

# ***HOW SOCIAL NETWORKING IMPACTS LAWYERS***

## **ETHICAL CONSIDERATIONS IN SOCIAL NETWORKING**

### ***Ten Common Issues Faced By Attorneys***

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### **What is social media?**

“Social media is to marketing what email is to business.”<sup>1</sup>

The on-going rapid changes in technology have significantly impacted the practice of law. Many lawyers use social networking for business networking and professional development reasons and as a litigation tool. As members of a regulated profession, we need to be mindful of our ethical obligations when we use social networking.

A social networking Web site is defined as a “web-based service[] that allow[s] individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their

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<sup>1</sup> Robert Ambrogi and Reit Trautz at the 2011 ABA Techshow.

list of connections and those made by others within the system.”<sup>2</sup> Social networking Web sites typically allow users to post profiles, add comments to their profiles and to the profiles of friends, engage in marketing, and otherwise report on his or her personal and professional life. Web sites such as Facebook, MySpace, Twitter, LinkedIn, Plaxo, Avvo, and Legal OnRamp are the oft-cited examples.

According to Facebook’s statistics website page dated August 13, 2011:

- More than 750 million active users are on Facebook;
- 50% of active users log on at any given day;
- More than 2.5 million websites integrated with Facebook;
- Average user has 130 friends;
- People spend over 700 billion minutes per month on Facebook;
- There are more than 250 million active users currently accessing Facebook through their mobile devices; and
- People that access Facebook on their mobile devices are twice as active on Facebook that non-mobile users.

A 2009 survey of nearly 1,500 lawyers shows that “more than 70% of lawyers are members of an online social network—up nearly 25% from the past year—with 30% growth reported among lawyers ages 46 and older.”<sup>3</sup>

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<sup>2</sup> Boyd & Ellison, *Social Network Sites: Definition, History, and Scholarship*, *Journal of Computer-Mediated Communication*, 13(1), Article 11 (2007), available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>.

<sup>3</sup> Baldas, *They Blog, They Tweet, They Friend*, NAT’L L.J. (Dec. 21, 2009).

According to the American Bar Association's 2010 Legal Technology Survey Report<sup>4</sup>:

- 56% of respondents reported that they use networks such as Facebook, LinkedIn, LawLink, or Legal OnRamp, compared with 43% in the 2009 survey and 15% in the 2008 survey.
- The highest percentage of respondents reported maintaining a presence in LinkedIn (83%), followed by Facebook (68%) and Plaxo (18%).
- 77% of respondents in the 30 to 39-year-old age group maintain a presence in an online community/social network (compared with 72% in the 2009 survey), followed by 68% of 40- to 49-year-olds (compared with 58% in the 2009 survey), and 50% of 50- to 59-year-olds (compared with 35% in the 2009 survey).
- 63% of large-firm respondents maintain a presence in an online community/social network (compared with 57% in the 2009 survey and 13% in the 2008 survey).
- 52% of solo respondents (compared with 37% in the 2009 survey and 15% in the 2008 survey) engage in some type of social media.
- The most common reasons for maintaining a presence in online communities/social networks:
  - 76% - Professional networking
  - 62% - Socializing
  - 42% Client development
  - 17% - Career development

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<sup>4</sup> See also Nora Riva Bergman's presentation "Increasing Client Inquires Through Creative Internet and Social Media Marketing, [reallifeppractice.com/wordpress/wp-content/uploads/2011/03/Social-Media-Marketing-For-Family-Law-Attorneys.pdf](http://reallifeppractice.com/wordpress/wp-content/uploads/2011/03/Social-Media-Marketing-For-Family-Law-Attorneys.pdf).

- 6% - Case investigation
- 10 % of respondents had a client retain them as a result of social media.

- *From the 2010 ABA Technology Survey Report*

Some lawyers join social networking Web sites purely for social interaction; others utilize these sites as a networking or professional development tool. Either way, with so many members of the bar Facebooking, Tweeting, status updating, friending, and posting, an examination of ethical considerations faced by attorneys is in order. Social media use does not transform otherwise appropriate conduct into something unethical.<sup>5</sup> However, an attorney's social networking activities may implicate several of the rules of professional conduct in the jurisdiction(s) in which the attorney is licensed to practice. **You must know your state's rules.** The following discussion of the ten most common social networking ethical issues faced by attorneys will concentrate on the American Bar Association Model Rules of Professional Conduct (the "Model Rules").<sup>6</sup>

## **I. Inadvertent Formation of an Attorney-Client Relationship.**

Legal directory Web sites such as [www.avvo.com](http://www.avvo.com) also include social networking and legal advice components. For instance, Avvo allows lawyers and clients to engage in social networking by posting, respectively, peer endorsements and reviews. Further, Avvo advertises that users can "Ask a Lawyer—Get free, personalized legal advice from experienced attorneys". Users post their questions on a public discussion board, and the attorneys listed in Avvo's

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<sup>5</sup> See Carolyn Elefant and Nicole Black, *Social Media for Lawyers: The New Frontier*.

<sup>6</sup> Due to the geographical diversity of the attendees at this program, our discussion focuses on the Model Rules, as opposed to the Rules of Professional Conduct of any particular state, with the possible exception of the authors' home state, Louisiana.

directory may post responses. In certain circumstances, there is a possibility that an attorney may unintentionally create an attorney-client relationship by responding to a posted question.<sup>7</sup>

In most states, the formation of an attorney-client relationship is largely based on a party's reasonable subjective belief that such an attorney-client relationship has been created.<sup>8</sup> To minimize the possibility of the inadvertent formation of an attorney-client relationship, some attorneys on Avvo post disclaimers such as the following:

DISCLAIMER: This answer is provided as general information, which may not be appropriate for the specific facts of your particular situation. No attorney-client relationship has been established based on this limited communication. You are advised to consult with an attorney in your jurisdiction before taking any action or inaction that may affect your legal rights.<sup>9</sup>

With the right mix of facts, a court could possibly conclude that an attorney-client relationship was formed, even if such a disclaimer is present. Accordingly, attorneys should use caution and their considered professional judgment in responding to posts on legal discussion boards. In the event that an attorney-client relationship is formed, even if an attorney's response

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<sup>7</sup> Compare RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14, cmt. c (2000) (“[A] lawyer may answer a general question about the law, for instance in a purely social setting, without a client-lawyer relationship arising”) with *Huddleston v. State*, 376 S.E.2d 683 (Ga. 1989) (The “basic question in regard to the formation of the attorney-client relationship is whether it has been sufficiently established that advice or assistance of the attorney is both sought and received in matters pertinent to his profession.”); see also Mallen & Smith, 2 LEGAL MALPRACTICE § 15:3 (2008 ed.).

<sup>8</sup> See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 and comments; see also, e.g., *In re Bordelon*, 894 So. 2d 315, 322 (La. 2005) (holding that “[w]hile it is true as a general principle that the existence of an attorney/client relationship ‘turns largely on the client’s subjective belief that it exists,’ the client’s subjective belief must still be reasonable); *Sheinkopf v. Stone*, 927 F. 2d 1259 (1st Cir. 1991); *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716 (Utah Ct. App. 1990); *Kotzur v. Kelly*, 791 S.W.2d 254 (Tex. App. Corpus Christi 1990); *Guillebeau v. Jenkins*, 355 S.E.2d 453 (Ga. 1987); *Fox v. Pollack*, 181 Cal. App. 3d 954 (1st Dist. 1986).

<sup>9</sup> See [http://www.avvo.com/legal-answers/can-my-husband-be-moved-closer-to-his-family-he-is-376356.html#answer\\_518184](http://www.avvo.com/legal-answers/can-my-husband-be-moved-closer-to-his-family-he-is-376356.html#answer_518184).

to a posting is made without charge, the text of Model Rule 1.1, which governs attorney competence, does not set a lesser standard of care for *pro bono* legal advice.<sup>10</sup>

## **II. Unauthorized Practice of Law.**

The internet has immeasurably facilitated communication beyond the borders of the states in which each of us is licensed to practice law. This ease of communication has increased the risk that an attorney may engage in the unauthorized practice of law.<sup>11</sup> Moreover, an attorney could unwittingly who is licensed in one state may unwittingly develop an attorney-client relationship with a client in a state where the attorney is not licensed.<sup>12</sup>

Depending on the nature of the internet activities at issue, it could be determined either that an unlicensed layperson is practicing law, or that a licensed lawyer is intentionally or unintentionally practicing law in jurisdictions in which the lawyer is not admitted.<sup>13</sup> The unauthorized practice of law issue becomes a greater concern in light of positions such as that of the New York City Bar Association, which has suggested that “almost any question and answer

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<sup>10</sup> Model Rule 1.1 provides 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.”

<sup>11</sup> See Melissa Blades & Sarah Vermylen, *Virtual Ethics for a New Age: The Internet and the Ethical Lawyer*, GEO J. LEGAL ETHICS, pp. 637-657 (Summer 2004); Wersh, A Bold New Frontier—To Blog Where No Lawyer has Blogged Before, IOWA LAWYER (Jan. 2009).

<sup>12</sup> See Joel M. Schwarz, *Practicing Law Over the Internet: Sometimes Practice Doesn't Make Perfect*, 14 HARV. J.L. & TECH. 657,675-77 (2001) (determination of whether an attorney-client relationship is created may be based on the specific nature of the advice given and the subjective expectation of the recipient/client of the advice, regardless of any disclaimer by the attorney).

<sup>13</sup> Shari Claire Lewis, *Beware the Unauthorized Practice of Law in Cyberspace* (N.Y. Law Journal, June 6, 2007) (available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1181034328636#11>).

may in fact constitute legal advice, even if the questioner does not appear to be seeking ‘specific’ legal advice.” N.Y. Ethics Op. 1998-2 (1998).

Under Model Rule 5.5(a), “[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” Thus, the analysis of what constitutes the unauthorized practice of law requires a state-by-state analysis, despite the fact that the conduct at issue—internet activity—is without borders.

For instance, a Louisiana court could conclude that providing legal advice on a Web site such as [www.avvo.com](http://www.avvo.com), discussed above, constitutes the practice of law. Louisiana defines the practice of law “by anyone who has not first been duly and regularly licensed and admitted to practice law by the supreme court”—a/k/a the unauthorized practice of law—is a felony. *See* LA. REV. STAT. § 37:213(C). The mere act of counseling another constitutes the “practice of law” or “giving of legal advice”.<sup>14</sup> This is confirmed in Louisiana Rule of Professional Conduct 5.5(e)(3), which provides that all of the following are considered the practice of law:

- (i) holding oneself out as an attorney or lawyer authorized to practice law;
- (ii) rendering legal consultation or advice to a client;
- (iii) appearing on behalf of a client in any hearing or proceeding, or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body operating in an adjudicative capacity, including submission of pleadings, except as may otherwise be permitted by law;
- (iv) appearing as a representative of the client at a deposition or other discovery matter;

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<sup>14</sup> *See Pisarello v. Administrator’s Service Corp.*, 464 So. 2d 917 (La. App. 4 Cir.), *writ denied*, 466 So. 2d 473 (La. 1985); *see also* LA. REV. STAT. § 37:212 (“The practice of law means and includes...[f]or a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect...[t]he advising or counseling of another as to secular law[.]”); Frank L. Maraist, *et al.*, 21 LA. CIV. L. TREATISE—LOUISIANA LAWYERING § 2.11 (2010 ed.).



(v) negotiating or transacting any matter for or on behalf of a client with third parties;

(vi) otherwise engaging in activities defined by law or Supreme Court decision as constituting the practice of law.

If an attorney decides to respond to questions posted on discussion boards of Web sites such as [www.avvo.com](http://www.avvo.com), he or she should, in an abundance of caution, consider refraining from providing responses to questions about the law in jurisdictions in which he is not licensed to practice.

### **III. Inadvertent Alteration of the Scope of Representation.**

An attorney's use of social networking Web sites to communicate with his clients may lead to an unintentional alteration of the scope of representation. Model Rule 1.2(c) provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." By design, messaging and other communications on social networking sites is casual. By engaging in such casual written communications with a client, for instance, an attorney may unwittingly enlarge the scope of representation to include matters beyond an otherwise properly limited representation. This in turn could lead to professional liability concerns.

### **IV. Communication With Clients.**

Model Rule 1.4 imposes a general duty on attorneys to keep their clients informed about matters and the means by which a given client's objectives are to be accomplished.<sup>15</sup> "Proper

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<sup>15</sup> Model Rule 1.4(a) provides that 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;

communication with clients is essential to maintain public confidence in the profession.”<sup>16</sup> Indeed, the duty to communicate is so fundamental that a lawyer cannot delegate this responsibility to lay employees.<sup>17</sup> “The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.” Model Rule 1.4, at Comment [5].

One of the main draws of social networking sites is that they facilitate quick and easy communications with those in one’s network. Thus, social networking sites have the potential to keep a client informed about the status of a matter. However, lawyers should consider using caution and restrain when using social networking sites for this purpose.

## **V. Confidentiality of Information.**

Social networking sites facilitate communication, and oftentimes people freely communicate about matters which they would never consider discussing in real life. Attorneys must resist any temptation to discuss or post items regarding their clients or matters. Model Rule 1.6(a) provides that “[a] lawyer shall not reveal information relating to the representation of a

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(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

<sup>16</sup> *La. State Bar Ass’n v. St. Romain*, 560 So. 2d 820, 824 (La. 1990).

<sup>17</sup> *Id.* (citing *La. State Bar Ass’n v. Edwins*, 540 So. 2d 294 (La. 1989)).

client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” Five comments to this Rule are particularly instructive on the breadth of a lawyer’s duty of confidentiality:

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation. ... This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. *See* Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security

measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. ...

Similarly, in discussing Rule 1.6, Professor Dane Ciolino of Loyola University in New Orleans has stated: “A lawyer’s duty of confidentiality is significantly broader than many lawyers understand. Because this rule prohibits lawyers from revealing ‘information relating to representation of a client,’ it is not limited merely to matters communicated in confidence by the client. *See* Model Rules of Professional Conduct Rule 1.6 cmt. 5. Thus, this rule prohibits disclosure of confidential information from any source, including from third parties and from documents prepared by third parties. When in doubt, however, the lawyer should seek client consent to disclose the information in question.”<sup>19</sup>

Further, a lawyer’s duty of confidentiality attaches even prior to the formal commencement of a lawyer-client relationship. Therefore, a lawyer must maintain the confidentiality of information learned during the initial consultation with a prospective client.<sup>20</sup>

Although there is some difference of opinion among commentators, the ABA Committee on Ethics and Professional Responsibility has opined that it is reasonable for lawyers to transmit confidential client information using unencrypted Internet e-mail.<sup>21</sup> In an age where Web site visitor or user lists are regularly bought and sold, however, there may be a lesser expectation of

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<sup>19</sup> LA. PROF. RESPONSIBILITY LAW & PRACTICE § 1.4 (2007), available at [http://lalegaethics.org/?page\\_id=149](http://lalegaethics.org/?page_id=149).

<sup>20</sup> *See* Model Rule 1.18 (addressing duties owed to prospective clients); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. c (2000); *id.* at § 15; *see* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 90-358 (1990).

<sup>21</sup> *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 99-413 (1999).

privacy with social networking Web sites. It may not be reasonable for an attorney to use these sites as a primary means of communication with his clients.

The basic duty to maintain confidentiality is also particularly at risk in the social networking milieu, because “[n]ew forms of communication can seductively cause lawyers to forget their ongoing duty to maintain the confidences of their respective clients.”<sup>22</sup> Indeed, there may be an inherent “tension between the duty of confidentiality and the Facebook norm of enormously reduced, if not nonexistent, personal boundaries.”<sup>23</sup> As one commentator notes, a Facebook status update that tells a lawyer’s “friends” that he is drafting an exception or a motion to dismiss a petition on particular grounds could reveal confidential information.<sup>24</sup> So too might a post that tells “a story to friends about a recent trial without revealing the identity of the client or any other fact not contained in the public record of the case.” Nevada Opinion 41 (June 24, 2009). This is not a theoretical issue. At least one lawyer has faced disciplinary charges after she published information about cases she was handling on her blog.<sup>25</sup>

Confidential information can also be revealed in another, less obvious way. Many networking sites permit the importing or uploading of contact information. If a lawyer releases

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<sup>22</sup> Los Angeles County Opinion 514 (Aug. 15, 2005).

<sup>23</sup> Gordon, *Why Can't We Be Friends?*, ABA Journal, posted Jan. 1, 2010 (available at [http://www.abajournal.com/magazine/article/why\\_cant\\_we\\_be\\_friends/](http://www.abajournal.com/magazine/article/why_cant_we_be_friends/)).

<sup>24</sup> Mayle, *Navigating the Ethical Pitfalls of Online Networking*, ABA Young Lawyers Division, The 101 Practice Series: Breaking Down the Basics (2009), available at <http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=member&role=abanetmo&url=/yld/mo/onlinepitfalls.pdf>.

<sup>25</sup> Levin, *More on the New Rules—Social Networks*, CBA Record (Nov. 2009) (the disciplinary charge, however, also related to the blog’s disparaging comments regarding judges).

his or her contacts in this manner, client contacts, expert witness or consultant contacts, vendor contacts and other sensitive information could become available to a very wide audience.<sup>26</sup>

## **VI. The Obvious: Watch What You Say and Do!**

Model Rule 3.3(a)(1) provides that “[a] lawyer shall not knowingly: ... 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[.]” A lawyer who fails to comply with this obligation and extensively shares the details of his or her life on a social networking Web site will likely be exposed.

For instance, it was recently reported that an attorney in Texas requested a continuance, asserting that the cause was the death of her father. However, that attorney had earlier posted a string of Facebook status updates, “detailing her week of drinking, going out and partying. But in court, in front of Criss [the judge], she told a completely different story.”<sup>27</sup> The same judge, Judge Susan Criss of the 212th District Court, Galveston, Texas, also caught a lawyer complaining via Facebook about having to handle a motion in her court. In response, the judge “playfully zinged her, too—on Facebook, of course.”<sup>28</sup>

Criss has seen lawyers on the verge of crossing, if not entirely crossing, ethical lines when they complain about clients and opposing counsel. And she admonished one family member who jeopardized her own tort case by bragging online about how much money she would get from a lawsuit. The judge’s near-breathless accounts of questionable online activity by members of the bench and bar had many in the audience wondering whether Facebook, Twitter and their ilk

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<sup>26</sup> Jeffrey T. Kraus, *Online Social Networking—Ethics and Liability Issues*, ALAS Loss Prevention Journal (Summer 2010).

<sup>27</sup> See Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, ABA Journal, posted July 31, 2009 (available at [http://www.abajournal.com/news/article/facebooking\\_judge\\_catches\\_lawyers\\_in\\_lies\\_crossing\\_ethical\\_lines\\_abachicago/](http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/)).

<sup>28</sup> *Id.*

are worth the headache. To Criss, there's no going back. With self-imposed ground rules—no politics, no blogging about cases—she's steaming right ahead.<sup>29</sup>

Other lawyers have fared worse than the lawyer “zinged” by Judge Criss, reminding us yet again that anything we write may end up in front of a judge:

Sean Conway was steamed at a Fort Lauderdale judge, so he did what millions of angry people do these days: he blogged about her, saying she was an “Evil, Unfair Witch.” But Mr. Conway is a lawyer. And unlike millions of other online hotheads, he found himself hauled up before the Florida bar, which in April issued a reprimand and a fine for his intemperate blog post.<sup>30</sup>

The tribulations faced by a former Illinois assistant public defender reinforce the foregoing point:

Kristine A. Peshek, a lawyer in Illinois who lost her job as an assistant public defender after 19 years of service...wrote posts to her blog in 2007 and 2008 that referred to one jurist as “Judge Clueless” and thinly veiled the identities of clients and confidential details of a case, including statements like, “This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because ‘he’s no snitch.’”

Another client testified that she was drug free and received a light sentence with just five days’ jail time, and then complained to Ms. Peshek that she was using methadone and could not go five days without it. Ms. Peshek wrote that her reaction was, “Huh? You want to go back and tell the judge that you lied to him, you lied to the presentence investigator, you lied to me?”

Due to Ms. Peshek’s comments, a complaint was brought before the Illinois Attorney Registration and Disciplinary Commission.<sup>31</sup>

Model Rule 4.1 prohibits a lawyer from making a false statement of material fact to a third person. Lawyers therefore should avoid “puffing” their online profiles or biographies.

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<sup>29</sup> *Id.*

<sup>30</sup> John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, THE N.Y. TIMES (Sept. 12, 2009); *see also When Talking Smack About a Judge, Proceed With Caution*, WALL STREET JOURNAL LAW BLOG, posted Sept. 14, 2009 (available at <http://blogs.wsj.com/law/2009/09/14/when-talking-smack-about-a-judge-proceed-with-caution/>).

<sup>31</sup> *See* <https://www.iardc.org/09CH0089CM.html> (last accessed Nov. 24, 2010).

Similarly, Model Rule 8.2(a) prohibits a lawyer from making “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.”

**• Is it Ethical to Use Social Networking Sites  
As A Litigation Tool – Internet Search?**

Model Rule 8.4(c) provides that it is professional misconduct for a lawyer to “[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Using social networking sites to gather intelligence on opponents may violate Rules 4.1 and 8.4 in certain circumstances. For example, Philadelphia Opinion 2009-02 (March 2009) considered a situation where a lawyer believed that an adverse party’s witness’s private Facebook and MySpace pages might contain information that could impeach the witness’s testimony. The lawyer could not access these private pages because they were available only to the witness’s “friends”. The lawyer wanted to hire an investigator to “friend” the witness without revealing his affiliation with the lawyer, obtain access to the private pages, and then pass on any information to the lawyer. That plan was found to be deceptive under Pennsylvania’s version of Rule 8.4(c)<sup>32</sup> because it would purposefully “conceal [the investigator’s reason for seeking access to the private pages] from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the [investigator] was associated with the lawyer and the true purpose of the access.” Further, the opinion found that such conduct would also violate Rule 4.1.

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<sup>32</sup> Pennsylvania’s version of Rule 8.4 adopts the Model Rule. *Compare* Model Rule 8.4 (available at [http://www.abanet.org/cpr/mrpc/rule\\_8\\_4.html](http://www.abanet.org/cpr/mrpc/rule_8_4.html)) with PENN. RULE OF PROF. CONDUCT 8.4 (available at <http://www.padisciplinaryboard.org/documents/Pa%20RPC.pdf>).



Lawyers should also avoid specific characterization of their practice on their social networking site profiles. For instance, LinkedIn profiles have a field for “specialties”. Model Rule 7.4 permits an attorney to “state or imply that [the] lawyer is certified as a specialist in a particular field of law” in various circumstances. Various states, however, have diverged from the Model Rule and have further restricted attorneys from making such representations.

For instance, in Louisiana, unless an attorney is recognized as a specialist by the Louisiana Board of Legal Specialization in one of the five areas of specialization, he or she should leave this “specialties” section of his or her LinkedIn profile blank.<sup>33</sup> Louisiana Rule 7.2(c)(5) defines the circumstances in which a lawyer may “state or imply that the lawyer is ‘certified,’ ‘board certified,’ an ‘expert’ or a ‘specialist’”.

## **VII. Trial Publicity.**

Model Rule 3.6(a) provides that “[a] lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” Social networking Web sites such as Facebook have extensive privacy settings; however, if an attorney’s profile on a social networking Web site is available to be viewed by the public at large, that profile may be considered a “public communication” under Model Rule 3.6(a). Thus, attorneys who utilize social networking sites should not only avoid publicizing their matters on social networking sites, but should also (for a number of reasons) utilize the privacy settings of such sites.

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<sup>33</sup> The five areas of specialization are Business Bankruptcy Law, Consumer Bankruptcy Law, Estate Planning and Administration, Family Law, and Tax Law. See <http://www.lascmcle.org/specialization/>.

## VIII. Communications with the Opposing Party.

As a general rule, attorneys should restrict their electronic communications regarding a matter to e-mail. However, due to prevalence of social networking sites and the ease with which a lawyer may contact the opposing party in a matter through these sites, a lawyer may find himself tempted to do the latter. In the event that an attorney feels such an urge, he or she should be directed to Model 4.2, which provides:

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

Comment [3] to the ABA Model Rules recognizes that “[t]he Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.”

In the event that the opposing party or a third party is not represented by counsel, when communicating with that party (via a social networking site or otherwise), an attorney should be mindful of Model Rule 4.3, which requires a lawyer to be forthright about his or her role in a matter. More particularly, Model Rule 4.3 requires a lawyer to explain his role to the third person if a third party is laboring under a misunderstanding.<sup>34</sup> In explaining his or her role, the lawyer must be truthful and must not misrepresent where his or her loyalties lie.<sup>35</sup> Rule 4.3

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<sup>34</sup> See *id.* at cmt. [1]; see also *La. State Bar Ass’n v. Harrington*, 585 So. 2d 514, 517 (La. 1990).

<sup>35</sup> See Model Rule 4.3; see also, e.g., Model Rule 4.1(a) (2004) (stating that a lawyer shall not “make a false statement of material fact...to a third person”); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 103 (2000) (prohibiting a lawyer from “mislead[ing] the non-client . . . concerning the identity and interests of the person the lawyer represents”).

prohibits a lawyer from giving “legal advice” to an adverse unrepresented person, “other than the advice to secure counsel.”

## **IX. Attorney Advertizing.<sup>36</sup>**

Generally, an attorney is prohibited from using social networking Web sites to make false or misleading communications about the attorney or his or her services. *See* Model Rule 7.1 (“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.”).

Perhaps more so than any Article of the Model Rules, attorney advertising rules vary from state to state. A number of states such as New York and Louisiana have recently enacted stricter advertising rules. Attorneys who are licensed in multiple states should, at a minimum, ensure that their social networking Web site profiles and activities are compliant with the advertising rules in each jurisdiction in which they are licensed.<sup>39</sup>

For example, the Texas State Bar posted a reminder that lawyer or firm videos disseminated on video-sharing Web sites like YouTube, MySpace, or Facebook that solicit legal services are considered public media advertisements and are required to be filed with the Texas Advertising Review Committee, unless exempted. Similarly, the chief disciplinary counsel for

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<sup>36</sup> The discussion in this section is merely illustrative of the various attorney advertising rules that may be applicable. Prior to engaging in any social networking Web site marketing activities, an attorney should review the entirety of Article 7 and, if necessary, should consider contacting the LSBA Ethics Counsel, Richard P. Lemmler, Jr. For more information, see <http://www.lsba.org/MemberServices/lawyeradvertising.asp>.

<sup>39</sup> Particularly when such profiles and activities are intended to be disseminated outside of the state in which they are licensed.

the Connecticut statewide lawyer grievance committee has stated that any “Web presence” showing that a lawyer offers legal services—including sending an invitation on LinkedIn to another user that links to the lawyer’s personal page describing his practice—is subject to Connecticut advertising regulations.<sup>40</sup> South Carolina Opinion 09-10 (undated) states that information on “networking Web sites are both communications and advertisements; therefore, they are governed by Rules 7.1 and 7.2. While mere participation in these Web sites is not unethical, all content in a claimed listing must conform to the detailed requirements of Rule 7.2(b)-(i) and must not be false, misleading, deceptive, or unfair.”<sup>41</sup>

## **X. “Friending Judges”.**

Under Rule 8.4(e) of the Model Rules, it is professional misconduct for a lawyer to “[s]tate or imply an ability to influence improperly a judge, judicial officer, governmental agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.”

A recent Florida ethics opinion concludes that “listing lawyers who may appear before the judge as ‘friends’ on a judge’s social networking page reasonably conveys to others the impression that these lawyer ‘friends’ are in a special position to influence the judge” and thus violate Canon 2(B) of the Florida Code of Judicial Conduct. Florida Judicial Ethics Advisory Committee Opinion 2009-20 (Nov. 17, 2009). A contrary result was reached by the South Carolina Advisory Committee on Standards of Judicial Conduct, which opined that “[a] judge may be a member of Facebook and be friends with law enforcement officers and employees of

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<sup>40</sup> See 24 Law. Manual of Prof. Conduct 444-45 (Aug. 20, 2008).

<sup>41</sup> See also Beougher, *Tech Talk: How to Navigate a World of Tweeting*, Ohio Law (May/June 2009).

the Magistrate as long as they do not discuss anything related to the judge's position as [M]agistrate.” South Carolina Advisory Committee on Standards of Judicial Conduct Opinion 17-2009 (Oct. 2009). Similarly, a New York Judicial Ethics Opinion found no *per se* violation of New York's Rules Governing Judicial Conduct when a judge “establishes a connection with an attorney...appearing in the judge's court through a social network” but advised the judge to “consider whether any such online connections, alone or in combination with other facts, rise to the level of a ‘close personal relationship’ requiring disclosure and/or recusal.” New York Judicial Ethics Opinion 08-176 (Jan. 29, 2009) (citations omitted).

Whether judges and attorneys may be linked on social networking sites is undecided in most states; however, the bench and bar are advised to be mindful of the split in authority, as well as Rule 8.4(e) in deciding whether to link to each other.

### ***Conclusion***

In using social networking as a litigation tool, and to network and market our practices, we should use common sense, think twice before we post, and consider the application of the Rules of Professional Conduct. A good rule of thumb is what my mother taught me: Don't do or say anything you don't want to appear on the front page of the newspaper!