, identifies by name the advertising attorneys or law firms whom the consumer of legal services may select and initiate contact with."

In Texas, when lawyers who are not in the same firm join to advertise, the advertisement must state that the cooperating lawyers pay for the ad, the ad must list the names of all the cooperating lawyers, and the ad must not state or imply that the lawyers have superior skills or special competencies.

New York Ethics Opinion 1131 indicates that a group advertising service needs to include a list of all participating attorneys with the required contact information (name, office address and telephone number) or a list of all participating attorneys who fall within the geographic and practice area parameters that may be set by the potential client, along with contact information.

Texas Rule 7.04(0) states:
A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:
(1) states that the advertisement is paid for by the cooperating lawyers;
(2) names each of the cooperating lawyers;
(3) sets forth conspicuously the special competency requirements required by Rule 7.04(b) of lawyers who advertise in the public media;
(4) does not state or imply that the lawyers participating in the advertising cooperative or venture possess professional superiority, are able to perform services in a superior manner, or possess special competence in any area of law advertised, except that the advertisement may contain the information permitted by Rule 7.04(b)(2); and
(5) does not otherwise violate the Texas Disciplinary Rules of Professional Conduct.

V

Does the lead generator comply with operational obligations?

In the 2002 revisions to its Model Rules, the ABA eliminated the obligation of lawyers to retain advertisements. However, several states continue to require a lawyer to retain a copy of its ads, with a record of their distribution. The time period for retention varies from two to six years from the last time it is distributed. Therefore, lawyers that participate in lead-generation programs should be certain they have the ability to archive the program's communications and their distribution. This can be a challenge when communications run through social media.

In addition, some states require ads to be filed, in which case the state does not review them but merely retains them in the event of any disciplinary complaints. Furthermore, Florida, Louisiana, Nevada and Texas require ads to be filed and screened for compliance with the rules of their states.

The filing requirements are as follows:

Alabama Rule 7.2(b) requires the lawyer to send a copy or recording to the general counsel of the state bar within three days after the ad's dissemination. The filing must also include the "contemplated duration" of the ad and the "identity of the publisher or broadcaster…either within the advertisement or by separate communication."

Connecticut Rule 2-28A requires lawyers to file a copy of the advertisement, a copy of the transcript and a list of where it will appear with the Statewide Grievance Committee. The state may spot-check ads for compliance.

Mississippi Rules 7.2(h) and 7.5 require the lawyer to file with the state bar a copy of the ad or communication in the form to be disseminated; a transcript, if the advertisement is on videotape or audiotape; a statement of when and where the advertisement has been, is, or will be used; and a fee of $25 per submission of advertisements filed before they are disseminated or $150 for advertisements filed after they are disseminated.

New York 7.3(c) requires a copy of a solicitation be filed with the disciplinary office in the judicial grievance committee of the district of the firm's principal office. A solicitation is defined to include an advertisement that targets a group. If the firm has no principal office in New York, it may be appropriate to file in each New York judicial department grievance committee district where the commercials are shown, which may well be all of them.

Rhode Island Rule 7.2(b) requires a videotape of television ads to be sent to the Supreme Court Disciplinary Counsel "prior to or within 48 hours of" the first dissemination. The rule also requires the lawyer to retain copies for two years.

Screening

Note that the following states require ads to be submitted for screening. Each state exempts ads that have limited content. Lawyers participating in lead-generating programs from these states should determine whether the advertisements fall into safe harbor provisions or are filed by the state for screening.

The state screening requirements are as follows:

Florida Rule 4-7.19 requires a lawyer to submit advertisements and written communications for screening for compliance with the rules of The Florida Bar. The filing must be at least 20 days prior to the dissemination of the ad.

The lawyer must file a copy of the ad, a transcript if the ad is on video or audiotape, a statement listing all media in which the ad will appear, the anticipated frequency of use of the ad in each medium, the anticipated time period during which the ad will be used and the name of the lawyer responsible for the content. Each ad requires a fee of $150 for submissions that are filed in a timely basis and $250 for submissions that are not timely.

Louisiana Rule 7.7 requires ads be filed at the time of their dissemination. The commercial, a transcript, a state form and a $175 filing fee must be provided.

Nevada requires ads be filed within 15 days of their dissemination. Commercials can be submitted electronically or on DVD, along with the script.

Texas Rule 7.07(b) requires a lawyer to file ads in the public media with the state bar no later than its first dissemination. The filing must include a copy of the ad in the form in which it appears, such as videotape or print, a statement of when and where the ad has been, is or will be used, an application form and a fee of $75 for each ad.

VI

Are payments made by participating lawyers to lead generators consistent with the state rules of professional conduct?

Comment 5 of ABA Model Rule 7.2 indicates that lawyers that participate in lead-generating programs must comply with the ethics rules that govern the division of fees. This includes Rule 7.2(b), governing the costs of advertising and lawyer referral services, Rule 1.5(e), governing the division of fees between lawyers who are not in the same firm (and not pertinent to the model discussed here) and Rule 5.4(a) governing the division of fees[14] with non-lawyers.

While a lawyer pays to advertise, that payment must be a reasonable one, according to Rule 7.2(b)(1), and, unlike a non-profit referral service, cannot be predicated on the revenue that the advertisement produces for the participating lawyers. Some states have gone farther and concluded that fees lawyers pay to the operating service to participate in the advertising model must be flat or fixed fees and cannot be predicated in any way on the results of the advertising.

Rhode Island Opinion 2000-4 finds a model that charges lawyers a set up fee of $5,000 plus $15,000 for every $100,000 in revenue generated from the referrals to violate its ethics rules.

Nebraska Opinion 95-3 finds a system that charges lawyers a flat fee and guarantees a certain number of responses and then adjusts the fee if the responses vary to violate its rules.

Arizona Opinion 99-06 finds a mechanism that charges participating lawyers based on the number of inquiries referred to them to violate its rules.

While some opinions center on the division of fees, and maintaining fidelity to the client instead of the service, other opinions go further and condemn payments based on the generation of leads or inquiries, which may never even result in the lawyer's representation or revenues.

[14] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising/comment_on_rule_7_2/

VII

Other Considerations

Lawyers must be cautious about their responsibilities to maintain their client's confidences. Confidentiality is a core value of the legal profession and under ABA Model Rule 1.6, a lawyer may not reveal "information related to the representation of the client" without the client's informed consent. "Informed consent" requires the lawyer to explain the material risks involved in a course of conduct. Most states have adopted this rule.

In addition, several states have adopted ABA Model Rule 1.18, which prohibits a lawyer from revealing information in most circumstances that was obtained when a prospective client consults with a lawyer about forming a lawyer-client relationship.

If the lead generator were using information gathered as part of the lead-generating process for any other reason, that could constitute a form of deception in which the lawyers could be complicit. Alternatively, it could be said that the lawyers owe a duty of confidentiality to the prospective clients who may contact them through the lead generating service and that this duty would be violated if other uses were made of the information.

This last point also raises one other and further consideration. Assuming, as should be the case, that the lead generator is not engaged in any other activity with the information that is being gathered, the lawyers will still want to make sure that confidentiality of potential client information is protected.

Conclusion

A lawyer's ethical obligations when seeking clients can be arduous under any circumstance, but are all the more difficult when any part of that function is outsourced to a third-party. This memo has set out critical areas that need to be considered and reconciled when a lawyer anticipates entering into an arrangement with a lead-generating program. Lawyers must always keep in mind that they are responsible for the actions of their agents. Therefore, the programs they participate in must be compliant just as if the lawyer were doing the advertising directly. Lawyers must exercise their own due diligence when considering the application of their state rules and laws.

They must be certain any lead-generating program avoids recommending the lawyer's services, avoids false or misleading communications as set out by the state, includes all applicable disclosure and disclaimer statements, complies with transparency requirements, abides by operational obligations, such as filing and screening requirements, complies with fee and payment arrangements, and properly maintains the confidentiality of clients and prospective clients.

Consumer Attorney Marketing Group

Consumer Attorney Marketing Group (CAMG) is an advertising agency that works exclusively with law firms. CAMG delivers the full spectrum of offline and online media. By applying a response-driven marketing model, CAMG is able to reduce non-productive expenditures to increase ROI.

At the core of CAMG's values is our commitment to ethics, transparency, efficiency, and innovation. We maintain the highest ethical standards in the industry in our marketing and in each of our service divisions.

We saw a need for a trusted resource on the ethics considerations of lead generating programs attorneys could draw from to ensure their marketing efforts are consistent with the ABA Model Rules and state ethics requirements. We worked with legal ethics authorities William Hornsby, Peter Jarvis, and Lucian Pera to create and publish the CAMG White Paper, "A Lawyer's Ethics Obligations When Participating in A Lead-Generation Program."

About the Authors

William E. Hornsby, Jr.

Will Hornsby served as staff counsel at the American Bar Association for 30 years. During that time, he supported a variety of ABA entities dedicated to expanding legal services, including the Commission on Advertising and the Standing Committee on the Delivery of Legal Services. As staff counsel to the Commission on Advertising, he authored the books Marketing and Legal Ethics: The boundaries of promoting legal services and Lawyer Advertising at the Crossroads: Professional Policy Considerations along with over a hundred articles on ethics, technology and the delivery of legal services. He has also been involved in the development of policies and advancement of innovative models to create better access to legal services. In 2018, he left the ABA in order to open a solo practice that uses his skill set to help clients explore their opportunities in ways that are consistent with the various ethics rules governing the practice of law.

Will has served as an adjunct professor at Chicago area law schools beginning in 2000, where he designed and taught courses examining regulatory obligations of innovative legal service models. He has served as a panel chair of the Illinois Attorney Registration and Disciplinary Commission since 2004, where he hears disciplinary complaints, is a fellow of the American Bar Foundation, and serves on the Board of the Chicago-based legal incubator the Justice Entrepreneurs Project. In 2019, Will was the recipient of the ABA Louis M. Brown Award for Lifetime Achievement.

Peter R. Jarvis

Peter is a partner in the Portland, OR, office of Holland & Knight, where he co-chairs the firm's Legal Profession Team. He practices primarily in the area of attorney professional responsibility and risk management where he advises lawyers, law firms, corporate and government legal departments about all aspects of the law governing lawyers.

Peter is past president of the Association of Professional Responsibility Lawyers (APRL), the national membership organization of lawyers working in the arena of legal ethics. He is a frequent speaker at APRL events, the American Bar Association's National Conference on Professional Responsibility, as well as public and in-house continuing legal education seminars and programs.

Peter is a co-author of The Law of Lawyering, one of the country's leading professional responsibility treatises, as well as a co-author or editor of many other articles and publications including The Ethical Oregon Lawyer and the Washington State Bar Deskbook.

Peter has served on many state bar committees including the Oregon State Bar Ad Hoc Committee on Attorney Advertising, the Oregon State Bar Legal Ethics Committee, the Washington State Bar Committee on the Future of the Profession, the Washington State Bar Committee on Professional Ethics, the Washington State Bar Committee to Define the Practice of Law and the Washington State Bar Rules of Professional Conduct Committee. He has drafted multiple state bar ethics opinions, as well as language that has been included in state legal ethic rules.

In 2019, the ABA Center for Professional Responsibility honored Peter with its prestigious Michael Franck Professional Responsibility Award, given annually to an individual whose career commitment in legal ethics demonstrates the best accomplishment of lawyers.

Lucian T. Pera

Lucian is a partner with the Memphis, Tennessee, office of Adams and Reese LLP, where his work includes counseling and representing lawyers, law firms, and others on questions of legal ethics and the professional responsibility of lawyers.

Lucian is a state and national leader in the organized bar. He served as the American Bar Association's Treasurer, on the ABA's Board of Governors and Executive Committee, and in the ABA House of Delegates since 1991. He served as president of the Association of Professional Responsibility Lawyers (APRL), the national membership organization of lawyers who work in the legal ethics arena, and chaired the Editorial Board of the ABA/BNA Lawyers' Manual on Professional Conduct. He has chaired ethics committees for the ABA Section of Business Law, the Media Law Resource Center Defense Counsel Section and the Tennessee Bar Association. He recently completed a three-year term as chair of the governing council of the ABA Center for Professional Responsibility.

At the state level, Lucian is a past President of the Tennessee Bar Association and currently serves as President of the Tennessee Coalition for Open Government.

He is a member of the American Law Institute, and a fellow of the American Bar Foundation. He is recognized in The Best Lawyers in America in the areas of First Amendment Law, Ethics and Professional Responsibility Law, Commercial Litigation, Health Care Law, and Legal Malpractice Law. Lucian is also a prolific author and frequent speaker at legal programs around the country.

Resources

Under the guidance of William E. Hornsby, Jr. Consumer Attorney Marketing Group has created a first-ever resource for attorneys to easily access the advertising rules of all 50 states.

To find the rules for your state and/or any states in which you plan to advertise, access the link below.

State Ethics Rules


CONSUMER ATTORNEY
MARKETING GROUP

7 Ethics Considerations For Lawyers Using Lead Generators

By **Lucian Pera, William Hornsby and Peter Jarvis**

Lucian Pera

William Hornsby

Peter Jarvis

For years now, lawyers have increasingly turned to marketing professionals to help them identify new clients. As a direct result, the business of lead generation for lawyers has emerged.

Of course, marketers have long sold leads to other businesses and professionals; lawyers are just now catching up.

The Old Days Are Gone

In what now seem ancient times, consumer bankruptcy lawyers might buy utility cutoffs — contact information for individuals whose electricity or gas service had been terminated for nonpayment — thinking they were good prospects for direct-mail marketing.

Today's sophisticated marketing pros use straightforward advertisements on television and websites; demographically targeted social media outreach; aggressive retargeting of website visitors; and data-gathering tools such as cookie trackers and web scraping bots to identify prospects, or leads, among consumers who may want help for legal matters such as personal injury claims, student debt relief, debt counseling or bankruptcy.

The leads generated can be very specific — by the precise type of legal help sought, by the consumer's location or by other categories. There's a thriving market for these leads, with numerous national players and other mom-and-pop providers routinely pitching their services to lawyers.

For lawyers looking for new clients, the opportunity can be tempting. Indeed, many lawyers have found successful, and entirely ethical, ways to use lead generation to build or augment their practices.

The Ethics Context for Lawyers

Even though lead generation for lawyers has been around for a while, the ethical and legal requirements for lawyers to safely use these services can be murky, and the formal guidance out there for careful lawyers can be thin.[1]

How does a thoughtful lawyer safely navigate this terrain? That's our topic — identifying what prudent lawyers should do when considering dealing with lead generators.

A Lawyer's Ethical Responsibility

Before turning to specific issues, it's worth noting the overriding principle for a lawyer considering working with a lead generator: The lawyer may well be held responsible for the conduct of that lead generator, as if the lead generator were a direct employee of the lawyer, working in the office next door under the lawyer's direct supervision. That may somewhat overstate the lawyer's risk, but prudent lawyers may well err in this direction.

A few things are clear. The ethics rules in every jurisdiction generally follow the substance of American Bar Association Model Rule of Professional Conduct 5.3, which governs lawyer supervision of "nonlawyers employed or retained by or associated with" the lawyer.

That includes marketing professionals and lead generators. That rule generally requires that the lawyer take "reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

Is the lawyer vicariously liable under the disciplinary rules for conduct by a marketer that does not comply with, for example, each of the lawyer advertising and solicitation rules? Perhaps not, but there is a requirement of at least some supervision.

At the very least, that implies good due diligence on the activities of the lead generator. It almost certainly requires some level of supervision of the lead generator to assure compliance with the lawyer ethics rules.

Can a lawyer avoid some of her supervision obligations if she simply buys leads at arm's length from a lead generator on an occasional basis, without a broader continuing arrangement with the lead generator? Maybe, but there's no good authority out there on this, so prudent lawyers will want to do business only with lead generators they have thoroughly vetted to be comfortable with their professional conduct.

Lawyer Due Diligence

That brings us to the issues lawyers should consider when dealing with lead generators.

1. Is the lead generator "recommending" your services?

In virtually every jurisdiction, the ethics rules broadly prohibit a lawyer from paying anything to anyone "for recommending the lawyer's services."[2] One exception everywhere is that a lawyer may "pay the reasonable costs of advertisements."

Assuming that the lead generator doesn't recommend the lawyer, the ABA model rules do clearly allow lawyers to pay lead generators, but they require compliance with the ethics rules in doing so.[3]

What does "recommend" mean? It means "endors[ing] or vouch[ing] for a lawyer's credentials, abilities, competence, character, or other professional qualities," but just listing a lawyer's practice area or credentials doesn't count.[4]

Of course, that means a lawyer needs to be aware of, and vigilant about, what a lead generator actually says about the lawyer.

2. Is the lead generator making any false or misleading statements?

Lawyers know that at the very heart of the lawyer ad rules in every jurisdiction is the ban

on any false or misleading statements.[5] Many jurisdictions still read that ban very broadly, from merely including statements that are misleading by omission to a flat-out ban on discussion of a lawyer's prior results.

A prudent lawyer will engage in sufficient due diligence of the lead generator's communications and methods to be comfortable that her big new case can't be derailed by a later misconduct charge.

3. Is the lead generator including the disclaimers and disclosures required by the ad rules in the lawyer's jurisdiction?

Jurisdictions vary wildly on the disclaimers and other disclosures they impose on lawyer advertising. Any prudent lawyer working closely with a lead generator will want to assure herself that the lead generator is complying with these regulations. And remember, too, that should include compliance with those requirements in any jurisdiction from which the lawyer is seeking leads.

4. Do the lead generator's methods of communication comply with any lawyer ad requirement of transparency concerning the lawyer's identity?

Many states have rules that require that a lawyer or law firm be identified in every lawyer ad. Careful lawyers will confirm that a lead generator's communications comply with any such requirements.

5. Does the lead generator comply with any operational requirements of the lawyer ad rules?

A number of jurisdictions require lawyers to keep copies of all ads they run, along with where and when those ads run. A few require filing copies of ads with a designated state office. Any prudent lawyer working closely with a lead generator will want to ensure that the lead generator is either complying with these requirements or providing the lawyer with the data needed to do so.

6. Does the lead generator's fee structure comply with ethics rules, especially including the ban on lawyer fee-sharing?

The dominant fee structure for lead generators for lawyers appears to be a fixed per-lead fee. That may well reflect the fact that almost all other fee structures run a serious risk of running afoul of every jurisdiction's fee-sharing prohibition.

Broadly speaking, a lawyer cannot pay for a lead based on any measure that is directly connected to the gross revenues, fees or profits resulting from that lead.

Can a lawyer pay more for certain leads than others? Yes, because some leads are, in fact, better than others, just as some lawyer billboards and other ads cost more than others, because of their location and reach. But a lawyer must exercise great caution over any fee arrangement that gives the appearance of allowing a lead generator to participate in the results of a lead.

7. Ask the vice-presidential question.

Political legend has it that every potential nominee for a major party vice-presidential nomination is always asked some form of this question: "Is there anything else in your

history and background that might later cause you to be a problem for the ticket?"

Any lawyer considering doing business with a lead generator needs to be vigilant in vetting them. The market is largely unregulated, constantly evolving and filled with players from the fly-by-night to the impressively professional. And there's no one out there to prequalify your new vendor for you.

Evaluate them as a business. Are they part of a larger organization? Is that organization experienced and reputable? How long have they been in business? Who do they do business with? Are they reputable? Do they have references? What do those references say? Have any of their leads or their business model ever led to trouble for other lawyers or nonlawyers?

One concern we have recently heard is whether lead generators repurpose or recycle their lawyer leads to other nonlawyer vendors. For example, a lead generated as a likely prospect for a bankruptcy lawyers might be sold both to a bankruptcy firm and to a credit card company mining secured or advanced-pay credit cards. Would that comply with the ethics rules? Do the lead generators get permission from the leads to do so?

The moral is plain: Lead generators can be an effective tool for lawyers to build their practice. But the price for lawyers is real vigilance. Be careful out there.

Lucian T. Pera is a partner at Adams and Reese LLP.

William E. Hornsby Jr., is a solo practitioner focused on the ethics of lawyer advertising. He served as staff counsel at the American Bar Association for 30 years supporting a variety of ABA entities dedicated to expanding legal services, including the Commission on Advertising and the Standing Committee on the Delivery of Legal Services.

Peter R. Jarvis is a partner and co-chairs of the legal profession team at Holland & Knight LLP.

[1] The authors have prepared a comprehensive White Paper on A Lawyer's Ethics Obligations When Participating in a Lead Generation Program, sponsored by Consumer Attorney Marketing Group. The White Paper and a state ethics rules database are available to review and download at https://camginc.com/state-rules/.

[2] (ABA Model Rule 7.2(b).).

[3] (Comment [5] to ABA Model Rule 7.2(b).).

[4] (Comment [2] to ABA Model Rule 7.2(b).).

[5] (ABA Model Rule 7.1.).

2014

Lawyers Beware: You Are What You Post - The Case for Integrating Cultural Competence, Legal Ethics, and Social Media

Jan L. Jacobowitz
University of Miami School of Law, jjacobowitz@law.miami.edu

Lawyers Beware: You Are What You Post—The Case for Integrating Cultural Competence, Legal Ethics, and Social Media

*Jan L. Jacobowitz**

First learn the meaning of what you say, and then speak.
—Epictetus[1]

[W]ords used carelessly, as if they [do] not matter in any serious way, often [allow] otherwise well-guarded truths to seep through.
—Douglas Adams[2]

Happy Mother's Day to all the crack hoes out there. It'[s] never too late to turn around, tie your tubes, clean up your life and make [a] difference to someone out there [who] deserves a better mother.
—Assistant State Attorney in Orange County, Florida[3]

I. INTRODUCTION

No thought left unspoken . . . social media networking—ubiquitous in our society—provides the opportunity for individuals to share their moment-to-moment thoughts and actions. Social media has created communities and its own culture. Social networking has empowered individuals to join together to stage uprisings, support charitable causes, launch entrepreneurial ventures, and generally share the accomplishments and defeats of their daily lives. Many lawyers actively participate in social media networks in their personal and professional lives. Some lawyers employ social media for marketing their practices and obtaining information and evidence to more effectively represent their clients. Unfortunately, other lawyers have found themselves caught in a quagmire of ethical and professional missteps resulting in disciplinary problems and loss of employment. This second group of lawyers often fails to appreciate the application of the legal ethics rules and

---

* Jan L. Jacobowitz is a lecturer in law and director of the Professional Responsibility & Ethics Program at the University of Miami School of Law. Thanks to Danielle Singer and Jacqueline Frisch for their thoughtful reviews of the article. Thanks also to John Browning, Lisa Browning, and the students of the SMU Science & Technology Law Review for an inspiring and enlightening symposium.

1. BRAINYQUOTE, http://www.brainyquote.com/quotes/quotes/e/epictetus149142.html (last visited Apr. 13, 2015).

2. DOUGLAS ADAMS, THE LONG DARK TEA-TIME OF THE SOUL 187 (1990).

3. Joe Kemp, *'Happy Mother's Day to All the Crack Hoes Out There': Florida Prosecutor Sparks Outrage Over Rude Facebook Rants*, N.Y. DAILY NEWS, May 22, 2014, *available at* http://www.nydailynews.com/news/national/florida-prosecutor-sparks-outrage-rude-facebook-rants-article-1.1801757.

standards of professionalism to the use of social media. Moreover, like many other individuals engaged in social media, these lawyers generally seem to lack perspective on the far-reaching impact that a social media communication may have upon the audience—and ultimately upon the communicator.

This article explores the importance of cultural competence both as a critical component of effective and ethical legal practice and as it pertains to a lawyer's participation in social media networking. This article will first define cultural competence and its significance to the legal profession. Next, this article will discuss the culture of the legal profession as it is reflected in social science research, popular culture, and scholarly works. Then, this article will examine the culture of social media and the legal profession's participation in this culture. Finally, this article will explore the interrelationships of the legal profession, cultural competence, and social media with the goal of providing insight and guidance for lawyers to professionally and ethically engage in social networking.

II. Defining Cultural Competence

A. Culture

Culture has been described as the "software of the mind."[4] Like a software program, culture allows the hard drives of our minds to sort and attach meaning to the world around us. More specifically, culture has been defined as the "deposit of knowledge, beliefs, values, attitudes and meanings . . . acquired by a group of people in the course of generations through individual and group striving."[5] In fact, there are over five hundred working definitions for culture. Employing the following concise definition serves the goal of this article: "Culture is the language, values, beliefs, traditions, and customs people share and learn."[6]

It is important to note that culture is *learned.* Geert Hofstede illustrates this principle by placing culture at the middle of a pyramid with human nature at the base of the pyramid and personality at the top.[7] He explains, "exactly where the borders lie between nature and culture, and between culture and personality is a matter of discussion among social scientists."[8] For exam-

4. Geert Hofstede et al., Cultures and Organizations: Software of the Mind 5 (2010).

5. Stephanie West Allen, *Why I Left My Heart in San Francisco: California Lawyers Expand Their Cultural Awareness*, 15 Lawyer Hiring and Training Report 4, Apr. 1995, *available at* http://westallen.typepad.com/idealawg/files/forum_on_training.pdf (quoting Larry Samovar et al., Communication Between Cultures 23–24 (2009)).

6. Ronald B, Adler et al., Interplay: The Process of Interpersonal Communication 31 (2012) (internal citations omitted).

7. Hofstede et al., *supra* note 4, at 6.

8. *Id.*

ple, the ability to experience fear, anger, and happiness is part of the basic human "operating system," but culture modifies the manifestations of these emotions.[9] Personality consists of a "unique . . . set of mental programs" derived from heredity, which is "modified by the influence of collective programming (culture) *as well as* by unique personal experiences."[10]

We all belong to many cultures such as gender, nationality, religion, age, race, and sexual preference.[11] These cultures provide both collective programming and unique personal experiences, which shape the cultural lenses through which we view and define the world. Some of our cultural differences are explicit and noticeable such as the differences in language, religious practice, gender, or age. However, some of our culturally influenced perceptions of our surroundings are so deeply ingrained that we are generally unaware of implicit biases that may influence our communication and reactions.[12] In fact, we all have:

> immediate, automatic associations that tumble out before we have time to think.[13] . . . The giant computer that is our unconscious silently crunches all the data it can from the experiences we've had, the people we've met, the lessons we've learned, the books we've read, the movies we've seen, and so on, and it forms an opinion.[14]

Clotaire Rapaille, author of *The Culture Code*, refers to this data as imprints on our minds and explains that "[e]ven the most self-examining of us are rarely in close contact with our subconscious. We have little interaction with

9. *Id.*

10. *Id.* at 7.

11. *Id.* at 17–18. Hofstede describes these subcultures as "several layers of mental programming," which correspond to "different levels of culture." He describes the levels as a national level; a regional and/or ethnic and/or religious and/or linguistic level; a gender level; a social class level related to educational and professional opportunities; and for those employed, a work organizational level.

12. CLOTAIRE RAPAILLE, THE CULTURE CODE: AN INGENIOUS WAY TO UNDERSTAND WHY PEOPLE AROUND THE WORLD LIVE AND BUY AS THEY DO 14, 27 (2007); MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2007) [hereinafter GLADWELL, BLINK].

13. GLADWELL, BLINK, *supra* note 12, at 85.

14. *Id.*

this powerful force that drives so many of our actions."[15] Simply stated, "most people do not know why they do the things they do."[16]

Malcolm Gladwell describes an interesting example of this subconscious "imprinting" phenomenon in his book, *Outliers: The Story of Success*.[17] He traces the cultural heritage of eight families who, in the early 1800's, migrated from the rocky cliffs of the northern British Isles to the Appalachians where they founded Harlan County, Kentucky, which is part of the Cumberland Plateau area. Gladwell details the family feuds over property and chattel that erupted not only in Harlan, but also in neighboring communities throughout the region, thereby creating a culture of violence. Sociologists studied this pattern of feuding in this region and concluded that the violence was caused by a "particularly virulent strain of what sociologists deem a 'culture of honor,'"[18] the origin of which was the region's ancestral heritage. In other words, the Harlan County community's culture of honor, which was a contributing factor to the feuding, was consistent with their ancestral culture that developed hundreds of years ago in the cliffs of Ireland and Scotland.[19] This ancestral culture developed as a result of an individual shepherd's compulsion to protect his herd.[20]

---

15. RAPAILLE, *supra* note 12, at 14. French psychiatrist and cultural anthropologist Rapaille explains that emotion is required for learning and that our emotional responses give rise to imprints on our brains. This psycho-emotional phenomenon explains how individuals know where they were, for example, when they learned that President Kennedy was assassinated and other major dramatic events.

16. *Id.* Rapaille studies culture to assist corporations in marketing products. He conducts focus groups that ask individuals not what they would like in a product but rather, what is their earliest association to a product. In other words, Rapaille believes that you cannot believe what people say; rather, you have to determine what they mean. In this manner, he concluded that the American code for Jeep is horse. A successful marketing campaign subsequently ensued that used a Jeep in a western setting in which a horse might have been substituted for a Jeep. Interestingly, when the Nestle Corporation was struggling to create a market for coffee in Japan in the 1970's, Rapaille determined that the Japanese had no early association for coffee and therefore Nestle would be doomed to fail. Nestle developed an alternative strategy that involved introducing coffee flavored children's desserts in Japan. Twenty years later, after having produced an entire generation with a positive association with coffee, there was a significant market for coffee in Japan. *Id.* at 1–10.

17. MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS 166 (2011) [hereinafter GLADWELL, OUTLIERS].

18. *Id.*

19. *Id.* The ancestral shepherd's individualistic culture existed in sharp contrast to the cooperative culture found in farming communities where people had to work in collaboration with one another.

20. *Id.*

Thus, some sociologists suggest that understanding a person's culture requires knowing not only where the person lives but also, and more importantly, where his ancestors lived. By looking further into the past, one can uncover patterns of behavior that are deeply ingrained in a group of people regardless of whether the original environment that gave rise to the cultural trait still exists.

Gladwell illustrates this theory by fast-forwarding to the early 1990s at the University of Michigan where psychologists Dov Cohen and Richard Nisbett conducted an experiment designed to test the deeply ingrained nature of the culture of honor. The experiment involved intentionally antagonizing a group of college-aged males, some of whom were raised in the south and others who were raised in the north, and recording their reactions. The students initially completed a questionnaire and were then instructed to take that questionnaire to a room at the end of a long, narrow hallway. A confederate in the hallway intentionally made the passage difficult by opening a file cabinet drawer and looking annoyed. When a student attempted to pass by, the confederate slammed the drawer, bumped his shoulder into the young man and in a low, but audible voice said, "asshole."[21]

Although the students from the south no longer lived in the environment of their ancestors—many were the children of upper middle class families—these students exhibited anger, had heighted levels of cortisol and testosterone, gave firmer handshakes, and demonstrated other signs of aggression.[22] On the other hand, students who grew up in northern parts of the country were generally amused, had lower cortisol levels, and exhibited no change in the strength of their handshakes.

Gladwell explains:

> Cultural legacies are powerful forces. They have deep roots and long lives. They persist, generation after generation, virtually intact, even as the economic and social and demographic conditions that spawned them have vanished, and they play such a role in directing attitude and behavior that we cannot make sense of our world without them.[23]

Of course, as mentioned above, many of the cultural differences that impact interpersonal communication are more explicit and therefore easier to observe. For example, some cultures value low context communication as opposed to high context communication.[24] Low context communication cultures value the direct expression of thoughts and feelings through verbal communication. High context communication cultures, on the other hand, place more value on nonverbal cues and verbal communication is more

21. *Id.* at 171.

22. *See id.*

23. GLADWELL, OUTLIERS, *supra* note 17, at 175.

24. *See* ADLER, *supra* note 6, at 44.

nuanced and indirect.[25] The often-cited example of the contrast between these two communication styles is the distinction between communication in eastern and western cultures. An American businessman travels to China to negotiate a business deal. He enters the conference room, offers a firm handshake while making direct eye contact, and launches almost immediately into his business presentation, which is a miserable failure. The American businessman has offended his Chinese counterpart with his direct eye contact, aggressive handshake, and failure to engage in personal conversation before discussing the business deal.

A more dramatic example of the impact of cultural communication styles is found in Gladwell's chapter, "The Ethnic Theory of Plane Crashes,"[26] which describes the unraveling of the mystery of Korean Air's tragic number of airline crashes in the 1990s. The number of crashes exceeded industry standards and there was no obvious explanation.[27] Ultimately, the remedy was primarily cultural.[28] The Korean culture's high context language and hierarchy of relationships prevented the appropriate and direct communication required between captains, first lieutenants, flight engineers, and the control tower employees. An American consultant was hired to alter the airline employees' cultural communication style.[29] The solution required English as the primary means of direct communication among the flight crew, thereby enabling a cultural shift in communication style that resulted in a significant reduction in airline crashes.[30] Thus, although some cultural components are implicit and difficult to recognize (especially in the moment), an objective analysis of possible implicit and explicit differences may improve communication and productive collaboration in any number of settings.

In fact, when we communicate with others, awareness of the intercultural nature of our communication may be critical to the exchange. Intercultural communication refers to the significance that our cultural differences may have upon the exchange. It is "[t]he process that occurs when two or more cultures or co-cultures exchange messages in a manner that is influenced by their different cultural perceptions and symbol systems, both verbal and nonverbal."[31] The spectrum of intercultural communication ranges from

25. *See id.*

26. *See* "The Ethnic Theory of Plane Crashes," *in* GLADWELL, OUTLIERS, *supra* note 17, at 177.

27. *Id.* at 180.

28. *But see My Thoughts on Gladwell's Response*, ASK A KOREAN (July 16, 2013), http://askakorean.blogspot.com/2013/07/my-thoughts-on-gladwells-response.html (debating Gladwell's description based upon a competing cultural analysis).

29. *See* GLADWELL, OUTLIERS, *supra* note 17, at 180–81.

30. *Id.* at 182.

31. ADLER, *supra* note 6, at 40 (citing SAMOVAR, *supra* note 5).

a communication in which cultural differences have little impact on the communication to an interaction that is heavily influenced by differences.[32] Thus, for a traveler to a foreign country who does not know the local customs, there may be a significant intercultural impact; however, for a married couple that grew up in different cultures, there may be a low impact based upon a mutual understanding developed throughout their relationship.[33]

For lawyers dealing with clients, the impact may vary depending upon the lawyer's cultural competence. Cultures have varying communication styles and assign different meanings to verbal and nonverbal communication.[34] For example, as discussed above, some cultures use high context communication as opposed to low context communication.[35] Thus, a client's failure to make eye contact, with his attorney may be interpreted from a low context perspective as lack of interest or a less-than-candid response to a question; however, if the client is from a high context communication culture, then he may be avoiding direct eye contact as a sign of respect for the attorney's authority.[36]

Cultures may also be characterized as either individualist or collectivist.[37] The individualist culture values autonomy, individual goal-setting, accountability, and personal choice.[38] The collectivist culture places an emphasis on group harmony, cohesion and choices made in consultation with and often in deference to family and authority figures.[39] These differences often come into play when a client is deciding upon the strategy for either proceeding with litigation or attempting to resolve a legal matter.[40]

For example, Marci Seville discusses the case of a Chinese migrant worker who will not consider reinstatement as an option in settling an em-

32. *Id.* at 41.

33. *Id.*

34. *See id.*; *see also* HOFSTEDE, *supra* note 4. There are many categories and characteristics into which cultural differences are analyzed. In addition to those cited above, some of the common ones referred to in the literature are differing attitudes in the areas of power distance, achievement versus nurturing, and uncertainty avoidance. However, it is beyond the scope of this article to thoroughly explore the many fascinating distinctions that have been attributed to cultural difference.

35. ADLER, *supra* note 6, at 44–45.

36. *See, e.g., id.*

37. *See* ADLER, *supra* note 6, at 45; *see also* HOFSTEDE, *supra* note 4, at 91–92.

38. *See* ADLER, *supra* note 6, at 45–46.

39. *See id.*

40. *See id.*; *see also* Jan L. Jacobowitz, *A Rose By Any Other Name? Enhancing Professionalism Through Cultural Competency*, FAWL JOURNAL 8 (Spring 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1509647 [hereinafter Jacobowitz, *A Rose*].

ployment case.[41] The Chinese proverb, "*The good horse won't eat back old grass*", provides insight into the client's stance.[42] The proverb reflects a cultural adage that translates in an employment situation to mean that a good employee will never go back to work for her former employer because to do so would subject the employee to shame among her Chinese co-workers.[43]

Sue Bryant and Jean Koh Peters provide a powerful illustration of the impact of cultural shame in the case of a Chinese woman charged with the murder of her husband.[44] The woman has a viable self-defense argument and is offered a misdemeanor plea, but informs her lawyers that she cannot accept a plea because it would be humiliating and would shame her ancestors, her children, and their children if she acknowledged any responsibility for the killing—she would rather risk a twenty-five-year jail sentence than suffer the shame of the plea.[45] A lawyer lacking cultural competency would likely have difficulty understanding his clients' decision-making strategies in these situations.

B. Cultural Awareness

Cultural awareness is a first step towards achieving cultural competence. Cultural awareness involves the process of learning and developing sensitivity to the characteristics of another culture.[46] The ultimate goal is to appreciate the similarities and differences of another culture without judgment.[47] Raymonde Carroll, explains:

> Very plainly, I see cultural awareness as a means of perceiving as "normal" things, which initially seem "bizarre" or strange among people of a culture different from one's own. To manage this, I must imagine a universe in which the "shocking" act can take place and seem "normal" and can take on meaning without ever being noticed. In other words, I must try to enter, for an instant, the cultural imagination of another.[48]

41. *See generally* Marci Seville, *Chinese Soup, Good Horses, and Other Narratives: Practicing Cross-Cultural Competence Before We Preach, in* VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER (2011).

42. *Id.* at 280.

43. *See id.*

44. Sue Bryant & Jean Koh Peters, *Culture and the Role it Plays in Lawyers' Work* (Oct. 2007), http://www.illinoislegaladvocate.org/index.cfm?fuseaction=home.dsp_content&contentID=5986.

45. *See id.*

46. *See* Jacobowitz, *A Rose*, *supra* note 40, at 7.

47. *See id.*

48. RAYMONDE CARROLL, CULTURAL MISUNDERSTANDINGS: THE FRENCH-AMERICAN EXPERIENCE 2 (1990).

Interestingly, Carroll's suggestion might be just as valuable when a parent is attempting to understand the "bizarre" conduct of his teenage child as when a lawyer is struggling to understand the reactions of his client to the settlement and plea offers discussed above. The ever-growing importance of cultural awareness stems from increased mobility and global interaction as a result of access to the Internet, smart phones and communication available on social media[49] However, awareness of a cultural difference without possession of the skills of cultural competence may result in misinterpreting the difference or failing to effectively employ the awareness toward a more productive interaction.

C. Cultural Competence

Cultural competence involves acumen that moves beyond cultural awareness. Developing cultural competency is an ongoing process that travels on a spectrum. This spectrum includes the elements of awareness, knowledge, and skills. Cultural competency has been defined as "the ability to accurately understand and adapt behavior to cultural difference and commonality."[50] In other words, having awareness and knowledge of cultural differences is important, but does not alone provide the adaptive skills that define cultural competency.

The developmental stages and traits of cultural competency have been defined by various terminologies. For example, the development of cultural competency has been described as consisting of four levels: the parochial stage, the ethnocentric stage, the synergistic stage and the participatory third culture stage.[51] The shorthand for defining the parochial stage is "my way is the only way," which signifies a point at which the impact of cultural difference is disregarded.[52] The ethnocentric stage is best described as "I know their way, but my way is better"; thus indicating a degree of cultural awareness, but simultaneously dismissing the other culture as inferior and not worthy of consideration.[53] The synergistic stage is referred to as "my way and their way," signifying that an individual is aware of both the problems and benefits of cultural differences and is willing to use cultural diversity to create new solutions and alternatives.[54] Finally, the participatory third culture stage is labeled "our way" and involves individuals of different cultures con-

49. *See* ADLER, *supra* note 6, at 36–37.

50. Travis Adams, *Cultural Competency: A Necessary Skill for the 21st Century Attorney*, 4 WM. MITCHELL L. RAZA J. 2, 6 (2013).

51. Stephanie Quappe & Giovanna Cantatore, *What Is Cultural Awareness, Anyway? How Do I Build It?*, CULTUROSITY.COM (2005), http://www.culturosity.com/pdfs/What%20is%20Cultural%20Awareness.pdf.

52. *Id.*

53. *Id.*

54. *Id.*

tinuously engaging in dialogue within a particular context to create new meanings and rules for meeting the needs of a specific set of circumstances.[55]

Jatrine Bentsi-Enchill uses Dr. Milton Bennett's Developmental Model of Intercultural Sensitivity to describe six stages of cultural competence[56] in relation to the legal profession. She begins with *denial*, which is a general lack of cultural awareness that may result in difficulty in establishing trusting relationships and client-centered strategies with clients.[57] Stage two is *defense*,[58] which is similar to "I know their way, but my way is better." For example, in the situation discussed above in which the Chinese woman would not accept a plea—regardless of the advice of her counsel—because of the role of shame in her culture, it is not difficult to imagine the feelings of frustration and perhaps annoyance that a lawyer lacking in cultural competence might experience.

Stage three is described as *minimization of the difference*.[59] A lawyer operating at this stage will be aware of and appreciate the cultural differences, but will remain wed to his own culture as the superior one; he may misinterpret a client's conduct by evaluating it in accordance with his own cultural values. The misinterpretation of a client's failure to make eye contact as a sign that the client is lying or not interested in his case, without regard to the fact that the client is from a culture of high context communication, is an example of a lawyer operating at this level.

Stage four is *acceptance of the difference*,[60] which is deemed to be the beginning of the ability to interpret culture through a culturally unbiased lens. This stage is exemplified by the elements of open-mindedness, flexibility, and adaptability, which are central to effective cross-cultural lawyering. For example, if an immigration client offers a lawyer a bribe to expedite the client's case and the client is from a country in which bribes are commonplace, the lawyer has the ability to both refuse the bribe and not harshly judge the client for making the offer.

Adaptation to the difference[61] is stage five and indicates that a lawyer has developed solid skills in intercultural communication as a result of increased awareness, acceptance, and initiative to understand the nuances of another culture. Finally, stage six is *integration of the difference*[62] and is

55. *Id.*

56. Jatrine Bentsi-Enchill, *The 6 Stages of Cultural Competence in Lawyers*, ESQ. BLOG (Nov. 17, 2005, 6:58 AM), http://esqdevelopmentinstitute.blogspot.com/2005/11/6-stages-of-cultural-competence-in.html.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Bentsi-Enchill, *supra* note 56.

reflected in a lawyer's ability to evaluate conduct and communication within the cultural frame of reference of another person—meaning a client, colleague, opposing counsel, or adverse party. Lawyers at this level will demand intercultural competence and support education and training programs targeted towards this goal.

Regardless of the manner in which the stages on the spectrum of cultural competency are described, the progression along the spectrum generally involves three main components: attitude, knowledge, and interpersonal communication skills. Attitude may be partially fueled by motivation, but also includes traits such as a tolerance for ambiguity and open-mindedness.[63] Generally, interpersonal communicators are concerned with reducing uncertainty about one another. In an intercultural communication, the level of uncertainty may be especially high and create ambiguity when neither communicator is fluent in the other language. Studies have shown that competent intercultural communicators not only tolerate, but also often embrace this type of ambiguity.[64] Additionally, these communicators recognize the importance of remaining nonjudgmental and open-minded about the habits of different cultures; they realize that judgment leads to bias and stereotyping, which inhibits cultural competency.

Knowledge and skills, the other components of cultural competency, require both self-awareness and awareness of or empathy towards others. Knowledge can be derived from passive observation, that is, noticing the behavior of another culture and adapting insights gained from observation to appropriately tailor communication. Knowledge may also be derived from active strategies such as reading, enrolling in courses, watching films, and speaking to experts in the area. Another strategy is honest self-disclosure, that is, expressing your cultural ignorance and a willingness to learn about another person's culture.[65]

Stephanie West Allen, in conducting workshops for mediators, suggests that a lawyer ask himself four questions that are designed to gauge cultural competency.[66] The first question is: *What is your own cultural heritage?*[67] This question calls for a reflection and awareness of the lawyer's own background to provide the lawyer with a better starting point for comparison.[68]

The second question is: *What is my comfort level with people who are culturally different?*[69] The query asks the lawyer to consider whether he is

63. ADLER, *supra* note 6, at 48–49.

64. *Id.*

65. *Id.*

66. Allen, *supra* note 5, at 4.

67. *Id.* at 5.

68. *Id.*

69. *Id.*

comfortable with ambiguity and open-minded about other cultures or instead views his culture as superior to others.[70]

The third question is: *How much do I know about the tendencies of my own mind?*[71] This question compels a lawyer to consider his implicit biases and cognitive traps.[72]

The final question is: *Do I know that the ways of my culture are not universal?*[73] In other words, beyond recognizing general differences does a lawyer fully comprehend that even seeming "universal truths" in the U.S. legal profession, such as, confidentiality, may not be defined as such in another cultural context, such as collectivism, in which ownership of the dispute would not belong solely to the individual and sharing information with the group would be the preferable way to reach consensus on strategy for proceeding with a case.[74]

While Allen's questions are posed in the context of a mediation workshop, the questions have broad application for cultural competency not only in other areas of the legal profession, but also for general intercultural communication competency.[75] Allen's analysis also highlights the fact that the legal profession is a culture unto itself.

Sue Bryant and Jean Koh Peters expand the concept of the legal profession as a culture in their seminal article *Five Habits for Cross-Cultural Lawyering* in which they explain that, "even when a lawyer and a non-law trained client share a common culture, the client and the lawyer will likely experience the lawyer-client interaction as a cross-cultural experience because of the cultural differences that arise from the legal culture."[76] Bryant and Koh Peters' article is primarily geared towards enhancing cross-cultural communication and building "trust and understanding between lawyers and clients,"[77] an area of growing significance and increasing scholarship.[78]

---

70. *Id.*

71. *Id.*

72. Allen, *supra* note 5, at 5.

73. *Id.*

74. *See* Liwen Mah, *The Legal Profession Faces New Faces: How Lawyers' Professional Norms Should Change to Serve a Changing American Population*, 93 CAL. L. REV. 1721, 1747, 1759–60 (2005).

75. Andrea A. Curcio et al., *A Survey Instrument To Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177, 191–92 (2014).

76. Bryant & Peters, *supra* note 44, at 1.

77. *Id.* (providing lawyers who are "in a cross-cultural relationship" with a three-step process: "(1) A lawyer should be able to identify his assumptions. (2) A lawyer should challenge those assumptions with fact. (3) A lawyer should practice law/lawyering based on fact.").

In fact, I have suggested that cultural competency be incorporated into the interpretations of competence, diligence, communication, and confidentiality contained in the rules of professional conduct.[79] Perhaps in a similar vein, in August 2012, the ABA amended the notations under Rule 1.1 Competence to include the statement "a lawyer must be aware of the advantages and disadvantages of technology."[80] Indeed, technology has created a global environmental and cultural shift that is impacting competence in the practice of law, but this global environment also compels the value of cultural competency for the legal profession in its dealing with clients.

Moreover, there are other reasons to explore culture competency and how it may influence the conduct of lawyers when confronted with shifting cultural norms in society. This article is focused less on the lawyer-client relationship and more on lawyers understanding their own professional culture in relation to the changing landscape and culture of connectivity arising from the advancements of technology and social media. Of course, as technology pervades the practice of law, the lawyer-client relationship is impacted, but the greater significance may lie in the culture clashes between the developing social media culture and the traditional culture of the legal profession such that some lawyers are tripping on ethical landmines and are surprised by the resulting explosions that are damaging their reputations and threatening their careers.

III. The Culture of the Legal Profession

So what is the culture of the legal profession? If we return to the fundamental definition of culture as "the language, values, beliefs, traditions, and customs people share and learn" and apply the metaphor of culture as a "software program of the mind," some thoughts may immediately come to mind. Lawyers are highly educated. Lawyers speak their own language of legalese. Lawyers value justice, the rule of law, and equality. Lawyers are the

78. *See* Seville, *supra* note 41; Curcio, *supra* note 75; Katherine Frink-Hamlett, *The Case for Cultural Competency*, N.Y. L.J. (2011); Jacobowitz, *A Rose*, *supra* note 40; Mah, *supra* note 7474; Nelson Miller, *Beyond Bias—Cultural Competence as a Lawyer Skill*, Mich. B.J. 38 (June 2008).

79. Jacobowitz, *A Rose*, *supra* note 40, at 8. ("If cultural competency was mandated, then competence would be defined as not only having the requisite legal skill, but also having an understanding of the culture of the client. Diligence would compel a lawyer to pursue a case in a manner consistent with the cultural values of the client. Communication would result in not only keeping the client informed, but in doing so in a style that is consistent with the client's culture and manner of communication. Confidentiality would be explained and treated in a manner consistent with the individualist or collectivist viewpoint.").

80. Model Rules of Prof'l Conduct R. 1.1 (2012); *see also* Model Rules of Prof'l Conduct R. 5.3, 5.5 (2012) (amended to incorporate outsourcing of legal work that has also been the result of technology and other changes in the practice of law).

voice of the people. Lawyers are zealous advocates. Lawyers value integrity and objectivity.

Or perhaps if we consider public opinion polls, pop culture and sociological analysis, we might say that lawyers are "ambulance chasers." Lawyers are greedy. Lawyers are contentious and some are downright nasty. Lawyers are depressed, substance abusers who have lost their way. Lawyers are amoral. Lawyers value winning no matter what the cost. In fact, social science research stereotypes lawyers as:

> self-confident, dominant, argumentative, aggressive, combative, cunning, highly intelligent, ingenious, required or permitted to use drama for effect, committed above all else to prevail for their clients and causes, involved in work, well-dressed, driven toward competence, ambitious, competitive with others in the field, and interested in social issues. It also portrays lawyers as working long hours; writing convincingly, interestingly, and creatively; not being uncomfortable lying; living in suburban, upper-middle-class neighborhoods; and driving sports cars.[81]

Susan Daicoff indicates that some of these stereotypes are supported by research on lawyers.

She has developed a personality profile for lawyers that she describes as follows:

a) A drive to achieve, evidenced by an achievement orientation;

b) Dominance, aggression, competitiveness, and masculinity;

c) Emphasis on rights and obligations over emotions, interpersonal harmony, and relationships;

d) Materialistic, pragmatic values over altruistic goals; and

e) Higher than normal psychological distress.[82]

Thus, various contrasting images of lawyers emerge when attempting to define the culture of the legal profession. There are several reasons why it may

---

81. SUSAN SWAIM DAICOFF, LAWYER, KNOW THYSELF 26 (2004) (internal citations omitted).

82. *Id.* at 41. After tracing the five thousand year history of lawyers, Andrus concludes that a lawyer is defined by the following traits: ethics; ability to heighten a client's legal conscious; insight and savvy with regard to problems, clients, and issues; in tune with the sound, smell, taste, and feel of words; ability to prepare and present a position; ability to properly organize and analyze facts; ability to see both sides of a dispute; ability to critique his or her own position (not just the other side's); a possession of deep and extensive knowledge based on personal experience and learning; a refined sense of justice—even in these cynical times; ability to embrace meaningful evaluation of his or her abilities and faults; active pursuit of evaluation through peers, clients, and introspection. *See* R. BLAIN ANDRUS, LAWYER: A BRIEF 5,000 YEAR HISTORY 374–383 (2009).

be difficult to readily identify a consensus on the cultural attributes of the profession.

First, if the mind is the "hard drive" in the technology metaphor that labels culture as software, then clearly the legal profession's culture is only one of many software programs running in the minds of lawyers. Everyone, including lawyers, has multiple cultural software applications simultaneously running in the mind's hard drive.[83] Thus, regardless of an individual's immersion into the profession through law school and work experience, that individual was culturally "programmed" before becoming a lawyer. Differences in gender, religious upbringing, ethnicity, race, socio-economic background, nationality, and other variables that constitute an individual's unique mental programming impact the cultural lens through which he views the world and influence how that individual assimilates into the legal profession's culture. In other words, determining "where the border lies between nature and culture, and between culture and personality" remains a challenge.[84]

Second, the public's perception—based upon personal interaction and the experience of friends and family—may widely vary. Individuals often interact with lawyers in connection with extremely stressful events—divorce, bankruptcy, personal injuries—and the perception of the culture of the legal profession may be significantly influenced by the outcome of an individual's case and his general experience with one lawyer.

Third, popular culture has portrayed lawyers on a spectrum that ranges from idyllic (think Gregory Peck as Atticus Fitch in *To Kill a Mockingbird*) to the devil incarnate (think Al Pacino as John Milton in *Devil's Advocate*).[85] Lawyer jokes abound and reference to Shakespeare's "First, kill all the lawyers" prose survives through the centuries.[86]

Finally, since its inception, the American legal profession has been both exalted and criticized by scholars and commentators. Alexis de Tocqueville's early observations provide a reference point. He is often quoted on his view

---

83. *See* HOFSTEDE, *supra* note 4, at 17–18; *see also* DAICOFF, *supra* note 81, at 51 ("People who choose law have some unique characteristics as children and as students . . . suggesting that [some aspects of the] the lawyer's personality develops long before . . . law school.").

84. HOFSTEDE, *supra* note 4, at 6.

85. *See* ANDRUS, *supra* note 82, at xxiii.

86. *See World's Best (and Worst) Lawyer Jokes*, LAW. WEEKLY (Apr. 21, 2010), http://www.lawyersweekly.com.au/folklaw/world-s-best-and-worst-lawyer-jokes; Jacob Gershman, *To Kill or Not to Kill All the Lawyers? That Is the Question. Attorneys Object to Interpretation of Shakespeare's Line; 'Not a Slur'*, WALL ST. J. (Aug. 18, 2014), *available at* http://online.wsj.com/articles/shakespeare-says-lets-kill-all-the-lawyers-but-some-attorneys-object-1408329001.

that lawyers occupied a position of trust and served the best interest of the people.[87] Adam White explains:

> By Tocqueville's telling, the legal class had the public's trust because the people know that lawyers' "interest is to serve the people's cause"; indeed, although the lawyer is drawn "to the aristocracy by his habits and his tastes," he first and foremost "belongs to the people by his interest and by his birth[.]" Thus lawyers, drawn from the people yet trained to be an elite class, become the "natural liaison" between the two classes—the "sole aristocratic element that can be mixed without effort into the natural elements of democracy and combined in a happy and lasting manner with them."[88]

White notes that even in Tocqueville's time, the legal profession had its critics. Gordon Wood, a Jeffersonian Populist implored people to "keep up the cry against Judges, Lawyers . . . and all other designing men, and to do 'their utmost at election to prevent all men of talents, lawyers, rich men from being elected.'" Wood wrote that lawyers' efforts to attract clients and "support [ ] any cause that offers" had "obliterated all [lawyers] regard to right and wrong."[89]

The tension between a lawyer's role as a proponent of the public good and a lawyer's self-interest in obtaining financial success, as identified by Gordon Wood, has been analyzed, bemoaned, and rationalized by leading scholars and lawyers throughout the past two centuries. Louis Brandeis counseled lawyers to focus less on corporate interests and more on the public good.[90] As "big business" became a driving force in the American economy, Roscoe Pound implored lawyers to "remain wary of 'the general and increasing bigness of things in which individual responsibility as a member of a profession is diminished or even lost, and economic pressure upon the lawyer [to] make the money-making aspect of the calling the primary or even the sole interest.'"[91]

---

87. Phil C. Neal, *De Tocqueville and the Role of the Lawyer in Society*, 50 MARQ. L. REV. 607, 607–08 (1967); Mah, *supra* note 74, at 1727.

88. Adam J. White, *Tocqueville's "Most Powerful Barrier": Lawyers in Civic Society*, AEI PROGRAM ON AMERICAN CITIZENSHIP, Policy Brief 13, 2 (Sept. 2013).

89. *Id.* at 2.

90. *Id.* at 8.

91. *Id.* at 8 (citing ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 354 (1953)). Interestingly, in his book, Andrus notes that "[i]n early America, the Laws and Liberties of 1648 omitted the stipulation contained in Section 26 of the Body of Liberties of 1641 that a lawyer may not receive remunerations for his services. Hence by 1648 (at least *sub silentio*) the paid

More recently, in 1993, Anthony Kronman commented on these clashing values in his book, *The Lost Lawyer: Failing Ideals of the Legal Profession*, by suggesting that:

> A culture that reinforces the idea that the practice of law affords deeper satisfactions than the mere production of income is bound to affect the ideals that lawyers share . . . and thus to exert a strong counter pressure against the natural interest that lawyers have always had in making money . . . When this norm is relaxed, or reversed, as it has been in recent years, the counter pressure is removed and the interest in moneymaking begins inevitably to play a larger role in defining the aims of professional life[.][92]

In 2010, Tom Morgan controversially wrote in his book, *The Vanishing American Lawyer*, that "lawyers in America are not now a profession and—over most of their history—they have never been one."[93] His assertion is tied to his theory that without the concepts of profession and professionalism, lawyers may be more successful in adapting to the evolving legal needs of the new global, technology driven society.[94]

In a review of the book, Neil Hamilton challenged Morgan's proposition and asserted that the concept of law as a profession fosters an ethical professional identity, which benefits not only lawyers, but also society.[95] However, Hamilton notes that he and Morgan agree upon the fundamental characteristics of the legal "profession."

---

attorney was recognized—though certainly not welcomed." ANDRUS, *supra* note 82, at pxxix.

92. ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 296 (1993). "These norms are informed by two influences, which are often in tension with one another. First, the profession sees nobility in its cause, believing that the practice of law in the spirit of a public service can and ought to be the hallmark of the legal profession. Justice Sandra Day O'Connor noted that the profession's norm entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. Second, the profession sees value in its own perpetuation, economically, politically, and socially. While the profession's economic viability is essential, many Americans view lawyers with distrust and are skeptical about whether lawyers' current norms exist more to serve themselves than to serve their clients." Mah, *supra* note 74, at 1725 (internal citations omitted).

93. THOMAS D. MORGAN, THE VANISHING LAWYER 21 (2010).

94. *See* Neil Hamilton, *The Profession and Professionalism Are Dead?: A Review of Thomas Morgan, The Vanishing American Lawyer*, 20 PROF'L LAWYER 2, 14 (2010).

95. *Id.* at 17.

> Professor Morgan argues, and I agree, that everyone benefits from having lawyers—and others acting alongside and in competition with lawyers—act with high character and a sense of pride and dignity in the excellence of the work. He also advocates, and I agree, that lawyers should internalize high degrees of "integrity, loyalty, competence, and confidentiality." My definition of professionalism drawn from the ABA professionalism reports includes also public service, respect for the legal system, independent professional judgment, peer review and self-restraint in seeking sustainable profits. He notes, and I agree, that all legal service providers exercise implicit moral judgments when they decide how to act on matters that they handle, and society benefits if these are good moral judgments.[96]

IV. Toward a Working Definition of the Culture of the Legal Profession

Thus, from Tocqueville to Morgan and Hamilton, legal scholars have robustly written about the role and characteristics of lawyers and the legal profession.[97] Implicit in the literature is the description of the cultural traits of the legal profession. Because the spectrum of personality traits and cultural norms is so wide-ranging and controversial, it becomes necessary to develop a contextual definition to proceed with a meaningful discussion of the juxtaposition of the culture of the legal profession with social media cul-

96. *Id.*

97. *See also* James E. Moliterno, Ethics of the Lawyer's Work 5, 58–60 (2003) (distinguishing between personal identity and the role of the lawyer and exploring the connection between the traditional attributes and role of a lawyer and the considerations of personal values in assuming the role of a lawyer). Moliterno quotes David Luban on the conflict that may arise between personal and role morality, defining role moralty as being tied to the principles of partisanship and nonaccountabilty as they relate to the obligation to the client as a first priority. David Luban, Lawyers and Justice: An Ethical Study xix–xxi (1988). Moliterno also quotes William Simon's four shared lawyering principles as neutrality, partisanship, procedural justice, and professionalism. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, Wis. L. Rev. 29, 36, 38 (1978); Richard Zitrin & Carol M. Langford, The Moral Compass of the American Lawyer 3–4 (1999) (exploring the proposition that "[e]very day, American lawyers in a wide variety of practices face competing principles—among the most important, the choice between representing a client's interests diligently and being truthful in one's words and deeds . . . Just as the rules of ethics are based on substantially on moral standards, each lawyer must ultimately decide how to balance ethics with the moral principles of our society. . . .").

ture and general cultural competency.[98] Guidance may be found in the Carnegie Foundation's Report, *Educating Lawyers—Preparation for the Profession of Law* (Carnegie Report) and in the Preamble to the American Bar Association's (ABA) Model Rules of Professional Conduct, which echoes Hamilton's identifiers of integrity, loyalty, competence, confidentiality, and respect for the legal system.

The Carnegie Report explains:

> professions are critically determined by the education of their members . . . . By providing systematic immersion into a distinctive knowledge base, professional schools set their students apart from lay people, binding them into a shared pattern of thinking and acting. . . . Professional education teaches both a way of understanding how the world works and a distinctive set of skills for working in the world. But, perhaps most decisively, professional education forms the identity of the future professional, showing how to succeed and how to comport oneself as . . . a member of the bar. . . .
>
> In particular, the academic setting of most law school training emphasizes the priority of analytical thinking in which students learn to categorize and discuss persons and events in highly generalized terms. This emphasis on analysis and system has profound effects in shaping a legal frame of mind. It conveys at a deep, largely uncritical level an understanding of the law as a formal and rational system, however much its doctrines and rules may diverge from the commonsense understandings of the layperson. This preference for the procedural and systematic gives a common tone to legal discourse that students are quick to notice, even if reproducing it consistently is often a major learning challenge. . . .
>
> [T]he task of connecting these conclusions [based upon abstracting facts from natural contexts and then applying rules and procedures to draw conclusions based upon reasoning] with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions remains outside of the method.[99]

98. The difficulty in reaching consensus and narrowing the definition of the culture of the profession is also probably compounded by the fact that in 2009 the legal profession had dramatically grown to approximately 890,000 lawyers in the U.S. as compared to 213,000 in 1960. ANDRUS, *supra* note 82, at xxviii.

99. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 185–87 (2007).

Thus, the Carnegie Report details some of the shared customs and values of legal education and notes the analytical, dispassionate critical thinking that is the hallmark of legal analysis. It is also critical of what it deems to be legal education's failure to focus on the practical realities and ethical challenges inherent in the practice of law.

If we accept as fundamental the learned attribute of analytical thinking, or *thinking like a lawyer*, and then review the aspirations of the legal profession, which are reflected in the ABA Preamble to the Model Rules of Professional Conduct, we may establish a working definition of some of the main components of the culture of the legal profession. The preamble defines a lawyer as "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[100] It also asserts that "[i]n all professional functions a lawyer should be competent, prompt and diligent[,] . . . maintain communication with a client[,] . . . [and] keep in confidence information relating to representation of a client.[101]

A lawyer's role is deemed to be vital "in the preservation of society . . . and . . . [t]he fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship."[102] Yet, "a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."[103] The preamble also notes:

> [w]ithin the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system. . . .[104]

Thus, a review of the literature, which discusses the culture and role of the legal profession, the social science and psychology, which attributes various personal traits and values to lawyers, the Carnegie Report's insights, and the ABA Preamble's aspirations, reveals a few common threads. Lawyers generally are highly analytical, logical thinkers in a profession that emphasizes loyalty and confidentiality to the client and respect for the rule of law and the legal system. Nonetheless, traditional legal training does not necessa-

100. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 1 (2012).

101. *Id.* ¶ 4.

102. *Id.* ¶ 13.

103. *Id.* ¶ 7.

104. *Id.* ¶ 9.

rily emphasize the connection between abstract analytical thinking and the "thinking through the social consequences or ethical aspects of the conclusions" that are reached as a result of applying facts to the law in a rational manner.

So, perhaps a shorthand description of the culture of the legal profession includes a culture that emphasizes analytical thinking, loyalty and confidentiality towards its clients, and respect for others in acknowledgment of the vital role of the legal profession in society. Further abbreviated, the legal profession may be seen as a culture exemplified by the normative values of analytical thinking, confidentiality and respect.[105] Assuming these normative values to be cornerstones of the legal profession, the professional culture may be analyzed in the context of social media, but only after the culture of social media is identified and defined.

V. The Culture of Social Media

If the working definition of culture as "the language, values, beliefs, traditions, and customs people share and learn"[106] is applied to social media, an emerging, seemingly new culture becomes apparent. However, Tom Standage concludes that from a historical and behavioral perspective, the Internet is merely the latest iteration of a social networking culture that has developed over the last two thousand years. In his recent book, *Writing on the Wall: Social Media—The First 2,000 Years*, Standage explains that human beings are inherently social animals with brains that have evolved to process information, exchange information to assess and maintain positions in social networks, and use media technology "to extend this exchange of information across time and space to include people who are not physically present."[107] He observes that "sharing information with other people in our social networks is, it would appear, a central part of being human."[108] As for the current social media networking, he asserts:

> [t]he Internet, with its instant, global reach, does this particularly effectively, allowing users to share information with unprecedented ease. But it is by no means the first technology to have supported such a social media environment; it is merely the most recent and most efficient way that humans have found to scratch a prehistoric itch.[109]

105. These terms are certainly not meant to be all encompassing, but rather representative of some of the values of the legal profession that are relevant to the discussion of the legal profession's engagement in social media.

106. Adler, *supra* note 6.

107. Tom Standage, Writing on the Wall: Social Media—The First 2,000 Years 7–8 (2013).

108. *Id.* at 14.

109. *Id.* at 8.

Standage traces the history of social communication from the invention of writing approximately five thousand years ago and the literal writing on walls, through the development of the Internet and social networking posts on virtual walls. He sees the 150 years before the invention of the Internet to be a time that was "overshadowed by centralized media operating on a broadcast model."[110] He claims, "[s]ocial forms of media based on sharing, copying, and personal recommendation, which prevailed for centuries, have been dramatically reborn, supercharged by the Internet."[111]

Standage concludes:

> [t]oday, blogs are the new pamphlets. Microblogs and online social networks are the new coffeehouses. Media-sharing sites are the new commonplace books. They are all shared, social platforms that enable ideas to travel from one person to another, rippling through networks of people connected by social bonds, rather than having to squeeze through the privileged bottleneck of broadcast media. The rebirth of social media in the Internet age represents a profound shift—and a return, in many respects, to the way things used to be.[112]

Although Standage views social networking as a phenomenon that is engrained in the human culture, he also concedes that "[w]orking out the implications and long term consequences of this new media environment is the giant collective experiment in which humanity is now engaged."[113] Thus, the specific normative values and customs of today's social networking culture are a work in progress.

Jose Van Dijck notes in her book, *The Culture of Connectivity: A Critical History of Social Media*, that "[i]n less than a decade, the norms for online sociality have dramatically changed, and they are still in flux. Patterns of behavior that traditionally existed in offline (physical) sociality are increasingly mixed with social and sociotechnical norms created in an online environment, taking on a new dimensionality."[114]

It is likely that this dynamic fluxing is contributing to the disturbances arising in the legal profession's culture when lawyers violate legal ethics norms with conduct that otherwise aligns with social media norms. Dijck shares legal scholar Julie Cohen's insights about culture as an ongoing, dy-

110. *Id.* at 239.

111. *Id.*

112. *Id.* at 250.

113. STANDAGE, *supra* note 107, at 239.

114. JOSE VAN DIJCK, THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA 19 (2013).

namic process, which is especially applicable to the evolving nature of online networking.[115] Cohen explains:

> culture is not a fixed collection of texts and practices, but rather an emergent, historically and materially contingent process through which understandings of self and society are formed and reformed. The process of culture is shaped by the self-interested actions of powerful institutional actors, by the everyday practices of individuals and communities, and by ways of understanding and describing the world that have complex histories of their own. The lack of fixity at the core of this conception of culture does not undermine its explanatory utility; to the contrary, it is the origin of culture's power.[116]

As the culture of social media continues to form, further insight may be gained by examining current practices and the nature of the communication at play.

A. Communication

A look at fundamental communication studies lays a foundation that assists in outlining the culture of social media. Face to face communication is sometimes described in terms of the "richness" of the exchange, which means not only an observation of the words employed, but also an analysis of any nonverbal communication that accompanies those words.[117] On the other hand, communication on social media is distinguished by its "leanness" or lack of nonverbal cues.[118] This "lean" quality renders the mediated communication harder to confidently interpret. Both the sender and receiver must strive for clarity.[119] The sender may attempt to carefully select his words to avoid ambiguity.[120] The receiver may need to clarify his interpretation of the message to avoid erroneous assumptions.[121]

Online communication is considered to be asynchronous communication, meaning that there is a time gap between when a message is sent and

115. *Id.* at 20.

116. JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE AND THE PLAY OF EVERYDAY PRACTICE 25 (2012).

117. ADLER, *supra* note 6, at 176–182. There are many studies and a robust literature on the meaning of how we position our bodies, the movement of our eyes, and the hundreds of facial expressions in which we engage. Moreover, nonverbal communication not only has some universal application, but also may vary by the cultural attributes of the communicator.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 53.

received.[122] The receiver may ponder the response or may choose not to respond at all.[123] Nonetheless, online communicators are more likely to communicate in a hyper-personal manner that accelerates the nature of personal sharing beyond what would naturally occur in face-to-face exchanges.[124]

Moreover, the tendency to transmit messages without considering their consequences is more likely to occur on mediated channels and is a phenomenon known as "disinhibition."[125] When extreme disinhibition leads to angry or vicious outbursts, the communication is known as "flaming."[126] Unfortunately, some communicators learn the painful lesson that although face-to-face communication is transitory, online communication is permanent and may be forwarded to a vast audience.

VI. Language, Values, Customs and Beliefs

Facebook, one of the most popular social networks in the world, uses the language of "friending," "liking," and "sharing." "Friending" denotes an individual's network of contacts, a badge of honor for some teenagers, who may or may not be "friends" in the more traditional sense of the word. "Liking" "pushes popular ideas or things with a high degree of emotional value, arguably at the expense of rational judgments for which there are no buttons in the online universe; 'difficult but important' is not a judgment prompted by social media sites."[127] Sharing is perhaps the fundamental culture code for social networking. The tension between online sharing and privacy is the subject of ongoing debate among scholars, and public policy commentators; this tension has also given rise to litigation across a wide spectrum of legal scenarios.[128]

Sharing and connection as fundamental normative values in the social media networking world are reflected in the opening statement of Facebook Principles, which states:

> We are building Facebook to make the world more open and transparent, which we believe will create greater understanding and connection. Facebook promotes openness and transparency by giving individuals greater power *to share and connect,* and certain principles guide Facebook in pursuing these goals. Achieving

122. *Id.*

123. Adler, *supra* note 6, at 53.

124. *Id.*

125. *Id.* at 59.

126. *Id.*

127. Dijck, *supra* note 114, at 66.

128. *See* Spencer Kuvin & Chelsea Silvia, *Social Media in the Sunshine: Discovery and Ethics of Social Media—Florida's Right to Privacy Should Change the Analysis*, 25 St. Thomas L. Rev. 335, 345 (2013).

> these principles should be constrained only by limitations of law, technology, and *evolving social norms.* We therefore establish these Principles as the foundation of the *rights and responsibilities* of those within the Facebook service.[129]

Share and *connect* reflect social media networking normative values that Facebook acknowledges are evolving social norms. Tweeting to followers, connecting on LinkedIn, and sharing photos on Instagram are all variations on this theme. Sharing is promoted as a positive attribute towards reaching a collective understanding that will improve the world. As of October 2014, there were 1.35 billion active monthly Facebook users worldwide.[130]

The social media culture begs the questions: Do I join? If not, will I be left behind or forgotten? If so, with which networks should I engage? With how many people should I connect? How much information should I share and how many pictures and status updates should I post? Some people are reluctant joiners, some stay away, and still others join and incorporate social media into their daily lives. If we revisit Standage's premise that human beings are essentially hard wired for sharing and connecting and that social media and the Internet are just the latest cultural manifestation of an age old human behavior, then it seems inevitable that social media is here to stay.[131] So, here's the query: how does an individual manage his online identity as distinct from his offline persona? Mark Zuckerberg, the Facebook founder, has explained, "You have one identity. The days of you having a different image for your work friends or co-workers and for the other people you

129. *See Facebook Home Page*, FACEBOOK, https://www.facebook.com/principles.php (last visited Apr. 13, 2015) (emphasis added); *see also* DIJCK, *supra* note 114, at 60. Dijck notes that the concept of sharing has become ambiguous as it not only may refer to sharing among users, but also among social networks and third party vendors. Regardless, for the purposes of this article, the concept of sharing among users is the more pertinent one. Her book is an interesting study of five of the major social media platforms and the influence of owners of these platforms juxtaposed with the demands of the users as the culture of connectivity continues to evolve. For the purposes of this article, an acknowledgment of the predominant characteristics of sharing, liking and friending or connecting, which run throughout most major social media networks, will suffice.

130. *The Top 20 Valuable Facebook Statistics*, ZEPHORIA (Oct. 2014), https://zephoria.com/social-media/top-15-valuable-facebook-statistics/.

131. STANDAGE, *supra* note 107, at 14.

know are probably coming to an end pretty quickly."[132] He adds: "[h]aving two identities for yourself is an example of a lack of integrity."[133]

VII. The Legal Profession and Social Media

So what does the concept of a blended online and offline identity mean for the legal profession? In 2013, an increasing number of lawyers who responded to the annual ABA Technology Survey reported that they are participating in social media in both their personal and professional lives.[134] In fact, the survey results indicate that approximately eighty percent of lawyers maintain an online presence for professional purposes and ninety four percent use social media for personal reasons.[135] Law firms and individual lawyers have websites that link to blogs, Twitter, and Facebook accounts. The legal profession is employing social media to advertise and to gather information about clients, opposing parties, witnesses, jurors and judges.[136] Transactional lawyers are considering social media when conducting due diligence.[137] And yes, lawyers are sharing aspects of their personal lives—their opinions, vacation photos, birthday greetings and even their "likes"—with all of their "friends."

In fact, recent state bar opinions have advised that lawyers may investigate clients, opposing parties, witnesses, and jurors on social media with the general stipulation that publically posted information that is readily available to anyone is fair game, but sending a request to connect with a person may be impermissible or subject to specific criteria.[138] For example, sending a

132. Jared Newman, *Facebook Comments Expose a Flaw in Zuckerberg's Vision*, Technologizer (Mar. 7, 2011, 9:43 AM), http://www.technologizer.com/2011/03/07/facebook-comments-zuckerberg-vision/.

133. Miguel Helft, *Facebook, Foe of Anonymity, Is Forced to Explain a Secret*, N.Y. Times, May 13, 2011, *available at* http://www.nytimes.com/2011/05/14/technology/14facebook.html?_r=0.

134. Allison Shields, *Communicating in the Online Era: Blogging and Social Media*, ABA TechReport, http://www.americanbar.org/publications/techreport/2013/communicating_in_the_online_era_blogging_and_social_media.html (last visited Apr. 13, 2015).

135. *Id.*

136. Thaddeus A. Hoffmeister, Social Media in the Courtroom: A New Era for Criminal Justice 99 (2014).

137. *See* Jonathan D. Gworek, *The Threat of Social Media Diligence on the Confidentiality of the M&A Process: The Problem and Possible Solutions*, ABA Business Law Today (Jan. 2014), http://www.americanbar.org/publications/blt/2014/01/01_gworek.html.

138. *See* Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U. Miami L. Rev. 445, 469–476 (2014) [hereinafter Jacobowitz & Singer, *The Social Media Frontier*]; *see also* Phila. Bar Ass'n Prof'l Guidance Comm., Formal Op. 2009-

Facebook friend request to a juror is impermissible as it is a violation of most state's versions of Model Rule 3.5, which prohibits lawyers from engaging in ex parte communication with a juror.[139] Similarly, sending a Facebook friend request to a represented party violates the no contact prohibition found in most state's versions of Model Rule 4.2.[140] On the other hand, some states have opined that sending a friend request to a witness may be permissible if there is full disclosure by the sender as to the nature of the inquiry and the connection to an anticipated or pending lawsuit.[141]

Recently, social media has invaded other aspects of discovery and states have begun to issue opinions on what lawyers may advise clients to do regarding removing social media content prior to or during litigation.[142] The debate in this area concerns the question: under what circumstances may the removal of social media content be tantamount to spoliation? New York, North Carolina, Pennsylvania Philadelphia, and Florida ethics advisory opinions all suggest that removal and preservation may be possible, but warn that legal analysis of spoliation must be considered.[143] There is also a growing body of case law that addresses those circumstances under which social media evidence may be compelled by court order.[144]

---

02 (2009); *see also* N.Y.C. Lawyer's Ass'n, Formal Op. 743 (2011); *see also* Mass. Bar Assoc., Formal Op. 2014-5 (2014); *see also* Pa. Bar Ass'n, Formal Op. 2014-300 (2014); *see also Social Media Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association*, NEW YORK STATE BAR ASS'N (Mar. 18, 2014), http://www.nysba.org/workarea/DownloadAsset.aspx?id=47547.

139. *See* Jacobowitz & Singer, *The Social Media Frontier*, *supra* note 138, at 469–71; N.Y.C. Lawyer's Ass'n, Formal Op. 743 (2011); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

140. *See* Jacobowitz & Singer, *The Social Media Frontier*, *supra* note 138, at 476; *see also* San Diego Cnty. Bar Ass'n, Formal Op. 2011-2 (2011).

141. *See* Jacobowitz & Singer, *The Social Media Frontier*, *supra* note 138, at 475–76; *see also* Mass. Bar Assoc., Formal Op. 2014-5 (2014).

142. *See* Jacobowitz & Singer, *The Social Media Frontier*, *supra* note 138, at 472–73; *see also Formal Social Media Ethics Guidelines*, NEW YORK STATE BAR ASS'N (Mar. 18, 2014), http://www.nysba.org/workarea/DownloadAsset.aspx?id=47547.

143. *See* N.Y. Cnty. Lawyer's Ass'n, Formal Op. 745 (2013); *see also* N.C. State Bar, Formal Op. 5 (2014); *see also* Pa. Bar Ass'n, Formal Op. 2014-300 (2014); *see also* Phila. Bar Ass'n Prof'l Guidance Comm., Formal Op. 2014-5 (2014); *see also* Prof'l Ethics of the Fla. Bar, Proposed Advisory Opinion 14-1 (Jan. 23, 2015).

144. *See* Agnieszka A. McPeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 WAKE FOREST L. REV. 887, 910 (2013); *see also* Romano v. Steelcase, Inc., 907 N.Y.S. 2d 650, 656 (N.Y. Sup. Ct. 2010) ("Since [sic] Plaintiff knew that her information may become publicly available, she cannot now claim that she had a rea-

Additionally, a number of states have advised on another hotly debated social media topic—whether judges may be friends with lawyers on Facebook. On one end of the spectrum, states such as Florida have voiced the conservative viewpoint that a judge should not be connected on social media with a lawyer who may appear before the judge.[145] On the other end; however, states such as South Carolina have offered a more liberal view that encourages judges to participate in the interest of community, but cautions them not to discuss any case pending before them in accordance with Judicial Cannons prohibiting bias and the appearance of impropriety.[146]

So, with all of this advice being offered by the state and local bar associations and the ABA, why do lawyers who are engaged in social media continue to stumble onto ethical and professional landmines? In fact, lawyers continue to face discipline for a wide array of social media related offenses. In Florida, a lawyer was reprimanded for blogging about a judge's controversial courtroom procedures and referring to her as an "evil, unfair witch"

---

sonable expectation of privacy."); *see also* Beswick v. Northwest Med. Ctr., Inc., No. 07-020592, 2011 WL 7005038 (Fla. 17th Cir. Ct. Nov. 3, 2011) (Defendants sought discovery of information Plaintiff shared on social networking sites concerning her noneconomic damages and the court found this information to be "clearly relevant to the subject matter of the current litigation and . . . reasonably calculated to lead to admissible evidence."); *see also* Levine v. Culligan of Fla., Inc., No. 50-2011-CA-010339-XXXXMB, 2013 WL 1100404, at *5 (Fla. 15th Cir. Ct. Jan. 29, 2013) (finding that "the critical factor in determining when to permit discovery of social media is whether the requesting party has a basis for the request" and that "Defendant ha[d] not come forth with any information from the public portions of any of Plaintiff's profiles that would indicate that there [was] relevant information on her profiles that would contradict the claims in th[e] case"); *see also* Salvalto v. Miliey, No. 5:12-CV-635-Oc-10PRL, 2013 WL 2712206, at *2 (M.D. Fla. June 11, 2013); *see also* Root v. Balfour Beatty Const. LLC, 132 So.3d 867 (Fla. Dist. Ct. App. 2d Dist. 2014); *see also* Nucci v. Target Corporation, No. 4D14-138, 2015 WL 71726 (Fla. Dist. Ct. App. 2d Dist. 2014 Jan. 7, 2015) (finding that "[i]t would take a great novelist, a Tolstoy, a Dickens, or a Hemingway, to use words to summarize the totality of a prior life. If a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media before the occurrence of an accident causing injury.").

145. Fla. Jud. Ethics Advisory Comm., Formal Op. 2009-20 (2009).

146. *See* Jacobowitz & Singer, *The Social Media Frontier*, *supra* note 138, at 471–72; *see also* Md. Jud. Ethics Comm., Formal Op. 2012-07 (2012); *see also* Cal. Judges Assoc. Jud. Ethics Comm., Formal Op. 66 (2010); *see also* Ky. Ethics Comm. of the Ky. Jud., Formal Op. JE-119 (2010); *see also* S.C. Advisory Comm. on Standards of Jud. Conduct, Formal Op. 17-2009 (2009); *see also* Ohio Bd. of Comm'rs on Grievance & Discipline, Formal Op. 2010-7 (2010); *see also* N.Y. Advisory Comm. on Jud. Ethics, Formal Op. 08-176 (2009); *see also* Mass. Comm. on Jud. Ethics, Formal Op. 2011-6 (2011); *see also* Okla. Jud. Ethics Advisory Panel, Formal Op. 2011-3 (2011).

among other derogatory characterizations.[147] In Illinois, a public defender received discipline for blogging about her clients, using derogatory language and identifying them by their prison numbers or reference to their first names.[148] In Virginia, a lawyer agreed to a five year suspension of his license and paid over a half million dollars in sanctions as a result of instructing his client to "clean up his Facebook page," delete his Facebook account, and sign answers to interrogatories that stated as of the date of the signing that he did not have a Facebook account.[149] In Georgia, a lawyer was reprimanded when she responded to a client's negative review on the lawyer rating service AVVO and thereby breached client confidentiality.[150] In yet another Florida case, a public defender was terminated after she posted a picture of her client's leopard printed underwear on Facebook and commented on the family's choice of proper client attire.[151] As Public Defender Carlos Martinez explained after terminating the lawyer, "[w]hen a lawyer broadcasts disparaging and humiliating words and pictures, it undermines the basic client relationship and it gives the appearance that [the client] is not receiving a fair trial."[152]

All of these disciplinary actions involve the application, in a social media context, of the traditional rules requiring respect for the judiciary, client confidentiality, and fairness to opposing counsel. However, there is also a growing list of examples of "random" postings—either done anonymously or openly—of thoughts and feelings about cases, controversies or current issues, the publication of which are jeopardizing the reputations and careers of the lawyers involved.

For example, last summer two public defenders were terminated after posting derogatory statements on their Facebook accounts about Palestinians

147. The Fla. Bar v. Conway, 996 So.2d 213 (Fla. 2008).

148. *In re* Kristine Ann Peshek, Disciplinary Comm'n, M.R. 23712 (Ill. May 18, 2010), *available at* http://www.state.il.us/court/SupremeCourt/Announce/2010/051810.pdf; *In re* Disciplinary Proceedings Against Peshek, 798 N.W.2d 879, 880–81 (Wis. 2011).

149. *See generally* Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. 2013); *see also Matthew B. Murray Resigns from the Allen Law Firm*, ALLEN ALLEN ALLEN & ALLEN, http://www.allenandallen.com/matthew-b-murray-resigns.html (last visited Apr. 13, 2015); *see also* Peter Vieth, *Murray Agrees to 5-Year Bar Suspension in Wake of Sanctions Payment*, VA LAWYERS WEEKLY (July 29, 2013), http://valawyersweekly.com/2013/07/29/murray-agrees-to-5-year-bar-suspension-in-wake-of-sanctions-payment/.

150. *In re* Skinner, 740 S.E.2d 171, 173 (Ga. 2013).

151. Martha Neil, *Lawyer Puts Photo of Client's Leopard-Print Undies on Facebook; Murder Mistrial, Loss of Job Result*, A.B.A. J. (Sept. 13, 2012), http://www.abajournal.com/news/article/lawyer_puts_photo_of_clients_leopard-print_undies_on_facebook_murder_mistri/.

152. *Id.*

in connection with the death of three Israeli teenagers.[153] After terminating the two lawyers, Public Defender Howard Feinstein said that he was stunned by the nature of the Facebook posts and explained that it is "[t]ime for us to learn and grow and draw the line in the sand firmly that as public defenders we have a higher calling and we cannot engage in hate speech that interferes with the mission of this office which is equal justice for all."[154]

In September, an Arkansas judge was removed from the bench and banned from holding office after he posted comments about his cases on a University of Louisiana online message board under the pseudonym "geauxjudge." Some of his comments were seen as reflecting bias against women, African Americans, and the gay community.[155] The judge also included commentary about the confidential adoption of a child by actress Charlize Theron.[156]

In 2011, an Indiana state prosecutor was terminated after he tweeted "use live ammunition" in response to the news report that riot police had been ordered to remove protestors from the state capital of Madison, Wisconsin.[157]

In 2011, a Minnesota Assistant U.S. Attorney made headlines after posting on Facebook that she was "keeping the streets safe from Somalis" during the trial of a Somali immigrant accused of attempted murder,[158]

153. Brittany Wallman, *Public Defenders Fired in Broward County for Alleged Hate sSpeech on Facebook*, CBS12, http://cbs12.com/news/top-stories/stories/public-defenders-fired-broward-county-alleged-hate-speech-facebook-17506.shtml (last visited Mar. 12, 2015).

154. *Id.*

155. Debra Cassens Weiss, *Controversial 'Geauxjudge' Commenter Admits He Is a Judge, Drops Out of Appellate Race*, A.B.A. J. (Mar. 7, 2014, 1:13 PM), http://www.abajournal.com/news/article/controversial_gauxjudge_commenter_admits_he_is_a_judge_drops_out_of_appella.

156. Martha Neil, *Judge Banned from Bench Due to Online Comments, Disclosing Confidential Info on Celebrity's Adoption*, A.B.A. J. (Sept. 11, 2014, 2:20 PM), http://www.abajournal.com/news/article/judge_who_talked_about_adoption_by_actress_charlize_theron_in_online_posts/?utm_source=internal&utm_medium=navigation&utm_campaign=most_read.

157. CNN Wire Staff, *Indiana State Prosecutor Fired over Remarks about Wisconsin Protests*, CNN (Feb. 23, 2011, 9:57 PM), http://www.cnn.com/2011/US/02/23/indiana.ammo.tweet/.

158. Minnesota v. Usee, 800 N.W.2d 192, 200 (Minn. Ct. App. 2011) (finding that "[h]ere, the jury was instructed throughout the trial not to research the case, the issues, or anyone involved in the case on the Internet. Appellant presented evidence in the form of two affidavits—one by each of his trial attorneys—stating that the prosecutor had posted the alleged comments on her public Facebook page. But appellant did not present evidence that any juror had been exposed to the comments. Absent evidence of juror exposure, appellant did not establish a prima facie case of juror misconduct.").

In 2012, at least four attorneys in a U.S. Attorney's office either resigned or were demoted as a result of their "anonymous" postings on a Louisiana newspaper's website during the high profile trial of five New Orleans police officers who allegedly shot innocent victims in the aftermath of Hurricane Katrina.[159] The online comments were a significant contributing factor to behavior that the judge deemed "grotesque prosecutorial misconduct" when he overturned the conviction and ordered a new trial.[160] Notably, the main online perpetrator was not directly involved in the trial.

In 2013, a Beaumont, Texas Assistant U.S. Attorney made derogatory, racially charged comments on Facebook regarding the Trayvon Martin case.[161]

> [He] . . . commented on the Trayvon Martin case, in which George Zimmerman was acquitted in the death of the teen who had gone to the store to buy Skittles and Arizona iced tea, the story says.
>
> [He] wrote: "How are you fixed for Skittles and Arizona watermelon fruitcocktail (and maybe a bottle of Robitussin, too) in your neighborhood? I am fresh out of 'purple drank.' So, I may come by for a visit. In a rainstorm. In the middle of the night. In a hoodie. Don't get upset or anything if you see me looking in your window . . . kay?"[162]

There are many more examples in what John Browning has dubbed the "rogues gallery" of social media blunders.[163] Perhaps one of the most recent

159. Martha Neil, *Ex-Prosecutor Blames Ambien, Job Pressure for Web Posts He Resigned Over; Says Few Were Work-Related*, A.B.A. J. (Sept. 10, 2014, 3:55 PM), http://www.abajournal.com/news/article/ex_prosecutor_blames_pressures_of_job_for_blog_posts_he_resigned_over_says/.

160. Martha Neil, *Judge Cites 'Grotesque Prosecutorial Misconduct,' Reverses Cop Convictions in Danziger Bridge Case*, A.B.A. J. (Sept. 17, 2013, 8:55 PM), http://www.abajournal.com/news/article/judge_cites_grotesque_prosecutorial_misconduct_reverses_cop_convictions_in_/.

161. Debra Cassens Weiss, *Assistant U.S. Attorney's Derogatory Facebook Comments about 'Dalibama' and Trayvon Martin are Probed*, A.B.A. J. (Aug. 15, 2013, 12:06 PM), http://www.abajournal.com/news/article/assistant_us_attorneys_derogatory_facebook_comments_about_dalibama_and_tray/?utm_source=maestro&sc_cid=130815AR&utm_campaign=weekly_email&utm_medium=email.

162. *Id.* While the Beaumont U.S. Attorney's Office found the comments to be reprehensible, it is unclear whether the prosecutor was disciplined because the comments did not have to do with a case in the office and the office did not have a social media policy.

163. *See generally* JOHN G. BROWNING, SOCIAL MEDIA AND LITIGATION: PRACTICE GUIDE 159 (2014); *see also* John Browning, *Friend or Foe: Ethical Concerns in the Use of Social Media*, TECHNOLOGY AND THE 21ST CENTURY ADVOCATE

is the Florida prosecutor's mother's day greeting to "all you crack hoes" that appears at the opening of this article.[164] Some of the lawyers involved in the examples discussed above lost their jobs, while others were disciplined on the job or by a bar association. Universal among the cases is the impact on the legal profession. No doubt, there are individual factors that apply in all of these examples, but given the pervasive nature of social media and the repeated social media mishaps occurring within the legal profession, perhaps there is an overarching cultural explanation.

A. Culture Clash?

Why are there so many stories of lawyers tripping on ethical landmines in cyberspace? Psychological studies have found that people share on social media because sharing is not only consistent with human nature, but also is often prompted by emotional arousal for which social media sharing may provide a sense of closure.[165] Additionally, "oversharing" stems from our basic wiring and the inherent pleasure we gain from talking about ourselves.[166] Thus, a lawyer's need to vent about a client, opposing counsel, or judge—conversations that traditionally occurred in a discreet, face-to-face conversation with a colleague—may now appear as a hyper-personal, disinhibited, and possibly "flaming" post on social media. As such, a lawyer's natural desire for connectedness and social feedback, another factor in why people share on social media, may underlie the impulse to post a crack hoes mother's day greeting or controversial comment about the Trayvon Martin case.

Perhaps, the problem is that the legal profession's culture is not a culture of quick *share and connects*. Contrasted with the quick and immediate nature of social media and its values of *share* and *connect* are the legal profession's values of careful *analytical thinking*, *confidentiality*, and *respect* for others as well as for the legal profession's perceived role in society. In other words, lawyers are known for careful analysis of confidential information

(Am. Inns of Court National Symposium, The Advocate: Professional Representation in the 21st Century 2013), *available at* http://home.innsofcourt.org/media/37095/panel_6_handouts.pdf.

164. Kemp, *supra* note 3.

165. Courtney Seiter, *7 Social Media Psychology Studies that Will Make Your Marketing Smarter*, HUFFINGTON POST (Sept. 2, 2014, 3:52 PM), http://www.huffingtonpost.com/courtney-seiter/7-social-media-psychology_b_5697909.html; *see also* John Tierney, *Good News Beats Bad on Social Networks*, N.Y. TIMES (Mar. 18, 2013), http://www.nytimes.com/2013/03/19/science/good-news-spreads-faster-on-twitter-and-facebook.html?pagewanted=all&_r=0 (last visited Apr. 13, 2015). While an in-depth discussion of the psychology of social media is beyond the scope of this article, this mention of it seems not only relevant, but also widely accepted and therefore relevant to the discussion of lawyers and social media use.

166. *Id.*

rather than public sharing of private information and opinions. Some of the fundamental cultural norms of social media and the legal profession seem to directly contradict one another. On the other hand, some of the personality traits associated with lawyers such as being aggressive, competitive, and subject to suffering high degrees of psychological stress may render social media compelling as an outlet for emotionally charged opinions or as a vehicle for winning-at-all-costs legal strategies.

Moreover, the fact that the profession has not historically codified the value of cultural competency and that legal education has been criticized for failing to adequately connect analytical thinking skills with real world situations compounds the situation. Why? Because a lawyer who does not appreciate the clashing nature of social media norms with the legal profession's norms and also suffers from a general lack of cultural competency will not likely appreciate the impact of his social media post upon the vast audience that comprises social media. The public defenders who were terminated for anti-Palestinian posts may not have considered that there would be uproar from the Islamic community that voiced concern about being able to have unbiased representation for anyone in their community who might be in need of a public defender.[167] Thus, a lawyer who blends his professional and personal life on social media without appreciating Mark Zuckerberg's suggestion that the days of having two identities—one for work and one for home—are rapidly coming to end, is a lawyer who may be risking his reputation and career. Beyond understanding the cultural differences between social media and the legal profession, some guidelines may prove to be beneficial.

B. Cultural Competency and Social Media Guidelines for the Legal Profession

In 2012, the International Bar Association's (IBA) Legal Projects Team conducted an international survey of its member bar associations and reported its findings in *The Impact of Online Social Networking on the Legal Profession and Practice*. The survey found that "over 90 percent of respondents identified a need for bar associations, law societies and councils, or, alternatively, the IBA, to develop guidelines regarding the use of online social networking sites in the legal profession."[168] On May 24, 2014, the IBA

167. Running throughout the rogues gallery of lawyer's social media blunders is the tension between legal ethics and professionalism on the one hand and a lawyer's First Amendment right of free speech, which is a robust discussion that is beyond the scope of this article. *See* Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in* Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter, 36 CAMPBELL L. REV. 75 (2013).

168. *IBA International Principles on Social Media Conduct for the Legal Profession*, INT'L BAR ASS'N (May 24, 2014), http://www.ibanet.org/Document/Default.aspx?DocumentUid=27EBAC25-0D13-4318-A1C4-6B751ACA935F (last visited Apr. 13, 2015).

published International Principles for the Legal Profession.[169] These principles were developed after taking into consideration varying cultural differences in the use of social media by IBA's international members and seek to resolve the "cultural clash" between social media and the legal profession.

The first of the six principles acknowledges the normative value of *independence* and suggests, "[b]efore entering into an online 'relationship', lawyers should reflect upon the professional implications of being linked publicly. Comments and content posted online ought to project the same professional independence and the appearance of independence that is required in practice."[170]

The second principle addresses *integrity* and explains "[l]egal professionals are expected to maintain the highest standards of integrity in all dealings, including those conducted over social media. Comments or content that are unprofessional or unethical could damage public confidence, even if they were originally made in a 'private' context."[171]

The third principle is *responsibility* and pertains to understanding how social media works. In other words, lawyers should acquire competence as to the methods for engaging in social media. The third principle states:

> Legal professionals should be reminded to maintain responsible use of social media based on a full understanding of the implications (noting that information published on social media is not easily removable) and, at the same time, monitor and regularly review their use of and content on social media . . .
>
> Social media provides a platform for quick, short messages to be disseminated widely. What was intended to be humorous or frivolous may be received as a serious declaration. Bar associations and regulatory bodies should remind legal practitioners to consider the context, the potential audience and whether the comment is clear and unambiguous. As a general guidance, legal practitioners ought not to do or say something online that they would not do or say in front of a crowd. Lawyers should also be reminded that inappropriate use of social media could also lead to exposure to discrimination, harassment and invasion of privacy claims as well as exposure to claims for defamation, libel and other torts.[172]

The fourth principle, *confidentiality*, pertains to the importance not only of client confidentiality, but also of the public perception that lawyers maintain confidentiality of client information. This principle recommends that, "bar associations and regulatory bodies should encourage lawyers to consider

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

client confidentiality more generally when using social media . . . [and warns that even] . . . information that locates a lawyer geographically and temporally could be used to show professional involvement with a client who does not wish to publicize that he or she is seeking legal advice."[173]

The fifth principle, *maintaining public confidence*, echoes Zuckerberg's observation of the need for a unified identity. It states that:

> [L]egal practitioners should be encouraged to monitor their online and offline conduct in the same way. Restraint should be exercised so that online conduct adheres to the same standard as it would offline in order to maintain a reputation demonstrating characteristics essential to a trusted lawyer, such as independence and integrity . . .
>
> As with offline activity, lawyers have personal autonomy over their private affairs. The difference with online social media is that a lawyer's life and activities may be exposed more widely to public gaze, which may have the effect of highlighting the key characteristics of the lawyer. It is essential that bar associations and regulatory bodies ensure that lawyers appreciate these key characteristics and risks when pursuing their personal social life online. In addition, because it is common to use a variety of social media, bar associations and regulatory bodies should remind lawyers to consider whether the sum total of their social media activity portrays a legal professional with whom clients can entrust their affairs.[174]

The sixth and final principle, *policy*, calls upon law firms and other legal offices to develop clear policy guidelines for employees as to social media use. This principle serves as reinforcement of the concept that social media culture is distinct from the culture of the legal profession and therefore must be thoughtfully integrated in the legal profession.[175]

The IBA has not only identified competence, integrity, confidentiality, and maintaining the public trust as characteristics of the legal profession, but has also sought to explain the nuances of social media to assist attorneys in avoiding the undertow when human nature encourages a lawyer to express himself online without regard to his offline professional identity and the cultural norms of the legal profession. Awareness is an essential ingredient in avoiding the quick expression of a thought or feeling consistent with the

173. *Id.*

174. *IBA International Principles on Social Media Conduct for the Legal Profession*, INT'L BAR ASS'N (May 24, 2014), http://www.ibanet.org/Document/Default.aspx?DocumentUid=27EBAC25-0D13-4318-A1C4-6B751ACA935F.

175. *Id.*

culture of social media, but the expression of which will ultimately clash with normative values in the legal profession.

VIII. The Role of Awareness

As discussed above, becoming culturally competent requires a heightened awareness in the moment. Pausing to consider another person's cultural context and how it might be influencing that person's communication is essential. Likewise, an awareness of an individual's own cultural predispositions and biases is a critical component of cultural competency. Awareness is necessary not only in dealing with clients, opposing counsel, judges, and jurors, but also when engaging in the culture of social media. Both aspects of cultural competency come into play. Awareness of the manner of self-expression of the communicator and awareness of the potential reaction of the recipients of the communication are required. The IBA's social media principles for the legal profession focus on both the need to maintain fundamental values of the legal profession and the fact that awareness of these values and the norms of social media culture are the formula for successfully integrating these two cultures.[176]

In his book, *The Eighth Habit: From Effectiveness to Greatness*, Stephen Covey describes awareness as the realization that there is a space between an event and a person's response to that event.[177] Covey notes that the understanding that an individual may pause in this space had a dramatic impact upon his orientation in the world.[178] Dr. Daniel Siegel explains that by pausing to gain insight into what is influencing your thought process, you may be able to reflect and more consciously deliberate to thoughtfully decide upon a response rather than quickly react in a regrettable manner.[179]

In "Thinking, Fast and Slow," Daniel Kahneman describes the process of thinking about our thinking, or "meta-awareness."[180] He explains that correcting errors that originate in our intuitive, implicit thinking is simple in principle, but in actuality requires a considerable investment.[181]

The simple principle is "to recognize the signs that you are in a cognitive minefield, slow down, and ask for reinforcement" from the conscious, deliberate aspect of your mind—the slow thinking system.[182] Kahneman further explains:

176. *Id.*

177. Stephen R. Covey, The 8th Habit: From Effectiveness to Greatness 42 (2004).

178. *Id.*

179. *See* Daniel J. Siegel, The Mindful Brain—Reflection and Attunement in the Cultivation of Well-Being 327 (2007).

180. Daniel Kahneman, Thinking, Fast and Slow 417 (2011).

181. *Id.*

182. *Id.*

> Unfortunately, this sensible procedure is least likely to be applied when it is needed most. We would all like to have a warning bell ring loudly whenever we are about to make a serious error, but no such bell is available . . . The voice of reason may be much fainter than the loud and clear voice of an erroneous intuition, and questioning your intuitions is unpleasant when you face the stress of a big decision. More doubt is the last thing that you want when you are in trouble . . . The upshot is that it is much easier to identify a minefield when you observe others wandering into it than when you are about to do so.[183]

Cultivating awareness and understanding the psychological theories that impact interpersonal relationships and decision-making are areas of growing interest in the legal profession. Jennifer Robbennolt and Jean Sternlight's book, *Psychology for Lawyers*, is part of the growing literature advancing the idea that not only should law students and lawyers be taught cultural competency, but also they should learn about cognitive psychology and emotional intelligence to increase self-awareness and improve effectiveness.[184] Robbennolt and Sternlight begin their book with Judge Learned Hand's observation in a 1911 opinion. Judge Hand wrote, "[h]ow long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance."[185]

Robbennolt and Sternlight have embraced Judge Hand's suggestion and provided an in-depth exploration of the value for lawyers of learning more about psychology, "the science of how people think, feel and behave."[186] They suggest that, "[l]awyers who can harness the insights of psychology

183. *Id.* at 417.

184. *See generally* JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING (2012); *see also* Alan Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible Choices*, 23 Q.L.R. 643 (2004); PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT—A GUIDE FOR LAWYERS AND POLICY MAKERS 481 (2010); Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 363 (2012); Andrew Perlman, *A Behavioral Theory of Legal Ethics* (Suffolk Univ. Law Sch. Research Paper No. 13-31, 2013), *available at* http://ssrn.com/abstract=2320605; Susan Swaim Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795 (2012).

185. ROBBENNOLT & STERNLIGHT, *supra* note 184, at 1 (citing Parke-Davis & Co. v. H. K. Mulford Co., 189 F. 95, 115 (1911)).

186. *See id.*

will be more effective interviewers and counselors, engage in more successful negotiations, conduct more efficient and useful discovery, more effectively persuade judges and others through their written words, better identify and avoid ethical problems, and even be more productive and happier."[187]

Robbennolt and Sternlight explain heuristics that impact decision-making and the variables that result in ethical lapses,[188] which may occur "more easily and less intentionally than we might imagine."[189] It is critical to maintain an awareness of the underlying psychology at play and the fact that the influence of certain aspects of legal practice, such as zealous client advocacy, may contribute to an ethical lapse.[190] Awareness of the ethics rules, as well as prior planning, also contribute to more effective and ethical decision-making.[191] Prior planning tools that may be used include identifying beneficial resources, anticipating pressure,[192] and employing the psychological strategy of implementation.[193] An "implementation intention" may be useful for lawyers who are highly engaged in social media and want to avoid impulsively sharing thoughts that are better left unpublished. Robbennolt and Sternlight explain:

> [a]n implementation intention is an if-then statement that specifies how we will behave in a future situation. In particular the statement anticipates and articulates a specific triggering circumstance or feeling followed by a detailed statement of what we will do on that occasion . . . . [W]e might say, when I feel myself under pressure to make a concession, I will tell Joe that I need to make a phone call and take a five-minute break." When the trigger occurs the response is automatic. Specifying the trigger as well as the specifics of the behavioral response in this way has been shown to be effective in furthering the desired goal-directed behavior.[194]

Another strategy for cultivating awareness is mindfulness, the development of non-judgmental awareness in the moment, which is growing in popularity in the legal community. Mindfulness enhances awareness of thoughts, feelings, and bodily sensations that are experienced in the present moment, which impact our decision-making and often go unnoticed. The legal profession is embracing mindfulness practice to provide tools to assist in engaging

187. *Id.*

188. *Id.* at 392.

189. *Id.* at 385. (An explanation of these phenomena, while fascinating, is beyond the scope of this article).

190. *See id.* at 393.

191. ROBBENNOLT & STERNLIGHT, *supra* note184, at 413.

192. *Id.*

193. *Id.* at 111.

194. *Id.* at 111–12.

in the pause, "thinking about ones thinking", and responding more thoughtfully.[195]

As discussed above, once an individual develops an enhanced self-awareness, he may better analyze his relationship to other cultures, obtain knowledge about other cultures, and further develop the skills to recognize and adapt to the distinction in the moment. This formula is true for any cross-cultural exchange, but traveling in the land of social media is more like being a traveler in a foreign land than it is sitting directly across from a client where perhaps it is easier to practice and engage in Bryant and Koh Peters' five habits of the culturally competent lawyer.[196] When using social media, a lawyer should be aware not only of aligning his conduct to the norms of the legal profession, but also must consider the culture sensitivities of the virtually unlimited culturally diverse audience.

It is not possible to apply cultural competence skills to consider all ages, ethnicities, nationalities, sexual preferences, vocations, education levels, socio-economic levels, and other traits of the people to whom a lawyer may be "speaking" through status updates, tweets, Instagram pictures, and YouTube videos. Thus, lawyers need to be aware that using prejudicial, biased language even in jest, posting controversial comments about a group of people such as the Palestinians, or unprofessionally posting and commenting on a client's underwear[197] are social media posts that can quickly be viewed by hundreds or even thousands of people, depending upon privacy settings as well as other social media sharing methodologies. Moreover, whatever you post is permanent.[198] In other words, *lawyers beware: you are what you post.*

195. Jan L. Jacobowitz, *The Benefits of Mindfulness for Litigators*, 39 ABA LITIG. J. 2 (2013), *available at* http://www.americanbar.org/publications/litigation_journal/2012_13/spring/benefits-mindfulness.html; *see also* JAN L. JACOBOWITZ, *Mindfulness and Professionalism*, *in* THE ESSENTIAL QUALITIES OF A PROFESSIONAL LAWYER (Amer. Bar Ass'n, Ctr. Prof'l Responsibility 2013); Jan L. Jacobowitz & Scott Rogers, *Mindful Ethics—A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility*, 4 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS (2014); SCOTT ROGERS & JAN L. JACOBOWITZ, MINDFULNESS AND PROFESSIONAL RESPONSIBILITY: A GUIDE BOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM 13 (2012); Nicole E. Ruedy & Maurice E. Schweitzer, *In the Moment: The Effect of Mindfulness on Ethical Decision Making*, 95 J. BUS. ETHICS 73 (2010); HALLIE N. LOVE & NATHALIE MARTIN, YOGA FOR LAWYERS: MIND-BODY TECHNIQUES TO FEEL BETTER ALL THE TIME 100 (2014).

196. BRYANT & PETERS, *supra* note 44.

197. Neil, *supra* note 151.

198. Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES MAG. (July 21, 2010), http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0.

VIII. CONCLUSION

There is a robust literature dedicated to cultural awareness and cultural competence. The role of the lawyer and the cultural norms of the legal profession also command an enormous body of scholarly writing and analysis. Finally, there is an increasing amount of research and literature revolving around the impact of the digital age and the culture of social media. Ultimately, this article is about raising awareness. Awareness of the value for lawyers who are willing to develop cultural competence. Awareness of the benefit for lawyers who understand the normative values of the legal profession and recognize how those values may align or contrast with personal values and the context in which they practice. Awareness that a competent lawyer must be knowledgeable about both the advantages and pitfalls of using social media in the effective practice of law. Finally, awareness in the moment so that a lawyer may pause and calibrate his cultural competency such that his words remain true to his intention and identity, whether it be online or offline.

> *Speak clearly, if you speak at all; carve every word before you let it fall.*[199]
>
> —Oliver Wendell Holmes Sr.

199. BRAINYQUOTE, http://www.brainyquote.com/quotes/quotes/o/oliverwend122641.html (last visited Apr. 13, 2015).

LEGAL ETHICS and SOCIAL MEDIA

A Practitioner's Handbook

JAN L. JACOBOWITZ AND JOHN G. BROWNING

AMERICAN BAR ASSOCIATION
Center for
Professional Responsibility

Contents

About the Authors xiii
Acknowledgments xv
Preface xvii
Introduction 1

1

When J.D. Means "Just Don't" Know, Digital Competence Is Essential 5

QUESTIONS

1. What is the cloud and how may it be used? 5
2. What is outsourcing, and under what conditions is it acceptable? 6
3. What about using my laptop at the airport or at a coffee shop on the free Wi-Fi? 8
4. Do I need to be concerned about cybersecurity when I am working in my office? 10

2

The "Duty to Google": Representing Clients in the Digital Age 13

QUESTIONS

1. What is a social media network? 16
2. How many people participate in social media networks? 17
3. What are some examples of popular social media networks of which lawyers should be aware? 18
4. What are some of the ways in which social media has impacted the practice of law? 19
5. How has social media impacted the establishment of appropriate jurisdiction in the litigation of a matter? 21
6. Have any courts approved substituted service of process via a social media network? 23
7. What do I need to demonstrate to the court to obtain permission to use substitute service via social media? 24

3

You Posted *What*? Advising Your Client About Social Media 25

QUESTIONS

1. How did social media savvy become a component of attorney competence? 26
2. How much do I really need to know about my clients' social media activity? 28
3. May I advise my client to use or change her privacy settings? 31
4. May I advise my client as to what to post on social media? 31
5. My client has some Facebook posts that could really hurt our case. May I ethically tell her to take them down or delete them? And may I tell her to refrain from using social media during the case? 33
6. Should I monitor my client's use of social media during the case? 34

Appendix of State Ethics Advisory Opinions 37

4

Social Sleuthing and Discovery 51

QUESTIONS

1. What is informal social media discovery? 54
2. What are the primary legal ethics rules that pertain to informal social media discovery? 55
3. May I review an opposing party's social media accounts? 58
4. May I contact an opposing party by connecting or friending him on social media? If the answer is yes, what is the proper procedure for doing so? 59
5. I'm suing this company for employment discrimination, and I'm sure many of my client's former co-workers who are still there have some good dirt on the employment practices at their firm. A number of them are on Facebook. May I ethically reach out to them via social media? 61
6. May I review a witness's social media accounts? 62
7. May I contact a witness through social media? If the answer is yes, what is the proper procedure for doing so? 62
8. Do the contact rules for the opposing party or witness differ if I have a law clerk or paralegal engage in the contact? 63
9. Is it permissible to review an opposing party or witness's social media postings that are behind a privacy wall if my client, a witness, or an employee at my firm has been connected on social media to the opposing party or witness prior to the incidents that are the subject of the current lawsuit? 63
10. In the event that I permissibly view and locate potential evidence on any aspect of the social media accounts of the opposing parties or any of the witnesses in a case, what, if any, other steps should I take to preserve the evidence? 65
11. What is formal discovery as it relates to social media? 66

12. What types of questions should I be asking in interrogatories? 67
13. What questions should I include in a request for production of documents? 67
14. What questions should I pose in opposing party or witness depositions? 69
15. If I receive discovery that requests social media information or production of documents from my client, what are appropriate objections to the requests? 71
16. If the other party is refusing to respond or objecting to interrogatories or a request for production of documents, what is the likelihood that I will succeed in obtaining the information if I file a motion to compel? 71
17. Assuming that I obtain useful social media discovery, what issues arise if I choose to use social media evidence at trial? 72

5

Digital Hide-and-Seek? Preservation and Spoliation of Evidence 75

QUESTIONS

1. What is the relationship between the Model Rules of Professional Conduct and spoliation? 76
2. What if a client has changed his privacy setting prior to the lawsuit, but after the incident that gives rise to the legal claim? 78
3. Is there any problem with a client changing privacy settings during a pending case? 79
4. Does deactivating a social media account constitute spoliation? 80
5. Does an inadvertent deactivation constitute spoliation? 83
6. What happens when my client has already deleted posts? 85
7. When deletion of relevant evidence occurs after counsel is retained, will it constitute spoliation that may result in severe sanctions? And what may happen if the court finds that counsel participated in or ratified the deletion? 86
8. What are the potential repercussions of a client removing social media evidence in a criminal case? 90

6

Juror, Juror on the (Social Media) Wall, Who's the Fairest of Them All? 93

QUESTIONS

1. I have a big trial coming up, and I want to gather as much "intel" on the jury panel as I can before I make my strikes. May I research the social media profiles and online postings of the venire members? 98
2. Can I get in trouble for "Facebooking" the jury? What are the potential impediments or dangers involved? 98
3. Are there risks involved in not "Facebooking" the jury? 100
4. If a judge asks me to justify my "Facebooking the jury," or orders the parties to brief the issue, is there any case support that I may cite? 105

5. My upcoming trial is in front of a judge who doesn't seem to be the type to embrace technology. Is this typical, and what are some of the judicial concerns about online research on prospective jurors that I should anticipate? 109
6. Should I notify the judge if I plan to conduct online research of the jurors? 110
7. Do judges restrict online research of jurors? 111
8. Do some courts have identifiable rules for researching jurors? 113
9. Have any ethics opinions addressed online juror research, and what kind of guidance has been provided? 114

7

Through the Prosecutorial Looking Glass: Prosecutors, Ethics, and Social Media 127

QUESTION

1. I'm an assistant district attorney, and our office uses social media quite a bit, including for researching incriminating posts by defendants. But are there any ethical danger areas of which we should be aware? 128

8

"Friends" with No Benefits? Judges, Legal Ethics, and Social Media 139

QUESTIONS

1. I have an important hearing coming up and when I looked up opposing counsel's Facebook page, I saw that among her "friends" is the judge in our case. Is this ethically permissible? Should I file a motion to recuse? 140
2. I found out that the judge in one of my cases is a Facebook friend of a family member of one of the parties. Is this grounds for recusal? 145
3. What are some of the primary concerns about judicial misuse of social media? 146

Appendix State-by-State Alphabetical Guide of Ethics Advisory Opinions Regarding Judges on Social Media 156

9

Cover Your Digital Assets! Social Media's Impact on the Transactional Lawyer 173

QUESTION

1. How has social media impacted the fundamental ethical obligations of competence, diligence, communication, and confidentiality across various practice areas? 173

Trust and Estate Law 173
Securities Law 175
Mergers and Acquisitions 177
Bankruptcy 178
Labor and Employment Law 180
Government Law 182

10

Attorney Advertising in an Age of LinkedIn, Twitter, and Blogs 185

QUESTIONS

1. Is my law firm website compliant? 189
2. What are some guidelines for blogging? 190
3. Any problem with linking my blog to my law firm website? 193
4. Any problem with advertising on Facebook? 193
5. What about YouTube? 194
6. I have been asked to be an expert on a website on which members of the public may pose questions. Any ethical issues I need to consider? 195
7. Should I claim my Avvo page? 195
8. Any issues with using pay-per-lead or pay-per-click advertising? 196
9. May I offer a Groupon or other daily deal coupon for my services? 199
10. Is it okay to purchase Google AdWords to increase my business? 201
11. May I use LinkedIn for advertising? How should I list my skills? What about accepting endorsements and recommendations? 203

11

They Said *What* About Me? Ethically Filtering Your Response to a Negative Online Review 207

QUESTIONS

1. An unhappy former client of mine has slammed me on Facebook and on online consumer sites like Yelp! My reputation is being trashed, and I want to defend myself. May I go online and set the record straight by telling my side of the story? 208
2. Why can't I bring a defamation lawsuit? After all, this client is trashing me by making false statements about my handling of the case. 213
3. How does *anonymous* online criticism impact the viability of a defamation suit? 214
4. Do anti-SLAPP statutes limit defamation suits against clients for negative online criticism? 214
5. Is there a best practice for dealing with negative online reviews? 215

12

Selfie Sabotage? Lawyers Are Human, Too! 217

QUESTIONS

1. What is the culture of social media? 223
2. What are the differences between the culture of social media and the culture of the legal profession, and how do these differences contribute to ethical missteps in the legal profession? 223
3. What policies may law firms establish to limit firm exposure to liability created by firm lawyers and other firm employees who engage in social media? 224
4. What are some suggestions to assist individual lawyers in avoiding the ethical landmines on social media? 225

13

The Once and Future Lawyer: Digital Defender and Client's Keeper? 229

Final Thoughts 239

Table of Cases 241

Index 247

CHAPTER 3

You Posted *What*? Advising Your Client About Social Media

Sooner or later, virtually every lawyer practicing in the digital age will have to confront two related questions: (1) Just how aware or involved must I be in what my clients are doing on social media platforms like Facebook or Twitter? and (2) What are my ethical boundaries in advising clients to "clean up" their social media profiles?

As to the first question, the short answer is "very." Regardless of your area of practice, the ubiquitous nature of social media, combined with the dizzying array of personal information that is shared every day via social media and the increasing extent to which lawyers are mining this digital treasure trove of information, make it a critical aspect of the attorney-client relationship in the twenty-first century. Not only have entire cases been undermined by revelations from a party's Facebook page or Twitter account, but the social media missteps by attorneys and clients alike have resulted in spoliation findings and sanctions rulings in cases throughout the country, as we discuss later. As the duties of "attorney and counselor at law" expand in the digital age to include counseling clients on what is posted in the first place on a site like Facebook, whether to post anything at all, what privacy settings or restrictions to adopt, and—perhaps most importantly—what content can be taken down and what must be preserved, it has become vital for lawyers to know where the ethical lines are drawn.

This chapter provides guidance to attorneys on how the ethical landscape has shifted by discussing the entire spectrum of attorney involvement from the relatively benign (advising clients on adopting privacy settings) to the more problematic issues of removing social media content and risking spoliation of evidence. In doing so, this chapter examines the "new normal" for twenty-first-century lawyers

by analyzing the various ethics opinions and guidelines nationwide that address the limits on how far lawyers can go in this regard. In the following chapter, we explore the interrelationship among legal ethics rules, ethics advisory opinions, and the law of spoliation by examining how courts throughout the US have treated parties who have removed content from their social networking pages, deactivated their Facebook accounts, or taken other measures to keep potentially incriminating posts or photos from prying eyes.

QUESTIONS

1. How did social media savvy become a component of attorney competence?

Being at least "socially aware" (if not quite social media savvy) is now considered part of the most fundamental responsibility for attorneys: the duty to provide competent representation to clients. Social media is a relatively new phenomenon, so how did social media expertise find its way into the definition of attorney competence?

The answer begins with the recommendations of the ABA Commission on Ethics 20/20 (which was created in 2009 to study how the Model Rules of Professional Conduct should be updated in light of globalization and technology's impact on the legal profession) that resulted in the ABA adopting certain changes to the Model Rules in August 2012.[1] One of these changes was to Model Rule 1.1 (Duty of Competence). As the revised comment 8 reflects, to maintain the requisite knowledge and skill, "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[2]

This change reflects the belated recognition of how technology affects "nearly every aspect of legal work, including how we store confidential information, communicate with clients, conduct discovery, engage in research, and provide legal services."[3] As the revision to Rule 1.1 indicates, competence

[1] ABA Comm'n on Ethics 20/20, Report to the House of Delegates Resolution 105A (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf [hereinafter ABA Res. 105A].

[2] *Id*.

[3] Diane Karpman, *ABA Model Rules Reflect Technology, Globalization*, Cal. Bar J: Ethics Byte (Sept. 2012), http://www.calbarjournal.com/September2012/EthicsByte.aspx.

means more than just keeping current with statutory developments or common law changes in one's particular field of practice. It also requires having sufficient familiarity with, and proficiency in, technology—both insofar as to its impact on a substantive area of law itself and as to how the lawyer delivers his or her services. Regarding the latter, the ABA Commission noted, for example, that "a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document."[4] And as to the former, an understanding of social networking sites such as Facebook is critical to accomplishing lawyerly tasks in the digital age.

In fact, ethics opinions in New York, Pennsylvania, North Carolina, Florida, West Virginia, and the District of Columbia (D.C.) have specifically noted that competence requires a lawyer to understand social media so that he or she may properly advise clients.[5] Moreover, given the vast wealth of information about individuals just a few mouse clicks away, and with "digital digging" becoming the norm for attorneys, it becomes harder for an attorney to credibly maintain that he or she has met the standard of competence when he or she has ignored social media avenues.

This certainly includes the searching side. For example, in a 2010 survey of its members by the American Academy of Matrimonial Lawyers, 81 percent reported using evidence from social networking sites in their cases.[6] In a 2013 criminal case, the Ninth Circuit held that a lawyer's failure to locate and use a purported sexual abuse victim's recantation on her social networking profile constituted ineffective assistance of counsel.[7] In addition, a number of state courts nationwide considering due diligence issues have held that lawyers have a duty to make use of online

[4] ABA Res. 105A at 3. It is important to note that the Comment to Rule 1.1 also says that "Competent representation can also be provided through the association of a lawyer of established competence in the field in question."

[5] Pa. Bar Ass'n, Formal Op. 2014-300 (2014), https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2014-300.pdf [hereinafter Pa. Op. 300]; *see also* Prof'l Ethics of The Fla. Bar, Op. 14-1 (2015), https://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+14-1?opendocument; W. Va. Office of Disciplinary Couns., L.E.O. No. 2015-02 (2015), http://www.wvodc.org/pdf/LEO%202015%20-%2002.pdf.; D.C. Bar Ethics Opinion 371 (2016), http://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm. An analysis of each opinion is provided in the appendix at the end of this chapter.

[6] John Browning, The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law (Thomson Reuters 2010).

[7] Cannedy v. Adams, 706 F.3d 1148 (9th Cir. 2013).

resources. One Florida appellate court compared a lawyer's failure to go beyond checking directory assistance to find an address for a missing defendant to the equivalent of using "the horse and buggy and the eight track stereo" in an age of Google and social media.[8]

But just as being competent in the digital age encompasses being able to do the searching and vetting online, it also includes advising one's clients that the other side will be actively engaged in such investigation as well, and that such online digging will likely include the client's social media activities, too.

2. How much do I really need to know about my clients' social media activity?

The short answer is that you have to know what's out there. Lawyers uncomfortable with technology cannot afford to take a "head in the sand" approach when it comes to their clients' activities on Facebook and other social media sites. One of the main reasons is the fact that social media has become the rule, rather than the exception. Seventy-five percent of all adults online use social networking sites. In addition, multiplatform use is more common than ever. Fifty-two percent of adults online use two or more social media sites, a significant increase over the 42 percent rate of just a year before.[9] Sites other than Facebook continue to have strong representation. For example, 23 percent of all adults online have a LinkedIn profile, while 22 percent are on Pinterest, 21 percent use Instagram, and 19 percent have Twitter accounts.[10] When we consider that 81 percent of all American adults use the Internet, the fact that 75 percent of the adult online population has at least one social networking presence becomes even more significant. Moreover, it's not simply the number of users (Facebook now boasts more than 1.5 billion worldwide) that is important, but also their level of engagement. With Facebook, for example, more than 70 percent of its users engage

[8] Dubois v. Butler ex. rel. Butler, 901 So.2d 1029 (Fla. 4th DCA 2005). As we discuss in chapter 6, the expectations for a lawyer to be technologically proficient also extend to jury selection. The ABA, in its Formal Opinion 466, has upheld the practice of researching the social media profiles of prospective jurors, as have the ethics bodies of every jurisdiction to examine this issue. *See* John Browning, *Should Voir Dire Become Voir Google? Ethical Implications of Researching Jurors on Social Media*, 17 SMU Sci. & Tech. L. Rev 603, 604 (2014); In one state, Missouri, the Supreme Court has even created an affirmative duty for lawyers to conduct online research of jurors during the voir dire process. Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (en banc).

[9] Maeve Duggan, et al., *Social Media Update 2014*, Pew Research Center (Jan. 9, 2015), http://www.PewInternet.org/2015/01/09/social-media-update.

[10] *Id*.

with the site on a daily basis, and 45 percent acknowledge doing so at least several times a day.[11]

The fact that so many people are active social media users assumes tremendous significance for attorneys. What a client has posted or decides to post can have significant consequences for his or her case. Incriminating statements found in a status update or photos and videos that contradict a key claim or defense can damage and even completely undermine a case. Consider the power attributed to photos posted on Facebook by a Florida appellate court considering their relevance and discoverability in a premises liability lawsuit, as follows.

> In a personal injury case where the plaintiff is seeking intangible damages, the fact-finder is required to examine the quality of the plaintiff's life before and after the accident to determine the extent of the loss. From testimony alone, it is often difficult for the fact-finder to grasp what a plaintiff's life was like prior to an accident. It would take a great novelist, a Tolstoy, a Dickens, or a Hemingway, to use words to summarize the totality of a prior life. If a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media before the occurrence of an accident causing injury. Such photographs are the equivalent of a "day in the life" slide show produced by the plaintiff before the existence of any motive to manipulate reality. The photographs sought here are thus powerfully relevant to the damage issues in the lawsuit.[12]

Moreover, a "day in the life" of a prospective client may reveal the tenuous nature of a claim. Model Rule 3.1[13] requires that lawyers have a reasonable basis in fact and in law to support a claim. If a lawyer reviews a client's social media at the initial client meeting, then there is an opportunity for the lawyer to either obtain a reasonable explanation for social media that appears to be inconsistent with the client's claim or to decline the representation. In fact, the D.C. opinion provides that a lawyer *must* address any inconsistencies between a client's social media presence and a client's legal

---

[11] *Id*.

[12] Nucci v. Target Corp., 162 So.3d 146 (Fla. 4th DCA 2015).

[13] Model Rules of Prof'l Conduct r. 3.1 (Am. Bar Ass'n, 2016).

claims before submitting any court or agency filings.[14] The D.C. opinion also notes social media risks for lawyers representing clients in transactions and in a regulatory practice. The opinion explains,

> [f]or example, review of client social media for their consistency with representations, warranties, covenants, conditions, restrictions, and other terms or proposed terms of agreements could be important because inconsistency could create rights or remedies for counterparties. Similarly, competent and zealous representation under Rules 1.1 and 1.3 in regulatory matters may require ensuring that representations to agencies are consistent with social media postings and that advice to clients takes such postings into account.[15]

If the inconsistent social media evidence is discovered during the course of a lawsuit, one of the two New York opinions advised, "if a client's social media posting reveals to an attorney that the client's lawsuit involves the assertion of materially false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using these false statements."[16] Similarly, an attorney should take "prompt remedial action" if a client fails to answer truthfully when asked whether changes were ever made to a social media profile.[17] Finally, a lawyer who finds fundamentally inconsistent evidence may need to withdraw. For example, a plaintiff's attorney with access to her client's private Facebook page who views Facebook comments by the client making it clear in a personal injury case that the client was hurt as a result of his own horseplay and not by the negligence of the defendant should make plans to withdraw as counsel rather than continue to pursue a frivolous claim.

Thus, best practice mandates an early discussion and review of a client's social media. Some attorneys have suggested using a flash drive to download the client's social media content prior to filing suit, thereby protecting both the lawyer and the client from claims of frivolous pleading and spoliation. However, the very real prospect of social media posts coming back to haunt a client, damage a case, or create ethical exposure for the lawyer are

[14] D.C. Bar Ethics Opinion 371 (2016).

[15] *Id.*

[16] New York Cty. Law. Ass'n, Ethics Op. 745 (2013), https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf.

[17] *Id.*

the overarching reasons for attorneys to be aware of the potential impact of social media. Perhaps the more fundamental question to explore is this: what are the limits in counseling clients about policing their online selves, in taking their Facebook accounts private, or in removing potentially harmful content from a profile?

3. May I advise my client to use or change her privacy settings?

Yes! The states that have addressed this question are in accord.[18] The Philadelphia opinion explains that changing privacy settings only renders the information more difficult to obtain, but access to the other party remains possible through formal discovery channels.[19] In fact, many individuals are unaware of privacy settings,[20] and it is probably good advice, regardless of the content, to advise clients to limit the exposure of their personal lives by electing an appropriate privacy setting. However, the D.C. opinion cautions that "[t]o provide competent advice, a lawyer should understand that privacy settings do not create any expectation of confidentiality to establish privilege or work-product protection against discovery and subpoenas."[21]

4. May I advise my client as to what to post on social media?

The North Carolina opinion concludes that advising a client as to social media posting, both before and after the filing of a lawsuit, is tantamount to providing competent and diligent representation to clients.[22] In fact, North Carolina explained that if a client's social media postings might impact

---

[18] Pa. Bar Ass'n, Formal Op. 2014-300 (2014), https://www.pabar.org/members/catalogs/Ethics%20Opinions/ formal/F2014-300.pdf [hereinafter Pa. Op. 300]; see also Prof'l Ethics of The Fla. Bar, Op. 14-1 (2015), https://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+14-1?opendocument; W. Va. Office of Disciplinary Couns., L.E.O. No. 2015 -02 (2015), http://www.wvodc.org/pdf/LEO%202015%20-%2002.pdf.; D.C. Bar Ethics Opinion 371 (2016), http://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm [hereinafter known as State Examples]. An analysis of each opinion is provided in the appendix at the end of this chapter.

[19] Phila. Bar Ass'n, Op. 2014-5 (2014), http:www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion 2014-5Final.pdf.

[20] New York Cty. Law. Ass'n, Ethics Op. 745 (2013), https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf.

[21] D.C. Bar Ethics Opinion 371 (2016).

[22] N.C. St. Bar, Formal Ethics Op. 2014-5 (2015), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-5/ [hereinafter N.C. Op. 2014-5].

that client's legal matter, then "the lawyer must advise the client of the legal ramifications of existing postings, future postings, and third party comments."[23]

The New York opinion agrees, "it is permissible for an attorney to review what a client plans to publish on a social media page in advance of publication . . . [and] . . . to guide the client appropriately, including formulating a corporate policy on social media usage."[24] The New York opinion further explains that guidance could involve the following attorney tasks: counseling the client to publish truthful, favorable information; discussing the content and advisability of social media posts; advising the client how social media posts might be perceived; advising the client about how legal adversaries might obtain access to even "private" social media pages; reviewing both posts not yet published and those that have been published; and discussing potential lines of questioning that might result.[25]

Consider, for example, a lawyer defending a chemical plant operator in a wrongful death suit brought by the surviving family members of workers killed in an explosion at the plant. Pursuant to North Carolina and New York's guidance, the lawyer may advise the company that it is fine, and even advantageous, to post on its Facebook page about the operator being cleared of wrongdoing in a subsequent Occupational Safety and Health Administration (OSHA) investigation. The lawyer might also discuss the timing of a post about the plant's longtime safety manager's retirement, due to how it might appear in close temporal proximity to the underlying accident. Defense counsel might even approve of Facebook posts touting the company's upcoming sponsorship of a community event or a charitable donation, given the anticipated spike in goodwill and burnishing of his client's public image. However, the same lawyer adhering to his ethical obligations should counsel against company employees tweeting gossip about one of the surviving children not having standing to sue due to not being the decedent's biological child—especially if the lawyer knows such a statement to be false.

Of course the commonsense caveat here is one that runs through most of the ethics opinions: a lawyer may not advise a client to post any false or misleading information on a social media website.

---

[23] *Id*.

[24] New York Cty. Law. Ass'n, Ethics Op. 745 (2013), https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf.

[25] *Id*.

5. My client has some Facebook posts that could really hurt our case. May I ethically tell her to take them down or delete them? And may I tell her to refrain from using social media during the case?

Generally the states that have opined on this issue have concluded that an attorney may advise a client to remove social media posts as long as relevant information is otherwise preserved so that it may be produced in discovery.[26] (Consider the use of a flash drive discussed above.) A failure to preserve and produce the evidence when appropriately requested not only implicates competence, but also the ethical obligations of fairness to opposing counsel and candor to the tribunal.[27]

Of course, the New York State Bar opinion notes that if litigation is not pending or reasonably anticipated, then removing social media content is fair game[28]; however, carefully query as to whether "reasonably anticipated" applies to the client's situation. By way of illustration, a lawyer whose client wants to delete some embarrassing photos from the office Halloween costume party that were posted to the company Facebook page would normally have no problem advising the client to go ahead and do so. However, if the client had received a letter from an attorney representing a recently terminated employee and asserting claims of sexual harassment and hostile workplace (including actionable comments or conduct at that office Halloween party), then these photos are potentially relevant, and the attorney should take steps to preserve them electronically (although they may still be taken down).

The Florida opinion noted that determining relevance may require "a factual case-by-case determination,"[29] because social media evidence that may not be "related directly" to the incident for which damages are being sought may nevertheless be deemed relevant to a case.[30] For example, social media comments on a personal injury plaintiff's Facebook page about her "personal best" times in local running events may on the surface not relate

---

[26] State Examples, *supra* note 18.

[27] For a comprehensive discussion of the ethical implications that may arise during discovery, see chapter 4.

[28] The Social Media Comm. of the Commercial & Fed. Litig. Section, N.Y. St. Bar Ass'n Social Media Guidelines of the Commercial And Federal Litigation Section of the New York State Bar Association 15. (2015), http://www.nysba.org/socialmediaguidelines/ [hereinafter N.Y. St. Bar Social Media Guidelines].

[29] Prof'l Ethics of The Fla. Bar, Op. 14-1 (2015), https://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+14-1?opendocument.

[30] *Id*.

directly to her subsequent accident. However, if she asserts a claim that she is unable to enjoy the same kind of success in post-accident competitive running, then such content is certainly relevant to her damages claims.

Additionally, attorneys may also advise clients to refrain from using social media during the case—much like the old-school advice to a client not to talk about his or her case. The Pennsylvania opinion notes, "[i]t has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes."[31]

6. Should I monitor my client's use of social media during the case?

Since it has become reasonable to expect that opposing counsel will monitor a client's social media account, the Pennsylvania opinion reasoned, "[t]racking a client's activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client's legal dispute."[32]

While monitoring is a judgment call that depends on assessing both your client and his or her case, consider the following real-world examples of the importance of knowing what your client is up to on social media. In a recent Florida employment discrimination case, *Gulliver Schools, Inc. v. Snay*, the former headmaster of a private academy sued for discrimination.[33] The case resulted in a $150,000 settlement ($70,000 of which was attorney's fees and back wages), which contained a standard confidentiality provision calling for any settlement monies paid to be forfeited if the plaintiff disclosed the amount or terms of the settlement to any third parties. When the defendants learned of a Facebook post by the settling plaintiff's daughter that breached this confidentiality clause (reading "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."), they sued. The court found that the disclosure by Snay to his teenage daughter leading to the Facebook post was a breach of the settlement agreement; it ordered a disgorgement of Snay's $80,000 settlement.

And in West Virginia, Kanawha County public defender Sara Whitaker found herself before a judge accused of contempt in December 2015 after allegedly giving her client a copy of a packet containing the identity of a

[31] Pa. Bar Ass'n, Formal Op. 2014-300 (2014), https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2014-300.pdf.

[32] *Id*.

[33] Gulliver Sch., Inc. v. Snay, 137 So.3d 1045, 1046 (Fla. 3d DCA 2014).

confidential informant.[34] The informant's name and address were posted on Facebook by the former roommate of client Tracie Jones, complete with captions like "exposed" and "cheap whore." Although Whitaker ultimately received only a fine, this case illustrates how quickly a client's social media posts could lead to witness intimidation charges as well as potential ethical violations for the lawyer.

Another cautionary tale about the importance of monitoring a client's social media activities comes straight from the headlines. Famed rapper 50 Cent filed for bankruptcy in 2015 in the wake of a $7 million jury verdict against him. But evidently, 50 Cent (real name: Curtis Jackson, III) didn't quite grasp the underlying concept of Chapter 11 bankruptcy, because he proceeded to post numerous photos to his social media accounts, including Instagram, depicting him holding, pointing to, or surrounded by stacks and stacks of cash. One photo showed stacks of cash stashed in his refrigerator. Another featured the rapper with money strewn across his bed (along with a caption referencing 50 Cent's song "I'm Too Rich"), and yet another showed the singer with stacks of cash carefully arranged to spell the word "BROKE."[35]

His creditors, including headphone company Sleek Audio and SunTrust Bank, were not amused and filed pleadings bringing the photos to the court's attention, and implying that 50 Cent was hiding assets. The rapper's lawyers insisted that the photos were being publicized in an attempt to "smear" 50 Cent, said that his social media postings were simply part of maintaining "his brand and image," and even maintained that the stacks of cash were from a Hollywood prop company and were not actual currency.

Concerned about "allegations of nondisclosure and a lack of transparency in the case," Connecticut bankruptcy Judge Ann Nevin ordered 50 Cent to appear and explain the photographs at a hearing. Despite the gravity of his situation, 50 Cent continued to post on Twitter and Instagram, including one photo depicting the rapper with stacks of cash stuck in his waistband that was apparently taken inside the federal courthouse in Hartford. Judge Nevin was clearly not amused and scolded the rapper saying: "There's nothing funny going on here. This is very serious stuff." Ultimately, though, the court stopped short of banning him from posting to social media accounts.[36]

---

[34] Erin Beck, *Lawyer Will Have to Explain Informant ID Release*, Charleston Gazette-Mail (Dec. 17, 2015), http://www.wvgazettemail.com/news/20151217/lawyer-will-have-to-explain-informant-id-release.

[35] Katy Stech, *Bankruptcy Judge Scolds Fifty Cent for Courthouse Photo*, Wall Street J.: Bankruptcy Beat (Apr. 7, 2016, 4:26 PM), http://blogs.wsj.com/bankruptcy/2016/04/07/bankruptcy-judge-scolds-50-cent-for-courthouse-photo/.

[36] *Id*.

Final Thoughts on the "Clean Up" Issue

Pragmatic questions continue to plague lawyers when it comes to counseling clients on their postings on social media and the presentation of social networking content. For example, in what form should social media content be preserved? Is a paper "print-out" or screenshot of information enough, or does information need to be saved in a way that preserves all metadata? No ethics regulatory bodies have tackled the question of whether a paper print-out of a Facebook post or Twitter tweet violates Rule 3.4. In the e-discovery arena, a number of courts have mandated that electronically stored information (ESI) must be preserved and produced in its native format. Given the dynamic nature of social media content, an argument can certainly be made that such data should be produced in its "original" format.

Another practical issue that is likely to present ethical concerns in this area for the foreseeable future is the explosive growth in self-deleting applications that delete data shortly after it is shared. The wildly popular Snapchat, as well as similar apps like Telegram, Confide, and Wickr, actively erase text or pictures once the recipient has viewed them. If a party uses such applications, the question shifts from whether such erased or disintegrated content can be retrieved to whether, for evidence preservation purposes, it was ever evidence that "existed" in the first place. And, is it spoliation if a user didn't have control over the evidence and a duty to preserve it at the time of its loss?

As a matter of providing competent representation in a world of seemingly endless amounts of data being shared and ever-changing mechanisms for that data to be shared, lawyers must embrace new responsibilities insofar as counseling clients on their social media activities is concerned. An attorney must be aware of what his or her client has done, is doing, and plans to do in terms of the client's online presence. Lawyers should address this issue in the very first client interview, as well as in the initial written communication or engagement agreement (a sample of such a first letter appears in the Appendix). In other words, when it comes to advising clients on "cleaning up" their Facebook profiles and other social media musings, a lawyer must serve as a kind of "client's keeper."

Appendix of State Ethics Advisory Opinions

This appendix provides a chronological state-by-state discussion of the advisory opinions that address advising a client on social media. It includes some of the examples provided above, but offers the reader a more detailed look at the specifics and nuances of the individual opinions and provides insight as to how the opinions connect and build on one another.

New York

The first ethics governing body to address the question of just how far a lawyer may go in advising a client regarding his or her social media presence was the New York County Lawyers Association Committee on Professional Ethics in July 2013, with its Formal Opinion 745.

In this opinion, the committee began by noting not only the prevalence of social media use (with an estimated 20 percent of Americans' online time being spent on social networking sites), but also the highly personal nature of the information being posted on these platforms.[37] With so many people posting information that could be viewed and used by everyone from potential employers to admissions officers to romantic contacts, and so many social media users ignorant of or oblivious to privacy settings, the Committee noted—with a nod to ethics opinions from around the country that have concluded that attorneys may ethically access publicly viewable social media pages—that attorneys have to be cognizant of what their clients are risking. Because serious privacy concerns may be implicated, the committee concluded, "it is permissible for an attorney to review what a client plans to publish on a social media page in advance of publication." It advised lawyers "to guide the client appropriately, including formulating a corporate policy on social media usage."[38] Such guidance, according to the committee, could involve the following attorney tasks: counseling the client to publish truthful, favorable information; discussing the content

[37] New York Cty. Law. Ass'n, Ethics Op. 745 (2013), https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf.

[38] *Id*.

and advisability of social media posts; advising the client how social media posts might be perceived; advising the client about how legal adversaries might obtain access to even "private" social media pages; reviewing both posts not yet published and those that have been published; and discussing potential lines of questioning that might result.[39]

However, in addition to such proactive rules, the committee cautioned that the attorney's advice regarding social media use by clients must still abide by other overarching ethical responsibilities. These include refraining from bringing or defending a frivolous proceeding; accordingly, the committee reasoned, "if a client's social media posting reveals to an attorney that the client's lawsuit involves the assertion of materially false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using these false statements."[40] Similarly, an attorney should take "prompt remedial action" if a client fails to answer truthfully when asked whether changes were ever made to a social media profile.[41]

But after reaffirming that an attorney may proactively counsel a client about keeping his social media privacy settings maximized, or counseling against posting certain content, the committee dropped its biggest bombshell with only a fleeting reference. An attorney, the committee stated, may offer advice as to what content may be "taken down" or removed, "[p]rovided that there [are] no violations of the rules or substantive law pertaining to the preservation and/or spoliation of evidence."[42] This bit of advice is provided with no further discussion or elaboration as a kind of afterthought in the opinion's brief conclusion—and yet it is arguably the most important subject mentioned by the committee. Many questions are left unanswered: for example, what kind of conduct might constitute spoliation in the digital age? Would deactivating an account suffice? And about deleting content—would it matter if content of questionable relevance were deleted, or if the "taking down" of content occurred prior to suit actually being filed? These questions, and others, were left unanswered. It would be up to later ethics opinions and to courts to fill in some of the blanks.

New York would return to this issue and re-affirm Formal Opinion 745 in March 2014, when the New York State Bar Association's

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*.

Commercial and Federal Litigation Section issued a sweeping set of "Social Media Ethics Guidelines."[43] These guidelines address a broad array of attorney tasks when using social media, including lawyer advertising, communicating with clients via social networking platforms, furnishing legal advice on social media, case investigation using social media, and researching the social media profiles of prospective and actual jurors. In its section on "Ethically Communicating with Clients," the New York Committee includes some advice on counseling clients about their social media activities. Guideline No. 4.A makes it clear that advising a client on what privacy settings should be used is within the lawyer's purview, noting that "[a] lawyer may advise a client as to what content may be maintained or make private on her social media account."[44] Later on, as part of Guideline No. 4.B on "Adding New Social Media Content," the committee also indicates there is no problem in advising a client on posting new content on a social media profile.[45] In its comment, the committee points to the scenario of pre-publication review by a lawyer on what the client plans to post, as well as providing appropriate guidance to that client (including formulating a policy on social media usage for business clients). The only caveat is that the proposed content must not be something the lawyer knows to be "false or misleading information that may be relevant to a claim."[46]

As the comment to this guideline discusses, a lawyer may "counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the factual content of a post may affect a person's perception of the post; and how such posts might be used in litigation, including cross-examination."[47] As to the last item, this guideline points out that the lawyer's proactive role in this regard may include advising a client "to consider the possibility that someone may be able to view a private social media profile through court order, compulsory process, or unethical conduct."[48]

---

[43] The Social Media Comm. of the Commercial & Fed. Litig. Section, N.Y. St. Bar Ass'n Social Media Guidelines of the Commercial And Federal Litigation Section of the New York State Bar Association 15. (2015), http://www.nysba.org/socialmediaguidelines/ [hereinafter N.Y. St. Bar Social Media Guidelines].

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Id*.

To reinforce the lawyer's ethical obligation to avoid being complicit in offering false statements or testimony, the committee added Guideline No. 4.C on "False Social Media Statements." In this guideline, the committee reminds lawyers of their ethical duties not to bring a frivolous claim or assert a baseless defense, including asserting materially factual statements that are false. No. 4.C cautions a lawyer against "proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertions of materially false factual statements or evidence that supports such a conclusion."[49]

In an age in which one of the most persistent criticisms of the Internet has been its potential for the dissemination of false or inaccurate information, this is a timely warning. And while some of these guidelines' directions may seem to place the lawyer in the role of "public relations flak" more than that of "attorney at law," there are valid and pragmatic reasons for doing so.

Consider the example on page 32, in which a lawyer defending a chemical plant operator in a wrongful death suit brought by the surviving family members of workers killed in an explosion at the plant. Pursuant to these guidelines, the lawyer may advise the company that it is fine, and even advantageous, to post on its Facebook page about the operator being cleared of wrongdoing in a subsequent Occupational Safety and Health Administration (OSHA) investigation. The lawyer might also discuss the timing of a post about the plant's longtime safety manager's retirement, due to how it might appear in close temporal proximity to the underlying accident. Defense counsel might even approve of Facebook posts touting the company's upcoming sponsorship of a community event or a charitable donation, given the anticipated spike in goodwill and burnishing of his client's public image. However, the same lawyer adhering to his ethical obligations and these guidelines should counsel against company employees tweeting gossip about one of the surviving children not having standing to sue due to not being the decedent's biological child—especially if the lawyer knows such a statement to be false.

On the flip side, a plaintiff's attorney may be alerted that it is time to withdraw rather than file a frivolous claim after a review of a client's social media presence reveals that the client's mishap was caused by the client's own carelessness rather than the defendant's alleged negligence.

[49] *Id.*

But what about removing or deleting social media content? Guideline No. 4.A states that a lawyer may advise a client "as to what content may be 'taken down' or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information."[50] The guideline goes on to reinforce this obligation to preserve evidence, stating that "Unless an appropriate record of the social media information or data is preserved, a party or non-party may not delete information from a social media profile that is subject to a duty to preserve."[51]

Just what kind of content must be preserved, and when? The Comment to Guideline No. 4.A points out that this preservation obligation extends to "potentially relevant information," and that it begins "once a party reasonably anticipates litigation."[52] It follows and even quotes from NYCLA Formal Opinion 745, observing that as long as the removal of content does not constitute spoliation of evidence, "there is no ethical bar to 'taking down' such material from social media publications."[53] In a situation when litigation is neither pending nor reasonably anticipated, the guideline notes, "a lawyer may more freely advise a client on what to maintain or remove from her social media profile."[54] And, like Formal Opinion 745, Guideline No. 4.A also reminds lawyers that in the digital age, "delete" doesn't necessarily translate to "gone forever." It cautions lawyers "to be aware that the act of deleting electronically stored information does not mean that such information cannot be recovered through the use of forensic technology," particularly if a "live" posting is "simply made 'unlive.'"[55]

For example, as discussed above, a client who wants to remove embarrassing office party photos from the company's Facebook page may be advised to do so; however, if there is a pending sexual harassment claim against the company by a terminated employee (that includes actionable comments or conduct at the office party)

---

[50] The Social Media Comm. of the Commercial & Fed. Litig. Section, N.Y. St. Bar Ass'n Social Media Guidelines of the Commercial And Federal Litigation Section of the New York State Bar Association 15. (2015), http://www.nysba.org/socialmediaguidelines/ [hereinafter N.Y. St. Bar Social Media Guidelines].

[51] *Id*.

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

then the client must be advised to electronically preserve the removed photos.

Philadelphia

The next ethics body to consider this issue was the Philadelphia Bar Association Professional Guidance Committee. In its Opinion 2014-5, issued in July 2014, the committee considered the following questions:

1. Whether a lawyer may advise a client to change the privacy settings on a Facebook page so that only the client or the client's "friends" may access the content
2. Whether a lawyer may instruct a client to remove a photo, link, or other content that the lawyer believes is damaging to the client's case from the client's Facebook page
3. Whether a lawyer who receives a Request for Production of Documents must obtain and produce a copy of a photograph posted by the client, which the lawyer previously saw on the client's Facebook page, but which the lawyer did not previously print or download
4. Whether a lawyer who receives a Request for Production of Documents must obtain and produce a copy of a photograph posted by someone other than the client on the client's Facebook page, which the lawyer previously saw on the client's Facebook page, but which the lawyer did not previously print or download[56]

As to the first question, Philadelphia's Committee held that a lawyer can certainly counsel a client to restrict access to his or her social media information, reasoning that changing privacy settings only made it more cumbersome for an opposing party to obtain the information, not impossible thanks to formal discovery channels.[57] Helping a client manage the content of her account, the committee opined, was simply part of a lawyer's responsibilities, especially in light of the changing standard of attorney competence. Providing competent representation, according to the committee, necessarily entailed having a basic knowledge of how social media sites work

[56] Phila. Bar Ass'n, Op. 2014-5 (2014), http:www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2014-5Final.pdf.

[57] *Id*.

as well as advising clients about issues that might arise due to their use of such platforms.[58]

For the remaining questions posed, the committee held that a lawyer may not instruct or knowingly allow a client to delete or destroy a relevant photo, link, text, or other content.[59] Citing to and adopting the New York Bar's Social Media Guidelines, the committee reasoned that a lawyer could only instruct her client to "delete" damaging information if she also took care to "take appropriate action to preserve the information in the event it should prove to be relevant and discoverable."[60] The committee, citing the now-infamous Virginia social media spoliation case of *Allied Concrete Co. v. Lester*, also reminded lawyers of their duties under Rule 3.3(b) of the Pennsylvania Rules of Professional Conduct to take reasonable remedial measures, "including if necessary, disclosure to the tribunal,"[61] if the lawyer learns that her client has destroyed evidence.

As to the remaining issues presented, Philadelphia's Committee ruled that in order to comply with a Request for Production (or any other discovery request), a lawyer "must produce any social media content, such as photos and links, posted by the client, including posts that may be unfavorable to the client."[62] Reminding lawyers of their obligations under the Rules of Professional Conduct not to engage in conduct "involving dishonesty, fraud, deceit, or misrepresentation," the committee held that a "lawyer must produce all of the requested photographs and other information from Facebook, regardless of whether it was favorable to the client."[63] Furthermore, if a lawyer knows or reasonably believes that extant social media content has not been produced by the client (and the social media content is in the client's or lawyer's possession), then the lawyer "must make reasonable efforts to obtain" the "photograph, link or other content about which the lawyer is aware."[64]

The Philadelphia Committee's opinion is significant not only because it adopts and builds upon the New York Bar's Social Media Guidelines, but because it elaborates and lends context to the discussion surrounding the issue that NYCLA Ethics Opinion 745 only mentioned in passing—advising a client on "taking down"

[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] *Id*.
[64] *Id*.

damaging social media content. Equally important, the Philadelphia Committee's insights are set against the backdrop of the attorney's duty of competence in the digital age. Being able to provide both proactive and reactive counseling to clients regarding their online presence is an expected part of the attorney-client relationship in the twenty-first century, not an added value or special distinguishing trait for a lawyer.

Pennsylvania

Soon after the Philadelphia Committee's opinion, the Pennsylvania Bar Association handed down its Formal Opinion 2014-300, an eighteen-page opinion that provided comprehensive guidance on a whole host of issues related to an attorney's use of social media.[65] These issues ranged from using social media for marketing purposes to mining social media for evidence on witnesses and even researching jurors on social media.[66]

A significant portion of Formal Opinion 2014-300 is devoted to the subject of advising clients on the content of their social media accounts. Referencing cases like the Gulliver Schools opinion from Florida, the Pennsylvania Bar reminded lawyers that "a competent lawyer should advise clients about the content that they post publicly online and how it can affect a case or other legal dispute."[67] Since it has become reasonable to expect that opposing counsel will monitor a client's social media account, the committee reasoned, "[t]racking a client's activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client's legal dispute."[68]

Lawyers, according to the Pennsylvania Bar, "should be certain that their clients are aware of the ramifications of their social media actions," and "should also be aware of the consequences of their own actions and instructions when dealing with a client's social media account."[69] The Pennsylvania Bar Committee agreed with and followed both the Philadelphia Bar's advice as well as the New York Bar's Social Media Guidelines, stating that a lawyer "may not instruct a client to alter, destroy, or conceal any relevant

[65] Pa. Op. 300, *supra* note 5.

[66] *Id*.

[67] *Id*.

[68] *Id*.

[69] *Id*.

information regardless of whether that information is in paper or digital form."[70] However, consistent with its predecessors, the Pennsylvania Bar concluded that a lawyer may "instruct a client to delete information that may be damaging from the client's page, provided the conduct does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information in the event it is discoverable or becomes relevant to the client's matter."[71]

In addition, citing the same Rules of Professional Conduct as its Philadelphia and New York counterparts, the Pennsylvania Bar Committee stated that attorneys may neither advise clients to post false or misleading information on a social networking page nor offer evidence that the lawyer knows to be false from a social media site.[72] The Pennsylvania Bar pointed out that, while it may be newly articulated, the reasoning underlying this advice is itself not exactly novel. As the opinion noted, "[i]t has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes."[73]

North Carolina

In April 2014, the North Carolina Bar Association's Ethics Committee weighed in with its 2014 Formal Ethics Opinion 5, on "Advising a Civil Litigation Client about Social Media."[74] This opinion posed three questions. First, both prior to and after the filing of a lawsuit, may a lawyer give a client advice about the legal implications of posting on social media sites and coach the client on what should and should not be shared via social media? Second, may a lawyer instruct a client to remove existing social media postings—either before or after litigation commences? Third, may a lawyer instruct the client to change her security and privacy settings on a social media page, either before or after litigation?[75]

---

[70] *Id*.

[71] *Id*.

[72] *Id*.

[73] *Id*.

[74] N.C. St. Bar, Formal Ethics Op. 2014-5 (2015), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2014-formal-ethics-opinion-5/ [hereinafter N.C. Op. 2014-5].

[75] *Id*.

As to the first question, the North Carolina Committee answered in the affirmative, pointing out that providing such advice, both before and after the filing of a lawsuit, is part of the lawyer's duty to provide competent and diligent representation to clients.[76] As the opinion states, if a client's social media postings might impact that client's legal matter, then "the lawyer must advise the client of the legal ramifications of existing postings, future postings, and third party comments."[77] This last observation about third-party postings is interesting, and apparently unique to the North Carolina Ethics Committee's opinion. In an age where public reaction occurs not only in response to the postings by the user himself, but also to the "likes," "shares," "comments," "retweets," and "tags" by those reading such a post, it is timely and valuable advice to remind a client about the sort of comments his post might generate. In a small but growing number of cases, individuals have experienced legal fallout not from their own social media post, but from the comments and reactions by other parties.[78]

In responding to the second question, the committee (citing NYCLA Ethics Opinion 745) answered that as long as the removal of postings "does not constitute spoliation and is not otherwise illegal or a violation of a court order," then a lawyer may instruct a client to take down existing social media posts.[79] The committee did add the caveat that if there is the potential that removing such content might constitute spoliation, the lawyer "must also advise the client to preserve the postings by printing the material, or saving the material to a memory stick, compact disc, DVD, or other technology (including web-based technology) used to save documents, audio, and video."[80] In addition, according to the committee, a lawyer "may also take possession of the material for purposes of preserving the same."[81]

---

[76] *Id*.

[77] *Id*.

[78] *See*, *e.g.*, Jake New, *Suspended for Spouse's Comments?*, Inside Higher Ed (Feb. 13, 2015), https://www.insidehighered.com/news/2015/02/13/u-tulsa-student-banned-campus-over-facebook-comments-posted-his-husband https://www.insidehighered.com/news/2015/02/13/u-tulsa-student-banned-campus-over-facebook-comments-posted-his-husband (discussing the case of University of Tulsa student George Barnett, who was suspended by the school over allegedly offensive Facebook posts on his page made by his spouse).

[79] N.C. Op. 2014-5, *supra* note 74.

[80] *Id*.

[81] *Id*.

For the North Carolina Committee, the third question presented was the easiest to answer. Devoting no discussion to the issue, the committee stated simply that a lawyer may indeed advise his or her client to implement heightened privacy settings, whether before or after suit is filed, as long as such counseling "is not a violation of law or a court order."[82]

Florida

One of the more recent ethics bodies to consider whether or not lawyers may advise clients to "clean up" their social media profiles was the Florida Bar's Professional Ethics Committee with its Proposed Advisory Opinion 14-1, issued January 23, 2015.[83] In this opinion, limiting itself to a pre-litigation time frame, the committee considered the following questions:

- May a lawyer advise a client to remove posts, photos, videos, and information from social media pages/accounts "that are related directly to the incident for which the lawyer is retained"? How about social media content that is not directly related to the incident for which the lawyer is retained?
- May a lawyer advise a client to change her social media privacy settings in order to remove the profile or account from public view?
- If the lawyer has advised the client to implement more restrictive privacy settings, must a lawyer advise a client not to remove social media content whether or not directly related to the litigation?

Not surprisingly, the Florida Bar's opinion cited and agreed with the conclusions of the ethics opinions that had preceded it from the New York, Philadelphia, Pennsylvania, and North Carolina bars. Florida's Committee also agreed that "the general obligation of competence" mandates that lawyers must advise clients "regarding removal of relevant information from the client's social media pages, including whether removal would violate any legal duties regarding preservation of evidence, regardless of the privacy settings."[84] With

---

[82] *Id*.

[83] Prof'l Ethics of The Fla. Bar, Proposed Advisory Op. 14-1 (Jan. 23, 2015), https://www.floridabar.org/DIVEXE/RRTFBResources.nsf/Attachments/8E73C71636D8C23785257DD9006E5816/$FILE/14-01%20PAO.pdf?OpenElement.

[84] *Id*.

respect to the most benign level of involvement with a client's social media activities, the Florida Bar's Ethics Committee stated that "a lawyer may advise that a client change privacy settings on the client's social media pages so that they are not publicly accessible."[85]

As far as actual removal of content is concerned, Florida's Committee held that, "[p]rovided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, a lawyer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as an appropriate record of the social media information or data is preserved."[86] But just what did Florida's Committee mean by "relevant" to the reasonably foreseeable proceeding?

The committee acknowledged that relevance may certainly lie in the eyes of the beholder, or at least require "a factual case-by-case determination."[87] The committee noted that social media content that may not be "related directly" to the incident that made the basis for a lawsuit may nevertheless be deemed relevant to a case.[88] For example, social media mentions on a personal injury plaintiff's Facebook page about her weight training accomplishments and goal to become a personal trainer may not directly relate to the alleged accident, but may be relevant to her damages claim if she is alleging that her injuries are life altering.

Like earlier ethics opinions, Proposed Advisory Opinion 14-1 makes reference to the emerging body of case law on social media spoliation including the *Lester* and *Gatto* decisions discussed later on. And interestingly, prior to issuing this proposed opinion, Florida considered an alternative approach that would have prohibited removal of social media content completely, regardless of steps taken to preserve that content.

West Virginia

West Virginia issued one of the most recent opinions addressing social media advice to clients.[89] The opinion echoes the views of the other states regarding both privacy settings and the removal and

---

[85] *Id*.

[86] *Id*.

[87] *Id*.

[88] *Id*.

[89] W. Va. Office of Disciplinary Couns., L.E.O. No. 2015-02 (2015), http://www.wvodc.org/pdf/LEO%202015%20-%2002.pdf.

preservation of social media. The opinion advises lawyers that they should advise their clients about social media use and must also be mindful of the consequences of their own conduct in providing such advice. It also cautions lawyers about the impermissible use of social media evidence that lawyers know to be false. Notably, the West Virginia opinion acknowledges that "social media is a rapidly and constantly evolving entity" and observes that there is no way certain to anticipate such changes.[90] Therefore, West Virginia "instructs attorneys to adhere to the spirit of the . . . Rules when using social media and not simply the language" of the opinion.[91]

District of Columbia

In November 2016, the District of Columbia issued a comprehensive social media opinion geared to the general provision of legal services. As discussed above, the D.C. opinion is notable in its acknowledgment of the impact of social media in litigation, transactional, and regulatory practice areas.[92] In all three practice areas, D.C. joins the state opinions in advising that competence requires lawyers to understand social media and "at least consider whether and how social media may benefit or harm client matters in a variety of circumstances."[93]

In considering advice to clients about social media, the D.C. opinion notes that competence may require that lawyers review all of their clients' relevant social media postings and advise clients to change privacy settings. The D.C. opinion adds that lawyers should understand and advise clients that a privacy setting does not create an expectation of confidentiality that will establish privilege or work product protection.[94]

Regarding the removal of social media postings, D.C. advises that lawyers may "need to include social media in advice and instructions to clients about litigation holds, document preservation, and document collection."[95] The opinion addresses whether clients may remove social media once litigation or regulatory

---

[90] *Id*. at 2.

[91] *Id*.

[92] D.C. Bar Ethics Opinion 371 (2016), http://www.dcbar.org/bar-resources/legal-ethics/opinions/Ethics-Opinion-371.cfm.

[93] *Id.*

[94] *Id.*

[95] *Id.*

proceedings are anticipated by directing lawyers to consider not only the legal ethics rules, but also the other statutes, regulations, and case law relevant to the specific legal matter—so there is no clear answer here.[96] The only clear direction is that if anything is removed, an accurate copy must be retained.[97] The opinion does suggest that "in the absence of unlawful activity or anticipation of litigation or adversary proceedings" a lawyer advising a client in a transactional or regulatory matter may be able to advise a client to adjust his social media content so long as the client does not make "fraudulent or unlawful adjustments."[98]

Given the murkiness and lingering uncertainty for attorneys surrounding the "clean up your Facebook page" issue, it is likely that the District of Columbia will not be the last jurisdiction that will address this subject.

[96] *Id.*

[97] *Id.*

[98] *Id.*

The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law

Jan L. Jacobowitz & Danielle Singer*

> *[W]e contend that social media in this day and age cannot be ignored. It is now a critical part of presidential politics, it has been part of revolutions in the Middle East, and it is going to be an unavoidable part of high-profile legal cases, just as traditional media has been and continues to be. We feel it would be irresponsible to ignore the robust online conversation, and we feel equally as strong about establishing a professional, responsible, and ethical approach to new media.*[1]

The O'Mara Law Group represented defendant George Zimmerman in the notorious Trayvon Martin case and established the website, "George Zimmerman Legal Case." The statement above appears on the website to explain the use of social media in the case. The website created controversy and the prosecution attempted to have it deleted, but the judge permitted the website and held that, "There has not been an overriding pattern of prejudicial commentary that will overcome reasonable efforts to select a fair and impartial jury."[2]

Mark O'Mara conceded that the creation of the website was an unusual strategy, but deemed it to be a necessary one to contend with the overwhelming amount of discussion about the case on social media, especially the damaging aspersions cast about his client and the websites impersonating George Zimmerman. The use of social media was not confined to this website, but rather invaded many aspects of the trial from jury selection to witness testimony on Skype and even an embarrassing picture posted on Instagram by one of the defense attorneys' daughters of she and her Dad eating ice cream with a caption, "We beat stupidity celebration cones" and the hashtag,"#dadkilledit."[3]

The Zimmerman trial highlighted the use of social media in the practice of law and, because of the tremendous media coverage of the trial, facilitated a robust conversation

---

* Jan L. Jacobowitz is a lecturer in law and the director of the Professional Responsibility &

[1] *Why Social Media for George Zimmerman?*, GEORGE ZIMMERMAN LEGAL CASE (Apr. 28, 2012), http://www.gzlegalcase.com/index.php/8-press-releases/7-why-social-media-for-george-zimmerman.

[2] Lizette Alvarez, *Judge in Trayvon Martin Case Denies Request for Silence*, NY TIMES (Oct. 29, 2012), http://www.nytimes.com/2012/10/30/us/judge-in-trayvon-martin-case-denies-request-for-silence.html.

[3] Evan S. Benn & Audra D.S. Burch, *Social media, technology drove Zimmerman trial*, Miami Herald (July 14, 2013), http://www.miamiherald.com/2013/07/14/3499936_p3/social-media-technology-drove.html.

on whether the legal profession's use of social media is the "new normal."[4] Actually, lawyers' use of social media pre-dates the Zimmerman case as evidenced by a growing body of case law, ethics opinions, and journal articles discussing the propriety of using social media in areas such as investigation, discovery, and jury selection.[5] In fact, there have been quite a few articles that offer guidance as to how to steer clear of the ethical pitfalls of social media; some lawyers opt to avoid social media as a strategy for avoiding liability. [6] In other words, social media is often discussed as a slippery slope where only the adventurous among the legal profession are traveling. However, technology and social media are evolving so quickly that lawyers who elect not to participate in social media may be in for a rude awakening. An awakening that makes clear that the requisite level of competence and expertise required to effectively represent clients and avoid disciplinary and malpractice exposure requires an understanding and use of social media and technology in the practice of law.

This article will explore the contention that the use of social media and technology in the practice of law has become a required component of effective lawyering. There are many uses of innovative technology in the practice; however, the primary focus of this article is social media, which would not exist without the technology made possible by the advent of the Internet. Thus, the reference to social media and technology is meant to describe the interconnection between social media and the Internet and the fact that in order to use social media, one must be familiar with the technology that accesses social media on the Internet.

The article will first review the legal profession's historical relationship and occasional reluctance to embrace innovative technology and communication methods. Next, it will briefly explore the relationship of legal ethics to malpractice law. It will then discuss the history of the self-regulating nature of the legal profession and the professional code of

---

[4] *Id.*

[5] *See e.g.*, Romano v. Steelcase, Inc., 30 Misc. 3d 426, 426 (N.Y. Sup. Ct. 2010); Phila. Bar Ass'n Prof'l Guidance Comm., Formal Op. 2009-02 (2009); John G. Browning, The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law (Thomson Reuters/Aspatore 2010) [hereinafter Browning, Lawyer's Guide to Social Networking]; Hope A. Comisky & William M. Taylor, *Don't be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas—Discovery, Communications with Judges and Jurors, and Marketing*, 20 Temp. Pol. & Civ. Rts. L. Rev. 297 (2011); Michael Downey, *12 Tips for Reducing Online Dangers and Liabilities*, 36 ABA Law Prac. 26 (2010), *available at* http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v36_is4_pg26.html; Nicole Hyland, *The Legal Ethics of Social Networking*, MLRC MediaLaw Letter 51 (2013), *available at* http://www.jdsupra.com/legalnews/the-legal-ethics-of-social-networking-85909/.

[6] *Id.*; *see* BROWNING, LAWYER'S GUIDE TO SOCIAL NETWORKING, *supra* note 5, at 15; Niki Black & Carolyn Elefant, *Social Media: What It Is and Why It Matters*, ABA LAW PRAC. TODAY (Jan. 2010), http://apps.americanbar.org/lpm/lpt/articles/ftr01102.shtml; Brian Dalton, *This 'Social Media' Thing Might Not Be A Fad, Law Firms Acknowledge*, Above the Law (Aug. 6, 2013), http://abovethelaw.com/2013/08/this-social-media-thing-might-not-be-a-fad-law-firms-acknowledge/.

conduct that governs lawyers. Next, the article will highlight some of the legal ethics rules that support the theory that social media is a requisite addition to legal practice. Finally, it will discuss historical and current aspects of malpractice law and conclude that the *failure to employ social media* may result in the ineffective representation of clients, disciplinary complaints, and/or malpractice claims.

The Legal Profession and Evolving Communication Technology

The legal profession has historically taken a cautious approach to technology that establishes new communication channels. Although the Internet and social media are relatively new, necessarily intertwined, and therefore somewhat different in character from earlier communication technology, a look back at innovations such as the telephone, telefax, and email and the legal profession's analysis of the ethical considerations relating to each invention is enlightening. Arguably, with each new technological development, the standard for competence was ultimately modified to adapt to the cultural change in the manner of communication.

The Telephone

On March 7, 1876, Alexander Graham Bell received his patent on the telephone and within twenty-five years there were 1.5 million telephones throughout the United States.[7] Telephones provided the opportunity for people throughout the country to communicate considerably faster with one another; this opportunity created concern in the legal profession.[8] In fact, Alexander Graham Bell's prospective father-in-law, a Boston attorney, viewed the telephone as "only a toy."[9] Another well-known lawyer of the time and the managing partner of what would later become Cravath, Swaine & Moore, Clarence Seward, strove to keep new technological devices like the telephone and typewriter out of the office because he believed that they were "destroying the simplicity of American life."[10] Seward was so displeased with the telephone that he refused to answer the phone, which was located in the separate "telephone closet," for years.[11]

---

[7] Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 162 n.34 (1999).

[8] *See* Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. U. L. REV. 1827, 1855 (2008) ("the telephone could conquer distance in a way that not even the telegraph could match").

[9] Lanctot, *supra* note 7, at 163.

[10] *Id.* at 165 (quoting ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1947, 116-17 (The Lawbook Exchange, Ltd., 1946)); *see* Marcus, *supra* note 8, at 1857 (using the telephone likely changed the practice of visiting other individuals in person moderately during the beginning of the twentieth century).

[11] *Id.* n.46.

The prominent law firm of Sullivan and Cromwell did not install a telephone in its office until nearly a decade after the invention became available.[12] The law firm maintained the phone in a separate office and instructed its clerks not to use the phone unless it rang.[13] John Foster Dulles recounted that when he joined Sullivan and Cromwell in New York in 1911 many of the attorneys believed that the only proper form of communication was through the use of letters delivered by hand.[14]

Despite the existence of many "technophobes" like Seward during this time, telephones infiltrated law firm offices by the turn of the twentieth century. The telephone dramatically transformed the legal profession, assisting law firms like Cravath to grow exponentially and serve a wider range of corporate clients.[15] Lawyers were able to communicate more efficiently with their clients and today the thought of operating a law firm without a telecommunication system is unimaginable. Of course, as cordless phones and cellular phones became available these devices also became integrated into the practice of law.

Etiquette aside, one of the primary concerns among lawyers about the use of any type of telephone technology is the potential for interception and the breach of client confidentiality. According to the ABA, lawyers have a reasonable expectation of privacy in using landline telephones to communicate with their clients; however, it is unclear whether a lawyer has that same reasonable expectation in regards to using a cellular or cordless telephone.[16] Although landline conversations are not absolutely secure, as a telephone line may be tapped or the phone company may commit a technical error, "using a telephone is considered to be consistent with the duty to take reasonable precautions to maintain confidentiality."[17]

State bar associations have reached differing conclusions on the definition of the reasonable expectation of privacy as it relates to using a cellular or cordless phone.[18] The ABA elected not to clarify the disparity in its Formal Opinion 99-413, but instead simply stated that it has many concerns regarding the risk for interception when a conversation occurs over a cellular or cordless phone as opposed to when email are

---

[12] *Id.* at 164.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 165.
[16] ABA STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 99-413 (1999).
[17] *Id.*
[18] *Compare* STATE BAR OF ARIZ., FORMAL ETHICS OP. 95-11 (1995) (finding lawyer can use a cellular phone to communicate with his or her client, but must take adequate precautions to avoid revealing client confidences) *with* MASS. BAR ASSOC., FORMAL ETHICS OP. 94-5 (1994) (finding that lawyer cannot discuss confidential matters with a client on a cellular telephone without client informed consent if there is any "nontrivial risk" that the confidential information may be overheard).

transmitted via land-based phone lines.[19] The ABA Committee discussed the fact that transmission achieved by the radio signals used by cordless and cellular phones adds to the risk of interception.[20] Thus, the risk of a breach is greater with the use of a cordless or cellular phone than with the use of a landline telephone or an email message.[21] While there are risks inherent in using landline, cellular, and cordless telephones, these devices have obviously become incorporated into the practice of law with attention paid to precautionary measures available to secure client confidentiality.[22]

The Telefax

Alexander Bain patented the original telefax (fax) machine in England in 1843.[23] His machine had two pens that were attached to pendulums that passed over chemically treated paper and left marks when an electrical charge was sent through the telegraph wire.[24] The fax machine was further developed throughout the late nineteenth and twentieth centuries, but was not widely used in American workplaces until the 1980's when the machines were smaller, faster, and overall more efficient.[25] For example, in 1970, an estimated fifty thousand fax machines were in use throughout the United States, but in the late 1980's the number of fax machines topped four million.[26]

Attorneys began using the fax machine to submit documents to the court to more efficiently deal with filing deadlines.[27] The fax machine alleviated the pressures of traffic and parking when attempting to file just before the deadline and became a wonderful addition to the practice of law.[28]

However, today, the early fax machine technology has been deemed obsolete technology by some who believe its use should be discontinued in the practice of law.[29] Some

---

[19] ABA STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 99-413 (1999).

[20] *Id.*

[21] *Id.*

[22] Cell phones have also given rise to the use of texting, which in turn has impacted not only the attorney-client relationships and confidentiality, but also has raised discovery issues. *See eg.*, Big Voices Media, LLC v. Wendler, No. 3:12-cv-242-J-99MMH-JBT, 2012 WL 6021443 (M.D. Fla. 2012) (broad production of text messages not warranted because request was not narrowly tailored; however, a discovery request for a specific text message or text messages from a specific person or specific time period would likely be appropriate); Manacuso v. Fla. Metro. Univ., Inc., No. 09-61984-CIV, 2010 WL 2572412 (S.D. Fla. 2010) (holding that text messages are only discoverable when they are relevant to the claims or defenses of the case).

[23] *Fax History*, FAXPIPE, http://www.faxpipe.com/fax-history.html (last visited May 19, 2013).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Linda Deutsch, *Fax Machines Give Lawyers a New Suit Tool*, LA TIMES (Oct. 22, 1990), http://articles.latimes.com/1990-10-22/business/fi-2452_1_printing-fax-machines.

[28] *Id.*

[29] *See* Philip Thomas, *Is the Fax Machine Still Relevant to a Law Firm?*, MS LITIGATION REVIEW & COMMENTARY (July 31, 2012), http://www.mslitigationreview.com/2012/07/articles/general-1/is-the-

attorneys suggest that email is a more efficient replacement for the fax machine.[30] Email is not necessarily a viable alternative, however, when other attorneys continue to use fax machines, but virtual fax now provides an alternative to the slow, antiquated traditional fax machine. Virtual fax allows attorneys to send faxes as emails and receive faxes as email attachments.[31] This new technology serves as a great way for attorneys to quickly send and receive messages, as well as keep a better record of documents, without wasting too much extra paper or toner.

Courts tend to presume that attorneys have a reasonable expectation of privacy in the use of fax machines and the ABA is in accord, but has noted that there are some significant risks for interception of which attorneys should be aware.[32] For example, a fax may be inadvertently sent to the wrong person simply by mixing up one number in dialing a fax number.[33] Thus, client confidentiality remains a concern and the fax sender must remain attentive to the process.

Email

Tracing the history of email requires a closer look at the history of the Internet. In 1969, the Department of Defense undertook a projected entitled the Advanced Research Projects Agency Network (Arpanet).[34] Eventually, additional networks became connected to Arpanet and this "network of networks" quickly gained recognition as the "Internet."[35] By the middle of the 1980s, there were only about one thousand "hosts" on the Internet.[36] However, Internet "browser" software was developed in 1990 and "this led to the exponential growth of the Internet."[37] Between the development of browser software and 1995, the number of networks grew to over 44,000 in 160 countries.[38] "Host" computers have also grown exponentially.[39] There were thirteen million host computers as of July 1996.[40] Host computers are particularly relevant to

---

fax-machine-still-relevant-to-a-law-firm/ (posing the question on his blog whether lawyers still need fax machines).

[30] John Cord, *How I Learned to Love the Fax Machine*, THE DAILY RECORD, GENERATION J.D. (Jan. 23, 2012), http://thedailyrecord.com/generationjd/2012/01/23/how-i-learned-to-love-the-fax-machine/.

[31] *Id.*

[32] ABA STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 99-413 (1999).

[33] *Id.*

[34] David Hricik, *Lawyers Worry Too Much About Transmitting Client Confidences by Internet E-mail*, 11 GEO. J. LEGAL ETHICS 459, 462 (1998).

[35] *Id.*

[36] *Id.* at 462-63.

[37] *Id.*

[38] *Id.* at 463.

[39] *Id.* These computers are "gateways to the Internet for individual computers networked to that host."

[40] *Id.*

this discussion because each one has a "unique Internet 'address' for sending and receiving email from computers networked to that host."[41]

Email quickly developed after Internet usage became widespread and is now commonly used by people around the world, especially attorneys. Email has served as an inexpensive form of communication that is "exceptionally fast and easily accessible to almost all individuals throughout the world."[42] It has proved to be very convenient because it allows an attorney to send documents to numerous parties to a case at the same time within seconds, and it also allows for files and messages to be forwarded.[43] However, with this convenient, fast new form of communication came concerns about whether client confidentiality is sacrificed when a sensitive matter is discussed over email.[44]

The ABA has determined that attorneys and clients maintain a reasonable expectation of privacy in most email communications; however, they must understand the dangers inherent in using this form of communication and take precautions to avoid disclosure.[45]

---

[41] *Id.*

[42] Ernest Sasso, *E-mail and Client Confidentiality*, LAW OFFICES OF ERNEST SASSO, http://www.ernestsasso.com/cm/Articles/Articles3.html (last visited May 20, 2013); *see also* Tana M. Materi, *Email Confidentiality*, CARNEY BADLEY SPELLMAN (May 2002), http://www.carneylaw.com/resources/getProfile.asp?publicationID=31 (discussing email as perfect for the business world because it is a "quick, cheap, and easy means of communication").

[43] *Id.*

[44] Materi, *supra* note 42 ("attorneys and their clients worry that sending sensitive correspondence via email may waive privilege claims or disclose client confidences").

[45] ABA STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 99-413 (1999); ABA STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 11-459 (2011). The Committee, in its 1999 opinion, examined four different kinds of email and the implications and dangers of each in turn:

The first type of email the ABA looked at was direct email, which involves an attorney directly emailing his or her client by "programming their computer's modem to dial their client's [modem]." The process by which this email is sent is quite similar to the sending of a fax, both of which are transmitted via land-based phone lines. This transmission is much more difficult to hack, however, when compared to a traditional telephone call because the email message travels in digital form. The Committee agreed with a number of state bar ethics opinions, as well as two federal courts, in determining that there is a reasonable expectation of privacy in this type of email communication based at least in part on the difficulty of intercepting these messages.

The second type of email the ABA examined was "private system" e-mail, which includes "typical internal corporate e-mail systems." The only worrisome distinction between this form of email and direct email is that there is a higher risk of misdirection in a private system. However, this misdirection would occur within a law firm or within a private system in which all still owe the duty of confidentiality to the client. Therefore, the Committee found that an attorney using this form of email communication also maintains a reasonable expectation of privacy.

The third type of email discussed by the ABA was On-line service providers or OSPs, which typically offer users a password-protected email system. The OSP is used by other individuals and is open to other

In 2011, the ABA reexamined email communications and affirmed its earlier finding of a reasonable expectation of privacy in this form of communication, but also expanded upon its earlier opinion by stating that an attorney must warn the client about this form of communication when there is a significant risk of interception by a third party.[46] Some of the situations where this "significant risk of interception" may arise include when an employee uses an employer's computer to contact his attorney or when a client logs on to a public or borrowed computer to contact his or her attorney.[47] The ABA Model Rule of Professional Conduct 1.6 requires a lawyer to maintain client confidentiality and "to refrain from revealing 'information relating to the representation of a client unless the client gives informed consent.'"[48] The Committee concluded that based upon this duty, a lawyer should usually advise his or her client to avoid using an employer's computer or network to send emails to the lawyer because of the assumption that the employer has a policy that allows it to view emails sent through its network.[49]

In 2010, The California State Bar evaluated email communication via Wi-Fi, noting the growing frequency of attorney-client communication that is occurring when one or both people are working on a laptop from a coffee shop or airport. The California advisory opinion reinforces an attorney's obligation to be attentive to available security features and to consider the sensitivity of client information. The opinion acknowledges the lightning speed at which technology is changing and concludes:

> An attorney's duties of confidentiality and competence require the attorney to take appropriate steps to ensure that his or her use of technology in conjunction with a client's representation does not subject confidential client information to an undue risk of unauthorized

---

members of the public who pay fees. Therefore, a misdirected email may land in the hands of someone who owes no duty of confidentiality to the client; however, this chance of misdirection is no different than that inherent in using a fax machine. The second danger in using OSP email is that the security is mainly dependent upon the measures taken by the OSP and not any measures taken by an individual user. However, the possibility of intercepting an OSP message is lessened by the use of protected passwords and encryption. Additionally OSP administrators are limited in their ability to examine emails on their systems by federal law. The Committee determined that these protections were sufficient to find that a lawyer has a reasonable expectation of privacy in utilizing this form of email.

Finally, the Committee looked at the use of Internet email, which typically is transmitted using land-based phone lines and numerous intermediate computers. The intermediate computers are made up of Internet service providers ("ISPs"), which are owned by third parties and allow for the possibility of copying messages passing through that network. ISPs have the same rights and restrictions on inspection as OSPs and, although hackers may be able to intercept a message sent through ISPs, this is a crime and is not seen as a reason to lessen the lawyer's reasonable expectation of privacy in Internet email. The Committee concluded by stating that this form of email communication is also permissible in accordance with the Model Rules.

[46] ABA STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL OP. 11-459 (2011).
[47] *Id.*
[48] *Id.* (quoting MODEL RULES OF PROF'L CONDUCT 1.6(a)).
[49] *Id.*

> disclosure. Because of the evolving nature of technology and differences in security features that are available, the attorney must ensure the steps are sufficient for each form of technology being used and must continue to monitor the efficacy of such steps.[50]

Thus, the legal profession has evaluated innovations in communication technology from the nineteenth century telephone to the twenty-first century laptop to determine the appropriate manner of use of technology in the practice of law. Ultimately, as communication technology has advanced, so too have lawyers modified their practice to remain competent and effective, connect with their clients on current technology, and maintain their competitive edge in the market place.

Social Media

Social media, also referred to as social networking, is defined as

> "any type of social interaction using technology (primarily the Internet, but also including modern smartphone and PDA innovations) with some combination of words, photos, video and/or audio . . . The concept is a relatively simple one: just as with a network of roads that enables you to see that Dallas is connected via highways to St. Louis, which in turn is connected with yet another city, a network of people exists as well. While on a personal level, you may know a friend who in turn knows a friend who works in an industry and knows of a job for you, this type of connection isn't widely known. Social networking sites help you see connections that you otherwise wouldn't see . . . You can see who your friends know, who your friend's friends know and so on."[51]

Social media allows an individual to join a network and connect with people all across the network. Social media is one of fastest growing communication vehicles in the world. The impact of the telecommunication innovations discussed above pale in comparison to the sea change brought about by the potential that social media has to connect people and through which some people are sharing the details of their daily lives. In fact, Facebook, one of the most popular social networking sites, recently reported that it has 1.15 billion users, including 198 million people in the United States and Canada who are actively participating on a monthly basis.[52] When Facebook recently added video

---

[50] STATE BAR OF CAL. STANDING COMM. ON PROF'L RESPONSIBILITY AND CONDUCT, FORMAL OP. 2010-179 (2010).

[51] BROWNING, LAWYER'S GUIDE TO SOCIAL NETWORKING, *supra* note 5, at 17.

[52] *Facebook Reports Second Quarter 2013 Results*, FACEBOOK (July 24, 2013), http://investor.fb.com/releasedetail.cfm?ReleaseID=780093.

sharing capacity to Instagram, Facebook's image sharing service, five million videos were uploaded in the first twenty-four hours. [53] Facebook's growth is perhaps all the more remarkable given that it was founded in 2004 for college students and was not available to the public until 2006.[54]

Attorneys have not been immune to the social media phenomena. An increasing number of attorneys belong to social networks and are posting about both their personal and professional lives in a number of different forums.[55] According to the 2012 ABA Legal Technology Survey Report, fifty-five percent of law firms surveyed have Facebook accounts and thirty-eight percent of lawyers have their own page on Facebook.[56] Some of the other major social networking options for lawyers include Twitter, LinkedIn, and blog websites. Thirteen percent of law firms indicated that they have a presence on Twitter, a service that allows users to share images and messages of up to one-hundred-forty characters. Twitter use by firms has increased from seven percent the previous year and five percent the year before.[57] Eleven percent of attorneys said they have their own Twitter account, which is also up from the previous year's six percent mark.[58] LinkedIn, a professional networking service, is popular among firms and individual lawyers, with eighty-eight percent of firms and ninety-five percent of the individual lawyers surveyed indicating that they have accounts.[59] Finally, the survey "not surprisingly" shows that the number of lawyers writing blogs has also grown.[60] Twenty-two percent of firms and nine percent of lawyers have blogs.[61] Nearly forty percent of attorneys said their blogs even generated new business for them.[62]

In fact, social media is "permanently altering the way that potential clients evaluate their need for legal services and select the lawyer best-suited to serve those needs."[63] Lawyers must provide the online information that clients are seeking in order to establish

---

[53] *Id.*

[54] BROWNING, LAWYER'S GUIDE TO SOCIAL NETWORKING, *supra* note 5, at 18.

[55] Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. Computer-Mediated Comm. 210, 214 (2008); Dalton, *supra* note 6.

[56] Robert Ambrogi, *ABA Survey Shows Growth in Lawyers' Social Media Use*, LAWSITES BLOG (Aug. 16, 2012), http://www.lawsitesblog.com/2012/08/aba-survey-shows-growth-in-lawyers-social-media-use.html (ABA sent questionnaires to 12,500 ABA-member lawyers in private practice and 823 completed the questionnaires).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* This is up from fifteen percent of firms with blogs in 2011 and fourteen percent in 2010. The amount of individual attorneys with blogs is up from five percent in both 2011 and 2010.

[62] *Id.*

[63] Black & Elefant, *supra* note 6 ("social media gives lawyers the tools to provide potential clients with the kind of in-depth info that they've come to expect online prior to making any kind of decision requiring a significant commitment of resources").

meaningful connections with those potential clients.[64] The legal community's online presence has required bar associations to reconsider their attorney advertising regulations as the current rules were created before the age of the Internet and social media.[65]

However, while many lawyers and law firms have an Internet presence for marketing purposes and must adhere to the advertising rules, the area in which social media is arguably having a more radical impact is in the actual practice of law. In other words, if there over 198 million Facebook users in the United States and Canada who are posting their thoughts, feelings, pictures and more, then isn't it likely that in many litigious disputes some of the participants have social network pages?

In fact, social media has become the proverbial treasure trove of evidence for those who know where and how to search. And just as with other types of innovative technology, the ABA, the state bar associations, and the courts are analyzing the permissible use of social media in the practice of law.[66] However, unlike the telephone or email, social media is not a linear exchange that may be analyzed in a single opinion or two. There are so many variations of social media and optional individual privacy settings that there is not a simple answer to the question of whether a lawyer may generally use social media to investigate a case, serve a complaint, conduct discovery, impeach a witness, select jurors or to support a recusal motion.[67]

Thus, the ABA and various state bar associations have begun to issue ethics advisory opinions and there is a growing body of case law on the use of social media. There are

---

[64] *Id.* (describing how "the interactive nature of social media helps lawyers build deeper and more meaningful connections online, which eventually translate into offline business and friendship").

[65] *See eg.* Jan L. Jacobowitz & Gayland O. Hethcoat II, *Endless Pursuit: Capturing Technology at the Intersection of the First Amendment and Attorney Advertising*, 17 J. TECH. L. & POL'Y 63, 64-65, 80 (2012).

[66] *See eg.*, PHILA. BAR ASS'N PROF'L GUIDANCE COMM., FORMAL OP. 2009-02 (2009); SDCBA FORMAL OP. 2011-2 (2011); FTC v. PCCARE247 Inc., No. 1:12-cv-07189-PAE (S.D.N.Y. Mar. 7, 2013) (holding that lawyers representing the FTC could serve legal documents on defendants in India via Facebook); Pierre Domville v. State of Florida, 103 So. 3d 184 (Fla. 4th DCA 2012) (the court certified the following question to the Florida Supreme Court: "Where the presiding judge in a criminal case has accepted the prosecutor assigned to the case as a Facebook "friend," would a reasonably prudent person fear that he could not get a fair and impartial trial, so that the defendant's motion for disqualification should be granted?"); ABA FORMAL OP. 462 (2013) (finding that, subject to the Judicial Canons, judges may participate in social media and having a social media friend does not necessarily mean that the judge is inappropriately biased); TENN. JUDICIAL ETHICS COMM., ADVISORY OP. NO. 12-01 (2012) (judges may use social media sites, but must be cautious); S.C. ADVISORY COMM. ON STANDARDS OF JUDICIAL CONDUCT, FORMAL OP. 17-2009 (2009) (judge can participate in social media, but cannot discuss matters related to judge's position); FLA. JUDICIAL ETHICS ADVISORY COMM., FORMAL OP. 2009-20 (2009) (judges cannot be "friends" on social media sites with lawyers who appear before them).

[67] *Id.*; *see also*, BROWNING, LAWYER'S GUIDE TO SOCIAL NETWORKING, *supra* note 5, at 29, 41, 123, 169, 173.

also bar journal articles, blog websites, and law review articles that have been published in the past few years and often offer tips or highlight ethical landmines to avoid if a lawyer *chooses* to use social media.[68] However, it appears that social media has become so pervasive that its use may no longer be a *choice,* but rather a *mandate*.[69]

Consider the following hypotheticals mirroring current reality that John G. Browning offers in his article on "*Digging for the Digital Dirt*":

> Imagine encountering the following scenario during the litigation following an industrial accident: just as an expert witness is explaining how all required safety protocols and procedures were diligently followed, opposing counsel confronts him with postings from YouTube videos shot by some of the defendant company's own employees showing how they cut corners. Or perhaps the defendant driver in a devastating accident denies that he was in a hurry and not paying attention, only to be confronted with his own tweets about being behind schedule. For plaintiff's counsel, consider the sinking feeling when your client, a grieving widow who has just finished testifying about the void left by the loss of her husband, is impeached with salacious photos and postings from her boyfriend's MySpace page--all of which are dated months before the accident in which her husband was killed. And of course, there is nothing quite like the look on the face of a "severely and permanently injured" plaintiff who has spun his tale of woe for the jury about barely being able to walk and who now has to explain the photos from his Facebook page depicting his completion of a recent 10k run or a mountain climb in the Pacific Northwest.[70]

Or if hypotheticals fail to persuade, consider the reality of *Lester v. Allied Concrete Co.*,[71] a wrongful death action in which defense counsel submitted a discovery request for a copy

---

[68] *See generally*, Comisky & Taylor, *supra* note 5; Downey, *supra* note 5; Hyland, *supra* note 5.

[69] *See* John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 204, 211 (2013). Browning states that "[a]n understanding of social networking sites, such as Facebook, is pivotal to accomplishing lawyerly tasks in the digital age . . . the sheer pervasiveness of social media in our modern society, coupled with its ease relative ease of use, demonstrates that a lawyer who ignores social media will fail to provide competent representation."

[70] John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, SMU SCI. & TECH. L. REV. 465, 465 (2011) [hereinafter Browning, *Digging for the Digital Dirt*].

[71] Allied Concrete Co. v. Lester, 736 S.E.2d 699, 702 (Va. 2013); *see* Lester v. Allied Concrete Co., Nos. CL08-150, CL09-223, Final Order (Va. Cir. Ct. Oct. 21, 2011). Also see Perrone v. Rose City HMA, LLC, No. CI-11-14933 (Pa. Ct. Common Pleas May 3, 2013) in which the court ordered the parties to hire a neutral forensic computer expert to view the plaintiffs' Facebook pages to determine whether she had to produce them. For a description of the case, see Katerina Milenkovski, *"Private" Postings*

of Mr. Lester's Facebook account with a picture of the grieving widower, Mr. Lester, who had survived the assault of a concrete truck hitting his car, but whose wife had perished in the crash. The picture exhibited Mr. Lester, with beer in hand, donning a t-shirt with the message, "I ♥ hot moms."

The question of how problematic that picture might have become at trial was lost in the social media "strategy" that ensued. Mr. Lester's counsel, a former president of his state bar association and perhaps a social media neophyte, instructed his paralegal to have Mr. Lester "clean up his Facebook account" and explained that he did not want to see "blow ups of those type of pictures at trial." Mr. Lester complied, eventually deleted his Facebook account, and signed interrogatories, at his attorney's direction, stating that as of the date of the signature, Mr. Lester did not have a Facebook account.[72]

Before the end of the trial and in response to the objections from Allied Concrete, Mr. Lester and his attorney recanted and reactivated the Facebook account. Apparently upon reactivation, Mr. Lester took it upon himself to delete sixteen pictures without informing his counsel.

What transpired next evidences the axiom that one may win the battle, but lose the war. Mr. Lester's attorney won a multi-million dollar verdict, but post-trial hearings on the defendant's motion for sanctions and attorney's fees based upon the Facebook debacle resulted in a court order requiring Mr. Lester's counsel to pay $522,000.00 in attorney's fees and a court referral to the state bar, which recently concluded its proceedings with an agreed upon five year suspension.[73]

Nevertheless Discoverable, ABA Litigation News 1 (Aug. 2, 2013), http://apps.americanbar.org/litigation/litigationnews/top_stories/080213-private-posts-discoverable.html ("[P]laintiff Grace Perrone claimed to have suffered severe, life-altering, and disabling injuries as a result of a fall at the Lancaster Regional Medical Center (LRMC). Perrone alleged that her injuries made it impossible for her to go for walks, garden, bicycle, or even to knit or sew. During settlement discussions, the defendants had produced photographs of Perrone from her Facebook page depicting her shoveling snow, climbing up a snow bank, and riding a sled downhill on her stomach, face first, tumbling, and laughing—all activities inconsistent with her alleged injuries. Perrone's Facebook page indicated that the photos were posted on February 6 and 13, 2010, a few weeks after the alleged injuries at the LRMC and coincident to two significant snowfalls in the area.")

[72] *Id.*

[73] Mr. Lester was also ordered to pay $180,000.00 and the case was referred by the court to the state attorney's office for consideration of perjury charges. Lester v. Allied Concrete Co., Nos. CL08-150, CL09-223, 2011 WL 8956003, at ¶ 107 (Va. Cir. Ct. Sept. 1, 2011). Lester's counsel has resigned from his law firm and has accepted a five-year suspension of his law license. *See Matthew B. Murray Resigns from the Allen Law Firm*, ALLEN ALLEN ALLEN & ALLEN, http://www.allenandallen.com/matthew-b-murray-resigns.html (last visited Aug. 7, 2013); Peter Vieth, *Murray agrees to 5-year bar suspension in wake of sanctions payment*, VA LAWYERS WEEKLY (July 29, 2013), http://valawyersweekly.com/2013/07/29/murray-agrees-to-5-year-bar-suspension-in-wake-of-sanctions-payment/.

Lawyers can no longer ignore social media—it is here to stay. The proverbial train has left the station and those lawyers who remain behind are likely to find themselves not only behind the learning curve and subject to humiliation, but also with heightened exposure to court sanction, disciplinary action, and malpractice claims.

Legal Ethics and Malpractice Law

> *We feel it would be irresponsible to ignore the robust online conversation, and we feel equally as strong about establishing a professional, responsible, and ethical approach to new media.*[74]

Revisiting the second part of the opening quote, the question becomes what are the considerations for establishing a "professional, responsible and ethical approach to new media"? Stated another way, what are the considerations that compel the conclusion that a social media assessment is a requisite component of a case evaluation?

Perhaps the place to begin is where lawyers find general guidance: the legal ethics rules and malpractice law. Of course, the legal ethics rules provide the baseline for appropriate conduct throughout the practice of law and malpractice law enlightens a lawyer as to how to limit liability exposure that generally arises under a tort theory. In other words, the ABA Model Rules of Professional Conduct, the various state professional codes, and ethics advisory opinions should be consulted before acting. On the other hand, while liability exposure may be an underlying ever-present calculation, a lawyer generally does not actively engage in analyzing the elements of a malpractice claim before acting in a case, unless he is unfortunately defending a claim. Nonetheless, both legal ethics and malpractice merit a closer look in the context of social media and the law.

Legal ethics rules establish the regulations by which lawyers are to conduct the practice of law. As will be discussed at greater length below, since 1908, the ABA has established national guidelines from which most states have adopted their own codes of professional conduct. A violation of these rules may result in prosecution by the state bar with the possible repercussions ranging from a reprimand to disbarment.

On the other hand, malpractice law has its roots in English common law and has been present in the United States since at least the eighteenth century.[75] A malpractice claim generally arises under a tort theory and is a private action brought by a client against his attorney for negligence in handling the client's case. Although various states have

[74] *Why Social Media for George Zimmerman?*, *supra* note 1.

[75] RONALD E. MALLEN & JEFFREY M. SMITH WITH ALLISON D. RHODES, LEGAL MALPRACTICE § 1:5 (2013).

defined the requirements differently, generally a client alleging malpractice must establish a viable attorney-client relationship, the attorney's neglect of a reasonable duty, and prove that the attorney's negligence was the proximate cause of the client's damages.[76] In evaluating whether an attorney has breached a reasonable duty, there is a presumption that an attorney is required to use the degree of "care, skill and diligence which is commonly possessed and exercised by attorneys practicing in the same jurisdiction."[77]

A malpractice case often turns on the definition of the appropriate standard for the duty of care in the case and that is where malpractice law and legal ethics may overlap. While the courts generally do not consider a violation of the ethics rules as tantamount to malpractice, ethics rules are sometimes used as one component in establishing the appropriate standard of care applicable when evaluating whether an attorney has breached his duty to a client.[78] Thus, in the context of social media and the law, it is wise to be mindful of which ethics rules may give rise to a duty to employ social media in a case and whether in some cases that ethical duty may also be evidence of the requisite standard of care element in a legal malpractice case.

Legal Ethics Rules and Social Media

History of the Ethics Rules

For over a century, the American Bar Association ("ABA") has provided guidance in legal ethics and professional responsibility by promulgating professional standards that serve as a model of regulatory authority governing the legal profession.[79] The ABA has adapted its regulations over time to accommodate the expanding influence of technology

[76] 7A C.J.S. Attorney & Client § 301 (2013).

[77] *Id.* (citing Sanijines V. Ortwein & Associates, P.C., 984 S.W. 2d 907 (Tenn. 1998)).

[78] Allen R. v. Eisinger, Brown, Lewis & Frankel, P.A., No. 3D12-1181, 2013 BL 184850 (Fla. 3d DCA July 10, 2013**)** ("We previously have observed that "a [v]iolation of the Code of Professional Responsibility does not prove negligence per se, . . . but it may be used as some evidence of negligence"). Oberon Invs., N.V. v. Angel, Cohen & Rogovin, 492 So. 2d 1113, 1114 n.2 (Fla. 3d DCA 1986), *rev'd on other grounds*, 512 So. 2d 192 (Fla. 1987). Pressley v. Farley, 579 So. 2d 160, 161 (Fla. 1st DCA 1991) (holding violation of the Rules of Professional Conduct does not create a legal duty on the part of the lawyer nor constitute negligence per se, although it may be used as some evidence of negligence"). Jett Hanna, *Social Media, Lawyer Liability and Ethics*, ASSOC. OF CERTIFIED E-DISCOVERY SPECIALISTS, http://www.aceds.org/wp-content/uploads/2013/04/Jett-Hanna-Social-Media-Lawyer-Liability-and-Ethics-Paper.pdf (last visited Aug. 6, 2013). Susan Saab Fortney & Vincent R. Johnson, Legal Malpractice Law: Problems and Prevention 31 (Thomson/West, 2008) (citing Smith v. Haynsworth, Marion, McKay & Geurard, 472 S.E. 2d 612, 613-14 (S.C. 1996)) ("A majority of courts permit discussion of such a violation at trial as *some* evidence of the common law duty of care. These courts generally rule that the expert must address his or her testimony to the breach of a legal duty of care and not simply to breach of a disciplinary rule. Other courts have held that ethical standards conclusively establish the duty of care and that any violation is negligence *per se*. A minority find that violation of an ethical rule establishes a rebuttable presumption of legal malpractice. And finally a few courts hold that ethical standards are inadmissible in a legal malpractice action." (internal citations omitted)).

[79] MODEL RULES OF PROF'L CONDUCT Preface (pre-2002).

on the practice of law. The original Canons of Professional Ethics were adopted by the ABA on August 27, 1908.[80] The Canons provided "ethical standards: (i) to judge who should be permitted to become and remain lawyers; (ii) to educate young or inexperienced lawyers; and (iii) to elicit and strengthen lawyers' resolve to conduct themselves in accordance with the highest ethical standards."[81]

Five years after the first Canons, the ABA established the Standing Committee on Professional Ethics with the goal of staying current on the professional ethics activities in state and local bar associations.[82] The Committee's name was changed in 1919 and it was then divided into two committees: the Committee on Professional Grievances, which had the authority to investigate professional misconduct charges, and the Committee on Professional Ethics, which had the authority to issue opinions on proper professional and judicial behavior.[83] The Committee on Professional Grievances was discontinued in 1971.[84] The Committee on Professional Ethics was renamed the Committee on Ethics and Professional Responsibility and has maintained its name and mission since that time.[85]

In 1964, a Special Committee on Evaluation of Ethical Standards created the Model Code of Professional Responsibility.[86] The Code was adopted by the ABA House of Delegates on August 12, 1969, and many state and federal jurisdictions followed in the adoption.[87] In 1977, the ABA created the Commission on Evaluation of Professional Standards to comprehensively study and evaluate the ethical issues and similar problems within the legal profession.[88] The Commission presented a Discussion Draft of the Model Rules of Professional Conduct in 1980.[89] Public hearings were then held throughout the country, which allowed for people to provide their opinions on the draft.[90] A year after the public hearings were conducted, the Commission analyzed all of the comments and integrated those into another draft.[91] After a six-year study and

---

[80] *Id.*

[81] James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2399 (2003).

[82] MODEL RULES OF PROF'L CONDUCT Preface (pre-2002).

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] Robert W. Meserve, *Model Rules of Prof'l Conduct Comm. on Evaluation of Prof'l Standards, Chair's Introduction*, ABA CTR. FOR PROF'L RESPONSIBILITY (Sept. 1983), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preface/chair_introduction.html.

[90] *Id.*

[91] *Id.*

drafting process, the Commission released the Model Rules of Professional Conduct.[92] "The Model Rules of Professional Conduct are intended to serve as a national framework for implementation of standards of professional conduct."[93] The Model Rules were adopted on August 2, 1983 by the House of Delegates and since then, nineteen amendments have been made.[94] At the time of adoption in 1983, "more than two-thirds of the jurisdictions had adopted new professional standards based on these Model Rules."[95]

Since the adoption of the Model Rules, the ABA has created three commissions to study and propose changes to the rules. The first commission created by the ABA was the Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") in 1997 "to comprehensively review the Model Rules and propose amendments as deemed appropriate."[96] The Commission submitted a report to the ABA House of Delegates in August 2001, which discussed the goal of the Commission to provide uniformity based on the "growing disparity in state ethics codes" and to address the effect of technological developments on the practice of law.[97] On February 5, 2002, a number of the Ethics 2000 Commission's proposed amendments were adopted by the House of Delegates.[98]

In 2000, the ABA created the Commission on Multijurisdictional Practice "to research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law."[99] This Commission submitted proposed amendments to Rules 5.5 and 8.5 that were adopted by the House of Delegates on August 12, 2002.[100] Finally, in 2009, the ABA created the Commission on Ethics 20/20 to evaluate the Model Rules in light of the effect of advancing technology and the globalization of the practice of law.[101] The Commission recently submitted proposed amendments to the House of Delegates, some of which were adopted in August 2012, including the heavily-discussed amendment to Comment 8 of Model Rule 1.1, discussing

---

[92] MODEL RULES OF PROF'L CONDUCT Preface (pre-2002).
[93] Meserve, *supra* note 88.
[94] MODEL RULES OF PROF'L CONDUCT Preface (pre-2002).
[95] *Id.*
[96] MODEL RULES OF PROF'L CONDUCT Preface (2012).
[97] ABA Ethics 2000 Commission, *Report to the House of Delegates*, ABA, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_hod_082001.authcheckdam.pdf (last visited May 27, 2013) [hereinafter ABA 2000 Report].
[98] MODEL RULES OF PROF'L CONDUCT Preface (2012).
[99] *Id.*
[100] *Id.*
[101] ABA COMMISSION ON ETHICS 20/20, *Report to the House of Delegates*, ABA, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited May 27, 2013) [hereinafter ABA 20/20 Report].

attorneys' duty to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[102]

The commissions created by the ABA have been influential in ensuring that the Model Rules reflect the ever-evolving practice of law. [103] Additionally, the Standing Committee on Ethics and Professional Responsibility continues to issue opinions on the Model Rules and to provide ethical guidance to the legal profession as it faces new challenges each day due to the role of rapidly advancing technology in our society.[104]

The Model Rules and a Duty to Incorporate Social Media and Technology

Some of the Model Rules and their state counterparts reinforce the proposition that the use of technology and social media is becoming a requirement, while other rules reflect this axiom in the developing body of ethics opinions that interpret the rules in the context of social media. The first few rules discussed below support the use of social media as a fundamental component of the practice of law and the remaining rules that are discussed demonstrate the guidelines that have been propounded to establish appropriate, ethical conduct on social media. Finally, a few rules are considered that indicate the increasing presence of lawyers in the world of social media.

---

[102] *Id.*; *see* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2012).

[103] Prior to the 2012 adoption of the ABA comment, a number of states had begun to address various technology concerns in the context of competence. In 2010, The State Bar of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion 2010-179, in which it described lawyers' duty to evaluate the technology that they use in representing their clients in order to be competent and ensure confidentiality. The Committee stated that because technology is constantly evolving and is playing a larger role in all of our lives, "attorneys are faced with an ongoing responsibility of evaluating the level of security of technology that has increasingly become an indispensable tool in the practice of law." The attorneys' duty of competence requires attorneys to take "appropriate steps" to ensure that clients' confidences do not become revealed and that no privileges or protections are waived. The Committee ultimately set out six considerations for attorneys when dealing with technology in representing their clients:

(a) The attorney's ability to assess the level of security afforded by the technology; (b) Legal ramifications to third parties of intercepting, accessing or exceeding authorized use of another person's electronic information; (c) The degree of sensitivity of the information. The greater the sensitivity of the information, the less risk an attorney should take with technology; (d) Possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product, including possible waiver of the privileges; (e) The urgency of the situation; (f) Client instructions and circumstances.

CAL. STANDING COMM. ON PROF'L RESPONSIBILITY & CONDUCT, FORMAL OP. 2010-179 (2010). Florida has also addressed the growing effect of technology on the practice of law. The Florida Bar Board of Governors asked the Professional Ethics Committee to opine on attorneys' ethical obligations in regard to using and storing information on hard drives and equipment such as printers, cellular phones, facsimile machines, and scanners. The Committee declared that "the lawyer has a duty to keep abreast of changes in technology" when utilizing these storage devices in the representation of their clients. Further, the duty extends from the time the lawyer obtains the device, through the life of the device, and until the lawyer disposes of the device, including the time subsequent to when the lawyer relinquishes control of the device. FLA. PROF'L ETHICS COMM., FORMAL OP. 10-2 (2010).

[104] *Id.*

Competence and Diligence

The duties of competence and diligence are ones that have undoubtedly been impacted by the growth of technology and the availability of social media on the Internet.[105] There are some lawyers employing social media to provide their clients with effective representation and[106] other lawyers who are not investigating social networking sites thereby facing a growing risk of missing crucial evidence, locating key witnesses, and the opportunity to expose potential bias and impropriety.[107]

Model Rule 1.1 states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[108] Model Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[109]

In August 2012, the ABA House of Delegates amended the comments to Model Rule 1.1 to state that, "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[110] The ABA Commission on Ethics 20/20 clarified that this amendment was not intended to create additional obligations for lawyers, rather it was meant to serve as a reminder that to remain competent, lawyers should keep up to date on technology.[111]

---

[105] Lawyers are now often expected to utilize online resources for a variety of tasks, including to diligently investigate a party being served and to select juries. Browning, *Digging for the Digital Dirt*, *supra* note 69, at 470.

[106] "If the use of social media tools continues to increase as expected, it may be possible that, soon, a basic awareness of social media may be essential to the competent practice of law." Additionally, "[i]f the diligent attorney must be zealous in pursuing a matter on his client's behalf, it seems possible that more than familiarity may be required—actual use of social media may be necessary." Margaret (Molly) DiBianca, *Complex Ethical Issues of Social Media*, THE BENCHER (Nov./Dec. 2010), http://www.innsofcourt.org/Content/Default.aspx?Id=5497.

[107] Social media sites can be "invaluable sources of information," especially for family lawyers and personal injury lawyers. You can find evidence of infidelity, bad tempers, bad behavior, and exaggeration or lying about injuries sustained. Attorneys no longer need to hire investigators to find this information. Michael E. Lackey Jr., *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 173-74 (2012).

[108] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006).

[109] MODEL RULES OF PROF'L CONDUCT R. 1.3 (2006).

[110] MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. (2012) (emphasis added).

[111] ABA 20/20 Report, *supra* note 100. "The amendment to Comment 8 illustrates the ABA's desire to nudge lawyers into the 21st century when it comes to technology," but the Commission's report suggests only a "gentle nudge." Matt Nelson, *New Changes to Model Rules a wake-up call for technologically challenged lawyers*, INSIDECOUNSEL 1 (Mar. 28, 2013), http://www.insidecounsel.com/2013/03/28/new-changes-to-model-rules-a-wake-up-call-for-tech.

However, regardless of the clarifying language to the amendment, arguably "[n]ot only do…[lawyers]… have a duty to understand and appreciate the potential pitfalls of online investigation, but …[they]… may also have a duty to actually use the Internet and social media to gather information in some situations."[112] This theory is further supported by the ethics opinions concerning discovery issues, which are discussed below, and have been primarily generated as a result of attorneys inquiring about proper methodology. In other words, the opinions focus not on whether social media should be used, but rather the proper manner in which to integrate social media into a case. Additionally, competence may dictate that lawyers have "an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients' position emanating from the clients' use of social media."[113]

In 2012, the New York City Bar Association (NYCBA) opined on the duty of competence as it relates to social media and jury selection.[114] The NYCBA analyzed the extent to which attorneys can research jurors on social media websites without violating the ethics rules.[115] This opinion will be discussed in greater detail below; however, it is worthy of mention here because the NYCBA opinion found that when lawyers conduct research on social media, they must understand how a prohibited communication can occur via a social media website.[116] Additionally, the NYCBA proclaimed that "standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case,"[117] thereby suggesting that social media research may be a requirement rather than an option.

Meritorious Claims and Contentions

Lawyers must avoid filing frivolous lawsuits, which means that they must fully investigate a client's case to ensure that they can make a good faith argument in support of their client's position.[118]

---

[112] Mary Dunnewod, *An Ethical Duty to Use the Internet?*, 41 ABA STUDENT LAWYER 5 (2013), http://www.americanbar.org/publications/student_lawyer/2012-13/jan/professionalism.html.

[113] "Thus, an attorney may properly review a client's social media pages, and advise the client that certain materials posted on a social media page may be used against the client for impeachment or similar purposes." NYCLA FORMAL OP. 745 (2013).

[114] NYCBA, FORMAL OP. 2012-2 (2012).

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] MODEL RULES OF PROF'L CONDUCT R. 3.1 (2006) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law"); MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2 (2006) ("The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the

> Whether a claim or contention is frivolous under Model Rule 3.1 is generally measured by an objective 'reasonable attorney' standard . . . not every meritless allegation is frivolous. For claims or contentions to be frivolous under Rule 3.1, there must be such 'a complete absence of actual facts or law that a reasonable person could not have expected the court to rule in his favor.'[119]

As John Browning's hypotheticals highlight, a client may provide his lawyer with a narrative that omits relevant facts.[120] Today, those missing facts may appear on the client's social media pages and make clear that the client does not have a valid case. Rather than having opposing counsel discover the frivolous nature of a pending lawsuit, a lawyer should investigate social media to avoid the risk of filing the case.[121] Arguably, lawyers should routinely employ social media to conduct preliminary case investigations.[122]

Communication

Lawyers have a fundamental duty to communicate with their clients, and the nature of that duty may be expanding as the various methods for communicating with a client increase.[123] In 2012, the ABA Ethics 20/20 Commission amended Comment 4 to

---

applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law").

[119] Douglas R. Richmond, *Saber-Rattling and the Sound of Professional Responsibility*, 34 AM. J. TRIAL ADVOC. 27, 31 (2010) (quoting Disciplinary Bd. v. Hoffman, 670 N.W.2d 500, 506 (N.D. 2003) (citing Lawrence v. Delkamp, 658 N.W.2d 758, 766 (N.D. 2003)).

[120] Browning, *Digging for the Digital Dirt*, *supra* note 69, at 465.

[121] "[I]f a client's social media posting reveals to an attorney that the client's lawsuit involves the assertion of material false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using those false statements." NYCLA FORMAL OP. 745 (2013).

[122] Performing preliminary research "can help the attorney to be more informed prior to filing suit. In some cases, it might help a litigator avoid bringing a claim that sounds great on the surface but breaks down under scrutiny." Andrew B. Delaney & Darren A. Heitner, *Made for Each Other: Social Media and Litigation*, NYSBA 12 (Feb. 2013), http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=151598&Template=%2FCM%2FContentDisplay.cfm.

[123] Under Model Rule 1.4,

> (a) A lawyer shall:
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; and

Model Rule 1.4, changing it from "[c]lient telephone calls should be promptly returned or acknowledged," to "[l]awyers should promptly respond to or acknowledge client communications."[124] In making the change, the Commission stated that this latter phrase "more accurately describes a lawyer's obligations in light of the increasing number of ways in which clients use technology to communicate with lawyers."[125] It is worth noting that as clients employ texting and social media, lawyers need to understand the communication possibilities and define the technology through which they will communicate with a client.

Impartiality and Decorum of the Tribunal

As discussed above, jury selection may be another area in which the use of social media is becoming a requirement rather than an option. The value of researching jurors is demonstrated by some specific examples: a Florida lawyer filed a complaint to recover compensation for injuries sustained by his client when she was forced to clean a machine in a confined space. The lawyer conducted Internet research on the jury venire and learned that one prospective juror belonged to a support group for claustrophobics. The person was selected for the jury and served as the foreman. The jury came back with a verdict in favor of plaintiff.[126]

The Zimmerman case provides another example that was widely reported. One of the potential jurors questioned during voir dire stated that he had little knowledge of the Zimmerman case; however, his Facebook activity indicated otherwise.[127] The juror had posted on the Facebook page of a group stating, "I CAN tell you THIS. 'Justice'…IS Coming."[128] Needless to say, that individual was dismissed. Individual jurors may have tremendous influence in the outcome of a case and one trial consultant has suggested that a lawyer who fails to employ the Internet in jury selection is bordering on malpractice.[129] Moreover, the NYCLA issued an opinion in 2011 that affirmatively

---

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

MODEL RULES OF PROF'L CONDUCT R. 1.4 (2006).

[124] MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 4 (2006); *see* Andrew Pearlman, *Ethics 20/20 Proposal to Amend Rule 1.4 (Communication)*, LEGAL ETHICS FORUM 1 (Feb. 27, 2012), http://www.legalethicsforum.com/blog/2012/02/ethics-2020-proposal-on-rule-14-communication.html.

[125] ABA 20/20 Report, *supra* note 100.

[126] Robert B. Gibson & Jesse D. Capell, *Researching Jurors on the Internet—Ethical Implications*, 84-DEC N.Y. ST. B.J. 10, 12 (2012).

[127] Elicia Dover, *Did Potential Zimmerman Juror Lie to Court?*, ABC NEWS 1 (June 13, 2013), http://gma.yahoo.com/blogs/abc-blogs/did-potential-zimmerman-juror-lie-court-034710693.html.

[128] *Id.*

[129] Trial consultant Robert B. Hirschhorn researches prospective jurors as part of his job and he says, "Anyone who doesn't make use of [Internet searches] is bordering on malpractice." Carol J.

indicates that [p]assive monitoring of jurors, such as viewing a publicly available blog or Facebook page, may be permissible.[130]

Additionally, courts are acknowledging the benefit of lawyers using technology to investigate jurors. One Missouri opinion, which grants a new trial based upon a juror's dishonesty during voir dire that was subsequently discovered as a result of a search on the courthouse's electronic service, suggests that technology places an increased burden on lawyers to thoroughly investigate potential jurors.[131]

In New Jersey, an attorney who was conducting an online search of potential jurors was admonished and ordered to close his laptop by the court after opposing counsel, who was without a laptop, objected.[132] On appeal, the Superior Court of New Jersey, Appellate Division found that the lower court's ruling was not prejudicial; however, it noted that it would not have been an unfair advantage to allow plaintiff's counsel to conduct research on the laptop because plaintiff's counsel was not being disruptive and both counsel had access to the free Wi-Fi in the courthouse.[133] Simply because plaintiff's counsel "had the foresight to bring his laptop computer to court, and defense counsel did

---

Williams, *Jury Duty? May want to edit online profile*, LA Times 2 (Sept. 29, 2008), http://articles.latimes.com/2008/sep/29/nation/na-jury29/2.

[130] NYCLA FORMAL OP. 743 (2011).

[131] Johnson v. McCullough, 306 S.W.3d 551, 558-59 (Mo. 2010). After *Johnson*, the Missouri Supreme Court Rules were changed to affirmatively require attorneys to conduct a review of "Case.net" before the jury is sworn. Missouri Supreme Court Rule 69.025 was added to the Rules in January 2011. Section (a) reads, "A party seeking to inquire as to the litigation history of potential jurors shall make a record of the proposed initial questions before voir dire. Failure to follow this procedure shall result in waiver of the right to inquire as to litigation history." MO. SUP. CT. R. 69.025(a) (2011). Section (b) reads "For purposes of this Rule 69.025, a 'reasonable investigation' means review of Case.net before the jury is sworn." MO. SUP. CT. R. 69.025(b) (2011). See *also* Khoury v. ConAgra Foods, Inc., 368 S.W.3d 189 (Mo. Ct. App. 2012) (upholding removal of juror after separate information apart from litigation history was discovered following the jury being empanelled, but prior to opening statements). In *Khoury*, the court and counsel for both parties agreed to conduct a search on Case.net prior to voir dire to ascertain whether potential jurors might be disqualified based upon discrepancies between their responses during voir dire and Case.net's report on the jurors' history of litigation. However, the following day after the jury had been empanelled, defense counsel moved to strike one of the jurors based upon information that counsel had found on a juror's Facebook page that allegedly indicated prejudicial bias and a failure to disclose that basis thereby warranting disqualification of the juror. The lower court granted a motion to strike the juror. The appellate court affirmed noting that the trial court had not abused its discretion and commenting further that, "Neither *Johnson* nor any subsequently promulgated Supreme Court rules on the topic of juror nondisclosure require that *any and all* research — Internet based or otherwise —into a juror's alleged material nondisclosure must be performed and brought to the attention of the trial court *before* the jury is empanelled or the complaining party waives the right to seek relief from the trial court. While the day may come that technological advances may compel our Supreme Court to re-think the scope of required "reasonable investigation" into the background of jurors that may impact challenges to the veracity of responses given in voir dire *before* the jury is empanelled — that day has not arrived as of yet." *Id.* 193, 203.

[132] Carino v. Muenzen, 2010 WL 3448071, at *4 (N.J. Super. Ct. App. Div. 2010).

[133] *Id.* at *10.

not, cannot serve as a basis for judicial intervention in the name of 'fairness' or maintaining 'a level playing field.'"[134]

The NYCBA opinion, mentioned above, which focused on investigating jurors on social media, cautioned that a lawyer using social media must assure that he does not cause a *communication* to occur with a juror sitting on the lawyer's case.[135] According to the NYCBA, lawyers must understand the websites they choose to use to research jurors to prevent prohibited communications from occurring.[136] A prohibited communication would occur if the: (1) juror received a "friend" request or a similar request to share information as a result of attorney's research or (2) juror otherwise became aware of attorney's deliberate viewing or attempt at viewing the juror's social media page.[137] The attorney cannot use deception to gain access to the juror's information and it may be a violation of the ethics rules if the attorney causes an inadvertent communication.[138]

Thus, appropriately investigating jurors on social media during voir dire may be an indispensable way to eliminate jurors with prejudice or bias from being decision-makers in a case. Using social media may ultimately provide lawyers with a more complete picture of both the jury venire and the empaneled jury because jurors are much more likely to be candid in an online environment.[139]

Additionally, pre-trial social media research may reveal pertinent information about the judge presiding over a case. A number of states, as well as the ABA, have opined on the propriety of judges and lawyers who appear before them being social media "friends." The ABA concluded that, subject to the Judicial Canons, a judge is permitted to participate in social media and can be "friends" with lawyers on those websites because that friendship does not necessarily connote a relationship showing bias or the need for recusal.[140] All of the states that have opined have encouraged judges to be cautious in their use of social media, with some states going so far as to conclude that judges and

---

[134] *Id.*

[135] NYCBA FORMAL OP. 2012-2 (2012).

[136] "Because of the differences from service to service and the high rate of change, the Committee believes that it is an attorney's duty to research and understand the properties of the service or website she wishes to use for jury research in order to avoid inadvertent communications." *Id. See also* Model Rule 3.5, which states: "[a] lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; [or] (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order."[136]

[137] *Id.*

[138] *Id.*

[139] Chip Babcock & Luke Gilman, *Use of Social Media in Voir Dire*, 60 THE ADVOC. (TEXAS) 44, 44-45 (2012).

[140] ABA FORMAL OP. 462. Jan Jacobowitz, *Same Rules, Different Application: The ABA Formally Opines on Judges Using Social Media*, LEGAL ETHICS IN MOTION 1 (Feb. 21, 2013), http://www.legalethicsinmotion.com/2013/02/same-rules-different-application-the-aba-formally-opines-on-judges-using-social-media/.

lawyers who appear before them should not be social media "friends" and others finding that judges and lawyers may be "friends," but they must not discuss a matter in which the lawyer is appearing before the judge.[141] Regardless of a state's view on judges and lawyers being social media friends, social media may nonetheless provide insight into the judge before whom a lawyer is representing his client.

The Model Rules and The Ethical Use of Social Media

Assuming the proposition that social media use is a requirement for effective lawyering, it is important to understand the developing guidelines for integrating social media into the practice of law. The following rules have been the subject of ethics opinions that are facilitating the discussion and reflect not only valuable practice pointers, but also the global impact of social media upon the law of lawyering.

Candor to the Tribunal & Fairness to Opposing Party and Counsel

In addition to a lawyer's duties of competence and diligence that require a lawyer to fully investigate a case, Model Rules 3.3 and 3.4 require lawyers to provide truthful information to the courts and opposing parties.[142] Social media supports these additional obligations.

Social media offers a virtual gold mine of information.[143] Divorce and personal injury lawyers are discovering damaging information concerning the opposing spouse and/or a plaintiff's exaggeration of alleged injuries.[144] Social media has also provided useful

---

[141] States that have opined on the issue of judges being social media "friends" with lawyers are Maryland, Florida, California, Kentucky, South Carolina, Ohio, New York, Massachusetts, and Oklahoma. Florida and Oklahoma concluded that judges should not be social media "friends" with lawyers that may appear before them. Tennessee urges caution in becoming social media "friends" and South Carolina allows for the friendship to exist, but states that lawyers and judges may not discuss a matter in which the lawyer may appear before the judge. Daniel Ilani, *Judges and Attorneys Should Think Twice Before Clicking "Add Friend"*, LEGAL ETHICS IN MOTION 1 (Feb. 11, 2013), http://www.legalethicsinmotion.com/2013/02/judges-and-attorneys-should-think-twice-before-clicking-add-friend/.

[142] For example, "(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . [or] (3) offer evidence that the lawyer knows to be false." MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) & (3) (2006). Additionally, "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value; . . . [or] (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." MODEL RULES OF PROF'L CONDUCT R. 3.4(a) & (d) (2006). Furthermore "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2006).

[143] Christopher B. Hopkins & Tracy T. Segal, *Discovery of Facebook Content in Florida Cases*, 31 NO. 2 TRIAL ADVOC. Q. 14, 14 (2012).

[144] *Id.* "As attorneys join social networks themselves, there is a growing awareness of the potential pitfalls--and gold mines--to be found on these sites. In civil lawsuits for damages, especially in the personal injury and insurance litigation context, potentially relevant and discoverable information is

evidence in employment practices cases.[145] However, the use of social media must be accomplished in accordance with the legal ethics rules and the discovery rules.

The *Lester* case, discussed above, is a prime example of a failure by plaintiff's counsel to understand the significance of social media that led to disastrous consequences.[146] Conversely, the case also illustrates a defense counsel who apparently understood the potential value of a request for production that included the plaintiff's Facebook page with a picture from that page attached.[147] Plaintiff's counsel not only violated the rules by instructing the deletion of Facebook evidence,[148] but also was arguably negligent in not exploring the client's social media presence at the beginning of the case.

Facebook and other social media discovery has been the subject of several cases and ethics opinions throughout the country. In one New York case, a plaintiff brought a personal injury action alleging permanent injuries and the inability to participate in certain activities.[149] The defendant's counsel reviewed the public portions of the plaintiff's Facebook and MySpace profiles and discovered that the plaintiff lived an active lifestyle since the accident and had traveled up and down the east coast despite her claim that she was unable to travel.[150] The court there found that "[p]laintiffs who place their physical condition in controversy may not shield from disclosure material which is necessary to the defense of the action," and that the plaintiff has no reasonable expectation of privacy in her Facebook or MySpace profiles.[151] The "defendant's need

---

often abundant on these sites." Evan E. North, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. KAN. L. REV. 1279, 1286 (2010).

[145] Hanna, *supra* note 77.

[146] Allied Concrete Co. v. Lester, 736 S.E.2d 699, 702 (Va. 2013).

[147] *Id.* Note that under Rule 4.2 if the person is represented, "a lawyer shall not communicate about the subject of the representation with [the] person . . . unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." MODEL RULES OF PROF'L CONDUCT R. 4.2 (2006). It is not clear from the case how defense counsel obtained the picture of the plaintiff. As discussed in the next section, if the picture was readily available to the public, then access was permissible.

[148] *But see* NYCLA FORMAL OP. 745 (2013). "Under some circumstances, where litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding destruction or spoliation of evidence, there is no ethical bar to "taking down" such material from social media publications, or prohibiting a client's attorney from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer." This recent advisory opinion has caused controversy and begs the question as to whether printing copies of social media pages and then deleting the online presence of these pages is permissible. If found to be permissible, then a savvy counsel must now consider propounding discovery that requests information regarding not only current social media posts, but also any and all social media that is or has ever been posted between particular dates that are relevant to the case. No doubt, if discovery moves in this direction, then additional technology will be required to support the validity of both the request and response.

[149] Romano v. Steelcase, Inc., 30 Misc. 3d 426, 426 (N.Y. Sup. Ct. 2010).

[150] *Id.*

[151] *Id.* at 428.

for access to the information outweighs any privacy concerns that may be voiced by plaintiff."[152]

In two Florida cases, the courts ruled that information contained on individual social media pages was discoverable *if* the party seeking discovery could prove that the information was relevant to the case.[153] However, parties may not engage in general fishing expeditions when the information sought on social media pages is clearly not relevant.[154]

Finally, in a criminal case in New York, the prosecutor served a subpoena on Twitter to obtain a defendant's tweets that contained information that negated his alleged defense. The court denied Twitter's motion to quash and stated:

> If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world . . . In dealing with social media issues, judges are asked to make decisions based on statutes that can never keep up with technology . . . The world of social media is evolving, as is the law around it. As the laws, rules and societal norms evolve and change with each new advance in technology, so too will the decisions of our courts. [155]

---

[152] *Id.* at 434.

[153] Beswick v. Northwest Med. Ctr., Inc., No. 07-020592, at *4 (Fla. 17th Cir. Ct. Nov. 3, 2011) (Defendants sought discovery of information Plaintiff shared on social networking sites concerning her noneconomic damages and court found this information to be "clearly relevant to the subject matter of the current litigation and [ ] reasonably calculated to lead to admissible evidence"); Levine v. Culligan of Fla., Inc., No. 50-2011-CA-010339, at *10 (Fla. 15th Cir. Ct. Jan. 29, 2013) (finding that "the critical factor in determining when to permit discovery of social media is whether the requesting party has a basis for the request" and in that case, "Defendant has not come forth with any information from the public portions of any of Plaintiff's profiles that would indicate that there is relevant information on her profiles that would contradict the claims in this case").

[154] *Id.*

[155] People v. Harris, 2012 NY Slip Op 22175, 36 Misc. 3d 868, June 30, 2012 Sciarrino Jr., J. Criminal Court Of The City Of New York, New York County available at http://www.nycourts.gov/reporter/3dseries/2012/2012_22175.htm. In acknowledging the evolution of the law and technology the court further commented: "While the U.S. Constitution clearly did not take into consideration any tweets by our founding fathers, it is probably safe to assume that Samuel Adams, Benjamin Franklin, Alexander Hamilton and Thomas Jefferson would have loved to tweet their opinions as much as they loved to write for the newspapers of their day (sometimes under anonymous pseudonyms similar to today's Twitter user names). Those men, and countless soldiers in service to this nation, have risked their lives for our right to tweet or to post an article on Facebook; but that is not the same as arguing that those public tweets are protected. The Constitution gives you the right to post, but as numerous people have learned, there are still consequences for your public posts."

Truthfulness in Statements to Others, Communication with Person Represented by Counsel, & Dealing with Unrepresented Persons

Investigation of witnesses is another area of trial preparation that has prompted ethics advisory opinions. Lawyers must adhere to rule 4.1, which requires truthfulness; and are guided by different constraints depending upon whether a witness has counsel or qualifies as an unrepresented person. If counsel represents a witness then any contact with the witness must be through counsel or with the counsel's permission.[156] A lawyer may communicate directly with an unrepresented a witness (or opposing party) but may not "state or imply that the lawyer is disinterested."[157]

Various state and local bar associations have interpreted these rules in the context of social media. In 2009, the Philadelphia Bar Association issued one of the first opinions and in response to an inquiry decided that attorneys may not use a third party, such as a paralegal, to "friend" a non-party, unrepresented witness if that person fails to reveal his association with the attorney.[158]

A year later, both the New York City (NYCBA) and New York State Bar Associations (NYSBA) issued opinions on similar issues. The NYSBA focused on other parties in the litigation and decided a lawyer "may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so."[159] The NYCBA issued what remains a controversial opinion because it found that lawyers may use their own names and profiles to "friend" an unrepresented person on a social networking site without explicitly disclosing their purpose for making the "friend" request.[160]

The San Diego County Bar Association evaluated a fact pattern that involved an employment discrimination case and the "friending" of two high-ranking employees in the defendant's company.[161] The opinion cautioned that if these employees were decision-makers then they may be considered "represented" by defense counsel thereby barring plaintiff's lawyer from sending them "friend" requests.[162] A lawyer's "ex parte communication to a represented party intended to elicit information about the subject

[156] MODEL RULES OF PROF'L CONDUCT R. 4.2 (2006).
[157] MODEL RULES OF PROF'L CONDUCT R. 4.3 (2006).
[158] PHILA. BAR ASS'N PROF'L GUIDANCE COMM., FORMAL OP. 2009-02 (2009). Note also Model Rule 8.4 which generally prohibits misrepresentation and fraud and was discussed in the Philadelphia opinion.
[159] NYSBA FORMAL OP. 843 (2010).
[160] NYCBA 2010-2 (2010). There are boundaries to allowing a lawyer to "friend" an unrepresented party, but they are not crossed when the lawyer uses only truthful information.
[161] SDCBA FORMAL OP. 2011-2 (2011).
[162] *Id.*

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."[163]

Most recently, the New Hampshire Bar Association Ethics Committee found that it is a violation of a lawyer's ethical duty of truthfulness in statements to others for a lawyer to send a "friend" request and not disclose his identity and role in the pending litigation.[164]

These opinions further reflect the use of social media in the practice of law and emphasize not only that lawyers are exploring social media for evidence, but also that the legal ethics rules apply to investigations on the Internet. As the O'Mara Law Group suggests, social media and the law should be embraced in a professional, ethical manner.

Other Social Media Considerations

While the focus of this article is the proposition that social media research is becoming a requirement in the practice of law, there are other situations in which lawyers are employing social media for marketing purposes, to provide access to legal information and/or to heighten awareness and promote legal reform. Generally, these areas reflect the optional use of social media although some lawyers may consider this type of social media engagement to be necessary to maintain a competitive edge in the legal profession. The discussion of the relevant rules below is offered to portray another aspect of the pervasive effect of social media on the practice of law, but not to suggest that engaging in social media for the purpose of marketing or sharing one's views is or should be a requirement for effective lawyering.

Duties to Prospective Client

In the age of the Internet and social media, communication occurs rapidly and in novel formats so that duties to a prospective client may arise inadvertently.[165] Model Rule 1.18 provides that "a person who communicates with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."[166] Furthermore, a consultation for legal services has likely occurred if the lawyer has requested information from an individual, without providing a disclaimer limiting the

[163] *Id.*

[164] NHBA ETHICS COMM., ADVISORY OP. #2012-13/05 (2013).

[165] "The speed of social networking . . . may facilitate referrals, advice, and the formation of apparent attorney-client relationships, all with a few clicks of a mouse. In social networking, casual interactions sometimes cannot be distinguished from more formal relationships. Thus extreme caution must be exercised." Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 122 (2009).

[166] MODEL RULES OF PROF'L CONDUCT R. 1.18 (2006).

lawyer's obligations, and the individual responds.[167] However, an individual does not become a "prospective client" by simply providing information unilaterally to a lawyer without any reasonable expectation of a client-lawyer relationship ever being formed.[168] These parameters frame the circumstances in which lawyers may be responsible to a prospective client on a social networking site. [169]

Arizona, New Mexico District of Columbia and Florida have all opined on the issue of lawyers providing advice online and the potential for duties to a prospective client to arise.[170] All the states have cautioned lawyers to draw the line between providing specific legal advice and general information.[171] "Lawyers should not answer specific legal questions from lay people through the Internet unless the question presented is of a general nature and the advice given is not fact-specific."[172]

Confidentiality

Confidentiality has been the subject of ethics opinions and disciplinary actions arising from conduct on blogs and attorney advertising.[173] Model Rule 1.6 provides that "(a) A lawyer shall not reveal information relating to the representation of a client unless the

[167] MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. 2 (2006). The key in determining whether someone becomes a prospective client over the Internet or via social networking "is whether the lawyer makes a communication that is seen as *inviting the submission* of information." Peter A. Joy & Kevin C. McMunigal, *Ethical Concerns of Internet Communication*, 27 CRIM. JUST. 45, 46 (Winter 2013).

[168] *Id.*

[169] For example, if a lawyer is posting on a blog and not engaging directly with a potential client about that the specific facts of a case, then an attorney-client relationship is generally not created. "Most blogging software only allows readers to post short, public comments visible to other blog readers—and the fact that people who post to blogs convey the information not to specific lawyers, but to all subscribers or readers of the blog, make blogs less likely to be the forums in which a potential client discusses representation with a lawyer and is thereby transformed into a prospective client." Martin Whittaker, *Ethical Considerations Related to Blogs, Chat Rooms, and Listservs*, 21 NO. 2 PROF. LAW 3, 5 (2012). Whereas, chat rooms and listservs have different qualities than blogs – more posts, private one-on-one communications, and real-time communication. Lawyers have been warned that when they participate in more personal communication that they "may be taking on duties to preserve confidences and to avoid conflicts of interest." *Id.*

[170] ARIZ. COMM. ON THE RULES OF PROF'L CONDUCT, FORMAL OP. 97-04 (1997); N.M. ETHICS ADVISORY OPINIONS COMM., FORMAL OP. 2001-1 (2001); D.C. BAR ASS'N, FORMAL OP. 316 (2002); FLA. BAR STANDING COMM. ON ADVERTISING, ADVISORY OP. A-00-1 (2010).

[171] *See id.*

[172] ARIZ. COMM. ON THE RULES OF PROF'L CONDUCT, FORMAL OP. 97-04 (1997). General questions posed by individuals that lawyers respond to with general answers are unlikely to create a lawyer-client relationship, but specific questions pose a much more difficult situation. N.M. ETHICS ADVISORY OPINIONS COMM., FORMAL OP. 2001-1 (2001).

[173] An exploration of attorney advertising and the Internet is beyond the scope of this article; however it is interesting to note that some states have used Model Rule 1.6 as a baseline and have added phrases about advertising past results without first obtaining an affected client's informed consent and "[t]he fact that some or all of the information a lawyer may wish to advertise is in the public record does not obviate the need for the client's informed consent." R. REGULATING FLA. BAR 4-7.13 cmt. (2013).

client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[174]

Lawyers must proceed cautiously when using social media and referencing client's cases.[175] Former public defender Kristine Peshek is the proverbial poster child for violating client confidentiality online. As a public defender she maintained a blog on which she commented about her client's cases, referring to her clients by their first name, some derivative of their first name, or their jail identification number.[176] Both the Illinois and Wisconsin Supreme Courts suspended Peshek's license to practice law for sixty days, as she was found to have violated Rule 1.6 by publishing client confidences or secrets on the Internet.[177]

---

[174] ABA MODEL RULES OF PROF'L CONDUCT R. 1.6 (2006). Paragraph (b) and (c) state:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
> (6) to comply with other law or a court order; or
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

[175] In a California case, a lawyer turned to her personal Facebook page to talk generally about cases and her victories. Many of the statements made were deemed to be subject to California's advertising regulations. It is interesting to note that California did not examine these statements in terms of confidentiality issues, but confidentiality should certainly be a concern when a lawyer posts about her cases on social media. STATE BAR OF CALIFORNIA STANDING COMM. ON PROF'L RESP. AND CONDUCT, FORMAL OP. NO. 2012-186 (2012). Another recent case, in Illinois, exemplifies the need to avoid divulging client information on social media website. Betty Tsamis, an Illinois employment lawyer, took to AVVO to respond to negative comments posted by a former client. Tsamis posted "I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about." Tsamis now faces discipline for alleged violations of Illinois Rules of Professional Conduct 1.6(a), 4.4, and 8.4. Matter of Tsamis, No. 6288664, ¶¶ 21, 23 (Ill. 2013).

[176] Matter of Peshek, No. 6201779, ¶ 2 (Ill. 2009).

[177] *Id.* Office of Lawyer Regulation v. Peshek, No. 2011AP909-D, ¶ 1 (Wisc. 2011). It is interesting to note that the Virginia Supreme Court recently ruled that a lawyer may blog about his clients completed cases using information in the public record, even if the information would be embarrassing or detrimental to the client. Hunter v. Virginia State Bar, No. 121472, at *9 (Va. Feb. 28, 2013). However,

Judicial and Legal Officials

> 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.[178]

However, a lawyer may express statements about such matters that are "honest and candid" because those statements contribute to "improving the administration of justice."[179]

The Sean Conway and JoAnne Denison cases illustrate the application of these rules to social media. Sean Conway is a Florida attorney who posted a blog entry on a public website that was entitled, "Judge Aleman's New (illegal) 'One-week to prepare' policy."[180] Conway made numerous derogatory remarks about the judge, who he had recently appeared before, including, that she was an "EVIL UNFAIR WITCH."[181] When the Florida Bar instituted disciplinary proceedings, Conway defended his comments as permissible in accordance with the First Amendment, but eventually agreed to a settlement, which was ultimately approved by the Florida Supreme Court.[182]

JoAnne Denison is currently the subject of a disciplinary action in Illinois as a result of her blog that she created to expose what she alleges to be a corrupt probate system in Illinois.[183] Denison's blog focuses on the case of a specific former client, which is provided as an example of a case that was mishandled because of corruption in the

---

the Virginia confidentiality rule retains the Model Code language that information learned from the client may not be revealed if it "would be embarrassing or would be likely to be detrimental to the client" as opposed to the broader definition of confidentiality propounded by the Model Rules and adopted by many states, which states that confidentiality pertains to all information contained in the course of representation. VA. RULES OF PROF'L CONDUCT R. 1.6 (2010). The ruling is controversial and is currently limited to Virginia lawyers.

[178] ABA MODEL RULES OF PROF'L CONDUCT R. 8.2 (2006).

[179] ABA MODEL RULES OF PROF'L CONDUCT R. 8.2 cmt. (2006). *See also* ABA MODEL RULES OF PROF'L CONDUCT R. 8.4(d) ("It is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice").

[180] Report of Referee, Florida Bar v. Conway, No. SC08-326, at *3 (Fla. Oct. 29, 2008).

[181] Other remarks include stating that Judge Aleman was "seemingly mentally ill"; that she has an "ugly, condescending attitude"; that she "is clearly unfit for her position and knows not what it means to be a neutral arbiter"; and "there's nothing honorable about that malcontent." *Id.*

[182] These remarks "not only unfairly undermined public confidence in the administration of justice, but these statements were prejudicial to the proper administration of justice." *Id.*

[183] In re Denison, Ill. ARDC No. 6192441 (Jan. 8, 2013).

probate system.[184] The Illinois Attorney Registration and Disciplinary Commission filed a complaint against Denison alleging that she knew her statements were false or made with reckless disregard as to the truth or falsity of the statements.[185] As this article was being written, Denison was posting documents and discussion about the disciplinary case, which had not yet been resolved.

Thus, whether it is a lawyer posting about her own disciplinary matter, a court decision or ethics advisory opinion encouraging social media investigation of jurors, or an opposing counsel using a Facebook page to propound discovery, all of these circumstances reflect and reinforce the potential value and necessity of incorporating social media into the practice of law in accordance with the legal ethics rules. As discussed above, the legal ethics rules often play a role in a malpractice case so it follows that the impact of social media upon malpractice law is worthy of consideration.

Malpractice Law and Social Media

The law of malpractice emanated from England where its early stages of development insulated the elite barristers as opposed to the solicitors and focused primarily on errors of inadvertence rather than errors of judgment. [186] In fact, until the middle of the eighteenth century, the courts struggled to define malpractice as the law of negligence was just beginning to take root.[187] An early 1767 English decision held that a lawyer should not be held accountable for an "honest mistake," but could be held accountable for "gross negligence."[188] This decision laid the foundation for the concept of the standard of care, which was more clearly articulated by an English court in 1830 in the case of Godefrey v. Dalton. [189] The court explained:

> "It would be extremely difficult to define any exact limit by which the skill and diligence which an attorney undertakes to furnish the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking,

---

[184] In her writings, Denison alleged "that there was corruption in the probate court of Cook County, particularly in relation to Mary Sykes' probate case, that Sykes was the victim of elder abuse, and that the GALs and the court had acted inappropriately with respect to Sykes' estate, that they had violated the law, and that they had physically or mentally harmed Syke." Additionally, she alleged that "there was impropriety going on in relation to the Sykes case; that the GALs and the judges were corrupt; that the GALs and the court had engaged in financial exploitation or had financially profited in some way in relation to Sykes' guardianship case; that the judge had inappropriately taken away Sykes' rights; and that Stern, Farenga, and the judge had committed crimes, were false." *Id.* ¶¶ 6, 10.

[185] *Id.*; http://marygsykes.com/click-here-to-read-my-ardc-complaint-just-for-running-this-blog/

[186] RONALD E. MALLEN & JEFFREY M. SMITH WITH ALLISON D. RHODES, LEGAL MALPRACTICE § 1:5 (2013).

[187] *Id.*

[188] *Id.* (citing 4 Burr at 2061, 98 Eng.Rep. at 75).

[189] *Id.*

> and that crassa negligenti or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible."[190]

The court's holding reflects the emergence of modern malpractice law, which was eventually defined in the United States as "an affirmative duty to use 'reasonable skill and diligence.'"[191]

Despite its early recognition in the United States, legal malpractice claims based upon professional negligence did not become a significant concern for the legal profession until the 1970's when both the number of lawyers and the number of claims significantly increased.[192] Thus,

> [l]egal malpractice, as a substantive area of the law, only began to develop within the last 50 years. Even today, many of the procedural rules governing the litigation of a legal malpractice suit are still developing. The law of legal malpractice continues to evolve and is doing so more on a national level rather than by jurisdiction.[193]

A common malpractice cause of action today may involve an allegation of failure to properly investigate and/or failure to properly prepare for trial. Unlike the legal ethics rules under which a failure to properly investigate and/or prepare for trial may give rise to a disciplinary action for violation of the duties of competence and diligence, a failure to properly investigate alone is not necessary evidence of malpractice. Once the plaintiff establishes that there was a failure to properly investigate, the plaintiff is required to prove that the failure is the proximate cause of actual damages sustained.[194] In fact, an action for malpractice may be based upon a failure to investigate and propound adequate discovery even if the case settles prior to a trial assuming that proximate cause and actual damage may be proven.[195]

Jett Hanna has suggested that, "[i]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites."[196] He adds that failure to investigate social media could give rise to a malpractice claim. Hanna's proposition may be characterized by some as an over-reaction to the growing use of social media in the practice of law, especially given that there does not yet appear to be a

---

[190] *Id.* (citing 6 Bing at 467, 130 Eng.Rep. at 1360).

[191] *Id.* (citing *E.g.*, Pennington's Ex'rs v. Yell, 11 Ark. (6 Eng.) 212, 52 Am.Dec. 262 (1850)).

[192] RONALD E. MALLEN & JEFFREY M. SMITH WITH ALLISON D. RHODES, LEGAL MALPRACTICE § 1:6 (2013).

[193] *Id.*

[194] Bill Branch Chevrolet, Inc. v. Philip L. Burnett, P.A., 555 So. 2d 455, 455 (Fla. Dist. Ct. App. 2d Dist. 1990).

[195] *Id.*

[196] Jett Hanna, *supra* note 77 at 1.

reported malpractice case based upon the failure to investigate social media. However, conceding the lack of reported precedent, Hanna points to several cases that he claims indicate that investigation of social media may already exist as a requisite standard of care.

For example, in a medical malpractice case in which a motion for a new trial was granted, thereby overturning a defense verdict based upon juror nondisclosure that was discovered in an online database, the Missouri Supreme Court commented, "[I]n light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage."[197]

Hanna also notes a few cases in "which the courts have chastised lawyers for failing to use an Internet search to obtain information about parties who cannot be located."[198] He posits that the failure to properly authenticate social media evidence could provide yet another basis for a malpractice claim and concludes that, "The distance to a finding that a lawyer negligently failed to search social media for evidence is a short one."[199]

Diane Karpman appears to agree with Hanna when she writes about the value of Googling jurors and adds, "When a practice or technique becomes ubiquitous in the profession, it demonstrates a potential change in standards of conduct. Failing to routinely employ a free product — in this case Google — that is a wealth of information (almost universally embraced) could provide fodder in a subsequent legal malpractice claim."[200]

Hanna and Karpman's observations are reinforced in William Peacock's recent blog post entitled *Will it Soon be Malpractice Not to be Social Media Savy?*.[201] Peacock comments on the pervasive nature of social media and its growing impact on the practice of law. He advises:

---

[197] Johnson v. McCullough, 306 S.W.3d 551, 558-59 (Mo. 2010).

[198] Hanna, supra note 77 at 5 (citing See Munster v. Groce, 829 N.E.2d 52 (Ind. App. 2005) (court noted the lack of an Internet search in attempts to serve a party)); DuBois v. Butler ex. rel. Butler, 901 So.2d 1029 (Fla. App. 2005) (criticizing attempts to find defendant, court said "advances in modern technology and the widespread use of the Internet have sent the call to directory assistance the way of the horse and buggy and the eight track stereo"); Weatherly v. Optimum Asset Management, 928 So.2d 118 (La. App. 2005) (judge's opinion that due process rights were violated in a tax sale after judge found party through an Internet search).

[199] *Id.*

[200] Diane Karpman, *Web offers pearls of wisdom, but also legal tangles*, CAL. BAR J. 1 (Aug. 2013), http://www.calbarjournal.com/August2013/EthicsByte.aspx.

[201] William Peacock, *Will it Soon be Malpractice Not to be Social Media Savvy?*, STRATEGIST 1 (May 17, 2013), http://blogs.findlaw.com/strategist/2013/05/is-it-malpractice-not-to-be-social-media-savvy.html.

> What if the most valuable evidence you could possibly locate lies in social media? Are you doing your client a disservice by not understanding the intricacies of tweeting, the snapshot streams of Instagram, or the persons pining to pin posts on Pinterest? The beauty, and danger of social media is that users are disinhibited about over-sharing. Instagram now, get arrested for identity theft later, right?
>
> We're almost certainly not at the point where the standard of care involves social media savvy, but if you want to do the absolute best by your client, you might want to start looking into the various services, or at least consider adding a Tweeting, Instagramming, status-updating, Flipboard-flipping and blogging guru to your support staff.[202]

Peacock's suggestion that regardless of whether social media use has yet been elevated to a standard of care status, social media may make you a more competent, effective lawyer dovetails with Hanna's observation that currently there remains only a short distance to travel to assign negligence to a lawyer who fails to use social media. Although finding causation and damages renders a social-media-based malpractice claim a more complex pursuit than the proof required to support a legal-ethics-based disciplinary action or court-ordered sanctions for discovery abuse, the indications in all three areas are that lawyers who do not take heed of the availability and significance of social media are vulnerable.

Conclusion

Social media use has become ubiquitous in our society. It has the potential to facilitate uprisings, contribute to political elections, unite people with common interests and hobbies, educate, and allow people to share any and every aspect of their lives. Social networking is a well-established subculture; the network contains evidence of people's lifestyles, thoughts about current issues, and comments about events that occasionally become the subject of legal action. The current generation in law school considers participation in social media to be second nature; personal privacy has morphed into a vastly more limited space.[203]

How much longer then may the legal profession continue to practice without incorporating social media as a component of competence, diligence, and a reasonable

---

[202] *Id.*

[203] Rick Whiting, *Facebook's Zuckerberg: Face It, No One Wants Online Privacy Anymore*, CRN (Jan. 11, 2010), http://www.crn.com/news/security/222300279/facebooks-zuckerberg-face-it-no-one-wants-online-privacy-anymore.htm; BROWNING, LAWYER'S GUIDE TO SOCIAL NETWORKING, *supra* note 5 at 21 ("Facebook founder and chief executive Mark Zuckerberg, however, points to a generational shift in expectations of privacy, saying that people no longer want "complete privacy." He says, " Our core belief is that one of the most transformational things in this generation is that there will be more information available.")

duty to investigate a case? Change, especially driven by technology, often brings uncertainty and discomfort. The telephone was discombobulating for some. The advent of the Internet and email was initially overwhelming for some lawyers who were accustomed to having secretaries type letters from a handwritten draft or a dictation device. Neither the developers of the telephone, nor those of the Internet and email slowed their progress for the legal profession.

Social media use is infiltrating the global society at a record pace thereby compelling the legal profession to take note or suffer the consequences. In the words of Robert Ambrosi: "When you have an institution not addressing social networking it overlooks the fact that any number of people are involved in social networking[.] It's important that law firms wake up and smell the coffee because this is happening all around them and they should be a part of it." [204]

Perhaps the legal ethics and malpractice considerations further compel the metaphor and suggest that lawyers should "wake up and drink the coffee" as they peruse social media networks to discover relevant evidence and thereby more effectively represent their clients. As the Pennsylvania court that ordered that a defendant be granted access to the non-public portions of a plaintiff's social media pages explains:

> By definition, a social networking site is the interactive sharing of your personal life with others; the recipients are not limited in what they do with such knowledge. With the initiation of litigation to seek a monetary award based upon limitations or harm to one's person, any relevant, non-privileged information about one's life that is shared with others and can be gleaned by defendants from the internet is fair game in today's society.[205]

Perhaps the larger message to be gleaned: if you are not in the game, you cannot win.

---

[204] Carol Elefant, *How Lawyers Are Using Social* Media, Legal Blog Watch (Mar. 6, 2009), http://legalblogwatch.typepad.com/legal_blog_watch/2009/03/how-lawyers-are-using-social-media.html#comments (citing the Robert Ambrosi comments in the Chicago Lawyer Magazine).

[205] Zimmerman v. Weis Markets, Inc., No. CV-09-1535, 2011 WL 2065410 (Pa. C.P. Northumberland May 19, 2011).