Blogging, Friending & Tweeting: What Attorneys Should & Should Not Do

Friday, March 25, 2011

9:00 a.m. to 12:30 p.m.

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Blogging, Friending & Tweeting: What Attorneys Should & Should Not Do

Friday, March 25, 2011

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BLOGGING, FRIENDING & TWEETING: WHAT ATTORNEYS SHOULD & SHOULD NOT DO

Friday, March 25, 2011 / 9:00-12:30 p.m.

Agenda

9:00-9:10 a.m. Introduction & Overview
Denise E. Backhouse

9:10-9:40 a.m. Effects of Blogging: An organization can gain attention, authority and clients with a Blog, it can also lose them. There are issues, even before factoring in the ethical considerations.
Chris Dale

9:40-10:10 a.m. Social Media: Ethical Implications for Lawyers
Jeremy R. Feinberg

10:10-10:40 a.m. Implementing a Social Media Policy
Ronald C. Minkoff

10:40-10:55 a.m. Break

10:55-11:25 a.m. Social Media in Litigation
Ronni D. Solomon

11:25-12:15 a.m. Discussion of Hypotheticals
Panel

12:15-12:30 a.m. Q & A
Panel

CLE Credit:

NY, NJ & CA: 3.5 total: 2.0 professional practice & 1.5 ethics.
Illinois: 2.75 general MCLE credits.
This live program provides transitional/non-transitional credit to all attorneys.
# Blogging, Friending, Tweeting:
## What Attorneys Should & Should Not Do

Friday, March 25, 2011

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Facebook ethics: it’s not about Facebook

by Eric Cooperstein on June 23, 2009

There is a good deal of postulating in the blogosphere about the types of ethical trouble a lawyer can get into by using social media. The nattering nabobs of negativism warn us to be careful when using social media like Facebook or Twitter, lest we unwittingly disclose client confidences, improperly solicit new clients, or misrepresent facts or law.

Although there is precious little evidence that any lawyers have gotten themselves in ethical hot water using social media, the Philadelphia Bar Association recently gave its own example of the potential dangers when its Professional Guidance Committee issued Opinion 2009-02 (March 2009).

The premise for the opinion is straightforward: a lawyer wanted to know if he could have a non-lawyer assistant send a Facebook “friend” request to a witness for the opposing party in a piece of litigation. The lawyer apparently thought there were juicy tidbits to be found on the witness’s Facebook page (or at least information with impeachment value) but did not think the witness would accept a friend request directly from the lawyer (no surprise there—he had just recently taken her deposition). But the lawyer thought a friend request from an otherwise unknown assistant stood a good chance of being accepted.

The Philly opinion frowned on the lawyer’s proposal. It called it a “highly material fact” that the witness would be making a friend request without disclosing the real reason for the request. Inducing the witness to respond favorably without that important fact would be a deception traceable to the lawyer, violating several ethics rules.

Whether one agrees with the opinion or not (I did a double-take the first time I read it), the opinion is not really about Facebook. It actually tackles a difficult subject in legal ethics known as “dissembling” or “pretexing” (which has nothing to do with sending text messages). The terms refer to situations in which a person, particularly a lawyer or the lawyer’s subordinate, pretends to be someone he or she is not for the purpose of obtaining information.

As noted in the Philly opinion, such conduct is permitted in many jurisdictions for the limited purposes of civil rights investigations (think fair-housing testers) or for patent infringement cases. Some jurisdictions, in contrast, have tried to outlaw pretexing entirely (see the authorities cited in the Philly bar opinion).

When one takes a step back from the Philly opinion and looks at it in the context of the larger legal issue, it becomes clearer that while it is certainly possible for a lawyer to violate an ethics rule while using social media, it is the lawyer’s conduct, not the medium, that will likely be at the heart of the issue. An unthinking lawyer who posts too quickly on Facebook or Twitter is not that unlike a lawyer who speaks too loudly about a client matter in a crowded elevator or puts an ad in the yellow pages that inflates the lawyer’s credentials.
client matter in a crowded elevator or puts an ad in the yellow pages that inflates the lawyer's credentials.

The old maxim that one should think before he or she speaks (or tweets) applies no less to the internet than it applies to other forms of communication.

Eric Cooperstein, the Ethics Maven, practices in the areas of legal ethics and professional responsibility.

{ 2 comments… read them below or add one }

Josh Camson June 23, 2009 at 2:57 pm

I don’t think anyone is arguing that Facebook or any other social media site is the cause of these potential ethical violations. Instead, it is the attorneys' casual approach to those sites. The mindset is often more relaxed when tweeting than when e-mailing a client. It’s that kind of relaxed or casual mentality that can lead to attorneys inadvertently advertising, forming unintentional attorney-client relationships, or misstating the law.

CStrusz August 18, 2009 at 10:24 pm

What if the client has the idea of using a Facebook entry first, and brings it to the lawyers attention… Can the comment or entry be used as evidence in a civil case?
Twitter, bribery and 37 corporate counsel in a big virtual bar

First published on http://chrisdale.wordpress.com on 24 January 2011

All your highly-polished marketing materials are useless if you do not get them in front of your intended audience and engage with them about it. An article intended merely to point you to a source of messages about the Bribery Act became side tracked - in a good way - into a discussion about the media used to promote it. Dust off that Twitter account which your marketing people opened one Friday afternoon and have been too nervous to use.

You have a specialist subject which is of interest and importance to a wide range of people and which ought to be known to and understood by many more. It is a multi-faceted subject which can be approached from many different directions and is of interest internationally. People, both those already knowledgeable about the subject and those coming new to it, seem to appreciate what you write. You are competent in modern means of disseminating information and views, have plenty of energy and do not mind working seven days a week.

No, this is not about me but about Barry Vitou of Pinsent Masons London who, with Richard Kovalesky QC, uses thebriberyact.com, to bring news and views on the UK Bribery Act which comes into force shortly. Actually, is it not really about Barry, who in this context merely serves as a hook for some thoughts on using modern media forms to promote ideas and demonstrate expertise. His approach is the same as mine, but I have been looking for an example which will not be confused with my promotion of me – I don’t mind doing that, of course, but it muddies the example if it has that parallel motive.

I have referred to thebriberyact.com already (see Some resources on the UK Bribery Act 2010). The crossover between e-disclosure / e-discovery and the Bribery Act is obvious (the clue, if you need one, lies in the Bribery Act defence of “adequate procedures”), and Barry and I are jointly presenting a breakfast session with Iron Mountain on 8 March.

I come back to the subject now, partly because you might otherwise miss the stream of useful articles appearing on thebriberyact.com or linked from its Twitter account, and partly because I met Barry last week at the suggestion of Malcolm Durant of Iron Mountain. We met at Barry’s club, the flavour of which can be gathered from the minimalist rules which seem to come down to "be polite"; the dress code reads "nudity is discouraged" and it positively welcomes both laptops and dogs, all of which make it my kind of place (I once belonged - briefly - to a London club which was so impolite as to send my wife back upstairs – the backstairs, not the one reserved for gentlemen which she had descended – to put on her ball dress for breakfast because women in trousers were banned, as was any evidence of business; I am sure that dogs were no more welcome than women, though you would probably have been allowed in on a horse).

Method matters as much as message

I digress, although there is commonality between your choice of club and your choice of marketing strategy. I am as interested in how one gets messages across as I am in the messages themselves, and the Bribery Act itself can wait (push off and read Barry’s site if you want undiluted corruption and compliance). The formal discipline is, of course, “marketing”, but marketing has become dull and
formulac. I am not suggesting that conventional marketing is unimportant, and e-discovery / e-disclosure marketing has some extremely good people in it (in contrast, if Charles Christian is to be believed, with the wider legal IT world – see Footnote 1). We do need tautly-written, bullet-pointed materials which deliver hard facts about products and their benefits, but we also need some more thoughtful stuff and faster ways of both delivering information and interacting with the audience. Conventional marketing deliberately avoids challenging the brain in the search for idiot-proof messages. I put it this way on my website:

Much legal technology marketing manages simultaneously to pass over the heads of its intended audience and to insult its intelligence - a remarkable double. There is certainly a place for snappy slogans and bullet-points and all those rather trite rules which marketing theory lives by, but a legal audience has a higher concentration of intelligence than almost any on earth, and can cope with having to think about what it reads.

My chosen method is to use a combination of blog and Twitter, the one to publish and the other to promote the publication – and, crucially, to follow it up with anyone interested enough to react. Conventional marketing requires painful drafting, agreement by committee, and submission to a webmaster for publication when he or she has time. It must fit the corporate ethos and, particularly for a public company, must satisfy criteria which are stifling both creativity and immediacy. Do not misunderstand me here - I am well aware that large companies and firms must exercise control over what is said in their name, and there are few who manage successfully to toe the corporate line and engage an audience with material of immediacy, value and interest. It only really works where senior people do the blogging and/or tweeting themselves, and there are few law firms and perhaps half a dozen e-discovery vendors who can pull this off. Many others have grasped the mechanics but not the point, and dutifully put out a couple of tweets per day, safely pointing either to the company's own closely-regulated marketing material or to a public article whose arguments can be disowned if they prove too challenging.

All those earnest committees in law firms and at technology providers who sit down with agendas headed "Using social media to promote our brand" are wasting their time if the upshot is just the same old stuff pushed down a different pipe. That is not what Richard Susskind meant when he said that the use of social media would be one of 2011’s crucial differentiators between law firms.

The best marketing material looks like something else

It will pain marketing people to read this, but the best marketing and advertising material looks like something else – I don’t mean it conceals itself, but this generation has learnt not to notice marketing when that is all there is to see. It has to come as part of something which people do want, and that is usually information which is relevant to their needs, interesting in its own right or, preferably, both. Down at the bottom end of the marketing pond, the telemarketeers discern this dimly (I choose the word advisedly); when a badly-spoken girl begins her unsolicited call with "It’s just a kurtesee korl reelly", she is unconscious that over-use has turned her scripted opening into a flag which says “I am about to screw you, sucker, and not in the way you might hope”. The audience has matured, and marketing must grow past it.

I say this often, but it bears repeating: those who struggle to see what Richard Susskind means when he talks of the coming importance of social media are the heirs to those who scoffed at his predictions that lawyers would publish free legal information on the web and communicate by email. The world moves on very quickly, and we have just got our minds round the last developments when the game changes again. If by "publish" you mean the painstaking committee process described above, then you have missed the moment – that was last week, when the news was hot. If “communicate” means that you send an email out to your mailing list, then save yourself the trouble – what does not get filtered out as spam is doomed to slip below the important stuff (important to them, that is) which piles into the InBox behind it. I have Outlook rules to bin unread the stuff from repeat offenders whose output is not relevant to me.
Besides, whilst the primary meaning of “communicate” is to impart or transmit, the dictionary meanings which matter most are “share” or “hold intercourse with” (Footnote 2). Static slabs of law, or recitals of a product’s features and benefits, will not grab attention whether you post them on a web site or chuck them at an InBox. They are a necessary, but not a sufficient, way of communicating.

Have a look at some recent thebriberyact posts:

**What amounts to carrying on business in the UK under the Bribery Act?**  
Complaints of the bribery act is anti-competitive UK plc do not tell the whole story.  
The UK is now tough on white collar: a return to the “good old days” is not on the cards,  
The Bribery Act & another call for change: Move on nothing to see here.

The material is timely and accurate, reacting to or anticipating something new; the views are trenchant; the external links are useful. Do not underestimate the value of a good title - it is that which attracts attention both in Google and in Twitter and, in the latter, dictates whether others re-tweet the link to their own followers.

Let us look at another one – same subject, different writer. Look at the post Disagreeing With, Well, Everyone which I found on a retweet in the course of researching this article (that is, it was put up by someone at least two degrees of separation from me, and retweeted by someone else who has read it and thought it good enough to pass on). I read it and liked it, retweeted it in my turn, and only then thought to see who wrote it. It is Howard Sklar whose blog and Twitter details show him to be at Recommind. Recommind (whom I know well, but Howard has only just joined them) happens to be one of the half-dozen e-discovery companies mentioned above as having grasped how to use modern media properly.

**The view from the potential clients**

Let’s spell this out. Pretend that I am in-house counsel at a large company. I first focus on the Bribery Act at IQPC’s conference in Munich, when Vivian Robinson, General Counsel to the SFO, talks about it and makes explicit the connection between the “adequate procedures” defence and information management - there were 37 general counsel at that conference, any of whom might have followed the same trail as I did. Someone (Iron Mountain in this case) refers me to Barry’s blog as an authoritative source of information – so far, so conventional, since many web sites have useful information on them. It is the next step which counts: the blog has a Twitter link, and I follow it. Over the next few days, tweets from @thebriberyact appear under my nose as they are typed, pointing either to further articles on the blog or to other sources. I pass on (by retweeting) those which I think will interest my followers; some of those in turn no doubt pass them to theirs, all the time adding to the number of people who follow @thebriberyact – this takes only one click, with no clunky registration forms which marketing people like to interpose between their material and people who want to read it (Footnote 3).

The Recommind example extends this - I found it, as I say, because someone retweeted a link to it. It does not trumpet its connection to a supplier – it does not conceal that, but its author relies on readers finding the article interesting and does not explicitly ram the commercial connection down their throats. It was sufficiently interesting for me to start following @HowardSklar on Twitter as well.

Wearing my putative in-house counsel hat, I think it likely that every provider of information management software, and many of the law firms on my panel, are alert to the significance of the Bribery Act and would be able to help me investigate my first Bribery Act problem (or, more usefully, help me anticipate and head off my first problem). If I bother to trawl their web sites regularly, I may find something about their expertise in this area. Not there? Perhaps it is on next month’s agenda for the marketing committee – oh look, there it is, “Item 14: Consideration of the pros and cons of using social media to promote our expertise (held over from last meeting)”. 
Twitteratigate and the Telegraph

By chance, as I was writing this, a mini-storm broke over a league-table of UK law firms’ use of Twitter (see Brian Inkster’s TimeBlawg article Law Firm Twitteratigate – The Whole Story for, well, the whole story). At No 10 in this league-table is a firm which has made no use at all of its Twitter account. It is an extremely good firm which, I am sure, has the Bribery Act at its fingertips - indeed, it has 71 articles on the subject, as anyone would know who thinks of the firm, finds its web site, and types “Bribery Act” into the search box. But who would know to look there? Who would bother, when other forms of media are chucking the stuff at you?

As I wrote the preceding sentence, at 9.45 on a Sunday night, thebriberyact.com tweeted a link to a story about Directors’ Guidance published in the Telegraph today which talks about directors’ liabilities in relation to the Bribery Act. If it is in the Telegraph, then lots of old buffers who act as non-executive directors will read it - a sentence which has “directors” and “liabilities” next door to each other should take their minds off the picture of Nicole Kidman’s bare shoulder in the Culture section which is what they chose the Telegraph for. Someone can expect some calls tomorrow. Your marketing committee will get to it some time in March.

Conclusion

So which club is it for you – the one where women must use a special staircase and wear ball gowns for breakfast, or the one whose only rule is that you ought to wear something? Which marketing strategy do you prefer – worthy, approved articles published in a corner of the web site after due consideration by the marketing committee when the webmaster has time, or quick links pushed out on a Sunday night whilst the subject-matter is hot?

I stress again that you do have to have a strategy, and I am not suggesting that major firms or companies should unleash their bloggers and tweeters to do their worst, because their worst it will certainly be. The strategy, however, must include an approved route to quick publication of those things you know about whilst the subject is live and topical. That means identifying the right person or people within the organisation who know their subject and can write. It means defining their parameters firmly but flexibly and trusting them to stick within them. Above all, it means a cultural shift (yes, I know, “cultural shift” is heading for cliché-dom but it is useful) to a state in which the aim is conversations, as Brian Inkster says (though, with respect, he is wrong to say in the same sentence that Twitter is a two-way medium: email is a two-way medium, the telephone is a two-way medium, but Twitter is a big virtual bar where anyone can join in the discussion).

And you do not know who is listening in. Even if they do not join the discussion, those 37 corporate lawyers who were at IQPC in Munich could be eaves-dropping the discussion. That is a reason for caution, of course, but you can be interesting, challenging and provocative without being wrong, reckless or rude. Twitteratigate may shake the tree a little, but it will be a while before law firms have the guts to let go a little and devolve some of their marketing strategy to those who actually know enough about the subject to engage in public ad hoc discussion. For one thing, marketing departments will think of turkeys, votes and Christmas when anyone suggests giving power to the lawyers to promote their own expertise.

The e-discovery / e-disclosure technology providers, though, can look to the few of their number who do engage via Twitter (I emphasise Twitter because it is my own weapon of choice, and I use the word “engage” deliberately) and wonder if they are missing something. I say again – the use of social media is not a substitute for the formal material but a way of driving people towards it, as well as a way to engage in discussions which jump over the formal constraints of conventional marketing.
Footnotes

Footnote 1  
See the videos here and here on the Orange Rag, plus Charles’s tweet of last week Sorry #PR appareatchick - if you so desperately want to meet me at #LTNY you might trying getting my name & publication right. I was once sent an PR’s invitation to talk to a big-name supplier which was addressed to Charles and mis-spelt both his name and the name of the high-ranking executive who was being offered for interview.

Footnote 2  
My dictionary was published in 1964 when, despite Philip Larkin’s discovery in the previous year, the word intercourse still connoted discussion rather than anything more exciting – ask Mr Google if I have lost you here, with “Larkin” and “1963” as your search terms.

Footnote 3  
I refuse to complete such registration forms on principle – the last time I did it (for research on an article which the company wanted me to write) some prat of a salesman was on the phone less than a minute later; if he had taken two minutes, he could have discovered that I was unlikely to be a buyer; three minutes would have given him time to realise that people will not give their names if they anticipate calls like that as a result and – like me – would rather do without the material.

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ETHICS OF LAWYER SOCIAL NETWORKING

By Steven C. Bennett*

Social networking via the internet (sometimes called “Web 2.0”) can be a low-cost way to connect with friends, family and old acquaintances, and form new relationships. For lawyers, social networking could make business development “faster, better and cheaper.” As a result, it has become a topic of interest for many in the legal profession. In a 2009 survey conducted by the American Bar Association, 43% of lawyers surveyed said that they are members of at least one online social network (this compared to only 15% in 2008). Twelve percent of respondents reported that their firms are also members of at least one online social network. Online social networking thus may play an increasing part in the legal community, and will continue to evolve as developers produce new innovations to increase the number and quality of services offered.

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2 Paul Lippe, Would Henry V Have Used Web 2.0 At Agincourt? Pt. II, www.law.com (Feb. 9, 2009); see also Paul Lippe, The Role Of Social Networking In Law, www.law.com (July 30, 2009) (“For my money, social networking will prove to be a powerful tool in law, because its structure reflects the distributed nature of the legal profession, so it has the potential to help improve quality and reduce costs at a time when these are more at the top of clients’ priorities than ever before.”).


4 Reginald Davis, Getting Personal: Social Networks Appeal, But Not To The Firm, A.B.A.J., available at www.abajournal.com (Aug. 2009). Another recent survey reported that “nearly 50 percent of lawyers are members of online social networks and more than 40 percent of attorneys believe professional networking has the potential to change the business and practice of law over the next five years.” Leader Networks, Networks For Counsel: Online Networking In The Legal Community (June 2008), available at www.leadernetworks.com. More generally, some surveys suggest that in excess a billion users, world-wide, are connected to one or more social networking sites. See Christian Kreutz, The Next Billion—The Rise Of Social Network Site In Developing Countries, www.web24dev.net (June 19, 2009).

5 The development of Web 2.0 applications, coupled with the expansion of wi-fi/mobile communications, may mean that the benefits of “Moore’s Law” (regarding expansion of computer power) will continue to yield new
This technology and the frequency of its use has already outpaced established legal practices. Existing ethics guidelines generally do not focus on technology issues, and state bar associations have been slow to fill in the gaps with opinions and best practice guides. Yet, lawyers require at least a basic understanding of how social networking works, and some awareness of the ethical implications of using such technologies. This Article briefly addresses some of the ethics issues lawyers may face when they use social networking tools.

**What Is Social Networking?**

Social networking web-sites allow registered users to upload profiles, post comments, join “networks” and add “friends.” They give registered users the opportunity to form “links” between each other, based on friendships, hobbies, personal interests, and business sector or academic affiliations. Social networking sites can be used both personally, to contact friends and find old classmates, and professionally, to look for employment or find someone with whom services for years to come. See Om Malik, Moore’s Law Reconsidered, Business 2.0 Mag., Apr. 3, 2007, www.cnn.com (“while the PC itself might be disappearing, mobile devices such as the iPhone are the new beneficiaries of Moore’s Law”).

6 The American Bar Association recently announced formation of a “Commission on Ethics 20/20,” with the recognition: “Technological advances and globalization have changed our profession in ways not yet reflected in our ethics codes and regulatory structures. Technologies such as e-mail, the Internet and smartphones are transforming the way we practice law and our relationships with clients, just as they have compressed our world and expanded international business opportunities for our clients.” See ABA News Release, Aug. 4, 2009, www.abanet.org.


9 “The idea of online social networking is that members will use their online profiles to become part of an online community of people with common interests.” Doe v. MySpace, Inc., 474 F. Supp.2d 843, 845 (W.D. Tex. 2007).

10 See generally Penny Edwards & Lee Bryant, Social Networking For the Legal Profession 7 (2009).
to collaborate. Most social networking systems are available to all users. Some are available by invitation (or special qualification) only. Most began with a personal focus on linking “friends,” but many now are used both for business and personal networking purposes. Some directly solicit participation by lawyers.\footnote{See Doug Cornelius, The State Of Legal Social Networking, \url{www.lawmarketing.com} (July 20, 2009) (listing available social networking sites meant for use by lawyers).}

These sites have received significant media attention.\footnote{The Journal of Computer-Mediated Communication recently dedicated an entire issue to the subject of social networks, their history and potential influence. See Dana N. Boyd & Nicole B. Ellison, Social Network Sites: Definition, History, And Scholarship, 13 J. of Computer-Mediated Comm. 210 (Dec. 2007).} Employers now search social networking sites before hiring employees;\footnote{See Michael Jones, Adam Schuckman & Kelly Watson, The Ethics Of Pre-Employment Screening Through The Use Of The Internet (2009), \url{www.ethicacpublishing.com}.} consumers worry about protecting themselves from identity theft;\footnote{See Leyla Bilge, Thorsten Strufe, Davide Balzarotti & Engin Kirda, All Your Contacts Belong To Us: Automated Identity Theft Attacks On Social Networks, \url{www.2009.org} (Apr. 2009).} and parents seek to keep their children safe from online predators.\footnote{See Janis Wolak, David Finkethor, Kimberly J. Mitchell & Michele L. Ybarra, Online “Predators” And Their Victims: Myths, Realities, And Implications For Prevention And Treatment, 63 Am. Psychologist 111 (Mar. 2008), available at \url{www.apa.org/journals}.} Advertisers, moreover, increasingly seek ways to exploit social networking systems to entice users into commercial relationships.\footnote{See Raghuram Iyengar, Sangman Han & Sunil Gupta, Do Friends Influence Purchases In A Social Network?, \url{www.hbs.edu/research} (Feb. 26, 2009); Jure Leskovec, Lada Adamic & Bernardo A. Huberman, The Dynamics Of Viral Marketing, ACM Transactions On The Web 1 (May 2007), available at \url{www.personal.umich.edu}.} These kinds of concerns are multiplied when legal professionals use social networking tools.

**Ethical Considerations: A Survey**

As suggested below, the ABA *Model Rules of Professional Conduct* (the “Rules”) do not directly address all of the ethics concerns associated with social networking.\footnote{See ABA Center for Professional Responsibility, History: The Development Of The ABA Model Rules Of Professional Conduct, 1982-2005 (2006); see also ABA Model Rules Of Professional Conduct (Pre-2002), History, \url{www.law.cornell.edu/ethics} (summarizing significant changes in individual rules).} The Rules,
however, point to potential issues, in a number of areas. The following survey of some of the essential ethical considerations associated with lawyer use of social networking examines the terms of the Rules, and reviews some interpretations of the Rules provided by bar ethics opinions, cases and commentaries.18

**Competence, Diligence And Supervision**

Rule 1.1 requires that lawyers provide “competent representation to a client.” Competent representation requires the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The more “technical or complex” the requirements of a matter, “the more difficult it may be for the lawyer to meet the ‘competency’ standard in providing such services.” In accordance with these basic principles, lawyers who use social networking tools must at least have a working understanding of the technology.19 As the technology is new, and ethics rules and opinions still developing, lawyers must also keep track of new professional responsibility pronouncements in the area.20

Lawyers cannot “pass the buck” regarding use of these tools. Rule 1.3 requires that lawyers “act with reasonable diligence and promptness in representing a client.” Further, Rules 5.1-5.3 make clear that lawyers must take responsibility to supervise the paraprofessionals and

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20 One excellent source of information on new technologies is the ABA Legal Technology Resource Center. See www.abanet.org/tech/ltrc.
administrative staff that work at their direction. In short, lawyers and law firms must develop policies and procedures for the use (or ban) of social networking, and must take steps to enforce such rules.

Confidentiality and Privilege

Rule 1.6(a) proscribes lawyers revealing information “relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted” under one of several enumerated exceptions. Comment 16 to Rule 1.6 notes that lawyers “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.” The lawyer’s duty requires choosing a means of communication for which the lawyer has a reasonable expectation of confidentiality. Comment 17 lists factors for determining the reasonableness of a lawyer’s expectation of confidentiality,

21 This issue has arisen recently in the context of “outsourcing” of legal services to vendors and part-time professionals. In that context, recent ethics opinions stress that the principal counsel involved in a matter retain ultimate responsibility for supervision of all work. See Steven C. Bennett, The Ethics Of Legal Outsourcing, 36 N. Ky. L. Rev. 479 (2009).

22 See Doug Cornelius, Online Social Networking: Is It A Productivity Bust Or Boon For Law Firms?, 35 Law Practice Mgmt. 28 (Mar. 2009), available at www.abanet.org/lpm/magazine (misuses of social networking technology “is not a technology problem—it is a people problem”).

23 Exceptions to the confidentiality requirement appear in Rule 1.6(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; or (6) to comply with other law or a court order.”

which 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.25

An ABA ethics committee has opined that it is not reasonable to require that a mode of communication, such as email, be avoided simply because interception is technologically possible, especially when unauthorized interception of the information is a violation of law.26 Nonetheless, lawyers “may be required to keep abreast of technological advances in security, as well as the technological advances being developed by hackers who are seeking to steal secrets from third parties.”27 Ultimately, a client may require that the lawyer implement special security measures, for certain confidential communications, in addition to what may be required by the Rules.28

Social networking presents many new ways for lawyers to (inadvertently) reveal client information. Lapses in confidentiality can occur on a firm’s website, client intake forms, in emails, attachments, on lawyer blogs, bulletin boards, chatrooms, listservs, and many other communication forms.29 Simply making a list of contacts public on a networking site, for

25 See generally Christopher J. Wesser, Ethical Considerations And The Use Of E-Mail, 49 DRI For The Defense 68 (Feb. 2007) (noting that counsel must observe “duty to prevent confidential communications from being misdirected or otherwise revealed to third-parties”).


28 Rule 1.6, Comment 17; see Frederick L. Whitmer & Benjamin D. Goldberg, Ethical Issues Of The 21st Century, 14 Law Firm Partnership & Benefits Rep. 1 (Oct. 2008) (practitioners should “assure themselves about the safeguards present” in their communication systems).

29 See generally Cydney Tune & Marley Degner, Blogging And Social Networking: Current Legal Issues, 962 PLI/PAT 113, 130 (Mar.-Apr. 2009) (“courts are generally unwilling to recognize a reasonable expectation of privacy in material that people both willingly post on the Internet and take no steps to limit access to or otherwise protect”).
example, could disclose a confidential relationship. Additionally, lawyers may reveal information related to the representation of a client by linking to other websites. Indeed, some social networking sites require that the user grant the site developer access to all information placed on the site. That arrangement could effectively destroy any claims of privilege or confidentiality regarding social networking communications.

The lawyer’s confidentiality protection duty extends to persons providing service to the client at the lawyer’s direction. Thus, Commentary to the Model Rules states: “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.” Lawyers must ensure that paraprofessionals and administrative staff who may use social networking services are made aware of limits on confidentiality associated with such services.

Finally, lawyers may need to discuss means of communications with their clients. Where, for example, a client uses an employer’s computer system to communicate with a lawyer, claims of privilege may be lost, because the employee may lack privacy rights in the system.

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31 See Westermeier, *supra*.

32 See Thomas R. McLean, *EMR Metadata Uses And E-Discovery*, 18 Annals Health L. 75, 104 (2009) (after registration, any material that passes through networking website “may no longer be considered confidential because of the grant of information access that was given to the site owner”).

33 See Rule 1.6, Comment 16.

may need to remind their clients of these and other threats to the confidentiality of their communications.\textsuperscript{35}

\section*{Creation of Unintended Attorney-Client Relationships}

An attorney-client relationship arises when “a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person,” and the lawyer either manifests “consent to do so,” or “fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.”\textsuperscript{36} Under this standard, even if a client never executes an engagement letter, an attorney-client relationship may be implied from the conduct of the parties.\textsuperscript{37} Thus, a lawyer who provides casual advice, or solicits confidential information from an acquaintance, risks a claim that an attorney-client relationship has developed.\textsuperscript{38}

Rule 1.18, moreover, specifies the duties of a lawyer to a “prospective client,” that is, “[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with

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respect to a matter[.]” Even when no attorney-client relationship ensues, “a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation,” except in limited circumstances.\(^39\) Rule 1.18, moreover, advises that a lawyer “shall not represent a client with interests materially adverse to those of a prospective client,” in the same or a substantially related matter, if the lawyer received information from the prospective client that could be “significantly harmful” to the prospective client. If a lawyer is so disqualified, no other lawyer in the same firm may conduct the representation, except if both the affected client and the prospective client consent, or if the lawyer who received the information “took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client,” and the disqualified lawyer is timely screened from the representation, and the prospective client receives prompt notice.

Comment 2 to Rule 1.18 states that a person who communicates information “unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship” should not be considered a “prospective client” within the meaning of the Rule.\(^40\) Further, Comment 4 to Rule 1.18 states that a lawyer “may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.” In accordance with these rules, commentators suggest that websites inviting potential clients to communicate with lawyers should disclaim the existence of an

\(^{39}\) Rule 1.6(b) permits revelation of confidential information, for specific, limited purposes. Rule 1.9 applies the same rule to former clients.

\(^{40}\) See Melissa Blades, *Virtual Ethics For A New Age: The Internet And The Ethical Lawyer*, 17 Geo. J. Legal Ethics 637, 647 (2003-2004) (“Because the Model Rules contemplate a discussion between client and lawyer before the attorney-client relationship can attach, unsolicited emails with detailed information about the client most likely do not create such a relationship.”).
attorney-client relationship, except on express agreement from the lawyer, and caution prospective clients not to send a lawyer confidential information, without confirmation of an agreement to undertake representation.41

In the virtual world, the establishment of electronic means of communication with potential clients risks establishment of attorney-client relationships, if the lawyer does not “exercise caution and vigilance.”42 The key, in general, is the degree to which the potential client may interact with the lawyer, especially with regard to the exchange of confidential information. Thus, conventional law firm web-sites, which principally provide information about lawyers and their firms, may essentially operate as passive advertising.43 Yet, where such sites invite email contacts with lawyers, the potential for interactions grows. As a result, many firms adopt restrictions on interactions, through their web-sites.44

The speed of social networking, moreover, may facilitate referrals, advice, and the formation of apparent attorney-client relationships, all with a few clicks of a mouse.45 In social networking, casual interactions sometimes cannot be distinguished from more formal relationships. Thus, extreme caution may be required.

41 David Hricik, To Whom it May Concern: Using Disclaimers To Avoid Disqualification By Receipt Of Unsolicited E-mail From Prospective Clients, 16 Prof. Lawyer 1 (2005).

42 Assoc. of the Bar of the City of New York, Formal Op. 1998-2, www.abcny.org; see generally Anthony E. Davis & David J. Elkanich, A Lawyer’s Guide To Managing E-Lawyering Risks, at 5 (2006), www.chubb.com (“The greatest risk to lawyers and law firms with an Internet presence is that they may not always know who their clients are. . . . [Web-site interactions] pose great risks in that attorney-client relationships may be created before any evaluation for appropriateness, such as checking for conflicts of interest, has been completed.”).


44 See Micah Buchdahl, Potential Ethical Issues And Ways To Avoid Pitfalls For The Law Firm Web Site, Wisconsin B.J. (2003), available at www.internetmarketingattorney.com. One state ethics opinion, however, suggests that lawyers “cannot avoid” some risk associated with the availability of an email system that allows potential clients to contact a law firm. See Mo. Informal Advisory Op. 20000179, www.mobar.org (attorney “can reduce these risks with a disclaimer,” but “cannot avoid them”).

To avoid creating implied attorney-client relationships, lawyers must refrain from giving fact specific legal advice in social interactions. Some jurisdictions have crafted ethics rules specifically governing advice provided over the internet. Ethics opinions generally distinguish between general and specific legal advice. “Providing legal advice . . . involves offering recommendations tailored to the unique facts of a particular person’s circumstances . . . . Lawyers wishing to avoid formation of attorney-client relationships through chat room or similar Internet communications should limit themselves to providing legal information . . . .”

A lawyer may write on general legal topics (including articles and blog postings) so long as there is no communication of individual advice. A clear and conspicuous disclaimer of attorney-client relationships can help prevent misunderstandings. Another useful tool is a “click-wrap” disclaimer acknowledgement, which requires readers to manifest their understanding (of lack of an attorney-client relationship) by clicking “Accept” prior to gaining access to website contents. Such a disclaimer (or click-wrap

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46 See Dean R. Dietrich, Online Chat: Be Careful What You Say, 82 Wisconsin Lawyer (May 2009), www.wisbar.org (“Lawyers should limit their discussion to explaining general principles or trends in the law or laying out the majority and minority viewpoints on particular issues. Lawyers . . . should advise individuals to obtain legal counsel to determine what law would be applicable to their unique circumstances and indicate that the discussion . . . should not substitute for specific legal advice.”).

47 See Ariz. State Bar Ass’n Ethics Op. 97-04 (1997) (“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”); N.Y. City Ethics Op. 1998-2 (1998) (“A lawyer . . . should carefully refrain from . . . a general solution applicable to all apparently similar individual problems since slight changes in fact situations may require a material variance in the applicable advice[.]”).


49 See id. (permissible communications include “the kind of information one might give in a speech or newspaper article”).

50 The following is one example of a disclaimer: “None of the information or materials posted in this weblog are intended to constitute legal advice, nor can we guarantee the accuracy of posted information, especially as to each individual situation. The views or opinions expressed in this page are strictly those of the weblog’s author.” See Divorce Net, www.divorcenet.com.

51 The following is one example of a “click wrap” acknowledgement: “Email addresses of our attorneys are not provided as a means for prospective clients to contact our firm or to submit information to us. By clicking ‘accept,’ you acknowledge that we have no obligation to maintain the confidentiality of any information you submit.
acknowledgement) may also clarify that the lawyer does not intend to solicit confidential information from a prospective client.\textsuperscript{52} For shorter messages, a reference to a web-site with the complete disclaimer may be all that is possible.\textsuperscript{53}

In addition to disclaimers and click-wrap acknowledgment forms, lawyers may need to take steps to ensure that they do not accept confidential information from their internet correspondents. Receipt of such information may be one marker of an attorney-client relationship. For example, the Ninth Circuit ruled that an online questionnaire gathering information for potential class members in a class action lawsuit created an attorney-client relationship even though users acknowledged that the questionnaire did “not constitute a request for legal advice and that the [user is] not forming an attorney client relationship by submitting this information.”\textsuperscript{54}

**Conflicts**

The inadvertent creation of attorney-client relationships (discussed above) could cause conflicts for an entire firm. Under Rule 1.7, a lawyer generally cannot represent a client if the representation involves a conflict of interest.\textsuperscript{55} Conflicts rules are more complicated than this (continued…)

\textsuperscript{52} See Nicole Lindquist, *Ethical Duties To Prospective Clients Who Send Unsolicited Emails*, 5 Shidler J. of Law, Commerce & Tech. 8 (2008) (noting that online disclaimers “present a unique challenge” because viewers can easily ignore, skip or misunderstand them, and suggesting desirability of manifestation of “some sort of assent”).


\textsuperscript{54} *Barton v. U.S. District Court for the Central District of California*, 410 F.3d 1104, 1105 (9th Cir. 2005).

\textsuperscript{55} Where a conflict is apparent from the outset of an encounter with a prospective client, the lawyer must decline the representation. *See* Rule 1.7, Comment 3 (“A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client[.]”).
simple principle suggests. Under the Rules, for example, a lawyer may represent a client, despite a potential conflict, where the lawyer believes that competent representation is possible, the representation is not prohibited by law, the representation does not involve assertion of a claim by one client against another client, and each affected client gives informed consent. The representation, however, must not involve the “assertion of a claim by one client against another client[.]” The conflicts of one lawyer in a law firm, moreover, may be attributed to other lawyers in the firm. Due to these kinds of complexities, most U.S. law firms have rigorous systems for “conflict clearance” before any legal engagement is accepted. Failure to follow these conflict clearance systems, in the context of social networking communications that may be characterized as forming relationships with clients, could cause considerable difficulty for a lawyer.

Under Rule 1.7, moreover, conflicts may arise where representation of a client may be “materially limited” by a “personal interest of the lawyer.” Thus, in theory, if a lawyer were to take a definitive legal position (in a blog or other posting), such position could “materially limit”

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56 See Rule 1.7(b)(1)-(4).

57 See Rule 1.7(b)(3).

58 See Rule 1.10(a) (no lawyer in a law firm may represent a client “when any one of them practicing alone would be prohibited from doing so”). The precise application of this Rule is a matter of some subtlety. Law firms may, for example, build “Chinese Walls,” to avoid potential conflicts due to imputed knowledge of the affairs of two clients in potential conflict. See Robert E. Ware, The Conflict Virus, Cleveland Bar. J. 16 (Jan. 2005) (outlining requirements for an “ethical screen” or “chinese wall”).

59 Comment 3 to Rule 1.7 suggests: “To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved.” The effectiveness of even sophisticated conflict clearance systems has been questioned by some commentators. See generally Susan P. Shapiro, Tangled Loyalties: Conflict Of Interest In Legal Practice 198 (2002) (suggesting that lawyers may develop conflicts in subtle ways, including social relationships).
the lawyer’s ability to represent clients for whom the opposite legal position is dominant. Yet, the notion of positional inconsistency does not prevent a lawyer from taking different sides in different cases. Indeed, some ethics opinions suggest that a lawyer may take “antagonistic positions on a legal question” that arises in different cases. Further, even where an individual lawyer might be prohibited from taking such antagonistic positions, other lawyers in the firm may not be so precluded.

At a minimum, however, public statements of a definitive legal position adverse to an existing client may cause embarrassment for a lawyer, or a law firm. Even if lawyers do not entirely eschew social networking for fear of causing such problems, some form of restraint may

60 See William Freivogel, Legal Ethics And Technology at 1 (July 2002), available at www.abanet.org/buslaww/newsletter (“Taking positions on legal issues online could undermine the position a lawyer is taking, or may have to take, on behalf of a client.”).

61 See Noreen L. Slank, Positional Conflicts: Is It Ethical To Simultaneously Represent Clients With Opposing Legal Positions?, Mich. Bar. J. 15 (May 2002), www.michbar.org/journal (positional conflicts “have generally been tolerated, except under the most sensitive of ethical barometers;” lawyers can “speak with as many voices as there are clients with positions to advance”).

62 See Professional Ethics Commission of the Board of Overseers of the [Maine] Bar, Op. 155 (1997), www.mebaroverseers.org (such an “issue conflict” is not a “conflict of interest”) (but noting duty of lawyer to employ “best judgment” to ensure that advocacy in a different case will not “impair her effectiveness”); D.C. Bar Op. 265 (1996), www.dcabar.org (“A traditional notion in the law of legal ethics holds that there is nothing unseemly about a lawyer’s taking directly opposing views in different cases so long as the lawyer does not do so simultaneously.”) (prosecutor may become criminal defense lawyer after public service; lawyer for plaintiff may represent defendants in other cases).

63 In its Formal Opinion 2007-177, the Oregon Bar noted that there is “no way for everyone in a multilawyer firm to know ever current or potential issue that may arise in every case the firm is handling.” Further, “there is no safeguard that a lawyer or firm can reasonably take to avoid issue conflicts in the same manner that a lawyer or firm can avoid traditional conflicts by keeping lists of the names of current and former clients.” The Rules, moreover, “are intended to be construed in a practicable manner that does not create unavoidable traps[.]” In light of these concerns, the Opinion concluded, “it would be inappropriate to hold that, on pain of discipline, all lawyers at a firm are chargeable with the full ‘issue conflict’ knowledge of every other lawyer at the firm.” Rather, “[a]ctual knowledge, or at least negligence in not knowing [about the positional conflict] must first be proved.” Or. Formal Op. 2007-177, www.osbarg.org.

be appropriate. Some law firms, for example, require screening of all publications with a committee. Often, moreover, firms require that individual publications be labeled as representing the opinion of the individual author only, such that the opinion should not be attributed to the firm as a whole, or its clients.

Unauthorized Practice of Law

Generally, under Rule 5.5, a lawyer who is not admitted to practice in a jurisdiction must not “establish an office or other systematic and continuous presence” in the jurisdiction, for the practice of law; or “hold out to the public or otherwise represent that the lawyer is admitted to practice law” in that jurisdiction. A non-lawyer who falsely offers legal services under the guise of being a lawyer is guilty of the unauthorized practice of law. And, because licensing of the practice of law is a state matter, a lawyer authorized to practice law in one state cannot, without admission to the other state’s bar, or pro hac vice admission for purposes of a specific matter, perform unlicensed legal services in a foreign jurisdiction. The precise contours of these rules are somewhat ill-defined. Increasingly, moreover, lawyers need to operate in more than one state (and perhaps more than one country) to be effective. In 2002, the ABA modified its rules on multi-disciplinary practice, to permit limited forms of multi-jurisdictional practice.

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65 See Arthur D. Burger, Spotting Firm Conflicts, Legal Times, July 16, 2001 (suggesting that “a human eye and brain are clearly needed” to spot potential positional conflicts).


68 See Richard L. Marcus, The Electronic Lawyer, 58 DePaul L. Rev. 263, 291 (2009) (“Law firms increasingly provide service across multiple venues using lawyers from multiple places to provide those services.”).

69 Under the new ABA Rule, a lawyer may practice law in jurisdictions where he or she is not admitted if: the lawyer associates with local counsel, if the work is related to a litigation or ADR proceeding in which the lawyer is appearing; if the client is the lawyer’s employer; or if federal law permits the representation. See Rule 5.5(c)-(d).
Rule 8.5 provides, however, that a lawyer not admitted in a particular jurisdiction is subject to disciplinary authority in that jurisdiction, “if the lawyer provides or offers to provide any legal services” in that jurisdiction. Comment 5 to Rule 8.5 states that a lawyer’s conduct must conform to the rules of the jurisdiction “in which the lawyer reasonably believes the predominant effect” of the lawyer’s conduct will occur.

A lawyer may use disclaimers to reduce problems involving unauthorized practice of law. The language of the disclaimer should indicate the state (or states) in which the attorney is admitted. Attorneys may take the additional step of asking potential clients about their residence before answering any questions or sending any messages.

In general, a lawyer may not establish an office or “other systematic and continuous presence” in a jurisdiction in which the lawyer is not admitted. Maintaining a blog or social networking profile may expose lawyers to unauthorized practice rules in many jurisdictions. At least one commentator has noted that, where a law firm “maintains an interactive website and

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70 See, e.g., S.C. Bar Ethics Advisory Comm., Advisory Op. 94-27 (1996) (lawyer should “clearly identify geographic limitations of the lawyer’s practice, so that it is clear that he may not practice law except in those states in which he is admitted to practice”); Cal. Bar Op. 2001-155 (recommending that attorneys explain where they are licensed to practice law, where they maintain offices, and the courts in which they regularly appear).

71 Rule 5.5(b)(1). Rule 5.5(c) permits a lawyer to practice law, on a temporary basis and in limited circumstances, in jurisdictions in which the lawyer is not formally admitted. Similarly, Rule 5.5(d) permits a lawyer licensed in one jurisdiction to practice, on either a temporary or continuous basis, in another jurisdiction if the lawyer is providing legal services solely for the lawyer’s employer or its affiliates, or is engaging in activities authorized by federal or other law.

purposefully avails itself of a jurisdiction, it is reasonable to conclude that the law firm will be
subject to the ethical rules applicable in such jurisdiction.\textsuperscript{73}

Although courts have not found that a website alone constitutes the practice of law, at
least two cases indicate that maintaining an online presence can contribute to liability.\textsuperscript{74} In
Maine, a lawyer who maintained an office and website holding himself out as able to provide
legal services, although not licensed there, was held to have engaged in unauthorized practice of
law.\textsuperscript{75} In California, a court held that, although not physically present, an out-of-state lawyer’s
use of “telephone, fax, computer, or other modern technological means” could constitute
unauthorized practice of law.\textsuperscript{76} Although the court declined to rule that a lawyer’s virtual
presence in California automatically amounted to practicing law, the holding is a reminder that
courts pay attention to an online presence.\textsuperscript{77} A prudent lawyer should research jurisdictional
restrictions on cross-border practice before creating websites or profiles on the Internet.\textsuperscript{78}

Advertising

In \textit{Bates v. State Bar of Arizona},\textsuperscript{79} the Supreme Court ruled that, to preserve the “free
flow” of commercial information, states could not wholly ban lawyer advertising, but could

\textsuperscript{73} Westermeier, \textit{supra}, at 288.

\textsuperscript{74} For a discussion of recent decisions, see \textit{id.} at 284-288.

\textsuperscript{75} Maine Ethics Op. 198 (2005).

\textsuperscript{76} Birbrower, Montalbano, Condon & Frank, P.C. \textit{v. Superior Court}, 949 P.2d 1 (Cal. 1998).

\textsuperscript{77} See also \textit{Florida Bar v. Kaiser}, 397 So.2d 1132 (Fla. 1981) (New York lawyer engaged in unauthorized
practice of law when firm advertised in Miami telephone books and on television, creating impression that lawyer
was licensed to practice in Florida).


\textsuperscript{79} 433 U.S. 350 (1977). The Court in \textit{Bates} noted the possibility the lawyer advertising might not provide a
consumer with all of the relevant information needed to make an informed decision about counsel. Nevertheless, the
Court observed, “[t]he alternative—the prohibition of advertising—serves only to restrict the information that flows
to consumers.” \textit{id.} at 374.
regulate false, deceptive or misleading advertisements. Consistent with that ruling, ABA Model Rule 7.2 permits a lawyer to advertise services through written, recorded or electronic communications, “including public media.” Comment 2 to the Rule permits public dissemination of information concerning: “a lawyer’s name or firm name; address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements; a lawyer’s foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.” Various states, applying these general rules, have prepared more detailed guidelines for appropriate attorney advertising. A host of ethics opinions, moreover, have attempted to apply these guidelines to specific aspects of lawyering in cyberspace. The guidelines do not deal specifically with social networking as a means of advertisement. Nevertheless, certain essential principles appear in the guidelines and related opinions.

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80 Beyond “commercial speech,” lawyers also have rights to express their beliefs or participate in political discourse. Distinguishing between such forms of speech may be difficult, in the context of social networking. See Will Hornsby, Lawyers Shouldn’t Have To Guess On Ethics Of Online Marketing, 2008 WLNR 25703029 (Aug. 18, 2008) (noting that regulation in this area amounts to “uncharted territory”).

81 See Rule 7.2, Comment 3 (“electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule”).

82 See Differences Between State Advertising And Solicitation Rules And The ABA Model Rules Of Professional Conduct (August 1, 2009), www.abanet.org (surveying state rules); see also Five Tips For Lawyer Advertising: From Billboards To Blogs (2009), www.abanet.org (listing principal limitations in state advertising rules).


84 Comment 3 to Rule 7.2, however, recognizes that “electronic media, such as the Internet, can be an important source of information about legal services[.]”
Law firm websites may be labeled a form of advertising.\(^8^5\) In general, lawyers may use websites and blogs to advertise their services.\(^8^6\) They may also use profiles on social networking sites.\(^8^7\) Such communications over the internet may be subject to state regulations on advertising.\(^8^8\)

Some states require submission of all attorney advertisements to a state bar committee for approval.\(^8^9\) Yet, because social networking profiles and posts can be (and often are) updated daily, materials submitted may not reflect current content.\(^9^0\) At very least, lawyers should keep periodic records (such as hard copies of website “screen shots”) (in case state regulators ask to review their advertising.\(^9^1\))


\(^8^7\) Whitmer & Goldberg, *supra* (“the prudent approach is to conclude that the [advertising] rule applies to social network sites and blogs because much of the same information [as on web-sites] is often included on both. Indeed, it would appear imprudent to conclude otherwise.”)

\(^8^8\) Some commentators suggest that the advertising rules “presumptively” govern lawyer communications on blogs and social networking sites. *See Sarah Hale, Lawyers At The Keyboard: Is Blogging Advertising, And If So, How Should It Be Regulated?,* 20 Geo. J. Legal Ethics 669, 671 (2007) (Rule 7.2 was “intended to cover any new public-communication technology, including blogs”).

\(^8^9\) See Charles F. Luce, *Ethics In Attorney Advertising And Solicitation*, www.mgovg.com (1997) (noting variety of advertising regulations, and suggesting: “The conservative approach is for those lawyers licensed in more than one state to follow the advertising rules of the most restrictive state in which they are licensed.”)

\(^9^0\) See C.C. Holland, *Mind The Ethics Of Online Networking*, www.law.com (Nov. 6, 2007) (pre-approval of content may be “just about impossible” where social networking materials “can reflect daily or even real-time changes that are outside the user’s control”).

\(^9^1\) Arizona requires attorneys to retain copies of websites when they appeared in a retrievable format. Massachusetts requires attorneys to keep copies of the content of websites for two years. New York and Virginia require attorneys to keep a copy of the website for at least one year. North Carolina requires copies of the web pages
Lawyers must also take care regarding the types of information they post on websites and social networking sites. Testimonials about a lawyer’s accomplishments may be prohibited, absent an express disclaimer.92 Excessive testimonials from “friends,” moreover, could in some instances create unjustified expectations about the outcome a lawyer can obtain for other clients.93

**Solicitation**

Rule 7.3 provides that “a lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.”94 Under Rule 7.3, a lawyer may not solicit professional employment unless the person contacted is a lawyer, or has a familial, personal, or prior professional relationship with the lawyer.95 Further, a lawyer may not solicit employment from a prospective client by electronic communication if the prospective client has made known to the lawyer a desire not to be solicited by the lawyer or the solicitation involves coercion, duress or harassment.96 Comment 1 to the Rule notes the “potential for abuse” in such solicitations.97
The question becomes whether social networking communications constitute “real-time electronic contacts” or merely “general advertising,” which is not prohibited as solicitation. At one end of the spectrum, passive web-sites and non-interactive blogs (although perhaps advertising) generally do not constitute prohibited solicitation. At the other end, “chat room” communications, wherein lawyers may importune potential clients to hire them, just as they might through a telephone call or in person, generally are considered to be solicitations. Although a chat room discussion “provides less opportunity for an attorney to pressure or coerce a potential client” than telephone or in-person solicitations, “real-time communication is

(continued…)

alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.”). In-person solicitations, moreover, are more difficult to record, in order to ensure that the communications made were not false or misleading. See Christopher Hurld, Untangling The Wicked Web: The Marketing Of Legal Services On The Internet, And The Model Rules, 17 Geo. J. Legal Ethics 827, 841 (2004).

98 See Rule 7.3, Comment 3 (“The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person or other real-time communications, will help to ensure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of direct in-person or other real-time communication between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.”).


potentially more immediate, more intrusive and more persuasive than e-mail or other forms of writing."101

The degree of “interactivity and immediacy” of social networking tools can vary greatly. 102 A lawyer who posts a profile on a social networking site, for example, identifying the individual as a lawyer, probably does not invoke the interactivity and immediacy of a solicitation (although such a posting may be considered an advertisement).103 The Twitter system (and its many clones), by contrast, essentially amounts to broadcast emails, to recipients who agree to “follow” a particular Twitter broadcaster.104 The choice to follow a particular “friend” is the user’s alone, although often threads of conversations with other “friends of friends” can produce new connections. The messages, moreover, are extremely short, and do not typically invite an immediate response.105

Other forms of social networking are designed to deepen relationships with family, friends and acquaintances, through shared interactions.106 A profile (or “wall”) on a social networking web-site, for example, typically offers participants the opportunity to post photographs and comments surrounding a shared interest. Users may connect to specific groups,

102 See ABA Center for Professional Responsibility, Model Rule 7.3, Reporter’s Explanation Of Changes, www.abanet.org/cpr (“interactivity and immediacy of response in real-time electronic communications presents the same dangers as those involved in live telephone contact”).
104 See Bennett, re: Legal Implications Of Twitter, supra.
105 See Educause, 7 Things You Should Know About Twitter, www.net.educause.edu (July 2007) (“The experience of using Twitter has been described as walking into a room of conversations and looking for a ‘hook’ to decide if and when to jump in.”).
106 See Dan Drath et al., Never-Ending Friending at 17 (Apr. 2007), available at www.creative.myspace.com (“most social networking users rely on the medium to deepen their existing relationships, whether with their favorite bands, brands, or people”).
already formed within the social network, and generally interact freely after admission to the group.\textsuperscript{107} The immediacy of the interactions, however, depends on the individual users.\textsuperscript{108}

The degree to which users may already have “personal” relationships (within the meaning of Rule 7.3), moreover, may vary greatly. A “friend of a friend,” or a stranger encountered in a networking user group probably could not qualify as a “personal” relationship, sufficient to permit a solicitation. But many other social networking users connect precisely because they already have long-standing relationships. With such relationships, solicitation (or referrals) may be entirely appropriate (and appreciated).\textsuperscript{109} Thus, no flat prohibition or approval of any particular type of social networking solicitation may be possible.\textsuperscript{110}

Rule 7.3 requires that any electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services shall include the words “Advertising Material” at the beginning and ending of any electronic communication,

\textsuperscript{107} See Alison Kitchens, Learn About The Basics Of Social Networking, \texttt{www.themountaineer.com} (July 26, 2009) (social networking wall “is similar to a bulletin board where users can type a message on a friend’s wall that anyone who looks at his or her page can read”); Monica S. Flores, 20 Tips For Social Networking, \texttt{www.womensmedia.com} (Apr. 3, 2009) (a “group” on a social networking site is “just like a group in real life—a gathering of people interested in a particular idea, issue, or cause;” there are “thousands of different groups that have been set up for different interests”).


\textsuperscript{109} See Martin A. Cole, Friends And Family, Bench & Bar of Minn. (Feb. 2007), \texttt{www.mncourts.gov} (“Individuals who have such a relationship with the lawyer may well turn to the attorney naturally to handle their legal affairs. Thus, the need for time to reflect or seek independent advice does not seem as essential in this situation.”).

\textsuperscript{110} Broadcasting of “spam” solicitations to multiple users may produce disciplinary sanctions, no matter the lack of immediacy and interactivity of the medium. See Tennessee Bar Association, \textit{Actions From The Board Of Professional Responsibility}, 33 Tenn. B.J. (July/Aug. 1997), \texttt{www.tba.org/journal} (lawyer disbarred, among other things, for placing advertisement that appeared on more than 5,000 internet news groups and 10,000 e-mail lists; hearing panel held that posting was improper intrusion into the recipients' privacy); Utah State Bar Ethics Advisory Op. 02-02, \texttt{www.utahbar.org} (emails that encourage recipient to engage firm’s services and extol firm’s expertise are “solicitations” for purposes of ethics rules); see generally Matthew T. Rollins, \textit{Examination Of The Model Rules Of Professional Conduct Pertaining To The Marketing Of Legal Services In Cyberspace}, 22 John Marshall J. of Computer & Info. Law 1 (2003) (discussing application of spam rules to lawyer advertising).
unless the recipient of the communication has already contacted the lawyer or has a prior relationship with the lawyer. Solicitations on websites, blogs and social networking sites, if made, must be clearly marked in accordance with this requirement.

**Honesty In Communications**

Rule 7.1 prohibits lawyers from making “a false or misleading communication about the lawyer or the lawyer’s services.” Under the Rule, 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.” A lawyer’s web-site, blog or social networking profile necessarily concerns the lawyer (and his/her services), and such information platforms must be true and not misleading. A law firm cannot, for example, imply (by use of the word “bar” in its domain name) that it is associated with a bar organization; nor may it use “org” as a top level suffix, which might imply that it is a not-for-profit organization.

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111 Rule 7.3(c).
112 For a list of state requirements, see www.abanet.org/tech/ltc/research/ethics/adsstates.
113 Tune & Marley, *supra* (noting that private, personal communications need not meet standards of the Rule).
114 See Arizona Bar Op. 01-05, www.myazbar.org/ethics; see also Ohio Board of Commissioners on Grievances and Discipline, Ethics Op. 99-4 (June 4, 1999); www.sconet.state.ohio.us/BOC (“preferable” for law firm to use its name as domain name on web-site, but other names may be used, so long as not deceptive); N.C. State Bar, 2005 Formal Ethics Op. 14, www.ncbar.com/ethics (domain name need not specifically identify law firm, so long as name is not otherwise misleading); Assoc. of the Bar of the City of New York, Formal Op. 2003-01, www.abcny.org/ethics (domain name may not imply expected results, such as “bigverdict.com” or include “puffery,” such as “personalinjuryexpert.com”).
Professional qualifications listed on social networking sites should correspond to official records and descriptions on firm websites.\textsuperscript{115} Lawyers not yet admitted to a state bar should so note in their user profiles and other materials on social networking sites.

Rule 8.4, more generally, prohibits lawyers from engaging in any conduct that involves “any dishonesty, fraud, deceit or misrepresentation.” Applying that Rule, a Philadelphia bar ethics committee held that a lawyer could not use a third party to “friend” an adverse witness, in an attempt to find possibly impeaching evidence concerning the witness, on a social networking site.\textsuperscript{116} The committee concluded that such communication was “deceptive,” because it omitted the material fact of connection between the third party and the lawyer, and the intent to gain information for purposes of litigation.\textsuperscript{117}

Finally, under Rule 3.6(a), trial lawyers cannot make extrajudicial statements that will be “disseminated by means of public communication,” where such communications may have a “substantial likelihood of materially prejudicing” a legal proceeding. Attorneys who blog about ongoing litigation might, therefore, be subject to professional discipline.\textsuperscript{118}

\textsuperscript{115} A lawyer may also list areas of specialty. Rule 7.4(a) allows a lawyer to “communicate the fact that the lawyer does or does not practice in particular fields of law.”


\textsuperscript{117} Some commentators, however, suggest that such “deception” may be justified, in circumstances where essential evidence otherwise would not become available. See Monroe H. Freedman, \textit{In Praise of Overzealous Representation - Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct}, 34 Hofstra L. Rev. 771, 780-781 (2006); see also Elizabeth Stull, \textit{Ethics Evolving With Technology}, 2009 WLNR 9278552 (May 14, 2009) (noting that some ethics opinions permit “dissemblance” when there is an “overarching public issue” being pursued, such as housing discrimination).

Conclusion

- In 2003, the American Bar Association’s Law Practice Management “eLawyering Task Force” created a set of “Best Practice Guidelines For Legal Information Web Site Providers.” The Guidelines, among other things, suggested that web sites should:

  - [P]rovide full and accurate information on the identity and contact details of the provider of the site;”

  - [I]nclude information about the dates on which the substantive content on [the site] was prepared or last reviewed;”

  - “[A]void misleading users about the jurisdiction to which the site’s content relates;” and “[G]ive users conspicuous notice that legal information does not constitute legal advice.”

Today, just a few years later, these general ABA Guidelines remain apt. But the addition of social networking tools to the array of communications methods that lawyers use every day has already made these Guidelines incomplete. With these new networking tools, the practice of law is changing, and rapidly. Social networking requires concerted thinking about adaptation of legal ethics rules to a dynamic world, where interactions between attorneys, clients and communities of social network users can become quite complicated. In this dynamic environment, the best approach for the responsible lawyer is to become educated on new

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119 www.abanet.org/elawyering/tool/practices.

technologies and new methods of practice, to remain alert to potential ethical issues involved in the use of these technologies and methods of practice, and to encourage candid discussion, among lawyers, clients, IT specialists and law firm managers about the best means both to serve client interests, and to uphold the high standards of the profession.\footnote{This Article has not addressed the separate technical and legal questions that may surround privacy, data security, virus protection and other concerns associated with electronic communications used in the practice of law. See generally Justin Rebello, \textit{Protecting Your Law Firm’s Online Data}, Wisconsin L.J., Aug. 24, 2009, available at \url{www.wislawjournal.com}; Faith M. Heikkila, \textit{Data Privacy In The Law Firm}, 0Mich. B.J. 33, July 2009, available at \url{www.michbar.org}. These kinds of concerns certainly should be accounted for in a law firm’s policies and procedures. Further, certain common sense aspects of social networking, such as the avoidance of defamatory communications, may be vital elements in training lawyers and staff. See, e.g., Adrianos Facchetti, \textit{Ten Ways To Avoid Being Sued On Twitter}, \url{www.twitip.com} (Aug. 21, 2009) (advising, among other things, to “lay off the booze” when communicating on social networks). Finally, social networking information may be discoverable, in the event of litigation. \textit{See Ledbetter v. Walmart Corp.}, 2009 WL 1067018 (D. Colo. Apr. 21, 2009) (ordering production of web-site information in response to subpoenas).}
Social Media Policy

Frankfurt Kurnit Klein & Selz (FKKS) supports the use of social media as a marketing and business development tool. However, social media activities may in some cases reflect adversely on our brand, create embarrassment, breach confidentiality, or otherwise violate existing law firm policies or rules of professional conduct (RPCs). Accordingly, when using social media such as LinkedIn, Facebook, Plaxo, or Twitter, we ask that you please observe the following firm policy:

1. **General rule.** In general, all FKKS policies that govern your “real world” or “offline” activities also apply to your social media and other online activities. Content you post, or content otherwise associated with you, should be truthful and accurate, consistent with your ethical obligations as an attorney, and consistent with your obligations as an employee or shareholder at FKKS. *You must always assume that your social media communications may be forwarded and seen by unexpected or unintended audiences; and that they may be impossible to retrieve or delete.*

2. **Describe yourself.** Draft and upload an appropriate profile to your preferred social media site or sites. *Ensure that your profile is accurate, that it is consistent with your current FKKS profile, and that it does not contain embarrassing typos. Consider including a professional photograph.* If you want to use content about your background in addition to what is on the FKKS web-site, please send the content, with an explanation as to why you want to include it, to Marc Handelman with a copy to Ron Minkoff or Lisa Davis.

3. **Make connections.** Social media marketing is about developing and extending your network of clients, prospects, and business referral sources. As with your offline marketing activities, there are many ways to “connect” online. For example, consider searching for your top clients and prospects. If a top client or prospect participates in a social media site, it may be a good idea for you to connect and participate too. Search for and consider linking to selected law school and college classmates, and groups that focus on areas of interest to you. *Be careful, however, that your activities on social media sites do not cross the line into overt solicitation of business, particularly from non-lawyer contacts.* Such activities could constitute “solicitation” within the meaning of NY RPC 7.3, and trigger a series of record-keeping obligations under that rule.

4. **Be professional and civil.** *Posting demeaning, disparaging, insulting, profane, discriminatory, or false comments about FKKS lawyers, FKKS staff, opposing counsel, clients, judges and competitor firms can create public embarrassment and legal liability for you and the firm, and is prohibited.* If you’re involved in a discussion on a social media site and another participant becomes hostile and
confrontational, please remove yourself from the discussion. Remember that clients, colleagues, prospective FKKS employees, vendors, competitors, and others may be reading your posts.

5. **Be Truthful.** Don’t say things to judges or adversaries that can be disproved by reviewing your Twitter entries or your social media websites. This may not only be embarrassing for you, but it can harm your client’s position and irrevocably damage your credibility.

6. **Don’t infringe IP or violate other laws.** In general, observe all laws that govern online communications, including laws prohibiting “spam.” Don’t infringe other people’s trademarks, copyrights, privacy/publicity rights, and other intellectual property rights. Post content on a social network only if you own all rights to that content or you have secured all necessary permissions. When selecting an online username, avoid using an infringing name, logo, or trademark.

7. **Label personal opinions.** If you are posting your personal opinion on a business, social, or political matter, please state that the communication is your opinion and does not represent an official statement by FKKS.

8. **Avoid business conflicts.** Please exercise discretion when opining about court decisions, regulatory changes, or other developments that affect our clients’ businesses, or that may be inconsistent with positions that the firm has taken on behalf of its clients.

9. **Protect confidential information.** Please protect client and law firm confidential information from disclosure. Remember that names of current, former, and prospective clients constitute confidential information that may be disclosed only with written approval of the client. Do not post contact information or other personally identifiable information, and do not post sensitive information about the firm, such as information about firm finances.

10. **Observe proper new client intake procedures.** Please establish attorney-client relationships only after following our client intake and conflict procedures.

11. **Answer questions.** From time to time you may encounter a question (e.g., in LinkedIn’s Q&A area) that you are qualified to answer. Answering questions is a good way to establish your credibility and develop business, and the firm encourages you to do so in appropriate cases. While you may answer questions posed in the abstract, subject to the disclaimer below, responding specific questions about or from prospective clients creates a risk that an attorney-client relationship will be created, which in turn raises concerns about conflicts of interest and potential malpractice liability. **Be sure to follow our standard new client intake and conflict procedures before providing this type of legal advice.** When your response to a question may contain legal advice, please ask the questioner to use a private email or other private means to communicate with you;
do not post legal advice publicly. If you must post publicly an answer that may contain legal advice, please include the following disclaimer:

“This response does not purport to be legal advice or to create an attorney-client relationship between me or my firm and the recipient. I am admitted to practice law only in FILL IN STATES.”

12. **Responding to requests for proposals (RFP).** From time to time you may encounter an RFP to which you would like to respond. The firm encourages you to respond to appropriate RFPs. Nevertheless, as noted above regarding other types of efforts to obtain business on social media, responding to RFPs might constitute a solicitation within the meaning of NY RPC 7.3. RPC 7.3 places certain restrictions on solicitations “directed to … a specific recipient or group of recipients … the primary purpose for which is retention of the lawyer … and a significant motive for which is pecuniary gain.” There are exceptions to RPC 7.3: communications to close friends, relatives, and former and current clients are exempt, as are proposals “delivered in response to a specific request of a prospective client.” Contact Ron Minkoff, Lisa Davis, or Marc Handelman before soliciting business from social media contacts.

13. **Multijurisdictional Practice (MJP).** Responding to questions on social media sites may result in your providing legal advice to persons or entities in jurisdictions where you are not admitted to practice, and may be misconstrued as providing specific responses under the laws of those jurisdictions. This is another reason why you must use the disclaimer set forth above when answering questions on social media sites.

14. **Attorney advertising.** In certain cases, especially when dealing with a non-lawyer prospective client, a social media communication may constitute an attorney “advertisement” under RPC 7.1. Attorney advertisements must be labeled (“attorney advertising”) and comply with other requirements of this rule. The RPCs (Rule 1.0) define attorney advertising as “any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.” If you’re not sure whether your social media communication constitutes an attorney advertisement, please contact Ron Minkoff, Lisa Davis, or Marc Handelman.

15. **Endorsements or testimonials.** Some social media sites (e.g., LinkedIn) provide features enabling people in your network to formally “recommend” or otherwise endorse you. While asking a client to write you a recommendation is acceptable, and may serve your business development goals, RPC 7.1(c): 1) prohibits endorsements or testimonials from a client regarding a matter that is still pending; 2) requires that paid endorsements or testimonials be disclosed; and 3) requires that the testimonial or endorsement be accompanied by the disclaimer “Prior
results do not guarantee a similar outcome.” If you’re not sure how RPC 7.1 applies to your situation, contact Ron Minkoff, Richard Maltz, or Marc Handelman.
Social Media and the Vanishing Points of Ethical and Constitutional Boundaries

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Social Media and the Vanishing Points of Ethical and Constitutional Boundaries

Ken Strutin*

Abstract

Social media are extraordinary communication and preservation tools brimming with fonts of incriminating, exculpating, and impeaching evidence. Legal professionals have already added online profiles, instant messaging, and videos to the list of information sources about their clients, their opponents, and their potential witnesses. Still, the bulk of legal authority and ethical guidance is rooted in precedent based on antecedent technologies, which has little resemblance to the emerging social centers of cyberspace. No guidelines for criminal defense discovery or investigation within networked social spaces can be found in existing statutes and ethics codes. One ethics committee has taken the lead on this issue in an opinion curtailing the limits of surreptitious witness investigation through Facebook. Defense counsel’s duty to zealously and effectively represent their clients, the practical desire to avoid being sued for malpractice, and the promotion of the fair administration of justice all require a clear demarcation of the ethical and constitutional boundaries for accessing and using data from social networking sites. This Article will examine the dual nature of social media as a communication conduit and information warehouse, the meaning of privacy in this environment, and the ethical and legal dilemmas inherent in prosecuting and defending cases with this new breed of evidence.

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Introduction

Our brick and mortar world is receding into a virtual landscape. There is an online realm where hundreds of millions of people are conversing, networking, and logging the details of their lives. This new mode of human interaction does not fit neatly into any discovery statutes, case law precedents, or ethics codes. Indeed, the administration of justice is struggling to adapt to this emergent reality with little guidance. The social networking era, marked by the creation of instant communities and depots of personal information, is pushing legal practice towards the vanishing points for ethical and constitutional boundaries.

The virtual socialscape exists at right angles to the physical world, and so our perceptions must bend accordingly. In the first decade of this new century, people became accustomed to recording increasingly larger amounts of data about their lives and activities. Five hundred million Facebook users can't be wrong.\(^1\) The creation and development of social media seems to satisfy a very deep biological need.\(^2\)

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1. Willie Raskin, Billy Rose, & Fred Fisher, Fifty Million Frenchmen (1927); See Scott Duke Harris, Facebook Milestone: 500 Million Members; on to 1 Billion?, SAN JOSE MERCURY NEWS, July 21, 2010, available at http://www.mercurynews.com/ci_15568209?ncli ck_check=1 ("If Facebook gallops ahead at its current pace, the 1 billion mark would indeed be reached in 2011. The online social network Mark Zuckerberg and a few Harvard classmates founded in 2004 went from zero to 250 million users in five years—and doubled that number over the past 12 months despite controversy regarding its privacy protocols."). Cecilia Kang, Facebook to Hit 500 Million Users, But Meteoric Rise Has Come With Growing Pains, WASH. POST BLOG (July 19, 2010, 5:00 PM), http://voices.washingtonpost.com/posttech/2010/07/facebook_hits_500_million _user.html ("The Silicon Valley Web site is now the biggest online trust of our vacation photos, electronic rolodexes, and recordings of how we felt about President Obama’s candidacy for president, the ban on headscarves in France and the Lindsay Lohan’s rollercoaster ride with sobriety. Seventy percent of users are outside the U.S., and one-quarter of all users are checking in and updating their pages from their cell phones.").

2. The explosive growth of social media is due to advances in technology, but its driving force might have originated in the depths of the mirror neuron response, i.e., the need to imitate. See Sandra Blakeslee, Cells that Read Minds, N.Y. TIMES, Jan. 10, 2006 (“The human brain has multiple mirror neuron systems that specialize in carrying out and understanding not just
important indicator of this subtle migration has been the growth of personal computer hard drives from megabytes to terabytes.\(^3\) The amount of information people collect about their own lives, combined with the data scattered through countless government and commercial databases, are filling citizen libraries.\(^4\) And the volume of information being

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3. See Michael Kanellos, \textit{Here Comes the Terabyte Hard Drive}, CNET News (Jan. 4, 2007), http://news.cnet.com/2100-1041_3-6147409.html (“A terabyte is a trillion bytes, or a million megabytes, or 1,000 gigabytes, as measured by the hard-drive industry. (There are actually two conventions for calculating megabytes, but this is how the drive industry counts it.) As a reference, the print collection in the Library of Congress comes to about 10 terabytes of information, according to the \textit{How Much Information} study from U.C. Berkeley. The report also found that 400,000 terabytes of e-mail get produced per year. About 50,000 trees would be necessary to create enough paper to hold a terabyte of information, according to the report. Who needs this sort of storage capacity? You will, eventually, said Doug Pickford, director of market and product strategy at Hitachi. Demand for data storage capacity at corporations continues to grow, and it shows no sign of abating. A single terabyte drive takes up less space than four 250GB drives, which lets IT managers conserve on computing room real estate. The drive can hold about 330,000 3MB photos or 250,000 MP3s, according to Hitachi's math.”).

4. No doubt “citizen libraries” chronicling the lives of ordinary people will soon rival the bulk of Presidential Libraries. \textit{Compare Peter Lyman & Hal R. Varian, How Much Information?} 2003, at 2 (2003), http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf (“According to the Population Reference Bureau, the world population is 6.3 billion, thus almost 800 MB of recorded information is produced per person each year. It would take about 30 feet of
consumed far outstrips the amount being stored.\textsuperscript{5}

Profiles, tweets, and YouTube videos are the equivalent of pyramid building, an effort by individuals to defeat time and overcome their mortality by preserving a colossal monument to their lives, albeit measured in gigabytes instead of cubits. The data from this life logging\textsuperscript{6} is creating a form of “micro-celebrity,”\textsuperscript{7} memorializing actions and thoughts for indeterminate time periods and creating buzz for forums where

\begin{itemize}
  \item[5.] See Roger E. Bohn & James E. Short, \textit{How Much Information? 2009 Report on American Consumers} 14 (2009), http://hmi.ucsd.edu/pdf/HMI_2009_ConsumerReport_Dec9_2009.pdf ("According to some estimates, the total amount of hard disk storage worldwide at the end of 2008 was roughly 200 exabytes. In other words, the 3.6 zettabytes of information used by Americans in their homes during 2008 was roughly 20 times more than what could be stored at one time on all the hard drives in the world.").
  \item[6.] See generally Gary Wolf, \textit{The Data-Driven Life}, N.Y. Times, Apr. 26, 2010 ("One of the reasons that self-tracking is spreading widely beyond the technical culture that gave birth to it is that we all have at least an inkling of what’s going on out there in the cloud. Our search history, friend networks and status updates allow us to be analyzed by machines in ways we can’t always anticipate or control. It’s natural that we would want to reclaim some of this power: to look outward to the cloud, as well as inward toward the psyche, in our quest to figure ourselves out."); \textit{Life-Logging and the Generation Gap over Privacy} (NPR Radio Feb. 14, 2007) ("Daily documentation has become routine as the tech-savvy [] connect with everyone, anyone, anytime. . . . Guests on the program talk[] about ‘life-logging,’ a system that documents every conversation, movement, and idea through a series of recording gadgets like GPS trackers and even brain scanners.").
  \item[7.] See Clive Thompson, \textit{Clive Thompson on the Age of Microcelebrity: Why Everyone’s a Little Brad Pitt}, Wired Mag., Nov. 27, 2007, available at http://www.wired.com/techbiz/people/magazine/15-12/st_thompson ("Microcelebrity is the phenomenon of being extremely well known not to millions but to a small group—a thousand people, or maybe only a few dozen. As [Do It Yourself] media reach ever deeper into our lives, it’s happening to more and more of us. Got a Facebook account? A whackload of pictures on Flickr? Odds are there are complete strangers who know about you—and maybe even talk about you.").
\end{itemize}
“microfans” know and debate the intimate details of strangers outside the pale of news media. Additionally, the virtual socialscape is more than information creation and storage; it encompasses communication and interaction. The administration of justice, the investigation of crimes, and the defense of the accused are being changed at the intersections with this virtual world.

This Article will examine the current state of social media, the cross-sections and currents that bring its users into the legal realm, and the existing laws and ethical rules that are guiding attorney conduct. Law and technology tend to develop along parallel lines. The principles and foundations of the legal system are over-layered by changes in society and electronic information sharing. It appears that social media and Internet behavior are leading the drive towards change. Although there are no bodies of statutes and precedent to offer leadership in this area, the necessity of legal processes has already begun to bring some order to the untamed continent inhabited by Facebook, MySpace, YouTube, and Twitter.

In Part I, the panorama of online communities, which have inspired hundreds of millions to create profiles and publish the

8. The will to communicate, the need to express the details of our lives so that others can consume them, extends back to the dawn of consciousness. See Prakash Chakravarthi, The History of Communications from Cave Drawings to Mail Messages, IEES AES MAG., Apr. 1992, at 30 (“Crude drawings on rock and cave walls are the earliest methods of communication which we know. Though it was cumbersome and slow it helped to convey ideas and past events to other people.”).

9. See generally Danah M. Boyd & Nicole B. Ellison, Social Network Sites: Definition, History, and Scholarship, J. COMPUTER-MEDIATED COMM. (Oct. 2007), http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html (“The rise of SNSs indicates a shift in the organization of online communities. While websites dedicated to communities of interest still exist and prosper, SNSs are primarily organized around people, not interests. Early public online communities such as Usenet and public discussion forums were structured by topics or according to topical hierarchies, but social network sites are structured as personal (or ‘egocentric’) networks, with the individual at the center of their own community. This more accurately mirrors unmediated social structures, where ‘the world is composed of networks, not groups.’ The introduction of SNS features has introduced a new organizational framework for online communities, and with it, a vibrant new research context.”) (internal citation omitted).
unguarded moments of their personal existence for global audiences, will be explored. The definition of privacy and the meaning of access in online social centers will be examined in Part II. Part III will discuss the current methods of electronic discovery and their broadening applications to social media. Parts IV and V will analyze the importance of preserving social networking evidence both as an obligation for the prosecution and a necessity for the defense. Undercover investigation, pretexting online, and the ethical fallout of such practices in the socialscapes of Facebook and MySpace are reviewed in Part VI.

The parallel processes of traditional legal procedures and the line of technology that has revolutionized communication and information practices will be viewed through several notable legal developments. Facebook and MySpace have already come to play an incipient role in acquiring jurisdiction and initiating litigation in civil and criminal proceedings. These sites have provided law enforcement with information for arrest and search warrants, and laid the foundation for indictments, and in some cases convictions. On the civil side, courts have approved service of process through a defendant’s online profile. In both arenas, the contents of online profiles and instant messages have played an important role as evidence at trial. But this is only the beginning. These media will eventually become a routine part of serving warrants and complaints, boilerplate discovery requests, evidence in all manner of proceedings, and ultimately, newly discovered evidence for post-conviction motions. For the criminal defendant, social media content might prove to be the DNA of newly discovered exonerating evidence.

I. Social Media, Social Networking, and Every Tweet in Between!

Social Networking provides a different avenue for familiar patterns of human behavior and public concern. For instance, “flash mobs,” which are groups of young people connected by instant messaging alerts or e-vites, join in spontaneous activities. Since these “flash mobs” have led to some public
disturbances, they are now the object of law enforcement surveillance.10 People in prison or on the run are also using Facebook and similar outlets.11 The professional conduct of attorneys, prosecutors,12 judges,13 as well as the behavior of clients,14 witnesses, and jurors15 have all been touched by social media.

Depending on the perspective, social networking can complicate legal practice and due process in different ways. Criminal defense counsel have a constitutional obligation to effectively represent their clients and fully investigate their cases. Both civil and criminal practitioners face legal liability and ethical imperatives in handling the representation of a client.

The measure of professional competence in a society that interacts virtually necessitates asking questions such as: what Social Networking Sites (SNS) are people using to communicate and store information and how are they being utilized?16 Will the information found on Social Networking

16. See, e.g., Michael Liedtke, Twitter Quitters Outnumber Tweeters, ASSOCIATED PRESS, May 5, 2009 (60% stopped using Twitter after a month);
Sites be admissible? Are there any privacy protections or barriers for materials stored on third-party sites? Since almost everyone else is already using them—for example clients, witnesses, and jurors—digital contents are coming in as evidence of guilt, impeachment, and innocence. Therefore, knowledge and understanding of technology will help in investigation, discovery, and jury pool and venue challenges. A lawyer’s professional responsibility ought to include staying abreast of this changing virtual environment.

Defense counsel need to have the same level of knowledge about social networking that is required to intelligently handle forensic evidence, i.e., some basic understanding of the principles and mechanics of its operation. The more detailed


17. See, e.g., Law School Hosts Panel on ‘Social Media as Evidence’; UC Davis SCH. L. (Feb. 5, 2010), http://www.law.ucdavis.edu/news/news.aspx?id=2525 (“Now, thanks to Twitter, Facebook, text messaging and social media, a permanent record of the exact words exchanged often exists. This material can be introduced in court, complete with a time stamp showing when it happened.”).

18. See, e.g., Pete Cashmore, Why Facebook’s Privacy War Is Not Over, CNN.COM (May 27, 2010, 4:16 PM), http://www.cnn.com/2010/TECH/social.media/05/27/facebook.privacy.war.cashmore/index.html (“If Facebook’s mission is to build a ‘more open and connected world’ in which users ‘share more,’ doesn’t this contradict the desire of some users to keep their information private?”).

19. Cf. The TJ Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (“Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.”); Smith v. Lewis, 530 P.2d 589, 593 (Cal. 1975) (An attorney’s competence best measured by “such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.”).

and nuanced issues will fall within the purview of expert or investigative assistance. For example, computer forensics can uncover evidence found in digital storage media, sociologists can explain online behavior, and linguists can interpret the codes and subtly of chat and profile postings.

The social media phenomenon is part of Web 2.0, i.e., the shifting of content from top-down publishing to user- and consumer-generated information; in other words, people powered publishing. Social networking is a fast growing segment of this media. In essence, SNSs are “web-based


22. See Ken Strutin, Internet Behavior and Expert Evidence, N.Y. L.J., Nov. 4, 2008, at 5 (“Web-based criminal cases bring judges and jurors into contact with an enigmatic Internet culture. A clear understanding of cyberbehavior is crucial to assessing probable cause in a search warrant affidavit or the merits of a defense at trial. And misconceptions about Internet conduct, in some instances, may be explained or dispelled by expert evidence.”); see, e.g., Debra Cassens Weiss, Twitter Expert Will Testify Against Courtney Love in Defamation Trial, A.B.A. J. (Jan. 5, 2011, 7:31 AM), http://www.abajournal.com/news/article/twitter_expert_will_testify_against_courtney_love_in_defamation_trial/.

23. The need of members of a society to communicate, to extend their personal narratives into cyberspace and assume new personas online may have its origins in the beginnings of Western drama—when performances evolved from communal rituals involving everyone into plays performed exclusively by actors. According to one historian, more than 2,000 years ago, the seeds of modern drama started with the exploration of “new dimensions of experience” and the emergence of individual performers pretending to be other people, and finally, the separation of the audience from the performance where “one part of the community was addressing another part.” See Daniel J. Boorstin, The Creators: A History of Heroes of the Imagination 207, 209 (1993). This fundamental transformation giving rise to personal expression, or “microtheater,” is occurring anew online. See, e.g., John Carroll & David Cameron, Drama, Digital Pre-Text and Social Media, 14 RES. IN DRAMA EDUC. 295 (2009) (“The techniques used for the development of the digital pre-text for this project are based on facilitator-generated online social networking and mobile media content. This approach generates the students’ examination of mistaken identity as a platform for a classroom exploration of Shakespeare’s Twelfth Night.”)
services that allow 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 list of connections and those made by others
within the system.”24

The core ingredients of these sites are their individual user
profiles (information storage and publication) and
communication tools:

While SNSs have implemented a wide
variety of technical features, their backbone
consists of visible profiles that display an
articulated list of Friends who are also users of
the system. Profiles are unique pages where one
can ‘type oneself into being.’ After joining an
SNS, an individual is asked to fill out forms
containing a series of questions. The profile is
generated using the answers to these questions,
which typically include descriptors such as age,
location, interests, and an ‘about me’ section.
Most sites also encourage users to upload a
profile photo. Some sites allow users to enhance
their profiles by adding multimedia content or
modifying their profile’s look and feel. Others,
such as Facebook, allow users to add modules
(“Applications”) that enhance their profile.25

For purposes of the penal law, the value of a
communication/information source is measured by the need to
control access to it.26 Access to social media has been found to
be important enough to be blocked as a condition of
punishment. For example, Victor L, a juvenile delinquent and
acknowledged gang member, pled guilty to a weapons offense

24. See Boyd & Ellison, supra note 9.
25. Id. (citations omitted).
11, 2005, at 5 (discussing the limits of banning access to the Internet,
computers or even television as a condition of probation or post-release
supervision).
in a California court. He was sentenced to probation, which included interdicting access to MySpace. Specifically, the terms of his probation limiting Internet usage stated: “The Minor shall not access or participate in any Social Networking Site, including but not limited to Myspace.com.” In a post-conviction proceeding, he challenged the condition, as well as several others, as vague and overbroad. However, the purpose behind this particular restriction was to “limit Victor’s access to the Internet in ways designed to minimize the temptation to contact his gang friends or to otherwise use the computer for illegal purposes by requiring adult supervision whenever he goes online.” Therefore, the condition survived constitutional scrutiny, in contrast to other cases, with terms totally banning Internet use or access, which did not.

The case of Victor L spearheads the judicial recognition of SNSs as communication media which can be monitored. Other cases involving social media have focused on its impact as

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28. *Id.* at 909.
29. *Id.* at 923.
30. *Id.* at 926.
31. Courts seem to be split on the appropriateness of lifetime or conditional Internet bans as a term of probation or supervised release. *Compare* United States v. Heckman, 592 F.3d 400, 409 (3d Cir. 2010) (“We do not hold that limited Internet bans of shorter duration can never be imposed as conditions of supervised release for this type of conduct, but when placed within the context of related precedents, the unconditional, lifetime ban imposed by the District Court in this case is so broad and insufficiently tailored as to constitute ‘plain error.’ We thus hold that this ban involved a ‘greater deprivation of liberty than is reasonably necessary.’ 18 U.S.C. § 3583(d)(2).”) *with* United States v. Fortenberry, 350 F. App’x 906, 911 (5th Cir. 2009) (“Although we recognize the conditional ban on the internet usage for a lifetime is a harsh condition of supervised release, we cannot say that Fortenberry has demonstrated that imposition of the same was plainly erroneous.”). *See generally* Robin Miller, *Validity of Condition of Probation, Supervised Release, or Parole Restricting Computer Use or Internet Access*, 4 A.L.R.6TH 1 (2005); David Kravetz, *U.S. Courts Split on Internet Bans*, WIRED Mag. (Jan. 12, 2010), available at http://www.wired.com/threatlevel/2010/01/courts-split-on-internet-bans/ (“[A]ppellate courts are all over the map when it comes to internet bans often imposed on defendants, especially sex deviants, once they have served their time. What’s more, the courts appear to be accepting the internet as a basic freedom to which convicts, even the worst of the worst, usually should not be denied permanent access.”).
evidence at trial, including its utilization during the commission of a crime, creating a virtual crime scene, and enhancing criminal sentences.

II. The Illusion of Privacy

The tension in social networking investigations is in drawing the line between public and private information. While

32. See, e.g., Hoover Police Capture Two Suspected Facebook Bandits, MyFOXAL.COM (July 31, 2009, 2:15 PM), http://www.myfoxal.com/global/story.asp?i=10825881 (In Alabama, burglars checked Facebook pages to see who was on vacation to lineup their targets); Chris Matyszczyk, Facebook Break Leads to Burglary Suspect, CNET NEWS (Sept. 17, 2009, 4:27 PM), http://news.cnet.com/8301-17852_3-10356117-71.html (In Virginia, a burglar checked his Facebook page in the victim's home during the break-in); MySpace Pics Lead to Burglary Bust, ABC-7.COM (Aug. 3, 2009, 6:22 PM), http://www.abc-7.com/Global/story.asp?S=10840135 (Burglars in Florida posted pictures online in which they were posing with the stolen goods). Notably, Louisiana has enacted a law punishing the unlawful posting of criminal activity for notoriety and publicity. LA. REV. STAT. ANN. § 14:107.4(A) (“It shall be unlawful for a person who is either a principal or accessory to a crime to obtain an image of the commission of the crime using any camera, videotape, photo-optical, photo-electric, or any other image recording device and to transfer that image obtained during the commission of the crime by the use of a computer online service, Internet service, or any other means of electronic communication, including but not limited to a local bulletin board service, Internet chat room, electronic mail, or online messaging service for the purpose of gaining notoriety, publicity, or the attention of the public.”).


34. See, e.g., Eric Tucker, Social Networking Puts the Bite on Defendants, LAW.COM (July 22, 2008), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=120243145595 (DWI defendants involved in crashes that resulted in serious injuries or death were disappointed to learn that pictures of themselves mocking or flaunting their actions, posted on Facebook or MySpace, had been provided to the court at sentencing.).
the scope of privacy expectations are being debated and argued in the courts, the public side of the online world is being archived and retransmitted without limit. The privacy dilemma lies at the center of a triangle formed by the private enclaves envisioned in the First, Fourth, and Fifth Amendments; service providers’ terms of service agreements (TOS) and their definitions of privacy; and the meaning of “reasonableness” as expressed in the practices and habits of millions of online users.

The Wayback Machine, which harvests much of the public side of the Internet, is almost two petabytes of data in size and growing at a rate of twenty terabytes per month. The Library of Congress announced that it will be archiving all public tweets since Twitter started operation in March 2006. The impetus behind Congress’ effort was to gather legal blogs, websites of candidates for national office, and websites of Members of Congress and capture a snapshot of public life expressed through tweets to the tune of 167 terabytes. Presently, there are no legal or ethical constraints on public

35. About the Internet Archive, INTERNET ARCHIVE, http://www.archive.org/about/about.php (last visited Aug. 13, 2010) (“The Internet Archive is a 501(c)(3) non-profit that was founded to build an Internet library. Its purposes include offering permanent access for researchers, historians, scholars, people with disabilities, and the general public to historical collections that exist in digital format.”).

36. See Frequently Asked Questions, INTERNET ARCHIVE, http://www.archive.org/about/faqs.php (last visited Sept. 12, 2010) (“How large is the Wayback Machine? The Internet Archive Wayback Machine contains almost 2 petabytes of data and is currently growing at a rate of 20 terabytes per month. This eclipses the amount of text contained in the world’s largest libraries, including the Library of Congress.”).


38. See Oregon State Bar Legal Ethics Comm., Formal Op. 2005-164 (2005), http://www.osbar.org/_docs/ethics/2005-164.pdf (“Accessing an adversary’s public Web site is no different from reading a magazine article or purchasing a book written by that adversary. Because the risks that Oregon RPC 4.2 seeks to avoid are not implicated by such activities, no Oregon RPC 4.2 violation would arise from such electronic access. A lawyer who reads information posted for general public consumption simply is not communicating with the represented owner of the Web site.”).
web searching, which includes blogs or personal websites.

But how do privacy settings and terms of service affect the expectation of privacy in social media? The existence of privacy in social media is a key question under codes of ethics and discovery rules. If the expectation is that online profiles are as private as a person’s home, desk drawer, or combination safe, then pretexting by private parties becomes problematic.  

However, this protean media does not offer clarity in its definitions of privacy, and those definitions change with advances in technology and public outcry. Meanwhile, courts and ethics committees are relying on subjective expectations to define privacy in social space.


41. See, e.g., Jeffrey Rosen, The Web Means the End of Forgetting, N.Y. TIMES, July 25, 2010 (Magazine), at MM30, available at http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html (“All around the world, political leaders, scholars and citizens are searching for responses to the challenge of preserving control of our identities in a digital world that never forgets. Are the most promising solutions going to be technological? Legislative? Judicial? Ethical? A result of shifting social norms and cultural expectations? Or some mix of the above?”); Mark Zuckerberg, From Facebook, Answering Privacy Concerns With New Settings, WASH. POST, May 24, 2010, at A19, available at http://voices.washingtonpost.com/wpdyn/content/article/2010/05/23/AR2010052303828.html (“We have heard the feedback. There needs to be a simpler way to control your information. In the coming weeks, we will add privacy controls that are much simpler to use. We will also give you an easy way to turn off all third-party services.”); Cecilia Kang, Senate Online Privacy Hearing to Draw PTC, FCC Chairs, Google, Apple and Facebook, WASH. POST BLOG (July 23, 2010, 11:40 AM), http://voices.washingtonpost.com/posttech/2010/07/the_senate_commerce_committees.html (last visited Sept. 12, 2010) (“Analysts said greater focus from Congress on online privacy has led Web sites and online ad networks to move toward self-regulation to fend off legislation. This self-regulation is aimed at greater disclosure on Web sites that consumers are being tracked, and an easy mechanism for opting out.”).

42. See generally SOCIAL NETWORKING PRIVACY, http://epic.org/privacy/socialnet/ (last visited Sept. 12, 2010) (collection of
Social media are analogous to open mikes. However, the unguarded remarks of millions who publish their thoughts, criticisms, and gossip on personal profiles are made under an assumed veil of privacy. The public privacy of social networking has not yet been clearly assigned a specific level of First, Fourth, or Fifth Amendment protections,\(^\text{43}\) nor has it been given a place among the privileges in the Rules of Evidence.\(^\text{44}\) The security of information posted on third-party host sites is defined by those sites, their terms of agreements, their privacy settings, and most importantly the discretion of visitors who can read, copy, and republish without limit. When e-mail gaffes gained prominence, a rule of thumb emerged cautioning users not put anything into an e-mail that they would not want to see printed on the front page of the *New York Times*.\(^\text{45}\) No such

\(^{43}\) See Susan W. Brenner, *The Privacy Privilege: Law Enforcement, Technology and the Constitution*, 7 U. FLA. J. TECH. L. & POL'Y 123, 191-92 (2002), available at http://grove.ufl.edu/~techlaw/vol7/issue2/brenner.pdf (“The First Amendment protects the privacy of the identity and associates of an individual; the Fourth Amendment protects the privacy of the activities of an individual; and the Fifth Amendment protects the privacy of the thoughts of an individual. The degree to which they protect these different privacy interests has evolved significantly since Justices Brandeis and Warren wrote in 1890. This evolution is directly attributable to the increased sophistication and proliferation of technology. This evolution is also responsible for the shift from the *Olmstead* holding to the *Katz* holding. When the decision was made by [the] *Olmstead* Court, wiretaps were in their infancy and were therefore an exceedingly uncommon event. By the time the decision was made by the *Katz* Court, surveillance technology had become very sophisticated, due in large part to advances made during World War II, and the ability of the government to spy on the activities of people had become a matter of public concern. In changing the focus of the privacy protections of the Fourth Amendment from places to people, the *Katz* Court sought to create a more dynamic standard, one that could be used to address the increasing invasiveness made possible by technology.”).

\(^{44}\) Id. at 137 (“By the time the Twenty-First Century dawned, cyberspace had become an important new venue for mankind’s activities, licit and illicit. The rise and proliferation of cybercrime raised new problems for law enforcement, both with the enforcement of existing substantive laws against conduct vectored through cyberspace and also in the gathering of evidence without violating the existing privacy standards.”).

\(^{45}\) See *E-Mail Etiquette*, JOB-HUNT.ORG, http://www.job-hunt.org/onlinejobsearchguide/article_e-mail_etiquette.shtml (last visited Sept. 20, 2010) (“Golden rule of e-mail - Don’t put anything in an e-mail that
common wisdom has arisen to chasten people from putting up pictures and videos showing questionable judgment or criminal behavior. In George Orwell’s *1984*, it was Big Brother that carried the burden and expense of mass surveillance, but in Web 2.0 surveillance starts from the ground up. The divide between consumer privacy expectations in social networking and the legal recognition of these interests might be informed by the ongoing challenges to e-mail privacy.

Electronic mail is not the equivalent of traditional mail or even a landline phone call. One author has likened e-mails to a postcard and pointed out that the privacy expectations in this format are declining. In his review of recent New York decisions, he suggested that the perception of e-mail privacy hinged on the degree of protections that the sender was willing to take:

Courts ask, for instance, does a sender leave his or her e-mail account “open” on a computer for others to see or access? Courts also look to whether the e-mail is sent or received via a corporate system or through a personal account; whether the computer used for such communication is owned by an employer or an individual; and whether, when the communication was transmitted, the computer at issue was located in a company’s office or at a home.

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47. See Mark A. Berman, *Expectations of Privacy in E-Mail Communications*, N.Y. L.J., July 6, 2010 (“E-mails should more properly be viewed as a ‘postcard’ or a conversation over a speakerphone, both open and available to a passerby to hear or see, than like a private ‘confidential,’ ‘sealed’ letter.”).

48. *Id.*
In addition to personal user habits, other factors include the existence of passwords, encryption, or security measures taken by the employer or individual. The prevalence of shared access to accounts by couples, employees, or in other situations where consent to use the e-mail or a waiver of permission to view exists is an increasingly significant detail.49

E-mail, like social media, is hosted or transits through a third party’s site. The expectation of privacy under the Fourth Amendment when e-mail contents are gleaned from an Internet Service Provider is being hotly debated. In Warshak v. United States,50 the government was investigating Steven Warshak for wire fraud and money laundering. They obtained two ex parte orders under the Stored Communications Act (18 U.S.C. § 2703) (“SCA”) to search plaintiff e-mails, including those stored on the Yahoo service. After nearly a year, the government notified Warshak about the orders. As a result, Warshak sought an injunction barring the government from any more ex parte e-mail searches or for using those e-mails for any purpose without a search warrant. The District Court for the Southern District of Ohio granted Warshak’s motion for a preliminary injunction in part, stating:

The United States is accordingly [enjoined], pending final judgment on the merits of Plaintiffs’ claims, from seizing, pursuant to court order under 18 U.S.C. § 2703(d), the contents of any personal e-mail account maintained by an Internet Service Provider in the name of any resident of the Southern District of Ohio without providing the relevant account holder or subscriber prior notice and an opportunity to be heard on any complaint, motion, or other

49. See, e.g., Boudakian v. Boudakian, 240 N.Y. L.J. 123 (Sup. Ct. Dec. 2, 2008) (finding the defendant did not have expectation of privacy in e-mail account accessible through family computer).
pleading seeking issuance of such an order.51

In granting relief, the judge made an important observation about the nature of privacy in electronically communicated media:

While the Court is prepared to reconsider its views upon the presentation of further evidence on these points, it is not persuaded—as an initial matter—that an individual surrenders his reasonable expectation of privacy in his personal e-mails once he allows those e-mails (or electronic copies thereof) to be stored on a subscriber account maintained on the server of a commercial ISP. As such, the Court finds that Warshak has shown a substantial likelihood of success on the merits of his Fourth Amendment claim.52

However, on appeal, the Sixth Circuit did not believe that the constitutionality of the SCA’s delayed notification provision53 and the question of whether e-mail passing through the hands of third party hosts engendered a reasonable expectation of privacy were ripe for resolution and vacated the injunction:

51. Id. at *33.
52. Id. at *19 (footnotes omitted).
53. 18 U.S.C. § 2703(a) (2006) ("A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.").
Our reluctance to hypothesize how the government might conduct a conjectural search of Warshak’s e-mails, then resolve the constitutionality of that search as well as any others the government might conduct under the statute, is reinforced by another reality: The Stored Communications Act has been in existence since 1986 and to our knowledge has not been the subject of any successful Fourth Amendment challenges, in any context, whether to § 2703(d) or to any other provision. If it “is often true” that reviewing “legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function,” the same is assuredly true when we have no precedent to guide us. Discretion, indeed, is the better part of valor.54

While e-mail is akin to a phone call or private correspondence, social networking has an entirely different set of rules. Privacy in social media seems to be a fluctuating concept depending on the circumstances.55 The presence of that information on a third-party site, a form of personal cloud computing,56 is an important factor. Social media is different

54. Warshak v. United States, 532 F.3d 521, 531 (6th Cir. 2008) (internal citations omitted).
55. See, e.g., Yath v. Fairview Clinics, N. P., 767 N.W.2d 34, 44-45 (Minn. Ct. App. 2009) (“The MySpace.com webpage that triggers Yath’s claim [invasion of privacy--publication of private facts] was such a site. Access to it was not protected, as some web pages are, by a password or some other restrictive safeguard. It was a window that Yath’s enemies propped open for at least 24 hours allowing any internet-connected voyeur access to private details of her life. The claim therefore survives the ‘publicity’ challenge.”) However, “[b]ecause Yath failed to produce any evidence on an essential element of her claim—specifically, that any of the defendants surviving on appeal were involved in creating or sustaining the disparaging MySpace.com webpage—her invasion-of-privacy claim fails.”).
from traditional mail, electronic mail, telephone calls, and telefacsimiles. Those familiar forms of communication transit through third party sites that incidentally and temporarily store information, contrasted with social networking services that are designed to store information as if they were a personal computer. Furthermore, social media is distinct from other mediums of communication because of its unique information sharing capabilities and the risks of unrestrained republication of personal data. In answering the questions of whether something offsite was realistically meant to be private, the terms of service, user expectations, webware, and current practices must all be examined.

There appears to be conflict in the approaches to social media privacy. People want to be popular and connected, while at the same time reserve their right to selectively fence off their activities.\(^57\) In other words, they want to have their cake is essentially a large-scale distributed computing system that taps into the vast resources of the Internet. Individual PCs access the 'cloud' of data rather than their own data centre and rent products or services such as extra storage space or applications from companies like Amazon.com or Google.).

\(^57\) See James Grimmelmann, *Privacy as Product Safety*, 19 WIDENER L.J. 793, 800 (2010) (“The point is not that these 'Digital Natives' prize privacy above all else or that they experience privacy in the same way previous generations did or that the social content of privacy is stable. The privacy they care about is social and relational, perhaps less concerned with databases and governmental surveillance than their parents’ and grandparents’ privacy. They are constantly trading their privacy off against other social opportunities and making pragmatic judgment calls about what to reveal and what to keep hidden. However, they do care about privacy, and they act accordingly.”) (footnotes omitted). \(^59\) See generally \(^59\) MARY MADDEN & AARON SMITH, REPUTATION MANAGEMENT AND SOCIAL MEDIA 2-3 (2010), available at http://pewinternet.org/~/media//Files/Reports/2010/PIP_Reputation_Management_with_topline.pdf (“The increased prevalence of self-monitoring and observation of others creates a dynamic environment where people promote themselves or shroud themselves depending on their intended audience and circumstances. There are good reasons to be more vigilant. Online reputation matters; 44% of online adults have searched for information about someone whose services or advice they seek in a professional capacity. People are now more likely to work for an employer that has policies about how they present themselves online, and co-workers and business competitors now keep closer tabs on one another. Those who are dating are more likely to research their potential mates online. And even neighbors have become more curious about finding information about one another online. Yet, even those who are careful
and eat it too. Without specific remedies, they are left to regulate themselves, which can lead to posting false information online, a behavior that ethics committees, prosecutors, and service providers try to prohibit. However, this identity masking is sometimes the result of people trying to protect their reputations.

Compromising photos, ill-considered rants, or “what was I thinking moments” recorded and posted impulsively might end up in a human resources file or before a university admissions committee. College-bound students have begun creating profiles with aliases to avoid being linked to a youthful indiscretion that they would not want a college recruiter to see.59 And one scholar has pointed out how much further the masking goes:

[A]s soon as you scratch beneath the surface of Facebook social practices, carefully modulated about their own disclosures have to stay on top of the identifying material that others may have posted about them on social networking profiles, photo- and video-sharing sites, Twitter and blogs."

58. See, e.g., Emma Barnett, Facebook Users Concerned About Privacy, Says Survey, TELEGRAPH, April 26, 2010, available at http://www.telegraph.co.uk/technology/facebook/7635125/Facebook-users-concerned-about-privacy-says-survey.html (“F-Secure, an internet security firm which polled 450 Facebook users, found that 73 per cent were not ‘friends’ with their boss on the site. The survey also found that 77 per cent said that they use the site’s privacy tools to safeguard their private information. The poll discovered that Facebook users have become increasingly aware of the need to ensure their personal information and status updates remain private with 35 per cent of pollsters admitting posting something on the site they later regretted.”).

59. See, e.g., Sarah Maslin Nir, An Online Alias Keeps Colleges Off Their Trail, N.Y. TIMES, Apr. 25, 2010, at ST8, available at http://www.nytimes.com/2010/04/25/fashion/25Noticed.html (“Michael Goldman, who graduated last year from the Frisch School in Paramus, N.J., estimated that nearly half his friends changed their Facebook names in the last two years of high school. ‘At this point it’s not done as much for the sake for being functional,’ Mr. Goldman said. ‘Now it’s gotten just more to be trendy.’ Once they are accepted, most revert to their actual names. Kwame Kruw Ocran, a senior at Brooklyn Technical High School, thinks hiding behind a pseudonym isn’t safe enough. He held a cleanse week last summer, where via Facebook he encouraged more than 1,000 of his fellow students to remove anything incriminating from their online profiles before applying to colleges.”).
privacy management is everywhere, Danah Boyd has documented how teens on Facebook, MySpace, and other social media use fake profiles, fake names, fake ages, and a cloud of other minor lies to keep their profiles safe from prying (usually parental) eyes while also connecting with their peers. Meanwhile, college students coming back from a night of partying have learned that the first thing they need to do is check Facebook and untag their names from any photos of them doing keg stands, lest their athletic coaches or campus police catch them drinking.60

In addition, false profiling or concealment can complicate the prosecution and adjudication of criminal cases. For example, threatening, harassing, and fake messages or contacts can be conducted through a phony profile. And this creates a serious concern in domestic violence cases, where the free range of Facebook and MySpace can allow any unauthenticated person to pose as anyone and make contact with a victim.61

60. Grimmelmann, supra note 57, at 799-800 (footnotes omitted).
61. See Laurie L. Baughman, Friend Request or Foe? Confirming the Misuse of Internet and Social Networking Sites by Domestic Violence Perpetrators, 19 WIDENER L.J. 933, 944 (2010) (“Because social networking sites allow individuals to freely post photos, comments, and other personal information, a new wealth of information is placed at the fingertips of abusers. Even if the victim does not post personal content on the Internet and does not have a page of his or her own, an abuser may be able to track down the previously unknown location of a victim if a family member, child, or friend posts a picture or other personal information about the victim and/or the victim’s children online. Privacy settings allow users to limit the availability of their information to certain friends or family members, rather than the general public. However, a simple search of a social networking site allows an abuser to access information about a victim without approved access to the victim’s profile or page. Additionally, social networking sites run on the honor system. The sites do not check into whether a user who creates a profile is in fact a real person, so the creation of a fake profile is as easy as the creation of a real profile. A fake profile may allow an abuser to access the site of a victim or victim’s family member, when an authentic profile would act as a red flag.”) (footnotes omitted).
These behaviors illustrate that social media participants have a different impression of privacy than they would expect in a sealed envelope, a phone call, or the contents of their own hard drive. They want privacy but on their own terms. Social and private are usually antithetical ideas, particularly online. And if the membership of a social media service treats identity deception as an accepted and necessary practice, or as ungovernable, then pretexting by lawyers and investigators might fall within the mores of that online society.

III. Discovery

The propriety of entering the fenced off portions of cyberspace in pursuit of litigation ends has kicked up a storm of reactions. Federal and state legislatures are scrambling to enact or amend laws to adjust to this new media, filling gaps in criminal behavior, e.g., cyberbullying, and addressing the

62. Grimmelmann, supra note 57, at 800 (“The point is not that these ‘Digital Natives’ prize privacy above all else or that they experience privacy in the same way previous generations did or that the social content of privacy is stable. The privacy they care about is social and relational, perhaps less concerned with databases and governmental surveillance than their parents’ and grandparents’ privacy. They are constantly trading their privacy off against other social opportunities and making pragmatic judgment calls about what to reveal and what to keep hidden. However, they do care about privacy, and they act accordingly.”).

63. Considering the unknown degree of deception, puffing, and exaggeration that users engage in, information quality also becomes an important, separate issue. But the first step is gaining access to the witness, whose evidence can be evaluated later in the crucible of the courtroom. See Seth P. Berman et al., Web 2.0: What’s Evidence Between ‘Friends’?, BOSTON B.J., Jan/Feb 2009, at 5, available at http://www.strozfriedberg.com/files/Publication/de2b8838-3e1c-43e8-871d03875d982c2e/Presentation/PublicationAttachment/0165df77-27cf-4d92-8438-15a274986a9c/bbj_janfeb_09%20First%20Principles.pdf.

64. See Kristopher Accardi, Is Violating an Internet Service Provider’s Terms of Service an Example of Computer Fraud and Abuse?: An Analytical Look at the Computer Fraud and Abuse Act, Lori Drew’s Conviction and Cyberbullying, 37 W. ST. U. L. REV. 67, 68-70 (2009) (describes the distinctions among the new types of offenses aimed at abusive behavior conducted through electronic media, i.e., cyberbullying, cyberstalking, and cyberharassment).
basics of procedure, e.g., service of process. The equation of social networking sites with recognized forms of communication has opened the door to legal process and might support the legitimacy of other actions, such as pretrial discovery by private parties.

Facebook and MySpace have become social replay for hundreds of millions of people, where the data of their lives can be viewed and reviewed at will. And one of the core features of these sites is communication. The legal system places a premium on modes of communication, which opens up a host of applications in criminal and civil practice, from search warrants to starting a civil action. For instance, service of process, the act of providing an opposing party with notice of an action, has evolved constitutionally with technology changes. At the heart of effective service are methods “reasonably calculated” to reach the parties in interest. From manually handing a notice and complaint to a person in the forum state to nail, mail, and file to telex, fax, text messaging, e-mail, and even television, courts have recognized these modes as acceptable under due process and statutory standards—neither of which ever contemplated electronic service of process. The underlying rationale behind the due process evolution of forms of service has been the unavailability of traditional formats, and widespread use and acceptance of new communication methods.

65. See generally Andriana L. Shultz, Superpoked and Served: Service of Process Via Social Networking Sites, 43 U. RICH. L. REV. 1497 (2009) (discusses the evolution of service of process founded on due process and statutory procedures and leading to the recognition of Facebook and other media as court approved methods).

66. See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”).

67. See, e.g., Smith v. Islamic Emirate of Afg., Nos. 01 CIV 10132(HB), 01 CIV 10144(HB), 2001 WL 1658211, at *3 (S.D.N.Y. Dec. 26, 2001) (“Service by Smith and Doe on Bin Laden will be by publication for six (6) weeks in all of the following media outlets: (1) Afghani newspapers Hewad, Anis, Kabul News, and the Kabul Times; (2) Pakistani newspaper Wahat, the paper in which Bin Laden has published his Fatwahs; and (3) broadcasters Al Jazeera, Turkish CNN, BBC World, ARN, and ADF.”) (emphasis added).

68. Shultz, supra note 65, at 1503-07.
technologies. In the right cases, unprecedented applications of new media might be sanctioned as a new approach “reasonably calculated” to serve process, and opens the door to applying them in other legal procedures.69

The most prominent example of social networking as communication conduit is the newly recognized use of Facebook for service of process. At the forefront, Australia’s courts have approved contact through a person’s profile as sufficient to satisfy the standards for serving notice, complaints and orders. In each case, social networking was the only, and as it turned out best, option available.

In the first reported case of its kind, an Australian court endorsed Facebook communication as a means of satisfying the notice requirements for a default judgment.70 A master of the Supreme Court of the Australian Capital Territory reached beyond the furthest ends of civil procedure to recognize this new form of substituted service. “Master Harper ordered that the defendants in the case could be validly served by the plaintiff sending a message by computer to the Facebook pages of both defendants informing them of the entry of and the terms of the judgment.”71

Two years later, another Australian litigant was granted relief through Facebook. A Sydney woman tried to obtain a paternity test from an elusive man, called Mr. Howard, whom

69. Id. at 1523 (“Courts that have upheld as constitutional service of process through new communication technologies generally have begun by noting the widespread societal embrace of the technology in other facets of life. In theory, this should have virtually no bearing on whether service is upheld in a given case because due process analyses in this context are, by nature, fact specific. In other words, the fact that the technology is widely employed in the community at large does not entail that it is reasonably calculated to provide the particular defendant notice. What is good for the goose is not always good for the gander. Nonetheless, even assuming that widespread use plays a role in the court’s decision, Facebook could reasonably be taken as widespread enough to gain approval.”) (Footnotes omitted).


71. Id.
she claimed was the father. Her letters went unanswered, efforts to contact him through his parents and girlfriend failed, and the process server was unsuccessful. Although his physical address was in flux, his Facebook profile was stable and routinely used. The woman’s solicitor informed Federal Magistrate Brown that a “private message” could be sent to the man’s online account. Satisfied with the efficacy of this form of service, the court granted an order to serve the documents via Facebook.

After receiving the documents, Mr. Howard promptly closed his Facebook and MySpace profiles. Nonetheless, the court imposed an order of paternity and child support on Mr. Howard, since he had been properly served. In the light of this second decision affirming legal process through social networking, Dr. Tim Butcher, a senior lecturer at the Royal Melbourne Institute of Technology, observed: “People are finding new ways to use social media every day,” he said. “It’s only natural that courts, businesses, government agencies will use these tools to track us down. You have the world at your fingertips—but the flip side is that people can find us as well.”

The e-service precedent begins to marshal support for other direct legal applications of Facebook, MySpace, and Twitter on the same grounds as other communication media. In these cases, the courts have approved private litigants accessing an opposing party’s social networking profile to ascertain identity and the stability of the site for accepting communications. And it makes sense that a network like Facebook, with 500 million profiles, is viewed as a reliable channel for communication; indeed it is the reason the


73. Id. (“In a recently published judgment, delivered in Adelaide, Mr. Brown said he was satisfied Mr. Howard had been properly served with the documents and inferred Mr. Howard wanted no involvement as ‘the parentage test can have only one outcome because he is [the child’s] father.’”).

74. Id.
company is in business.\textsuperscript{75}

However, there has been no mention of the mechanism by which this information had been obtained. Did the plaintiffs already have accounts and use their privileges as members to unearth the data or did they do it surreptitiously, using a fake profile or a legitimate one that masked their purpose? Mr. Howard did not hesitate to take down his profiles after being served, indicating that he would not have willingly accepted a “Friend” request from a woman or her representative seeking a paternity test. So it is unclear what actions the lawyers, investigators, or plaintiffs undertook to complete service.

It is significant that the parties being reached could not be contacted through traditional means. Social media became the sole and best choice in these circumstances. Similarly, information impeaching a witness or providing leads to exculpatory evidence might only be found in unique places like Facebook or MySpace. Someone’s online profile might be the only place that an inconsistent statement or contradictory version of testimony can be found, or even a confession pointing to someone else’s guilt. For this reason alone, the “uniqueness” of the evidence source, social media investigation warrants legal and ethical sanction.\textsuperscript{76}

Confirming the identification of the profile’s owner, confronting privacy limitations and terms of service restrictions, and analyzing ethical rules about using deception or providing false statements are all issues to be considered in

\textsuperscript{75} “Facebook’s mission is to give people the power to share and make the world more open and connected.” FACEBOOK.COM, http://www.facebook.com/facebook?ref=pf%2Fr.php?locale=en_US#!/facebook?v=info&ref=pf%2Fr.php%3Flocale%3Den_US (last visited Sept. 26, 2010).

\textsuperscript{76} Schultz, supra note 65, at 1528 (“The Australian case permitting service of a default judgment via Facebook foreshadows future attempts to employ social networking sites to effectuate legal ends. As this comment illustrates, attempted service of process through Facebook may very well be permissible under Rule 4(0)(3) for serving foreign defendants, and such service does not appear to constitute a per se due process violation, no matter how narrow the circumstances permitting such service might be. Necessity, the mother of invention, has frequently been the catalyst for adapting the law to implement new technologies, and if a situation arises in which a message sent via Facebook is the only available means to serve an elusive defendant abroad, the law might, in due time, adapt accordingly.”) (footnote omitted).
online investigations. At the same time, courts and legislators ought to recognize the unqualified necessity of using social media as a foundation for discovery and case preparation. The principal concern in most cases is the destruction of ephemeral evidence.

IV. Spoliation: Preservation of Evidence

To address spoliation, one approach would be to seek an ex parte discovery order from the trial court, like a protective order, requiring that the party’s or witness’ profile be frozen and downloaded. The order might be addressed to either the person who posted the profile or the network provider that hosts it. The profile’s contents should be reviewed in camera to confirm identifying information, a preliminary issue linking the profile to the actual person, and then examined for content, e.g., exculpatory evidence, impeachment, or other relevant information. This preservation step will be crucial to safeguarding important and unique evidence.

In *People v. Hardaway*, a Michigan defendant appealed his conviction for third-degree criminal sexual conduct claiming ineffectiveness of counsel, among other issues. The crux of the appeal was his attorney’s failure to preserve the contents of the victim’s social networking profile and use it for impeachment at

77. *See* Lloyd S. van Oosternrijk, Comment, *Paper or Plastic?: Electronic Discovery and Spoliation in the Digital Age*, 42 HOUS. L. REV. 1163, 1183 (2005) (“Only a few state courts have addressed the unique role of electronic discovery in today’s trials, but cost-shifting in electronic discovery cases has come into vogue in the federal arena. Generally speaking, the current Rule 26(c) allows a responding party to seek a protective order shifting the cost of discovery when the cost would create an undue burden.”) (footnotes omitted).

78. *See*, e.g., Leanne Italie, *Divorce Lawyers: Facebook Tops in Online Evidence*, SAN JOSE MERCURY NEWS, July 2, 2010, available at http://www.mercurynews.com/business/ci_15429107 (“Oversharing on social networks has led to an overabundance of evidence in divorce cases. The American Academy of Matrimonial Lawyers says 81 percent of its members have used or faced evidence plucked from Facebook, MySpace, Twitter and other social networking sites, including YouTube and LinkedIn, over the past five years.”).

the bench trial:

According to defendant, the web page would have established that the victim had a “pattern of lying” because the victim, on her MySpace page, claimed that she was 18 years old and married. Defendant also argues that counsel was ineffective for failing to inquire into the disappearance of the victim’s MySpace page. Defendant claims that had counsel done so, counsel “may have been able” to establish a Brady violation.\(^{80}\)

By the trial date, the victim’s online profile had disappeared, like Mr. Howard’s. Nonetheless, the evidence came in through another route, and defendant’s ineffective assistance of counsel claim was denied.\(^{81}\) Still, the question remains: what are an attorney’s obligations under the Constitution and the Rules of Professional Conduct in this situation?

If the privacy issue and terms of service hurdles were removed, then the duties of counsel and the court might be made clear. In \textit{Torres v. Lexington Insurance Co.},\(^{82}\) plaintiff claimed that she had been sexually assaulted during a massage she received at one of the defendants’ hotel. Her complaint stated that “she suffered and continues to suffer intense mental anguish, feelings of shame, humiliation, depression, unworthiness, weeping and has been forced to undergo psychological treatment and therapy.”\(^{83}\) Attorneys for the

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80. \textit{Id.} at *2-3 (footnote omitted).
81. \textit{Id.} at *2-3 (“However, the trier of fact knew what defendant argues the victim’s MySpace page would have established—that the victim lied about her age and marital status. On cross-examination, the victim admitted that she lied on her MySpace page about her age and marital status. Accordingly, there is no reasonable probability that if counsel had investigated the disappearance of the victim’s MySpace page or presented the web page as evidence at trial, the result of defendant’s trial would have been different.”).
82. 237 F.R.D. 533 (P.R. 2006).
83. \textit{Id.} at 534.
defendants had learned independently, not through procedural
discovery channels, that the plaintiff had several web pages
“depicting an active social life, and an aspiring singing and
modeling career.”84 Plaintiff and her counsel were unaware
that these pages had been uncovered by the other side. The
defendants downloaded and printed out most of their contents,
and then notified plaintiff’s counsel that “eliminating or
altering the websites could be considered spoliation or evidence
tampering.”85 Two days later, the web pages were gone without
explanation. Defense counsel moved to dismiss the lawsuit or
eliminate or reduce the damages. In response, the court
ordered sanctions:

In this case, Mrs. Torres did not make it known
to defendants that she had an aspiring modeling
or singing career. In fact, she attempted to depict
the life of a recluse with no or little social
interaction. Instead, Mrs. Torres led an active
social life and announced this information to the
world by posting it on very public internet sites.
Then, immediately upon defendants’ discovery of
evidence, which could be used to contradict or
impeach her allegations, Mrs. Torres removed
the information from the internet. This is the
type of unconscionable scheme the court seeks to
deter.86

To remedy the spoliation problem the judge made several
decisions. He declined to dismiss the complaint or limit a
finding on damages, but precluded plaintiff from introducing
any evidence of mental anguish. Furthermore, he concluded
that the defendants’ actions in preserving the pages’ contents
by downloading and printing them out did not factor into the

84. Id. at 533-34. See generally Oregon State Bar Legal Ethics Comm.,
85. Id. at 534.
86. Id.
analysis. The court separated the action of evidence spoliation from the mechanics of investigating and uncovering the web content. This lends support to the idea that a court would be empowered to issue a sanctionable preservation order. In addition, it leaves for separate consideration the means for opposing counsel to discover the existence of an online profile. The public or private nature of the site would be the only fly in the ointment.

The defense might make additional applications based on a due process right to present a defense to seek any data that might lead to additional evidence, such as a Friends list or references to Brady or Jencks material. While no published decision has yet concluded that a social networking profile contained Brady or Jencks’ material or impeaching evidence, there is anecdotal evidence that it can.

In New York City, a man was arrested for carrying a loaded weapon. The case rested on the credibility of the arresting officer. His online reputation became a central part of the defense when evidence from his Facebook page was used for impeachment. The defendant asserted that he had been

87. Id.
88. See Washington v. Texas, 388 U.S. 14, 19 (1967) (“The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”).
89. This tocsin about preservation applies with equal force to the client’s page. See, e.g., Damiano Beltrami, I'm Innocent. Just Check My Status on Facebook, N.Y. Times, Nov. 12, 2009, at A27 (“[Rodney Bradford’s] defense lawyer, Robert Reuland, told a Brooklyn assistant district attorney, Lindsay Gerdes, about the Facebook entry, which was made at the time of the robbery. The district attorney subpoenaed Facebook to verify that the words had been typed from a computer at an apartment at 71 West 118th Street in Manhattan, the home of Mr. Bradford’s father. When that was confirmed, the charges were dropped.”).
stopped and assaulted by the officer and his partner (leaving him with three broken ribs); the officers then planted the gun to cover up their conduct. However, the jurors learned that the officer had set his Facebook page to “devious mood,” and that he had listed his status as watching the movie *Training Day* to “brush up on proper police procedure.” Ultimately, the defendant was acquitted of the gun charge, but convicted for resisting arrest.

Defense counsel were led to the officer’s profile from an Internet search that revealed statements he had made about video clips showing suspects being arrested, and in which he talked about “tuning up arrestees” before putting on the cuffs. The online statements supported the defense’s theory that the officer intended to cover-up his use of excessive force. However, there is no way to know exactly how the jurors processed this information because they acquitted on the principal felony charge but still convicted on resisting arrest.

Nonetheless, any impeachment evidence has the potential of raising reasonable doubt. The question for the defense is how to find it and for the jury how to weigh it. Social media as evidence is inextricably tied to its discoverability, and will bring up questions of authenticity, weight, and credibility.

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93. Injudicious statements and misuse of social media has sounded a warning bell in the law enforcement community, prompting a call for workplace standards. *See Terrence P. Dwyer, Pitfalls for Police Officers on Facebook*, POLICEONE.COM (Aug. 11, 2010), http://www.policeone.com/off-duty/articles/2304799-Pitfalls-for-police-officers-on-social-networking-sites/ (“Police administrators are well advised to adopt a social networking policy if they have not already started to do so. Police officers are advised to keep content unobjectionable at the least, but would be better off staying clear of online postings and video rants. The democratization of media use has created a ‘big brother’ of monstrous proportions and can quickly become a trap for the careless officer.”).

The prosecutor in the New York City case argued that the *Training Day* comments were protected speech, criticism of a movie, and irrelevant to the circumstances of the arrest. Still, the judge allowed the evidence in. Privacy, freedom of expression, and weight of the evidence are all factors that must be addressed in every instance where this type of self-published evidence will be used. Context is as important as content in the world of social media evidence.

V. Spoliation: Preserving Defense Evidence

Before counsel has had an opportunity to review a client’s social media profile, the government might already be aware of it and reveal its intent to use the contents through the normal course of discovery. In other words, law enforcement or the prosecution may have built their indictment on the material found on MySpace or Facebook during an investigation or before bringing formal charges.

In a computer-based crime, such as illicit pornography, a defendant’s computer would be seized. It might also happen

95. United States v. Drummond, No. 1:09-cr-00159, 2010 U.S. Dist. LEXIS 29981 (M.D. Pa. Mar. 29, 2010) (pictures from defendant’s MySpace page, where he had large amounts of cash and held a gun, were made known through the regular channels of discovery).

96. See Randy L. Dryer, *Advising Your Clients (and You!) in the New World of Social Media: What Every Lawyer Should Know About Twitter, Facebook, YouTube, & Wikis*, 23 Utah B.J. 16, 19 (2010), available at http://www.utahbar.org/barjournal/pdf/May_June_2010.pdf (“Social media clearly expands the universe of potentially discoverable materials and impacts data retention/destruction policies. Just as requests for e-mails were the discovery rage of the last decade, requests for information on social media platforms will soon become standard. Unlike the early internet days where digital information was primarily e-mails, information now posted on social media sites includes audio, photographs, and video. Virtually everyone has a cell phone, and virtually every cell phone has both still photograph and video capabilities. And in 2010 we are seeing more and more ways for people to access their social media sites (and upload content) through their mobile phones. These new technologies are dramatically changing the discovery landscape.”).

in prosecutions involving social media. However, what should be done with the material on the third party provider's site? Can defense counsel advise his client to take down the incriminating photographs? Can the prosecutor prevent it? And can the court intervene?

Several recent cases seem to cast doubt on the wisdom of advising a client about the disposition of online profiles or other social media. There are risks that such advice might constitute evidence tampering or obstructing governmental administration, which could lead to criminal conviction and disbarment. In Matter of Coren, a New York attorney pleaded guilty to federal felonies that included “mail fraud, wire fraud, money laundering, conspiracy to commit money laundering and obstruction of justice (tampering with physical evidence).” He had allegedly participated in a conspiracy with a client to defraud the federal government regarding the administration of funds for wage contracts. The Disciplinary Committee for the New York First Judicial Department sought an order for disbarment based on the federal felony conviction. Ultimately, the attorney lost his legal challenge to downgrade the proceeding from automatic disbarment to a serious crime matter. The issue hinged on the similarity between New York and federal laws on tampering and obstruction of justice. The Appellate Division concluded that there was an "essential similarity" between the two and upheld the disbarment.

Noteworthy was the plea allocution:

[R]egarding the count in the indictment charging obstruction of justice, I admit that on February 3, 2006, I advised Nomi Beig [his client] in response to a question he posed to me that he should

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1. 2010.
99. Id. at 286.
100. Id.
101. Id. at 287 (“Respondent’s conviction for obstruction of justice in violation of 18 U.S.C. § 1512(c) is a proper predicate for disbarment because there is ‘essential similarity’ between that federal statute and the New York felony of tampering with physical evidence (Penal Law § 215.40[2]).”).
destroy a computer flash drive containing documents that I advised him to remove from his office when I heard that his company was under investigation. I knew that by doing so Nomi would be destroying documents that could have been used in a Government investigation.\textsuperscript{102}

Although he did not erase the computer records himself, the attorney was charged with actual tampering, as opposed to attempted tampering that would have reduced the charge to a misdemeanor under New York law. His plea to this count of the federal indictment was sufficient to support automatic disbarment.

In another obstruction case, a Connecticut attorney, Philip D. Russell, was indicted for allegedly taking steps to destroy the contents of his client’s laptop computer, which contained evidence of illicit pornography.\textsuperscript{103} The computer belonged to the choirmaster of a church, and a fellow employee discovered the pornographic images while using it for work. A day later, officials of the church “sealed and wrapped” the laptop, anticipating its use as evidence.

The choirmaster met with Russell the following day; the lawyer took possession of the computer and destroyed the hard drive. Unknown to either of them, an FBI investigation was already underway against the choirmaster. The Department of Justice charged the attorney with obstruction of justice and violation of the Sarbanes-Oxley Act (anti-shredding prohibition).\textsuperscript{104} Russell moved to dismiss the charges both because the federal investigation was unknown to him at the time and because the Sarbanes-Oxley Act was not intended to apply to pornographic contraband. In other words, the government did not “allege any nexus between his obstructive conduct and any federal proceeding or investigation that was

\textsuperscript{102} Id. at 288 (alterations in original); see also United States v. Coren, No. 07-CR-265 (ENV), 2009 U.S. Dist. LEXIS 73913, at *27 (E.D.N.Y. Aug. 20, 2009).


reasonably foreseeable to him.”\textsuperscript{105} The district court judge denied Russell’s motion, finding that the “indictment contains sufficient factual particularity showing a relationship in time, causation, and logic between Russell’s destruction of Tate’s Computer and a grand jury proceeding or a FBI investigation to put him on notice of the charges against him.”\textsuperscript{106} Russell’s Sarbanes interpretation was also rejected.\textsuperscript{107} Ultimately, he was sentenced to six-months of home confinement, a substantial fine and community service.\textsuperscript{108}

These two cases highlight the risks of counseling or aiding a client in the destruction or removal of computer-based evidence. On the flip side, what if the prosecutor advises the complainant, law enforcement, experts, or a fact witness to purge their multimedia online profiles, forestalling defense investigators?\textsuperscript{109}

Another important facet of this problem is when the police and prosecutors have audited the social media information of their own witnesses, whether in individual cases or routinely through department policies.\textsuperscript{110} In such instances, the contents of those sites might become \textit{Brady} or \textit{Jencks} material, or fall under the scope of other provisions of the discovery statutes. Under those circumstances, a court might issue a protective order preventing its deletion or compelling disclosure.\textsuperscript{111}

\begin{itemize}
  \item \textsuperscript{105} \textit{Id.} at 232.
  \item \textsuperscript{106} \textit{Id.} at 236.
  \item \textsuperscript{107} \textit{Id.} at 237 (“Nothing in the legislative history supports a conclusion that the drafters intended to narrowly circumscribe its application to the destruction of business records and documents.”).
  \item \textsuperscript{110} \textit{See}, e.g., Rocco Parascandola & Laura Rivera, \textit{NYPD Rookies Warned About MySpace, Facebook Pages}, \textit{Newsday}, May 6, 2008.
  \item \textsuperscript{111} \textit{See}, e.g., Dryer, \textit{supra} note 96, at 19 (“Posts on social media are within the scope of ‘electronically stored information’ as that term is used in Rule 34 of the Federal Rules of Civil Procedure. Litigation hold letters likely trigger an obligation to preserve such posts if they are reasonably related to the litigation. This means that just like companies had to revise their document retention and destruction policies and their internal protocols for
\end{itemize}
Other pitfalls include the risks of independent research or communication online by judges, jurors, or other parties and witnesses in a case, which might taint or prompt the deletion of such evidence. A social media snapshot of the state’s witnesses might be required to protect the defendant’s constitutional and statutory discovery rights at a time when guidance on obtaining that information independently is unclear.

VI. Undercover Investigation (Pretexting)

The key to understanding how a lawyer should operate in the social networking context is the recognition that new approaches are necessary. All the rules that the legal profession relies on to instruct lawyer behavior were forged before the emergence of twenty-first century technology. The rule book for this young century has not been written yet, but the foundations are there. The application of those principles is informed by post-Internet thinking and current online realities.

Failure to adequately investigate a crime or witnesses, whether in the real or virtual worlds, can violate the right to counsel and due process. Surreptitious online investigation

handling litigation hold requests when e-mail became a pervasive way of communicating, so too will these policies require updating to address the nuances of social media.

112. See generally Pitfalls, supra note 13, at 5 (discusses ethical problems that can occur when judges and lawyers contact each other through social networking, and the dangers of independent factual investigations through the same method).

113. See generally ABA, Agenda for Ethics 20/20 Project Examines Impact of Technology, Disappearing Borders, 25 LAW. MAN. PROF. CONDUCT 694 (2009), http://www.abanet.org/ethics2020/impact.pdf (Social networking is among the issues to be addressed by the ABA Commission on Ethics 20/20 during its three year tenure).

114. See, e.g., Thomas v. Kuhlman, 255 F. Supp. 2d 99, 107 (E.D.N.Y. 2003) ("Counsel 'has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Where the nature of the crime scene is material to the defense, counsel may be deemed ineffective for having failed to investigate it properly. See, e.g., Williams v. Washington, 59 F.3d 673, 680-81 (7th Cir. 1995) (ineffective assistance in part for failure to investigate crime scene where doing so would
in some cases might be the best or only method for uncovering crucial information, which might otherwise be deleted or compromised. The lawyer who fails to pursue it might risk accusations of malpractice and ineffectiveness of counsel. It is a difficult needle to thread.

With the rapid pace of technological development, lawyers have had to confront unprecedented issues on how to conduct discovery, litigation, and professional relations in the face of metadata, data mining, and now social networking. This adds a new wrinkle to the initial client intake. Besides asking for contact information and employment history, an attorney may be obligated to inquire into a client’s online presence. Whether the lawyer should do it independently without the client’s knowledge raises ethical issues. Of course, asking the client directly begs the question of what to do with the answer.

Accessing Facebook or MySpace is not the same as a Google search about a client that would only bring up data available to anyone. The former sites have public and private areas. A visitor can search the public segment without constraint, but to go further and see a client’s profile, membership (registration and agreement to terms of service) is required. Without a client’s consent, the lawyer may be overstepping the network’s terms of service and pushing the limits of the Rules of Professional Conduct. Mechanically, a visit to an online profile might only involve observation and recording. On the other hand, Friending is a form of contact.

have revealed evidence that, “given the layout of the home and the relatively crowded conditions, the alleged assault could not have taken place as claimed.”); People v. Donovan, 184 A.D.2d 654, 655 (N.Y. App. Div. 1992) (ineffective assistance where counsel failed “to dispatch an investigator to the scene [of defendant’s arrest] . . . until after the trial had commenced,” leaving him “unprepared to effectively argue [the issue] before the court”).


And in the case of a witness or complainant, the act might cross the line against communicating with a represented party or influencing a witness.

The ethical analysis begins with familiar technology, the telephone. ABA Formal Opinion 337, issued in 1974, declared “with certain exceptions spelled out in this opinion, no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.”117 The common situations identified by the Committee included recording conversations involving clients or witnesses. They relied principally on Canon 9 of the Code of Professional Responsibility requiring lawyers to avoid the appearance of impropriety and DR 1-102(A)(4) prohibiting “dishonesty, fraud, deceit, or misrepresentation” to reach that conclusion.118 A law enforcement exception was acknowledged but not fully explored:

There may be extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys or officers acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements. This opinion does not address such exceptions which would necessarily require examination on a case by case basis. It should be stressed, however, that the mere fact that secret recordation in a particular instance is not illegal will not necessarily render the conduct of a public law

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118. Id.
enforcement officer in making such a recording ethical.\textsuperscript{119}

In 2001, the American Bar Association Standing Committee on Ethics and Professional Responsibility reexamined its position on the propriety of a lawyer recording a phone conversation without the other party’s knowledge and came to the opposite conclusion from Opinion 337, withdrawing that precedent.\textsuperscript{120} The first reason for this change in position was the issuance of the Model Rules of Professional Conduct. The new Rules omitted Canon 9’s “appearance of impropriety” admonition, removing a major pillar justifying their earlier analysis. The fraud and deceit section survived in Model Rule 8.4(c). However, in the intervening quarter century practice and perspective on this issue had changed:

First, the belief that nonconsensual taping of conversations is inherently deceitful, embraced by this Committee in 1974, is not universally accepted today. The overwhelming majority of states permit recording by consent of only one party to the conversation. Surreptitious recording of conversations is a widespread practice by law enforcement, private investigators and journalists, and the courts universally accept evidence acquired by such techniques. Devices for the recording of telephone conversations on one’s own phone readily are available and widely are used. Thus, even though recording of a conversation without disclosure may to many people “offend a sense of honor and fair play,” it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or

\textsuperscript{119} Id.
\textsuperscript{120} ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).
conduct by that party inducing a belief that the conversation will not be recorded.121

Although the Committee did not directly address the pretexting question,122 it affirmed the “widespread practice” of surreptitious recording that changed a party’s or witness’ expectations. Phone-tapping technology was ubiquitous and law enforcement and prosecutors as well as private investigators made use of it. These same factors militate in favor of accessing a party’s social media employing common technology. The difference is in the nature of the communication, not the recording. Thus far, the ABA opinion opens the door a crack for contact through the latest communication/recording medium, social networking.

The second point it made was that the recording involved a “legitimate and even necessary activity” that would be at risk from the danger of an attorney tipping her hand too soon. This concept was born of the numerous exceptions to Opinion 337’s proscription found in state bar committee opinions. Of special note were opinions from Tennessee and Kentucky123 that recognized the need for “recordings by criminal defense lawyers, reasoning that the commonly accepted ‘law enforcement exception’ otherwise would give prosecutors an unfair advantage.”124 It also embraced the constitutional necessity of leveling the playing field. Some of the other exceptions they listed are also used as justifications for pretexting,125 e.g., protecting against witness or client perjury.

121. Id. (footnotes omitted).
122. Id. (“We conclude that the mere act of secretly but lawfully recording a conversation inherently is not deceitful, and leave for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical.”).
uncovering housing discrimination and trademark infringement, and generally for prosecution and criminal defense investigations.\textsuperscript{126}

Another important facet of the ABA’s analysis was the determination to avoid per se rules and decide each case on its merits. It did not see the logic in creating a categorical bar swallowed by exceptions and instead advised interdicting nonconsensual recordings if accompanied by other misconduct.\textsuperscript{127}

Lastly, the third criticism of Opinion 337, which led to its reversal, was a change in philosophy. The Mode Code’s instruction for attorneys to “avoid even the appearance of impropriety” had been omitted from the Model Rules. The rights of third parties were protected under a direct approach embodied in Rule 4.4(a) “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”\textsuperscript{128}

As applied to nonconsensual phone recordings, Rule 4.4 looked to the purpose behind the action. An intent to “embarrass” or “burden” a witness, for example, would violate the Rule. But the Committee did not differentiate taping a phone conversation from other forms of evidence gathering since they were not unlawful. The same rationale applied to situations where the attorney misrepresented that a conversation was not being recorded. Again, it was not the acting of recording the phone call that troubled its conscience, but the accompanying false statement to a third person in violation of Rule 4.1.\textsuperscript{129}

An attorney or investigator hiding their purpose behind Friending a witness’ or a complainant’s Facebook or MySpace page might run afoul of this kind of prohibition. Friending in itself is a lawful, ethical mode of contact. Being secretive about

\textsuperscript{126} Formal Op. 01-422, at 8.
\textsuperscript{127} Id.
\textsuperscript{128} MODEL RULES OF PROF’L CONDUCT R. 4.4(a) (2009).
\textsuperscript{129} Formal Op. 01-422, at 5 n.28.
the purpose or misleading the recipient of the request might border on a false representation. And it again raises the third party’s privacy rights in their profile from surreptitious solicitations, whether in state law or the terms of service.

The federal and state laws governing Internet conduct are a patchwork that is continually being tested in the courts. As Opinion 01-422 pointed out in the case of one-sided phone recordings, a lawyer must be familiar with the laws of the jurisdictions involved since Rule 4.4 specifically prohibits violating the rights of a third party under state law in conducting discovery or investigation. Similarly, an attorney undertaking discovery through social media must be versed in the federal and state laws on computer fraud, cyberbullying, and harassment that might ensnare her. Like telephonic communication, Internet communication naturally crosses state boundaries, imposing a burden on the lawyer to know the rules and laws for the jurisdictions involved—although it cannot be assumed that such communications are always interstate.

The Committee was divided over the advisability of recording clients without consent and in general considered it inadvisable. So they recommended advising him or her at the start that conversations might be recorded. Per force, this sheds light on the advisability of an attorney viewing a client’s MySpace or Facebook page to download or otherwise review its contents. To do so without the client’s knowledge or consent, via pretexting, might violate a lawyer’s duty of loyalty and risk damaging the ability to preserve the confidentiality of attorney-

130. Id. at 6.
131. See United States v. Schaefer, 501 F.3d 1197, 1201 (10th Cir. 2007) ("We recognize in many, if not most, situations the use of the Internet will involve the movement of communications or materials between states. But this fact does not suspend the need for evidence of this interstate movement. The government offered insufficient proof of interstate movement in this case.") (footnotes omitted). See generally Colin Fieman, Defending Internet Pornography Cases by Challenging Interstate Jurisdictional Elements Under U.S. v. Schaefer, CHAMPION MAG., Jan. 2009, at 32, available at http://www.nacdl.org/public.nsf/01c1e7698280d20385256d0b00789923/13752bbd3072166a85257560007eb864?OpenDocument (discussing the importance of distinguishing intrastate from interstate transmissions of illicit pornography as an element of the government’s case).
client communications. Moreover, contacting a client through her online profile or Twitter, etc., whether directly or undercover, increases the chances of inadvertent disclosure and destroying privilege. Can a client and attorney communicate by Friending each other through social media and still expect their conversations to be privileged?

In an earlier opinion, the ABA Standing Committee on Ethics and Professional Responsibility addressed the sanctity of e-mail communications, confidentiality, and inadvertent disclosure. It concluded:

A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, landline telephonic transmissions, and facsimiles applies to Internet e-mail. A lawyer should consult with the client and follow her instructions, however, as to the mode of transmitting highly sensitive information relating to the client’s representation.

The Committee’s reasoning relied heavily on an analysis of the privacy features of the technology being used. Under Rule 1.6, “(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” And the attorney must take reasonable measures in selecting a mode of private communication. The

133. Id.
134. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009).
Committee cited the trustworthiness of overland mail, for example, and the privacy expectations in telephonic communications. As to other technology, some caution was indicated, such as facsimile transmission that included a greater than normal risk of misdirection, interception, or mishandling. Another area of grave concern was the cell phone. Cordless and cellular phones broadcasting over public air waves were susceptible to interception by many commonly available models of radios and similar devices. And as voice communication, they were not digitally encoded like e-mail.

The risks of interception and disclosure may be lessened by the recent introduction of digital cellular phones, whose transmissions are considered more difficult to intercept than their analog counterparts. New communications technology, however, does not always advance privacy concerns. The use of airplane telephones, for example, exposes users to the interception risks of cellular telephones as well as a heightened risk of disclosure due to eavesdropping on the airplane itself.\textsuperscript{135}

Finally, they resolved that the safeguards and nature of Internet-based e-mail provided a reasonable assurance of privacy.

The fact that ISP administrators or hackers are capable of intercepting Internet e-mail—albeit with great difficulty and in violation of federal law—should not render the expectation of privacy in this medium any the less reasonable, just as the risk of illegal telephone taps does not erode the reasonable expectation of privacy in a telephone call.\textsuperscript{136}

\textsuperscript{135} Formal Op. 99-413, at n.19.
\textsuperscript{136} Id.
Social media embrace the most dubious characteristics of e-mail and cellular transmissions. Their semi-public nature, networking among unvetted friends, evolving privacy terms and settings, and the endless possibility of republication and the impossible task of keeping a secret among hundreds of one's closest confidants online, makes this form of communication unreasonable to preserve confidential exchanges of information with clients. And since this form of public media has not attained the sanctity of the telephone booth, it throws doubt on privacy claims that might be asserted by targets of undercover defense investigation.

Again, Opinion 01-422 suggested two areas where secret recording of a client’s phone conversation would not be problematic: (1) “where the lawyer has no reason to believe the client might object”; (2) “where exceptional circumstances exist.” The second exception could be triggered in cases where the lawyer thinks the client might commit a crime “likely” to result in “imminent death or substantial bodily harm.” This would also open the door to an ethical quandary surrounding those instances where a lawyer has learned from the client’s profile that she has admitted responsibility for a crime attributed to an innocent third party, who was being wrongfully prosecuted for it. These cases typically begin where the client has confessed to her attorney that she

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137. See Katz v. United States, 389 U.S. 347, 353 (1967) (“The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.”).


139. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2009) (“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”).

committed the crime that someone is being charged with in the course of confidential meetings. However, if a lawyer directly or discretely examined a client’s social media and unearthed this information without the client’s knowledge, another layer of conflict is created.

ABA Opinion 01-422 lays the groundwork for a nonconsensual contact through social media for “legitimate” and “necessary” activities associated with the right to present a defense. And it illustrates some of the potential pitfalls awaiting incautious counsel gathering evidence undercover. On the other hand there are compelling constitutional imperatives that demand an attorney investigate social media in order to prepare and present a defense. The foundations for these requirements can be found in the measurement of effective assistance of counsel and the use of technology.

In Gill v. State, a Missouri man had been convicted of first-degree murder and sentenced to death. A key issue on his appeal was the failure of his attorney to review the contents of the victim’s computer. During the penalty phase of the trial, the prosecution introduced evidence of the victim’s good character. Before trial and in the course of discovery, a report had been found in defendant’s car detailing the contents of the victim’s computer, including lists of file names, folders, and instant messages. Neither defense counsel interviewed the detective who prepared the report or flagged any issues other than inquiring of the prosecutor if there was any incriminating or exculpatory information.

141. See Ken Strutin, Hiding in Plain Sight: Evidence on Social Networking Sites, N.Y. L.J., Nov. 10, 2009, at 5 [hereinafter Hiding in Plain Sight].
142. 300 S.W.3d 225 (Mo. 2009).
143. Id. at 228 n.2 (“The victim’s computer was relevant to the investigation and prosecution of the crime because, after the murder, Gill and his co-defendant, Justin Brown, used the computer to transfer $55,000 from one of the victim’s accounts to an ATM-accessible account so that they could access the money.”).
144. Id. at 228 (“The prosecutor assured defense counsel that there was nothing on the computer that he planned to use in the case or that implicated another potential defendant. Relying on the prosecutor’s assertions, defense counsel decided to focus their attention away from the computer’s contents.”).
At a post-penalty hearing, the detective who prepared the report testified that “he knew there was pornography on the computer within a few days of creating the report. Before Gill’s trial, he looked at the transcript of the instant message conversation about the 17-year-old daughter.”145 This revelation was not discovered until the attorney for Gill’s co-defendant, Brown, spoke with the Lieutenant before his trial and requested a copy of the hard drive for independent analysis. The analyst testified at Gill’s hearing that there were instant messages and other files containing illicit sexual content on the victim’s computer. Due to this discovery, the prosecution did not introduce the same good character evidence in the co-defendant’s penalty phase, thus making the information irrelevant. Brown was eventually sentenced to life in prison.146

On appeal of Gill’s case, the court first dispensed with the Brady violation claim. The defense had a copy of the report that would have led to uncovering this information. The defense’s failure to recognize it did not render the information undisclosed.147 More importantly, defendant’s second claim was that defense counsel should have identified the pornography evidence on the victim’s computer and used it in the penalty phase to preclude the prosecution from introducing the good character evidence or to rebut it. On this point, the appellate court agreed:

By failing to discover those files on the victim’s computer, Gill’s counsel’s performance was deficient. A reasonably competent attorney would have carefully reviewed the report provided by the State and recognized file names like “a_slutty18girl_w38c” and “sweet_tasting_slute” as evidence of sexually explicit material on the computer. A reasonably competent attorney would have conducted

145. Id. at 229.
146. Id. at 230-31.
147. Id. at 231.
further investigation as to the contents of the computer and discovered the child pornography images, bestiality content, and sexually explicit instant message conversations about the 17-year-old daughter. Then, a reasonably competent attorney would have rebutted the State’s character evidence at the penalty phase.148

Additionally, the court held that Gill’s attorneys should have interviewed the police investigator who prepared the report. The investigator was on the state’s witness list and was the first to examine the victim’s computer. Based on the leads in the report, a discussion with the Lieutenant would have unearthed all the details of the pornography on the victim’s machine that would have proved invaluable at the sentencing phase of the trial.

The essence of the Gill decision was that valuable and necessary information about a victim was available from her computer, and that information had been made known to defense counsel, who did not act on it. This scenario has much in common with social media investigations. First, if a complainant or prosecution witness has posted exculpatory, impeaching, or self-incriminating information online, and the government knows about it, then it ought to be disclosed. And the defense should have the opportunity to view it independently. Facebook or MySpace are fundamentally another hard drive, a remote site where people store information similar to their home computer—actually it is duplicative in many instances since the content originates from a personal data device, which presumably stores a copy. Since the right to counsel compels a defendant’s lawyer to pursue witness computer records revealed through discovery, specific motions grounded on Brady and Jencks and statutory disclosure rights should be considered for potential social networking evidence.

Social media has become the new “mass observer,” and in

148. Id. at 233.
terms of discovery, a ready recorder of spontaneous events. The defense attorney for a former Illinois police officer, accused of shooting another man in a Pontoon Beach bar parking lot and charged with aggravated battery with a firearm, filed a motion asking to subpoena Facebook for the identity of witnesses at the scene. "The motion seeks disclosure from Facebook of 23 individual user profiles and the actions of a Facebook group called ‘Jeff Bladdick is a bulletproof badass’ going back to the day before the Nov. 9, 2008 incident." The attorney learned about the Facebook group from an anonymous source. In support of his motion, counsel marshaled familiar arguments: “His client’s constitutional rights fall within exceptions of the 2000 Electronic Communications Privacy Act and said that law enforcement regularly accesses the same records for its own investigations.” This evidence was essential to mounting a self-defense argument. Facebook responded by pointing to the Electronic Communications Privacy Act, which prevented it from complying. In addition, the company claimed it would be technologically overwhelming to locate twenty-three profiles out of three-hundred and fifty million. The motion, which appears to have been the first of its kind, was ultimately denied and the case ended in a plea bargain. In other words, social media discovery by the


151. Id.

152. Id.

153. Id. (“Watkins [defendant’s attorney] claims that Pour acted in self-defense after he was attacked by two people in a Pontoon Beach bar parking lot. Watkins says Pour pulled the gun from the back of his waistband during the attack and fired, and mistakenly hit Bladdick [victim].”).

154. Id.

defense is unguided by statute or ethical code. However, the firmest grounds for making such discovery requests are the right to counsel, compulsory process, and due process, and reciprocal rights of investigation on par with the government.

When direct discovery offers no revelations and the government does not possess social media information from witnesses, it is defense counsel’s duty to investigate. In light of the massive participation in social media, it would be difficult to argue that a reasonable lawyer could ignore a resource of such magnitude. So the question becomes what are the risks associated with investigating prosecution witnesses in the semi-secluded online world of Facebook and MySpace?

The dilemma occurs when an attorney, in order to effectively represent her client, tries to uncover impeaching evidence on a witness computer using deception. In Office of Lawyer Regulation v. Hurley, a man charged with sexually assaulting a child and possession and exhibition of illicit pornography hired Hurley to represent him. A key issue for the defense was the accusation that the defendant had forced a fifteen year-old child, S.B., to view pornography. However, “Hurley believed that S.B. had an independent interest in, and the ability to access, the materials . . . .” To uncover evidence that S.B. had been lying, Hurley devised an investigation plan that would allow him to examine the contents of S.B.’s computer.

attorney] sought at one point in Pour’s criminal case to subpoena records of 22 people from the Facebook social networking website. They included police officers who investigated the shooting, as well as other potential witnesses. Watkins said. Attorneys for Facebook argued that federal law prevented Facebook from disclosing the material, and Associate Judge James Hackett agreed in a ruling in July. He said disclosure was barred by the Electronic Communications Privacy Act.

156. See, e.g., Kang, supra note 1 (“Facebook is expected to say this week that it has reached 500 million users, making it the biggest information network on the Internet in a meteoric rise that has connected the world into an online statehood of status updates, fan pages and picture exchanges.”).


158. Id.

computer. If S.B. had been alerted to this plan, there was a grave risk of spoliation. Unlike Gill, there was some question about the detective’s interest in preserving this evidence, so no direct formal discovery request was feasible.\(^{160}\)

Hurley hired a private investigator and, after exploring the options together, they devised an undercover operation. The investigator sent a letter to S.B. advising him that he had been selected to participate in a computer usage survey and, in exchange for surrendering his computer for ninety days, he would get a free laptop. Hurley provided guidelines for the investigator that included making sure the mother was present during his interactions with S.B. and the child would be allowed to remove any contents from the computer he desired before turning it over. The exchange was made according to plan and the computer turned over to a forensic expert who found illicit pornographic images.

In 2007, the Wisconsin Office of Lawyer Regulation (OLR) filed a complaint\(^{161}\) against Hurley for employing “dishonesty, fraud, deceit or misrepresentation” in violation of the state’s Supreme Court Rules. The referee’s report stated that the OLR did not meet its burden of proof. Testimony presented at the disciplinary hearing established that “there was a widespread belief in the Wisconsin bar that the type of conduct engaged in by Attorney Hurley was and is acceptable.”\(^{162}\) Even the prosecutor behind the grievance affirmed that deceit was a recognized practice in its undercover operations involving nonlawyer investigators. The OLR director agreed that this type of investigation practice was recognized for prosecutors, but not private attorneys, although no authority had been cited to support the differentiation.

Approving the referee’s conclusion that Hurley did not intend to break any rules or realize that his conduct might have done so, the Supreme Court of Wisconsin quoted this telling paragraph from the referee’s report:

\(^{160}\) Id.
\(^{161}\) Based on allegations made by the district attorney’s office involved in the criminal case. Id. at 3.
\(^{162}\) Id. at 2.
Mr. Hurley was faced with a very difficult decision, with concurrent and conflicting obligations: should he zealously defend his client, fulfill his constitutional obligation to provide effective assistance of counsel, and risk breaking a vague ethical rule that, according to the record, had never been enforced in this way? Or should he knowingly fail to represent [the defendant] in the manner to which he was entitled and hand him persuasive grounds for appeal, an ethics complaint, and a malpractice claim? The Sixth Amendment seems to have broken the tie for Mr. Hurley. A man’s liberty was at stake. Mr. Hurley had to choose, and he chose reasonably, in light of his obligations and the vagueness of the [supreme court rules].

Gill and Hurley both speak to the fundamental importance of right to counsel, which encompasses conducting a thorough investigation. The contents of personal and home computing devices have been extended firmly into the realm of third party hosts, with their own rules of conduct. Inevitably, attorneys will have to enter this virtual world to fulfill their constitutional and ethical obligations, which brings us to the paucity of authority that has treated this issue.

In 2005, the Oregon State Bar issued an opinion establishing guidelines for lawyers whose investigations took them into the public lanes of the Information Highway. Essentially, they distinguished visits to a public page of an opponent’s website and crossing the threshold by making contact through that website. The scenario involved a civil case in which the defendant had an Internet page accessible to anyone, which the plaintiff’s lawyer wanted to view. Oregon

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163. Id. (alteration in original) (emphasis added) (citing Hurley, 2008 Wisc. LEXIS 1181) (Referee’s Report and Recommendation).
RPC 4.2 cautioned against contacting a represented party, and has been interpreted to apply to any mode of communication. However, the purpose of the rule, to assure that represented persons had the benefit of counsel when speaking with opposing counsel, was not implicated by seeing the contents of a site open to anyone. Any public matter published by an adverse party, regardless of format, was fair game.

Moreover, the Legal Ethics Committee divorced the notion of communication from viewing online: “A lawyer who reads information posted for general public consumption simply is not communicating with the represented owner of the Web site.”165 In the footnote to this line, they make a very cogent and significant observation: “For purposes of this opinion, a Web site can be ‘public’ even if an access fee or a subscription fee is charged.”166 Access that implies registration brings it within the ambit of social media sites. Of course, the terms of service may vary, but the Oregon State Bar believed that joining a site or registering alone was not problematic, it would be the next step of communication that tips the balance. Notably, it avoided directly addressing the pretexting question in this same footnote.

The concern over engaging an opponent through her web page was a possible violation of the attorney-client privilege. If a lawyer knew that the person she was communicating with online was represented, such contact would violate the Rule.167 But if the person was some low-level employee who might only be a fact witness, then the communication would not raise any eyebrows.168 And if the attorney contacted someone via the

165. Id.
166. Id.
167. This would also apply to situations where clients undertake to speak with a represented party under the direction of or with the involvement of counsel. See, e.g., Trumbull Cnty. Bar Ass’n v. Makridis, 77 Ohio St. 3d 73 (1996) (attorney representing client in civil suit reprimanded for overseeing a phone call by his client to opposing party to discuss client’s testimony, then taking the phone and speaking to the other represented party directly).
168. Formal Op. 2005-164, at 3 (“Lawyer A could not use Internet communications to invade the adverse party’s lawyer client privilege. If, on the other hand, Lawyer A does not invade the adverse party’s privilege and
website that she did not know was represented, but actually was, there would still be no problem.\textsuperscript{169}

So the complications would arise when a lawyer leaves the public side of the web and joins a social media site for the purposes of making contact with a witness. Getting in does not seem to be a problem, according to the Oregon opinion, any more than it would be for any Internet site that charged a fee or required registration. Significantly, complainants and witnesses in criminal prosecutions are largely unrepresented, so a defense attorney might likely be in the position of someone who did not “know” whether individuals in a case had counsel, dispensing with Rule 4.2 concerns. The heart of the problem is the one specifically not addressed by the Oregon Bar, pretexting.

Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02, published in March 2009, is the first known authority to directly address undercover investigations in social media.\textsuperscript{170} It involved a civil case and the deposition of an unrepresented eighteen-year-old witness who was giving evidence favorable to the opposition. During questioning she admitted having Facebook and MySpace communicates only with a nonmanagerial employee who is merely a fact witness, no violation would exist.”).

\begin{verbatim}
\textsuperscript{169} Id.

\textsuperscript{170} Later opinions on social networking and discovery have followed the Philadelphia approach. See N.Y.S. Bar Ass’n Comm. on Prof’l Ethics, Op. 843 (2010), available at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions &TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208 (“A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not ‘friend’ the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).”) ; Ass’n of the Bar of the City of N.Y. Comm. on Prof’l & Judicial Ethics, Formal Op. 2010-2 (2010), available at http://www.abcny.org/Ethics/eth2010.htm (“[A] lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.”).
\end{verbatim}
accounts. The Committee observed that these personal pages limited access to certain individuals according to the account holder’s preference. The deposing lawyer had reason to think that her pages might contain impeaching material. He did not directly or openly ask the witness’ permission to access the pages but tried unsuccessfully to get to those pages without her consent. From what he did see, the lawyer concluded that she had a liberal policy of letting people have access to her profile. His proposed investigation plan was as follows:

The inquirer proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and MySpace websites, contact the witness and seek to “friend” her, to obtain access to the information on the pages. The third person would state only truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness. If the witness allows access, the third person would then provide the information posted on the pages to the inquirer who would evaluate it for possible use in the litigation.171

This is a classic pretexting operation, and one which has been approved in cases involving civil rights, law enforcement, and intellectual property infringement.172 On the surface, none


172. See, e.g., N.Y.C. County Lawyer’s Ass’n, Formal Op. 737 (2007), http://www.nycla.org/siteFiles/Publications/Publications519_0.pdf (“In New York, while it is generally unethical for a non-government lawyer to knowingly utilize and/or supervise an investigator who will employ dissemblance in an investigation, we conclude that it is ethically permissible in a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful
of the recognized exceptions applied to this civil action, so the Philadelphia Committee’s Opinion focused principally on Pennsylvania Rules of Professional Conduct Rule 8.4(c) concerning “dishonesty, fraud, deceit or misrepresentation.” They believed that the proposed surreptitious investigation would violate this rule:

It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness’s pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.173

activity undertaken solely for the purpose of gathering evidence. Even in these cases, a lawyer supervising investigators who dissemble would be acting unethically unless (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably and readily available through other lawful means; and (iii) the lawyer’s conduct and the investigator’s conduct that the lawyer is supervising do not otherwise violate the New York Lawyer’s Code of Professional Responsibility (the ‘Code’) or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. These conditions are narrow. Attorneys must be cautious in applying them to different situations. In most cases, the ethical bounds of permissible conduct will be limited to situations involving the virtual necessity of non-attorney investigator(s) posing as an ordinary consumer(s) engaged in an otherwise lawful transaction in order to obtain basic information not otherwise available. This opinion does not address the separate question of direction of investigations by government lawyers supervising law enforcement personnel where additional considerations, statutory duties and precedents may be relevant. This opinion also does not address whether a lawyer is ever permitted to make dissembling statements directly himself or herself.”. See generally Hiding in Plain Sight, supra note 141, at 5.

Concealment of identity and purpose was impermissible in this context. And the witness’s risky policy of accepting “Friends” with little information did not validate the lawyer’s, or investigator’s, approach. The privacy policy of the witness did not factor into the analysis of whether the deceit was permissible under the Code. In other words, there was no way to sanitize the conduct of any person who might have access the witness’ page at the direction of the attorney, regardless of the information they provided.\footnote{174}{Id. at 4 (“The Committee believes that in addition to violating Rule 8.4(c), the proposed conduct constitutes the making of a false statement of material fact to the witness and therefore violates Rule 4.1 as well.”).}

The Committee distinguished this situation from a day in the life video that might record an unsuspecting plaintiff out in “public” to impeach her claims, because information on social networking sites was intended to be kept private.\footnote{175}{Id. at 3.}

The Committee went on to consider the limitations of deception in legal investigation, criminal and civil, and exceptions to further societal good, such as uncovering unlawful and discriminatory behavior.\footnote{176}{Id. at 4-6.} Without addressing the blanket prohibition of covert investigation recognized by some states or the exceptions endorsed in others, the Committee found that in this scenario it was unethical.\footnote{177}{The Committee also declined to answer the question about the admissibility of social media evidence obtained through pretexting. This is another important problem that has to be resolved in tandem with the ethics and legitimacy of the investigative technique; otherwise the evidence may be precluded or suppressed. \textit{See} Berman et al., \textit{supra} note 63, at 5 (analyzes issues associated with introducing evidence from second generation web sources such as social networking). \textit{See generally} Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. Md. 2007) (discusses basic tenets of admitting electronic or digital evidence analyzing the difficulties in establishing relevancy, authenticity, overcoming hearsay, best evidence, and prejudice versus probity arguments); \textit{Paul W. Grimm et al., Back to the Future: Lorraine v. Markel American Insurance Co. and New Findings on the Admissibility of Electronically Stored Information,} 42 ABRON L. REV. 357, 367 (2009) (update on the evidentiary foundation requirements for electronic evidence first discussed in the \textit{Lorraine} decision, including: e-mail, web sites, text messages, and computer generated evidence).}

This opinion was rendered in a bubble, and peremptorily
closed off a huge and vital area of discovery. The trouble lies in the concepts of privacy and purpose, and the thin veil that can deflect legitimate and necessary covert investigations. As one scholar has observed, it was unfair to exempt government law enforcement, civil rights and intellectual property from the bar on undercover work without a critical rationale behind these choices.178 Moreover, he suggested a “neutral” test that might be applied more fairly:

[T]he search should be for neutral principles that reasonably balance the benefits and risks of such technology. These neutral principles should focus less on whether the lawyer/investigator is operating anonymously or with a pseudonym. Rather, they should concentrate more on the intrusiveness of the technique and the risk that confidential or privileged information may be improperly revealed in the process.179

A reasonable guideline for criminal cases is the “societal good” criterion, i.e., the fair administration of justice. The goal would be to prevent or address current problems in the system that result in wrongful convictions. These should be addressed at the earliest stages of a case to preserve the presumption of innocence and due process of law.

Conclusion

Today, hundreds of millions of people are sharing information, communicating, and archiving the details of their lives online. Through canyons of Internet bandwidth, an increasingly complex forum of overlapping voices are being created, preserved and transmitted worldwide. Thirty years

178. See Steven C. Bennett, Ethics of “Pretexting” in a Cyber World, 41 MCGEORGE L. REV. 271, 279 (2010) (“Ethics authorities should not arbitrarily limit the benefits of such information or favor certain categories of lawyers over others.”).

179. Id. (emphasis added).
ago, the Supreme Court recognized that most people were getting their information about court proceedings from electronic and print media. Now, our society is in the midst of a personal data revolution in which new enclaves of data and individual metrics are being created on a monumental scale.

Social networking will surpass diaries, photo albums, and paper correspondence; it will supersede e-mail and telephonic communication; it will even trump television, radio, and newspapers as the principal source of news and personal information.

Facebook, Twitter, YouTube, and the other social media gained prominence rapidly. Their power is still unmeasured and the rules for their uses unclear. In a sense, social networking is the Promethean fire of the Information Age. Without guidance, it spells mischief for the lawyers who must use it to represent their clients. The question has changed from how to find information about witnesses and parties online, to how to find information within ethical and legal boundaries that will be in existence when the case comes to trial.

180. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) (“With the press, cinema, and electronic media now supplying the representations or reality of the real life drama once available only in the courtroom, attendance at court is no longer a widespread pastime.”).

181. See Richard Macmanus, The Coming Data Explosion, N.Y. TIMES, May 31, 2010, available at http://www.nytimes.com/external/readwriteweb/2010/05/31/31readwriteweb-the-coming-data-explosion-13154.html (“One of the key aspects of the emerging Internet of Things—where real-world objects are connected to the Internet—is the massive amount of new data on the Web that will result. As more and more ‘things’ in the world are connected to the Internet, it follows that more data will be uploaded to and downloaded from the cloud. And this is in addition to the burgeoning amount of user-generated content—which has increased 15-fold over the past few years, according to a presentation that Google VP Marissa Mayer made last August at Xerox PARC. Mayer said during her presentation that this ‘data explosion is bigger than Moore’s law.”).


183. See generally Mark A. Berman, The Ethics of Social Networking Discovery, N.Y. L.J., Nov. 2, 2010, at 5 (“Just like conducting Westlaw or Lexis due diligence on an individual, social networking sites need to be reviewed as part of discovery protocol when seeking to obtain relevant
The big problem is that the standards of privacy and criminal behavior are being defined in large part by the terms of service and technology options set by social networking providers. The Drew Lori case taught us that a breach of contract, such as a terms of service contract, was unlikely to sustain a violation of federal criminal law. \(^{184}\) Privatizing criminal law or definitions of privacy are problematic and unconstitutional. It would be an abdication of the legislative function to permit private Internet-based services to define online privacy or criminalize behavior vaguely described in browser- and clip-wrap contracts. The legislatures have to update the definitions of criminal laws related to electronic media in the discovery and penal statutes. Moreover, the courts must be adept and up to date on the latest technology innovations that might influence the interpretation of legal and ethical rules for attorney conduct in this virtual environment as in other developing areas. \(^{185}\)

Social networking is a convergence technology, combining communication media and information storage in unprecedented ways. A new unified approach is necessary to administer the application of criminal law, evidentiary rules, and ethical constraints in this context. As courts and counsel

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\(^{185}\) See, e.g., Committee on the Development of the Third Edition of the Reference Manual on Scientific Evidence, COMM. ON SCI., TECH. & L., http://sites.nationalacademies.org/PGA/stl/development_manual/index.htm (last visited Oct. 10, 2010) (“At the request of the Federal Judicial Center (FJC), and in collaboration with the FJC, [the Committee on Science, Technology, and Law] will develop the third edition of the Reference Manual on Scientific Evidence. The Reference Manual assists judges in managing cases involving complex scientific and technical evidence by describing the basic tenets of key scientific fields from which legal evidence is typically derived and providing examples of cases in which that evidence has been used. The development of the third edition will follow the basic structure of the current edition, but will include, in addition to updating, new topics and annotated case citations.”).
wend their way through the thickets, a fundamental constitutional analysis will serve as the best guidepost. The right to present a defense and reciprocal discovery are well established and supported by Supreme Court precedent. Until the nuances of cyber criminal investigations are worked out, judges should maintain the balance of rights by leveling the playing field between prosecutors and defense. If the government is permitted access to Facebook or Twitter, if the prosecution can introduce YouTube videos and iPhone messages, then due process demands the same rights for the defense. For law enforcement, social media are among the first avenues to be investigated undercover, and there are no logical reasons why the defense should have to exhaust all other options before following the same path. In this area, the delete button and risk of spoliation of digital media make early entry into a witness social profile an unacknowledged imperative for the defense as much as for the prosecution.

We have entered a new part of the Information Age, the Social Media Era. It is the time of quantum computing and the specter of nearly a billion personal profiles online. Countries around the world are evolving into societies that permit unbounded sharing and displaying of personal multimedia experiences. To paraphrase Andy Warhol, everyone wants their 15 gigabytes of fame. And all fame has its price. The cost of this freedom is a qualified privacy, a cloverleaf intersection weaving electronic human activities with the law, and the unveiling of new avenues of investigation. The best “path forward” for discovery in social space is to recognize that it is unprecedented and construct rules that remain faithful to the constitutional and ethical principles that have served society in the physical world. Due process and the fair

186. Online communities are really no different than the unregulated ancient Roman bathhouses, where people came together to talk, relax and entertain themselves, while baring all. And bandwidth, like currents of water, is the well that draws people together. See JAMES SALZMAN, THIRST: A SHORT HISTORY OF DRINKING WATER (2005), available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2043&context=faculty_scholarship (“The main reason for construction of the aqueducts was not hygienic but social. Bath houses were an integral part of Roman society and they required large volumes of water.”).
administration of justice dictate that there ought to be an equal right of access and use of virtual evidence regardless of changes in the mechanics of human communication and interaction.
Social networking sites offer an abundance of exculpatory and impeaching evidence that may not be obtainable without some undercover detective work. Unfortunately, discovery rules and ethical guidelines have not kept pace with the digital sprawl of MySpace and Facebook. In the absence of explicit direction from the Rules of Professional Conduct and the laws governing online behavior, flying a false flag in these uncharted waters may be hazardous.¹

Before an attorney or investigator considers using subterfuge—such as concealing his true identity and purpose to contact a witness through an online profile—he ought to be mindful that legal and ethical precedents on this subject are slow in coming.

Historically, surreptitious investigation has found some validation in the arenas of law enforcement, civil rights and intellectual property infringement. Still, there is a scarcity of ethical and legal authorities outside these specific areas and only recently has online covert investigation begun to draw attention.

In March, the Philadelphia Bar Association's Professional Guidance Committee issued what appears to be the first ethics opinion (2009-02) categorically proscribing lawyers and their associates from using deception in connection with contacting a deponent through her online profiles.

A witness in a civil case revealed during her deposition that she had Facebook and MySpace accounts. The attorney seeking the ethics opinion believed these sites contained information relevant to the case and, in particular, valuable for impeachment. No direct questions were posed to the witness about the contents of the accounts.

Access to the witness' pages was by permission only. The attorney asked the committee whether it would be allowable to ask someone to "friend" the witness without disclosing his affiliation or purpose. All identifying and other information would be truthful.

Noting the responsibility of lawyers for the behavior of investigators, the committee found that the proposed actions would constitute misconduct under Rule 8.4 prohibiting "dishonesty, fraud, deceit or misrepresentation." Therefore, "friending" the witness without revealing that the purpose of the contact was to gain access to private areas of her profile constituted an act of "deception."

The lawyer's concern over the witness' reluctance to otherwise permit access did not soften the nature of the concealment. Even if the witness had a liberal practice of
accepting friend requests, running the risk that someone might take advantage of the information in her profiles, it did not temper the result.

Acknowledging the conflicting views on covert investigation, the committee declined to recognize an exception along the lines of the ones found in New York and other states ethics opinions and court decisions.

**New York Exception**

In Opinion 737, the New York County Lawyers' Association's Committee on Professional Ethics developed this approach in response to a question about private attorney pretexting:

Non-government attorneys may...ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where: (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means; and (iii) the lawyer's conduct and the investigators' conduct that the lawyer is supervising do not otherwise violate the Code (including, but not limited to, DR 7-104, the 'no-contact' rule) or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties.

Notably, "dissemblance" in this context included concealment or misstatement of identity and purpose in the process of evidence gathering.

**The New Privacy**

The last presidential election revealed the staggering power inherent in online social networking. In August 2008, then presidential candidate Barack Obama's Facebook page had 1.3 million supporters and more than 56,000 people following him on Twitter. This phenomenon begs the question, how private is a social networking profile where a friend's list could fill Yankee Stadium?

Online culture is an estate of compromise, where privacy gives ground to community building. A social network cannot function unless its members relinquish some personal space-making obscurity as a substitute for privacy. In essence, social networking sites are quasi-public.

Studies have illustrated that users seeking to create online identities, form relationships or join networks knowingly expose themselves and their friends and families to the scrutiny of people they have never met or intended to meet. And it carries implications for the practice of law. For example, a Canadian judge observed that a litigant with 366 friends could not contend that his profile was intended to be private.
The reality of public privacy in social networking sites blunts the absolutist view of online privacy underlying the Philadelphia bar committee's opinion.

**Criminal Law Practice**

The lodestars of due process, effective assistance of counsel and the right to present a defense guide every criminal defense investigation and discovery request. Yet, the ethical and legal exceptions carved out for undercover work have not directly addressed these constitutional beacons. Are a defendant's rights to counsel and due process less important than uncovering housing discrimination or trademark infringement?

In the absence of clear-cut guidelines or precedent, covert online investigation must be analyzed on a case-by-case basis. In an oft-cited law review article, attorneys David B. Isbell and Lucantonio N. Salvi developed a framework for examining these issues that might be useful in future cases.6

Their analysis begins with the premise that undercover investigations performed by private attorneys and their employees or associates are aimed toward a laudable purpose or societal good.

In the criminal context, this translates into the prevention of wrongful conviction and promotion of fair trials. Effectively representing an accused and presenting a defense are essential to the administration of justice and the stability of society.7

Next, the evidence to be gathered could not be acquired by other means, e.g., discrimination testing.

The content on social networking sites is as unique as the people who post it. And like all online sources, these profiles are transitory and their content easily altered or removed. In other words, they may contain evidence "not reasonably available through other lawful means."

Isbell and Salvi's thorough and insightful interpretation of the model rules led them to conclude:

[T]he pertinent rules simply do not prohibit a lawyer's involvement with testers or investigators making misrepresentations only of the kinds here under consideration—namely, misrepresentations as to identity or purpose, made solely for purposes of discovering information.8

Of course, this analysis did not condone a blanket exemption. The "nature of the misrepresentations" and the "circumstances in which they are made" are always factors. According to the authors, if the dissembling was limited to identity and purpose in order to collect information to be used in litigation, no violence was done to the model rules.9
At this point, no authority has squarely addressed this question in the context of defense investigation of online social networking profiles.

**Reciprocal Discovery**

Still, there are many compelling reasons for undercover discovery of digital and online evidence, such as exploring the veracity of a government witness.10

In *Office of Lawyer Regulation v. Hurley*, No. 2007AP478-D (Wis. Sup. Ct. Feb. 11, 2009), a Wisconsin attorney confronted the ethical quandaries raised by using undercover investigation in a case where the victim claimed the defendant forced him to view child pornography. The attorney sought exculpatory material from the complainant's computer to show that he had the ability and inclination to view illicit images on his own.

The lawyer suspected that if put on notice the complainant might destroy information on his computer that would expose his misconduct. He hired a private investigator to carry out a pretense, a computer swap offer, to acquire the victim's laptop temporarily for examination. Forensic analysis revealed many illicit pornographic images.

A complaint was filed against defense counsel for violating the equivalents of Rule 4.1, making a false statement to a third person, and Rule 8.3, engaging in dishonesty, fraud, deceit or misrepresentation.

Ultimately, the Supreme Court of Wisconsin affirmed a referee's finding that the attorney had not violated any ethics rules. There was no rational distinction between the prosecutor's use of undercover investigative techniques and the defense need to acquire information in pursuit of their client's constitutional rights.

Recognizing the deference accorded law enforcement in utilizing deception in criminal investigations, the court found:

Neither of them [Director of Office of Lawyer Regulation or Prosecutor] could point to any Wisconsin precedent drawing a distinction between prosecutors and other attorneys in that regard, and the record demonstrates that there was wide belief in the Wisconsin Bar that the type of conduct engaged in by Attorney Hurley was acceptable. We also note that the OLR [Office of Lawyer Regulation] concedes that Attorney Hurley was not trying to break the rules and may not have known that his conduct would violate any rule.

In an article reviewing developments in this area of ethics, the author questioned the efficacy of the Philadelphia bar committee opinion against the background of New York and Wisconsin's treatment of similar issues:

The *Hurley* case may supply an argument justifying the conduct of one pretexting attorney, expanding on NYC Bar Op. 2003-2 [undisclosed taping of conversations by lawyers] and NYCLA Op. 737 [non-government lawyer use of investigator who employs
dissemblance], but it may not be an airtight defense to discipline that will apply in all situations.¹¹
Repercussions

Disciplinary sanctions, criminal charges for violating terms of use or other federal laws, not to mention the possible suppression of evidence at trial, are a few of the risks inherent in this kind of investigation.

On the other hand, case preparation that overlooks social networking evidence may expose an attorney to malpractice or ineffectiveness of counsel claims.

The unevenness of authorities on this point puts defense counsel on the horns of a constitutional dilemma.

Yet, there is a storied line of U.S. Supreme Court decisions that suggest a basis for a constitutional right to access social networking profiles in the preparation of a criminal defense.

In *Wardius v. Oregon*, 412 U.S. 470 (1973), the conviction was overturned due to an unbalanced alibi evidence rule that did "not" allow the defense reciprocal discovery of the state's rebuttal witnesses.

And based on the right to present a defense, the Court in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), held that a hearsay rule prohibiting introduction of exculpatory evidence of third party guilt violated due process.

Lastly, a rule barring a co-participant's testimony in *Washington v. Texas*, 388 U.S. 14, 19 (1967), while allowing the prosecution the exclusive privilege to present such evidence, ran afoul of the compulsory process clause.

These cases reveal the overarching principles of fairness and reciprocal discovery that ought to apply with equal force to the cyber-extended society created by and accessible to hundreds of millions of people.

Conclusion

The picture of justice cannot be complete while exculpatory evidence hides in plain sight. Defense preparation must keep pace with innovation to satisfy the constitutional underpinnings of our justice system—due process and right to counsel.

Just as new streams of communication and online behavior are becoming mainstays of prosecution cases, the federal Constitution requires defense counsel to vigilantly confront and explore these new avenues of evidence.

Some agreement exists about the value of concealing identity and purpose to conduct discovery in pursuit of civil rights, law enforcement and intellectual property infringement. Meanwhile, as we wait for ethics committees and courts to dilate upon the
social importance of undercover work in the online world, attorneys must thoughtfully and cautiously approach this area of discovery.

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Endnotes:


3. See How Many Friends Is Too Many?, Newsweek, May 26, 2008 (noting Facebook's 5,000 friend limit had been skirted by nearly a thousand members).

4. See generally Saving Facebook, 94 Iowa L. Rev 1137, 1197 (2009).


8. Ethical Responsibility, 8 Geo. J. Legal Ethics at 811.

9. Id. at 829.

10. See, e.g., NYSBA Comm. on Prof. Ethics Op. 402 (1975) (Not improper to employ investigator to befriend key prosecution witness to ascertain truthfulness of testimony).


have its case prejudiced by suppression of its evidence when the law was previously unsettled in this area").


George Orwell's state-run surveillance society had children spying on parents, neighbors scrutinizing neighbors and Big Brother watching over everyone. What Orwell did not foresee was a time when people would voluntarily publish chronicles of their lives for public consumption.

Imagine bookstores suddenly inundated with truckloads of privately published diaries, photo albums and home movies. An unlikely scenario until the mass marketing of computers, digital cameras and Internet access provided an inexpensive outlet.

 Millions are participating in online social networks in an age of unprecedented self-surveillance (sousveillance). And these sites are pushing criminal investigation into uncharted waters.

Two of the most popular networking sites are MySpace and Facebook, each of which boasts over 100 million users. And according to a 2008 Pew Internet and American Life Project survey, the numbers of adult users with online profiles increased more than 400 percent over the last four years.

Evidence derived from social networking comes into play in several ways. Law enforcement and prosecutors use it to identify suspects and build cases. And defense attorneys have begun to mine this resource for information that can exculpate their clients, impeach a state's witness, or provide a basis for a reduced sentence or post-conviction review.

A couple of months ago, Newsweek reported on an investigation concerning the murder of a British college student in Italy. The suspects in that case were identified through Skype, an Internet phone service; and additional leads revealed by photos and short stories appearing on a Facebook page, an unsettling YouTube video and queries found in the history of a Google search engine. All told, these social networking and Internet communication sites collectively created a "virtual crime scene," the output of which is finding its way into the courtroom.

In a Niagara County Court, a judge increased the bail of a defendant charged with felony assault and misdemeanor weapons possession based on pictures found on a MySpace page. The accused had been released on $5,000 bail, but during his arraignment the prosecutor introduced 10 pages of MySpace photos. They allegedly showed him wearing gang clothing, giving gang signs, and standing with others in gang colors. Based on this and other information supporting a likelihood of conviction, the judge raised bail to $50,000.
And during a Michigan murder trial, the prosecutor introduced Molineux-type evidence of intent and planning from defendant's MySpace site. The evidence in People v. Liceaga, 2009 Mich. App. LEXIS 160 (Mich. Ct. App. Jan. 27, 2009), included photos of the accused with a gun, purportedly used to shoot the victim and "throwing" a gang sign. Admission of the images was upheld on appeal because they established familiarity with the weapon and a pattern of threats made to other victims.

Social networking evidence plays an increasingly important role at other stages of the criminal process.

In United States v. Ebersole, 263 Fed. Appx. 251, 253 n.4 (3d Cir. Pa. 2008), a sentence of supervised released for interstate stalking was revoked because it was claimed the defendant sent a threatening e-mail to the victim. "At the revocation hearing," the court said, "Ebersole testified that he used his MySpace web page as a 'vehicle to voice [his] frustration.' (App. 29.)" The court admitted the profile page evidence to put the message in context.

Recently, in People v. Fernino, 2008 NY Slip Op 28044, 3 (N.Y. City Crim. Ct. 2008), a Staten Island judge held that a friend request intended to reach the complainant's MySpace page violated the "no contact" provision of an order of protection. "The defendant should not be exculpated because she, instead of contacting her victim directly, used the MySpace Mail Center Friend Request Manager," the court said.

In both cases the indirect nature of the communication was an unavailing defense. However, communication is a two-way street, and as illustrated below, the actions of the recipient may determine the outcome of a case.


A key factor in dismissing the charge was the complainant's willingness to access defendant's messages on her page. No attempts were made to block them nor did she ask him to desist. At some point, the prosecution claimed she disabled her account, but offered no evidence to determine when it occurred or whether it was done in response to defendant's epistles.

The virtue and vice of social networking, and the Internet in general, are that it empowers everyone to be an investigator. But incautious use of publicly accessible profiles can lead down the wrong path in some cases.

A North Carolina resident had been arrested and prosecuted for injuries to a victim in an Albany bar fight.4 Some time after the incident, the victim had gone to a MySpace page where he saw an image of a person he thought was the attacker. Meanwhile, the man in the photo, who lived more than 700 miles away, denied ever having been in Albany. One DNA sample later, the case against him was dismissed.
**Due Diligence**

Internet searching has emerged as a necessity in legal investigation. And with the advent of Google cache and the Wayback Machine to resurrect defunct sites and links, the search parameters have broadened. And now social networking is redefining due diligence in online investigation.5

Sites like Facebook and MySpace may hold the keys to an alibi,6 justification or mental health defense or mitigating evidence. In addition, they may provide material to impeach law enforcement and expert witnesses or assail the credibility of eyewitnesses.7 Mistaken identifications and false or misleading information might be uncovered as well.

A defendant's social networking page can also be turned to advantage because, like most personal sites, it represents part of a life story. There may be postings that show strong roots in the community supporting a bail application or positive reputation evidence from testimonials useful in developing a defense theory or mitigation at sentencing.8

Depending on the material posted, it could prove to be a valuable snapshot of a client's experiences - similar to a day in the life movies used in civil litigation.

**Jury Behavior**

These sites can open the door to opinion making, where the power of one person or a 1,000 to post their views about a pending case can impact due process.

In United States v. Boyd, 2007 U.S. Dist. LEXIS 88493 (E.D. Tenn. Nov. 30, 2007), the accused moved for a change of venue based on pretrial publicity. In addition to TV broadcasts and newspapers articles, attorneys involved with the defense testified that there were YouTube videos, opinions about the case posted on Internet news sites, and extensive Google search results concerning the victim. All of the electronic information was available to any potential juror in the venire district.

While the attorneys could not determine how many potential jurors might have viewed the YouTube videos, for example, they noted: "[A]nyone, located anywhere on Earth, with access to a computer and the internet, could create a video about Christian and Newsom [victims], or the prosecutions arising from their deaths, and put it on YouTube."

The trial judge denied the motion as premature, being unable to determine the existence of actual prejudice, and instead granted a defense motion for individual voir dire as needed.

The dangers of jury pool contamination intoned by the defense attorneys in Boyd were realized in a West Virginia case.
K.J., one of the alleged sex abuse victims in State v. Cecil, 221 W. Va. 495, 504 (W. Va. 2007), had a MySpace account. A private detective working for the defense testified that she posted a statement about being "famous someday," and "used the website to communicate with older boys contrary to her mother's testimony that K.J. was now withdrawn and did not like to be around older boys or men."

The curiosity of two jurors got the better of them, and during trial they tried to visit K.J.'s MySpace page. However, the profile had been restricted or removed before trial and inaccessible - reducing its prejudicial impact. Still, one of the jurors did discuss the site with her daughter, who knew the other victim and her family. While the jurors' attempted investigation was not productive, their actions combined with other misconduct by a third juror denied Cecil a fair trial.

As this next case illustrates, Web sites have to be seen to be impactful.

In State v. Gaskins, 2007 Ohio 4103, P30-P35 (Ohio Ct. App., Medina County, Aug. 13, 2007), the defendant was charged with sex crimes against two underage victims. During trial, he attempted to introduce evidence that one of the complainants held herself out on her MySpace page as an 18 year old with experience in adult sexual relationships.

The court permitted photos of the victim from that site to be admitted based on testimony about her appearance at the time. However, since no proof had been offered that the defendant had ever seen the site, and it was created after the event, questioning about the MySpace page was not permitted.

Jury selection has to take into account the fact that many in the pool will be familiar with social networking and Internet searching or have their own sites.

In view of the potential for unwanted publicity or juror curiosity, voir dire and jury instructions should consider how these sites can infiltrate and influence the proceedings. The questions from the Pew survey might suggest a few starting points.9

**Information Quality**

Since Web pages can change or disappear, archiving or making a demand for preservation may be necessary. Admission or exclusion of testimony about the contents may hinge on this early capture of Web content.

Distinct from content is the conduct of the person profiled, whether a party or witness. The act of removing a page, privatizing access or changing the nature of the material posted may be probative as a virtual recantation, recent fabrication, inconsistent statement, or basis for impeachment.

Depending on the reason that a complainant shuts down her site or a witness restricts access to his MySpace page, the next step may involve a subpoena to the networking
host, a discovery motion, a Rosario demand or preclusion motion, and ultimately, an adverse inference jury charge.10

Foreclosure of such evidence might run afoul of the confrontation and compulsory process clauses.

Moreover, if photos from Facebook were used in an identification proceeding or statements on a blog found their way into a search warrant application, there might be a basis for suppression.

The integrity of self-published online information depends on its authenticity and reliability. Well-known phenomena plaguing Web sites apply with equal force to social networking, such as hacking, identity theft, malicious misinformation and misrepresentation.

The Pew survey reported that 4 percent of users deleted their profiles because their page had been hacked or password stolen.

Social networking sites are personal. They represent an extension of conversations that take place between friends or reveal the desire to create casual relationships. The informality and dubiety of their content can be questioned. Whether offered as evidence by the prosecution or considered for use by the defense, fact checking is essential.11

**Conclusion**

Media rich social networking sites have pulled back the curtain on the activities of multitudes. And lawyers are representing an increasing number of clients with an online presence, and trying cases where complainants and witnesses post information that can lead to impeaching or exonerating evidence.

Criminal defense is now virtual defense. And unlike memories that fade with time or physical evidence that deteriorates, a Web site will continue communicating to a global audience for a long time.

What will it mean when we live in a society where everyone knows everything about everyone? And how will it affect the rights of defendants to confront their accusers and prepare their cases?12

A world with "virtual crime scenes" demands a comparable set of safeguards to ensure access to and the integrity of the virtual evidence that is fast becoming a staple of criminal prosecutions.

**Ken Strutin** is director of legal information services at the New York State Defenders Association.
Endnotes:


THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2010-2

OBTAINING EVIDENCE
FROM SOCIAL NETWORKING WEBSITES

TOPIC: Lawyers obtaining information from social networking websites.

DIGEST: A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.

RULES: 4.1(a), 5.3(c)(1), 8.4(a) & (c)

QUESTION: May a lawyer, either directly or through an agent, contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation?

OPINION

Lawyers increasingly have turned to social networking sites, such as Facebook, Twitter and YouTube, as potential sources of evidence for use in litigation. In light of the information regularly found on these sites, it is not difficult to envision a matrimonial matter in which allegations of infidelity may be substantiated in whole or part by postings on a Facebook wall. Nor is it hard to imagine a copyright infringement case that turns largely on the postings of certain allegedly pirated videos on YouTube. The potential availability of helpful evidence on these internet-based sources makes them an attractive new weapon in a lawyer's arsenal of formal and informal discovery devices. The prevalence of these and other social networking websites, and the potential

1 Social networks are internet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to “friends” – those who have specifically sent a computerized request to view their profile page which the user has accepted. Examples of currently popular social networks include Facebook, Twitter, MySpace and LinkedIn.


benefits of accessing them to obtain evidence, present ethical challenges for attorneys navigating these virtual worlds.

In this opinion, we address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively "deceptive" behavior to "friend" potential witnesses. We do so in light of, among other things, the Court of Appeals' oft-cited policy in favor of informal discovery. See, e.g., Niesig v. Team I, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 497 (1990) ("[T]he Appellate Division's blanket rule closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."); Muriel, Siebert & Co. v. Intuit Inc., 8 N.Y.3d 506, 511, 836 N.Y.S.2d 527, 530 (2007) ("the importance of informal discovery underlies our holding here"). It would be inconsistent with this policy to flatly prohibit lawyers from engaging in any and all contact with users of social networking sites. Consistent with the policy, we conclude that an attorney or her agent may use her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request.4 While there are ethical boundaries to such "friending," in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements. See, e.g., id., 8 N.Y.3d at 512, 836 N.Y.S.2d at 530 ("Counsel must still conform to all applicable ethical standards when conducting such [ex parte] interviews [with opposing party’s former employee]." (citations omitted)).

The potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web. In that connection, in seeking access to an individual's personal information, it may be easier to deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.

In contrast, in the "virtual" world, the same stranger is more likely to be able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the foregoing information. Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools, hobbies,

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4 The communications of a lawyer and her agents with parties known to be represented by counsel are governed by Rule 4.2, which prohibits such communications unless the prior consent of the party's lawyer is obtained or the conduct is authorized by law. N.Y. Prof'l Conduct R. 4.2. The term "party" is generally interpreted broadly to include "represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties." N.Y. State 735 (2001). Cf. N.Y. State 843 (2010)(lawyers may access public pages of social networking websites maintained by any person, including represented parties).
interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a “friend request” falsely portraying the attorney or investigator as the witness’s long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a “friend request” or even one less tailored to the background and interests of the witness. Similarly, an investigator could e-mail a YouTube account holder, falsely touting a recent digital posting of potential interest as a hook to ask to subscribe to the account holder’s “channel” and view all of her digital postings. By making the “friend request” or a request for access to a YouTube “channel,” the investigator could obtain instant access to everything the user has posted and will post in the future. In each of these instances, the “virtual” inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to “open the door” to strangers, social networking users often do just that with a click of the mouse.

Under the New York Rules of Professional Conduct (the “Rules”), an attorney and those in her employ are prohibited from engaging in this type of conduct. The applicable restrictions are found in Rules 4.1 and 8.4(c). The latter provides that “[a] lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” N.Y. Prof’l Conduct R. 8.4(c) (2010). And Rule 4.1 states that “[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.” Id. 4.1. We believe these Rules are violated whenever an attorney “friends” an individual under false pretenses to obtain evidence from a social networking website.

For purposes of this analysis, it does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse. As provided by Rule 8.4(a), “[a] lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” Id. 8.4(a). Consequently, absent some exception to the Rules, a lawyer’s investigator or other agent also may not use deception to obtain information from the user of a social networking website. See id. Rule 5.3(b)(1) (“A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it . . . .”).

We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. See N.Y. County 737 (2007) (requiring, for use of dissemblance, that “the evidence sought is not reasonably and readily obtainable through other lawful means”); see also ABCNY Formal Op. 2003-02 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions -- a question we do not address here -- they are, at least in

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most situations, inapplicable to social networking websites. Because non-deceptive
means of communication ordinarily are available to obtain information on a social
networking page -- through ordinary discovery of the targeted individual or of the social
networking sites themselves -- trickery cannot be justified as a necessary last resort.5
For this reason we conclude that lawyers may not use or cause others to use deception
in this context.

Rather than engage in “trickery,” lawyers can -- and should -- seek information
maintained on social networking sites, such as Facebook, by availing themselves of
informal discovery, such as the truthful “friending” of unrepresented parties, or by using
formal discovery devices such as subpoenas directed to non-parties in possession of
information maintained on an individual’s social networking page. Given the availability
of these legitimate discovery methods, there is and can be no justification for permitting
the use of deception to obtain the information from a witness on-line.6

Accordingly, a lawyer may not use deception to access information from a social
networking webpage. Rather, a lawyer should rely on the informal and formal discovery
procedures sanctioned by the ethical rules and case law to obtain relevant evidence.

September 2010

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5 Although a question of law beyond the scope of our reach, the Stored Communications Act, 18 U.S.C. §
2701(a)(1) et seq. and the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq., among
others, raise questions as to whether certain information is discoverable directly from third-party service
providers such as Facebook. Counsel, of course, must ensure that her contemplated discovery comports
with applicable law.

6 While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an
ethical line when she falsely identifies herself in a “friend request”. See, e.g., Niesig v. Team I, 76 N.Y.2d
363, 376, 559 N.Y.S.2d 493, 499 (1990) (permitting ex parte communications with certain employees);
Muriel Siebert, 8 N.Y.3d at 511, 836 N.Y.S.2d at 530 (“[T]he importance of informal discovery underlie[s]
our holding here that, so long as measures are taken to steer clear of privileged or confidential
information, adversary counsel may conduct ex parte interviews of an opposing party’s former
employee.”).
Opinion 08-176

January 29, 2009

Digest: Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules.

Rules: 22 NYCRR 100.2, 100.2(A); 100.3(B)(8); 100.4(A)(2), 100.4(G); 100.6(B); Opinions 07-141; 07-135; 06-149; 01-14 (Vol. XIX).

Opinion:

A judge received an e-mail inviting him/her to join an online “social network” and inquires whether it is appropriate for him/her to accept that offer and participate.

Social networks, as they are commonly known, are Internet-based meeting places where users with similar interests and backgrounds can communicate with each other. Users create their own personal website - a profile page - with information about themselves that is available for other users to see. Users can establish “connections” with other users allowing increased access to each other’s profile, including, in many cases, the ability to contact any connections the other user has and to comment on material posted on each other’s pages.

Although they vary in certain specific details, social networks generally allow users to reconnect with friends and family, discuss common interests, share photographs, and play games with each other. Other social networks, such as the one at issue in this inquiry, are more business-oriented in nature, with an almost-exclusive focus on professional networking and sharing of business-related information. The social network at issue would allow the judge to join an online community and interact with lawyers and litigants among many other users.

There are multiple reasons why a judge might wish to be a part of a social network: reconnecting with law school, college, or even high school classmates; increased interaction with distant family members; staying in touch with former colleagues; or even monitoring the usage of that same social network by minor children in the judge’s immediate family.
The Committee cannot discern anything inherently inappropriate about a judge joining and making use of a social network. A judge generally may socialize in person with attorneys who appear in the judge’s court, subject to the Rules Governing Judicial Conduct (the “Rules”) (see Opinion 07-141). Moreover, the Committee has not opined that there is anything per se unethical about communicating using other forms of technology, such as a cell phone or an Internet web page (see e.g. Opinion 07-135 [permitting use of a website in a judge’s campaign for office]). Thus, the question is not whether a judge can use a social network but, rather, how he/she does so.

The Rules require that a judge must avoid impropriety and the appearance of impropriety in all of the judge’s activities (see 22 NYCRR 100.2) and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (see 22 NYCRR 100.2[A]). Similarly, a judge shall conduct all of the judge’s extra-judicial activities so that they do not detract from the dignity of judicial office (see 22 NYCRR 100.4[A][2]).

What a judge posts on his/her profile page or on other users’ pages could potentially violate the Rules in several ways. The Committee has, for example, advised that a court should not provide a link on its web page to an advocacy group for Megan’s Law which listed the names and counties of residence for registered sex offenders (see Opinion 01-14 [Vol. XIX]; but see Opinion 07-135 [permissible to provide link to newspaper articles on judge’s website, provided that they are dignified, truthful, and not misleading]). A judge should thus recognize the public nature of anything he/she places on a social network page and tailor any postings accordingly.

The judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge’s court through a social network. In some ways, this is no different from adding the person’s contact information into the judge’s Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge’s friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a “close social relationship” requiring disclosure and/or recusal (compare Opinion 07-141 with Opinion 06-149).

Further, other users of the social network, upon learning of the judge’s identity, may informally ask the judge questions about or seek to discuss their cases, or seek legal advice. As is true in face-to-face meetings, a judge may not engage in these communications. The Rules bar all judges from commenting publicly on pending or impending matters (see 22 NYCRR 100.3[B][8]). Likewise, a full-time judge may not practice law and can only act
pro se or give uncompensated advice to a family member (see 22 NYCRR 100.4[G]). Part-time judges, to the extent permitted to practice law (see 22 NYCRR 100.6[B]), should be mindful of the public nature of communications via social networks.

The guidance set forth above is, and can only be, a non-exhaustive list of issues that judges using social networks should consider. The Committee urges all judges using social networks to, as a baseline, employ an appropriate level of prudence, discretion and decorum in how they make use of this technology, above and beyond what is specifically described above. It is not difficult to find many mainstream news reports regarding negative consequences and notoriety for social network users who used social networks haphazardly (see e.g. Helen A.S. Popkin, *Twitter Gets You Fired In 140 Characters Or Less*, http://www.msnbc.msn.com/id/29796962/ [March 23, 2009, accessed April 10, 2009] [discussing dangers of postings about workplace on social networks]); *Facebook Post Gets Worker Fired*, http://sports.espn.go.com/nfl/news/story?id=3965039 [March 9, 2009, accessed April 10, 2009] [discussing termination of NFL team employee for criticizing a player personnel move on Facebook]).

Finally, the Committee is also aware that the functions and resources available on, and technology behind, social networks rapidly change. Neither this opinion, nor any future opinion the Committee could offer, can accurately predict how these technologies will change and, accordingly, affect judges’ responsibilities under the Rules. Thus, judges who use social networks consistent with the guidance in this opinion should stay abreast of new features of, and changes to, any social networks they use and, to the extent those features present further ethics issues not addressed above, consult the Committee for further guidance.
BEFORE THE
JUDICIAL STANDARDS COMMISSION

INQUIRY NO. 08-234

PUBLIC REPRIMAND

B. CARLTON TERRY, JR.
DISTRICT COURT JUDGE
JUDICIAL DISTRICT 22

This matter came to the attention of the Judicial Standards Commission by a written
complaint filed with the Commission. A formal investigation was ordered by the Commission
and conducted by the Commission’s investigator. During its meeting on February 13, 2009, the
Commission completed its review of the investigative report prepared in this matter. The
Commission caused a copy of this Public Reprimand to be personally served upon Judge B.
Carlton Terry, Jr. In accordance with Rule 11(b) of the Rules of the Judicial Standards
Commission, a judge has 20 days within which to accept the Public Reprimand or to reject it and
demand, in writing, that disciplinary proceedings be instituted in accordance with Rule 12 of the
Rules of the Judicial Standards Commission.

Findings of Fact

1. B. Carlton Terry, Jr., was at all times referred to herein a judge of the General Court of
Justice, District Court Division, Judicial District Twenty-two and, as such was subject to
the Canons of the North Carolina Code of Judicial Conduct, the laws of the State of
North Carolina, and the provisions of the oath of office for a district court judge as set
forth in the North Carolina General Statutes, Chapter 11.

2. Beginning Tuesday, September 9, 2008 and continuing through Friday September 12,
2008, Judge Terry presided over a child custody and child support hearing in the matter

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of Whitley vs. Whitley, Iredell County File No. 07CVD0008.

3. On or about September 9, 2008, while in the judge’s chambers, Judge Terry and Charles A. Schieck, attorney for Mr. Sterling Whitley, the defendant in the proceeding, spoke about “Facebook”, a internet social networking website. Jessie Conley, attorney for Mrs. Renee Whitley, the plaintiff in the proceeding, was present during the discussion but stated she did not know what “Facebook” was, and that she did not have time for it. Judge Terry and Mr. Schieck designated themselves as “friends” on their “Facebook” accounts so that they could view each other's account.

4. During an in chambers meeting on or about Wednesday September 10, 2008, Judge Terry, Shieck and Conley were reviewing prior testimony that suggested one of the parties had been having an affair. Schieck asked Judge Terry if he thought Mr. Whitley was guilty of having an affair. Judge Terry stated he believed the allegations were true due to evidence introduced by Conley, but that it did not make any difference in the custody dispute. It was at this time Schieck stated “I will have to see if I can prove a negative”.

5. On or about the evening of September 10, 2008, Judge Terry checked Schieck's “Facebook” account and saw where Schieck had posted “how do I prove a negative”. Judge Terry posted on his “Facebook” account, he had “two good parents to choose from” and “Terry feels that he will be back in court” referring to the case not being settled. Schieck then posted on his “Facebook” account, “I have a wise Judge”.

6. During a break in the proceedings on September 11, 2008, Judge Terry told Conley about the September 10, 2008 exchanges on “Facebook” between Schieck and himself.

7. On or about September 11, 2008, Judge Terry wrote on his “Facebook” account, “he was in his last day of trial”. Schieck then wrote “I hope I'm in my last day of trial.” Judge Terry responded stating “you are in your last day of trial”.

8. Sometime on or about September 9, 2008, Judge Terry used the internet site “Google” to find information about Mrs. Whitley’s photography business. Judge Terry stated he wanted to see examples of Mrs. Whitley’s photography work. Upon visiting Mrs. Whitley's web site, Judge Terry stated he viewed samples of photographs taken by Mrs. Whitley and also found numerous poems that he enjoyed.

9. When court reconvened at approximately 2:00 p.m. on September 12, 2008, prior to the
to announcing his findings in the case, Judge Terry recited a poem, to which he had made minor changes, that he found on Mrs. Whitley's web site.

10. Judge Terry told the Commission’s investigator he quoted the poem because it gave him “hope for the kids and showed that Mrs. Whitley was not as bitter as he first thought”. Judge Terry stated that he felt the poem reflected favorably towards Mrs. Whitley.

11. Judge Terry acknowledge he accessed Mrs. Whitley’s photography web site on the first two days of trial and stated he may have accessed the site on the last day of trial to copy the poem. Judge Terry could not recall exactly how many times he visited the site but stated that four times was very possible.

12. Judge Terry never disclosed to counsel or the parties at any time during the four days of trial that he had conducted independent research on Mrs. Whitley or had visited any web site belonging to Mrs. Whitley.

13. Following the conclusion of the hearing and after having orally entered his order, Judge Terry requested a bailiff to summon Conley and Schieck to return to the courtroom, whereupon Judge Terry disclosed his actions of having viewed Mrs. Whitley’s web site and quoting a poem he found thereon.

14. Conley filed a Motion in the Cause on October 2, 2008, whereby she requested a) Judge Terry’s order be vacated, b) a new trial, and c) Judge Terry’s disqualification.

15. Judge Terry disqualified himself by Order filed October 14, 2008.

16. Judge Terry’s Child Custody and Child Support Order was vacated and an order for a new trial entered on October 22, 2008.

17. Judge Terry cooperated fully with the investigation.

**Conclusions**

Judge Terry had ex parte communications with counsel for a party in a matter being tried before him. Judge Terry was also influenced by information he independently gathered by viewing a party’s web site while the party’s hearing was ongoing, even though the contents of the web site were never offered as nor entered into evidence during the hearing. Judge Terry’s actions described above evidence a disregard of the principles of conduct embodied in the North
Carolina Code of Judicial Conduct, including failure to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved (Canon 1), failure to respect and comply with the law (Canon 2A), failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2A), engaging in *ex parte* communication with counsel and conducting independent *ex parte* online research about a party presently before the Court (Canon 3A(4)). Judge Terry’s actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute (N.C. Const. art IV, § 17 and N.C.G.S. § 7A-376(a)).

**Corrective Action and Acceptance of Terms**

Judge Terry agrees that he will not repeat such conduct in the future, mindful of the potential threat any repetition of his conduct poses to public confidence in the integrity and impartiality of the judiciary and to the administration of justice.

Judge Terry agrees he will promptly read and familiarize himself with the Code of Judicial Conduct.

Judge Terry further agrees that he will not retaliate against any person known or suspected to have cooperated with the Commission, or otherwise associated with this matter.

Judge Terry affirms he has consulted with, or had the opportunity to consult with counsel prior to acceptance of this Public Reprimand.

I, B. Carlton Terry, Jr., hereby accept the terms contained in this Public Reprimand this the __25__ day of _____March____________, 2009.

**ORIGINAL SIGNED BY**

_________________________________
B. Carlton Terry, Jr.

**ORDER OF PUBLIC REPRIMAND**

Now therefore, pursuant to the Constitution of North Carolina, Article IV, Section 17, the procedures prescribed by the North Carolina General Assembly in the North Carolina General Statutes, Chapter 7A, Article 30, and Rule 11(b) of the Rules of the Judicial Standards Commission, the North Carolina Judicial Standards Commission, hereby orders that B. Carlton
Terry, Jr., be and is hereby PUBLICLY REPRIMANDED for the above set forth violations of the Code of Judicial Conduct. Judge Terry shall not engage in such conduct in the future and shall fulfill all of the terms of this Public Reprimand as set forth herein.

Dated this the __1st__ day of_______April_______, 2009.

ORIGINAL SIGNED BY

____________________
John C. Martin, Chairman
Judicial Standards Commission
PART 1200 –
RULES OF PROFESSIONAL CONDUCT
These Rules of Professional Conduct were promulgated as joint rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009. They supersede the former Part 1200 (Disciplinary Rules of the Code of Professional Responsibility).
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RULE 1.0: Terminology

(a) “Advertisement” means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

(b) “Belief” or “believes” denotes that the person involved actually believes the fact in question to be true. A person’s belief may be inferred from circumstances.

(c) “Computer-accessed communication” means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

(d) “Confidential information” is defined in Rule 1.6.

(e) “Confirmed in writing” denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person’s oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) “Differing interests” include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(g) “Domestic relations matter” denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(h) “Firm” or “law firm” includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

(i) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

(j) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

(k) “Knowingly,” “known,” “know,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(l) “Matter” includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, ar-
rest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

(m) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional legal corporation or a member of an association authorized to practice law.

(n) “Person” includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(o) “Professional legal corporation” means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(p) “Qualified legal assistance organization” means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(q) “Reasonable” or “reasonably,” when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, “reasonable lawyer” denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.

(r) “Reasonable belief” or “reasonably believes,” when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(s) “Reasonably should know,” when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(t) “Screened” or “screening” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.

(u) “Sexual relations” denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(v) “State” includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(w) “Tribunal” denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party’s interests in a particular matter.

(x) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and email. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

**RULE 1.1:**

**Competence**

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.
RULE 1.2:
Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions herein, a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate this Rule by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

RULE 1.3:
Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

RULE 1.4:
Communication

(a) A lawyer shall:
   (1) promptly inform the client of:
      (i) any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(j), is required by these Rules;
      (ii) any information required by court rule or other law to be communicated to a client; and
      (iii) material developments in the matter including settlement or plea offers.
   (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 a client’s 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 these Rules 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.
RULE 1.5:

FEES AND DIVISION OF FEES

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to
the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse’s primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a statement of client’s rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

1. the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

2. the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client’s agreement is confirmed in writing; and

3. the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

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**RULE 1.6:**

**Confidentiality of Information**

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

1. the client gives informed consent, as defined in Rule 1.0(j);

2. the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

3. the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;

2. to prevent the client from committing a crime;

3. to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representa-
tion was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer’s firm or the law firm;

(5) (i) to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct; or
(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer’s employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

RULE 1.7:
Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

RULE 1.8:
Current Clients: Specific Conflict of Interest Rules

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not:

(1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer...
any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:

1. a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or

2. any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

2. a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

3. a lawyer, in an action in which an attorney’s fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer’s own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer’s representation of the client, from one other than the client unless:

1. the client gives informed consent;

2. there is no interference with the lawyer’s independent professional judgment or with the client-lawyer relationship; and

3. the client’s confidential information is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

1. make an agreement prospectively limiting the lawyer’s liability to a client for malpractice; or

2. settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

1. acquire a lien authorized by law to secure the lawyer’s fee or expenses; and

2. contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

(j) A lawyer shall not:

1. as a condition of entering into or continuing any professional representation by the lawyer or the lawyer’s firm, require or demand sexual relations with any person;
(ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer’s firm; or
(iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer’s representation of the client.

(2) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.

(k) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

RULE 1.9:
DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

RULE 1.10:
IMPUTATION OF CONFLICTS OF INTEREST

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

(d) A disqualification prescribed by this Rule may be
waived by the affected client or former client under the conditions stated in Rule 1.7.

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

(1) the firm agrees to represent a new client;
(2) the firm agrees to represent an existing client in a new matter;
(3) the firm hires or associates with another lawyer; or
(4) an additional party is named or appears in a pending matter.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

(h) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

RULE 1.11:
Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:

(1) shall comply with Rule 1.9(c); and
(2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

   (i) notify, as appropriate, lawyers and non-lawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
   (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
   (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and
   (iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in
this Rule, the term “confidential government information” means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(e) As used in this Rule, the term “matter” as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions.

(f) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer’s action as a public official.

RULE 1.12:
Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals

(a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) an arbitrator, mediator or other third-party neutral; or

(2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

   (i) notify, as appropriate, lawyers and non-lawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

   (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

   (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and
(iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

RULE 1.13:
Organization As Client

(a) When a lawyer employed or retained by an organization is dealing with the organization’s directors, officers, employees, members, shareholders or other constituents, and it appears that the organization’s interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer’s efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

RULE 1.14:
Client With Diminished Capacity

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial
physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

RULE 1.15:
Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer’s practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. “Banking institution” means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer’s own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer’s firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer’s firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an “Attorney Special Account,” “Attorney Trust Account,” or “Attorney Escrow Account,” and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer’s firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging
to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

1. promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;
2. identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
3. maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and
4. promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

1. A lawyer shall maintain for seven years after the events that they record:
   a. the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer’s practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;
   b. a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;
   c. copies of all retainer and compensation agreements with clients;
   d. copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;
   e. copies of all bills rendered to clients;
   f. copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer’s regular employ, for services rendered or performed;
   g. copies of all retainer and closing statements filed with the Office of Court Administration; and
   h. all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

2. Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

3. For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining “copies” by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only
to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.
Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers’ Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.
(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer’s estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers’ Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.
Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.
The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.
A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.
RULE 1.16:
DECLINING OR TERMINATING REPRESENTATION

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer’s services to perpetrate a crime or fraud;

(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer’s inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer’s mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

(11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a
lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

RULE 1.17:

SALE OF LAW PRACTICE

(a) A lawyer retiring from a private practice of law; a law firm, one or more members of which are retiring from the private practice of law with the firm; or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller’s private practice of law, notwithstanding any other provision of these Rules. Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.

(b) Confidential information.

(1) With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as confidential information under Rule 1.6.

(2) Notwithstanding Rule 1.6, the seller may provide the prospective buyer with information as to individual clients:

(i) concerning the identity of the client, except as provided in paragraph (b)(6);

(ii) concerning the status and general nature of the matter;

(iii) available in public court files; and

(iv) concerning the financial terms of the client-lawyer relationship and the payment status of the client’s account.

(3) Prior to making any disclosure of confidential information that may be permitted under paragraph (b)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to paragraph (b)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless the seller shall have obtained the consent of the client in accordance with Rule 1.6(a)(1).

(4) Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.

(5) Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.

(6) If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client’s consent to the proposed disclosure.

(c) Written notice of the sale shall be given jointly by
the seller and the buyer to each of the seller’s clients and shall include information regarding:

(1) the client’s right to retain other counsel or to take possession of the file;

(2) the fact that the client’s consent to the transfer of the client’s file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

(3) the fact that agreements between the seller and the seller’s clients as to fees will be honored by the buyer;

(4) proposed fee increases, if any, permitted under paragraph (e); and

(5) the identity and background of the buyer or buyers, including principal office address, bar admissions, number of years in practice in New York State, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.

(d) When the buyer’s representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

(e) The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

**RULE 1.18:**

**DUTIES TO PROSPECTIVE CLIENTS**

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

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and non-lawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;

(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the
law firm will be able to provide competent and
diligent representation in the matter.

(e) A person who:

(1) communicates information unilaterally to a
lawyer, without any reasonable expectation that
the lawyer is willing to discuss the possibility of
forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of
disqualifying the lawyer from handling a mate-
rially adverse representation on the same or a
substantially related matter, is not a prospective
client with the meaning of paragraph (a).

RULE 2.1:

Advisor

In representing a client, a lawyer shall exercise inde-
pendent professional judgment and render candid ad-
vice. In rendering advice, a lawyer may refer not only
to law but to other considerations such as moral, eco-
nomic, social, psychological, and political factors that
may be relevant to the client’s situation.

RULE 2.2:

[Reserved]

RULE 2.3:

Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter af-
fecting a client for the use of someone other than
the client if the lawyer reasonably believes that
making the evaluation is compatible with other as-
pects of the lawyer’s relationship with the client.

(b) When the lawyer knows or reasonably should know
that the evaluation is likely to affect the client’s in-
terests materially and adversely, the lawyer shall not
provide the evaluation unless the client gives in-
formed consent.

(c) Unless disclosure is authorized in connection with
a report of an evaluation, information relating to
the evaluation is protected by Rule 1.6.

RULE 2.4:

Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a “third-party neutral” when the
lawyer assists two or more persons who are not
clients of the lawyer to reach a resolution of a dis-
pute or other matter that has arisen between them.
Service as a third-party neutral may include service
as an arbitrator, a mediator or in such other capac-
ity as will enable the lawyer to assist the parties to
resolve the matter.

(b) A lawyer serving as a third-party neutral shall in-
form unrepresented parties that the lawyer is not
representing them. When the lawyer knows or rea-
sonably should know that a party does not under-
stand the lawyer’s role in the matter, the lawyer
shall explain the difference between the lawyer’s
role as a third-party neutral and a lawyer’s role as
one who represents a client.

RULE 3.1:

Non-Meritorious Claims and
Contentions

(a) 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 friv-
olous. A lawyer for the defendant in a criminal pro-
cceeding or for the respondent in a proceeding that
could result in incarceration may nevertheless so
defend the proceeding as to require that every ele-
ment of the case be established.

(b) A lawyer’s conduct is “frivolous” for purposes of
this Rule if:

(1) the lawyer knowingly advances a claim or de-
fense that is unwarranted under existing law,
except that the lawyer may advance such claim
or defense if it can be supported by good faith
argument for an extension, modification, or re-
versal of existing law;

(2) the conduct has no reasonable purpose other
than to delay or prolong the resolution of litiga-
tion, in violation of Rule 3.2, or serves merely
to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

**RULE 3.2:**

**Delay of Litigation**

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

**RULE 3.3:**

**Conduct Before a Tribunal**

(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;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

**RULE 3.4:**

**Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a) (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or
conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness’s testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

RULE 3.5:
MAINTAINING AND PRESERVING THE IMPARTIALITY OF TRIBUNALS AND JURORS

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer’s behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

(i) in the course of official proceedings in the matter;

(ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;

(iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or

(iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts;

(3) seek to or cause another person to influence a juror or prospective juror by means prohibited by law;

(4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of
the jury unless authorized to do so by law or court order;

(5) communicate with a juror or prospective juror after discharge of the jury if:
   (i) the communication is prohibited by law or court order;
   (ii) the juror has made known to the lawyer a desire not to communicate;
   (iii) the communication involves misrepresentation, coercion, duress or harassment; or
   (iv) the communication is an attempt to influence the juror’s actions in future jury service;

(6) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

RULE 3.6:

Trial Publicity

(a) A lawyer who is participating in or has participated in a criminal or civil 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.

(b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:
   (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness;
   (2) in a criminal matter that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person’s refusal or failure to make a statement;
   (3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
   (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that could result in incarceration;
   (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
   (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:
   (1) the claim, offense or defense and, except when prohibited by law, the identity of the persons involved;
   (2) information contained in a public record;
(3) that an investigation of a matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence
and information necessary thereto;
(6) a warning of danger concerning the behavior of
a person involved, when there is reason to be-
lieve that there exists the likelihood of substan-
tial harm to an individual or to the public
interest; and
(7) in a criminal matter:
(i) the identity, age, residence, occupation
and family status of the accused;
(ii) if the accused has not been apprehended,
information necessary to aid in apprehen-
sion of that person;
(iii) the identity of investigating and arresting
officers or agencies and the length of the
investigation; and
(iv) the fact, time and place of arrest, resist-
ance, pursuit and use of weapons, and a
description of physical evidence seized,
other than as contained only in a confes-
sion, admission or statement.

(d) Notwithstanding paragraph (a), a lawyer may make
a statement that a reasonable lawyer would believe
is required to protect a client from the substantial
prejudicial effect of recent publicity not initiated
by the lawyer or the lawyer’s client. A statement
made pursuant to this paragraph shall be limited to
such information as is necessary to mitigate the re-
cent adverse publicity.

(e) No lawyer associated in a firm or government
agency with a lawyer subject to paragraph (a) shall
make a statement prohibited by paragraph (a).

RULE 3.7:

**Lawyer As Witness**

(a) A lawyer shall not act as advocate before a tribunal
in a matter in which the lawyer is likely to be a wit-
ness on a significant issue of fact unless:
(1) the testimony relates solely to an uncontested
issue;
(2) the testimony relates solely to the nature and
value of legal services rendered in the matter;
(3) disqualification of the lawyer would work sub-
stantial hardship on the client;
(4) the testimony will relate solely to a matter of
formality, and there is no reason to believe that
substantial evidence will be offered in opposi-
tion to the testimony; or
(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal
in a matter if:
(1) another lawyer in the lawyer’s firm is likely to
be called as a witness on a significant issue other
than on behalf of the client, and it is apparent
that the testimony may be prejudicial to the
client; or
(2) the lawyer is precluded from doing so by Rule
1.7 or Rule 1.9.

RULE 3.8:

**Special Responsibilities of Prosecutors
and Other Government Lawyers**

(a) A prosecutor or other government lawyer shall not
institute, cause to be instituted or maintain a crim-
inal charge when the prosecutor or other govern-
ment lawyer knows or it is obvious that the charge
is not supported by probable cause.

(b) A prosecutor or other government lawyer in crim-
inal litigation shall make timely disclosure to coun-
sel for the defendant or to a defendant who has no
counsel of the existence of evidence or information
known to the prosecutor or other government
lawyer that tends to negate the guilt of the accused,
mitigate the degree of the offense, or reduce the
sentence, except when relieved of this responsibility
by a protective order of a tribunal.
RULE 3.9:
**Advocate In Non-Adjudicative Matters**

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

RULE 4.1:
**Truthfulness In Statements To Others**

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

RULE 4.2:
**Communication With Person Represented By Counsel**

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

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person’s counsel that such communications will be taking place.

RULE 4.3:
**Communicating With Unrepresented Persons**

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

RULE 4.4:
**Respect for Rights of Third Persons**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

RULE 4.5:
**Communication After Incidents Involving Personal Injury or Wrongful Death**

(a) In the event of a specific incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after
the date of the incident.

(b) An unsolicited communication by a lawyer or law firm, seeking to represent an injured individual or the legal representative thereof under the circumstance described in paragraph (a) shall comply with Rule 7.3(e).

RULE 5.1:
Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 5.2:
Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.

RULE 5.3:
Lawyer’s Responsibility for Conduct of Nonlawyers

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the like-
lihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the non-lawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 5.4:
Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer’s firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may compensate a non-lawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer’s professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer’s duty to maintain the confidential information of the client under Rule 1.6.

(d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

RULE 5.5:
Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.

(b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.
RULE 5.6:
Restrictions On Right To Practice

(a) A lawyer shall not participate in offering or making:

(1) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(2) an agreement in which a restriction on a lawyer’s right to practice is part of the settlement of a client controversy.

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

RULE 5.7:
Responsibilities Regarding Nonlegal Services

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and (c) with respect to the confidential information of a client receiving legal services.

(c) For purposes of this Rule, “nonlegal services” shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

RULE 5.8:
Contractual Relationship Between Lawyers and Nonlegal Professionals

(a) The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed “independent professional judgment and undivided loyalty uncompromised by conflicts
of interest.” Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State.

Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a), provided that:

(1) the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules;

(2) the lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm, nor, as provided in Rule 7.2(a)(1), shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

(3) the fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the “Statement of Client’s Rights In Cooperative Business Arrangements” pursuant to section 1205.4 of the Joint Appellate Divisions Rules.

(b) For purposes of paragraph (a):

(1) each profession on the list maintained pursuant to a Joint Rule of the Appellate Divisions shall have been designated sua sponte, or approved by the Appellate Divisions upon application of a member of a nonlegal profession or nonlegal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:

   (i) have been awarded a bachelor’s degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university and work experience;

   (ii) are licensed to practice the profession by an agency of the State of New York or the United States Government; and

   (iii) are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession;

(2) the term “ownership or investment interest” shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

(c) This Rule shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.
**RULE 6.1:**

**Voluntary Pro Bono Service**

Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.

(a) Every lawyer should aspire to:

1. provide at least 20 hours of pro bono legal services each year to poor persons; and
2. contribute financially to organizations that provide legal services to poor persons.

(b) Pro bono legal services that meet this goal are:

1. professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel;
2. activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and
3. professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

(c) Appropriate organizations for financial contributions are:

1. organizations primarily engaged in the provision of legal services to the poor; and
2. organizations substantially engaged in the provision of legal services to the poor, provided that the donated funds are to be used for the provision of such legal services.

(d) This Rule is not intended to be enforced through the disciplinary process, and the failure to fulfill the aspirational goals contained herein should be without legal consequence.

**RULE 6.3:**

**Membership in a Legal Services Organization**

A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer’s firm. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer’s obligations to a client under Rules 1.7 through 1.13; or
(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer’s firm.

**RULE 6.4**

**Law Reform Activities Affecting Client Interests**

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the organization, but need not identify the client. When the lawyer knows that the interests of a client may be adversely affected by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the client.

**RULE 6.5:**

**Participation in Limited Pro Bono Legal Service Programs**

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a
client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) shall comply with Rules 1.7, 1.8 and 1.9, concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest; and

(2) shall comply with Rule 1.10 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9.

(b) Except as provided in paragraph (a)(2), Rule 1.7 and Rule 1.9 are inapplicable to a representation governed by this Rule.

(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client’s informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.

(e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation.

RULE 7.1:

ADVERTISING

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

1. contains statements or claims that are false, deceptive or misleading; or

2. violates a Rule.

(b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

1. legal and nonlegal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;

2. names of clients regularly represented, provided that the client has given prior written consent;

3. bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and

4. legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.

(c) An advertisement shall not:
(1) include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter still pending;

(2) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

(3) include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;

(4) use actors to portray the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same;

(5) rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence;

(6) be made to resemble legal documents; or

(7) utilize a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.

(d) An advertisement that complies with paragraph (e) may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer’s services with the services of other lawyers;

(3) testimonials or endorsements of clients, where not prohibited by paragraph (c)(1), and of former clients; or

(4) statements describing or characterizing the quality of the lawyer’s or law firm’s services.

(e) It is permissible to provide the information set forth in paragraph (d) provided:

(1) its dissemination does not violate paragraph (a);

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated; and

(3) it is accompanied by the following disclaimer: “Prior results do not guarantee a similar outcome.”

(f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled “Attorney Advertising” on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words “Attorney Advertising” shall appear therein. In the case of electronic mail, the subject line shall contain the notation “ATTORNEY ADVERTISING.”

(g) A lawyer or law firm shall not utilize:

(1) a pop-up or pop-under advertisement in connection with computer-accessed communications, other than on the lawyer or law firm’s own web site or other internet presence; or

(2) meta tags or other hidden computer codes that, if displayed, would violate these Rules.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements shall appear on the home page.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services...
that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(k) All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

(l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

(p) All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law §488(3).

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(r) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.
other professional services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and

(2) A lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).

(b) A lawyer or the lawyer’s partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer’s services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer’s services or those of the lawyer’s partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

(1) a legal aid office or public defender office:
   (i) operated or sponsored by a duly accredited law school;
   (ii) operated or sponsored by a bona fide, non-profit community organization;
   (iii) operated or sponsored by a governmental agency; or
   (iv) operated, sponsored, or approved by a bar association;
(2) a military legal assistance office;
(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or
(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) Neither the lawyer, nor the lawyer’s partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;

(ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;

(iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

(iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;

(v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations; and

(vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.
RULE 7.3:
Solicitation and Recommendation of Professional Employment

(a) A lawyer shall not engage in solicitation:
   (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or
   (2) by any form of communication if:
      (i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;
      (ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;
      (iii) the solicitation involves coercion, duress or harassment;
      (iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or
      (v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this Rule, “solicitation” means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:
   (1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:
      (i) a copy of the solicitation;
      (ii) a transcript of the audio portion of any radio or television solicitation; and
      (iii) if the solicitation is in a language other than English, an accurate English-language translation.
   (2) Such solicitation shall contain no reference to the fact of filing.
   (3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.
   (4) Solicitations filed pursuant to this subdivision shall be open to public inspection.
   (5) The provisions of this paragraph shall not apply to:
      (i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;
      (ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at a prospective client affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or
      (iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).

(d) A written solicitation shall not be sent by a method
that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(f) Any solicitation made in writing or by computer-accessed communication and directed to a predetermined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient’s potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked “SAMPLE” in red ink in a type size equal to the largest type size used in the agreement and the words “DO NOT SIGN” shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

RULE 7.4:
IDENTIFICATION OF PRACTICE AND SPECIALTY

(a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

(c) A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:

1. A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: “The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law;”

2. A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: “Certification granted by the [identify state or territory] is not recognized by any governmental authority within the State of New York. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.”
RULE 7.5:
PROFESSIONAL NOTICES, LETTERHEADS AND SIGNS

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:

(1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates;

(2) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;

(3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or

(4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated “Of Counsel” on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as “General Counsel” or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain “PC” or such symbols permitted by law, the name of a limited liability company or partnership shall contain “LLC,” “LLP” or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as “legal clinic,” “legal aid,” “legal service office,” “legal assistance office,” “defender office” and the like may be used only by qualified legal assistance organizations, except that the term “legal clinic” may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer who assumes a judicial, legislative or public executive or administrative post shall not permit the lawyer’s name to re-
main in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer’s name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate these Rules.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.

RULE 8.1:
CANDOR IN THE BAR ADMISSION PROCESS

(a) A lawyer shall be subject to discipline if, in connec-

tion with the lawyer’s own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

RULE 8.2:
JUDICIAL OFFICERS AND CANDIDATES

(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.

RULE 8.3:
REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6;
or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

**RULE 8.4:**

**Misconduct**

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.

**RULE 8.5:**

**Disciplinary Authority and Choice of Law**

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer’s conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.
Hypotheticals For CLE Panel

1. You are taking a deposition of Ms. X in a civil case arising from a contract dispute. Ms. X is a non-party in the case, and is also pro se. During her deposition, she gives testimony that is very helpful to your client’s adversary. Also during her deposition, Ms. X reveals that she has accounts on Facebook and MySpace. You do not know for certain, but you have reason to believe, based on her answers to some of your questions, that Ms. X may have posted on her Facebook and MySpace pages information that might be relevant to the litigation. After the deposition, you try to access Ms. X’s Facebook and MySpace pages, without success, as you learn that she must “friend” you; i.e., give you permission, before you can access these sites. You do not try to “friend” Ms. X.

Instead, you call your friend Joe and ask him to contact Ms. X and seek to “friend” her in order to obtain access to her web pages. You tell Joe that he should only state truthful information about himself in his communications with Ms. X, e.g., his real name, but you tell him that he should not reveal his affiliations with you, nor should he reveal the purpose for which he is seeking access to Ms. X’s websites. Have you acted ethically?

2. Same facts as above, except that the litigation you are handling is an intellectual property dispute, and Ms. X is the vice president of a company that your client has reason to believe is about to release on the market a product whose name infringes on your client’s trademark. During her deposition, Ms. X refuses to divulge any information about the new product’s name, but comments that she made during the deposition suggest that she had bragged about the forthcoming product on her Facebook and MySpace pages.

Now can you call Joe and ask him to try to “friend” Ms. X and obtain access to her web pages?

3. A matrimonial part judge in New York Supreme Court has “friended” you, who are an attorney whose Facebook page clearly identifies you as a divorce and child custody lawyer. You use your Facebook page, among other things, as a forum to discuss current matrimonial and family law issues. During one online “debate,” the judge weighs in with his views about a particular custody issue that you and others are discussing due to a new decision that has come out from the Court of Appeals. The next month, the judge learns that you have a divorce case assigned to him. There are no children of the marriage in the case at issue before him. May this judge preside over the case?

4. Same facts as above. The judge has decided not to recuse himself from the case, and you know that this is the same judge who “friended” you last month. Must you disclose to your adversary your previous online interactions with the judge?
5. You are a criminal defense lawyer who regularly reads and participates in a criminal defense lawyers’ blog. The topic of discussion one afternoon was Criminal Court Judge M, before whom you had had a terrible appearance earlier that day, when she gave you only one week to prepare for trial, when most other judges give at least a month. You post a comment on the blog complaining about the absurd time table that the judge has imposed upon you and theorize that she has done so as a way to pressure you into asking for an adjournment and thus force you to waive your client’s constitutional right to a speedy trial. In the course of your commentary, you also happen to refer to the judge as an “evil, unfair witch” and, further, mention her “ugly, condescending attitude” towards defense lawyers.

Will you face possible disciplinary action? Should you?

6. You are an assistant public defender who, in the course of your duties, have obtained information about clients that would otherwise be confidential or secret. You publish a blog, approximately one-third of which is dedicated to postings about your work and clients. In your work-related postings, you often refer to your clients by their first names or jail identification numbers, and discuss the facts of their cases, including why you think, in certain instances, that they have been treated unfairly and what their treatment reveals about the problems with the criminal justice system. You have never once written anything unfavorable about any of your clients on any of your postings.

Will you face possible disciplinary action? Should you?

7. You are civil litigator and recently took the videotaped deposition of your client’s adversary, who was and is represented by counsel. The deposition went very well, in your view, and during the course of it, the deponent made many extremely embarrassing and damming admissions that advanced your client’s case significantly. Nevertheless, the deponent does not seem to share your views of how the deposition went, and has not once broached the topic of settlement. Your client is happy with the deposition but complaining often about how long the litigation has been dragging on. You decide that a good way to induce a settlement conversation would be to post the embarrassing excerpts of the deposition on YouTube, for all the world to see.

Is this something that you can or should do?

8. You are a class action lawyer. On your Facebook page, you explain that your firm is commencing a lawsuit against XYZ Corp. for its alleged environmental torts, including dumping toxic materials into Lake Clearwater. You ask people visiting your site (it is not password protected) to let you know if they have ever lived near Lake Clearwater within the last five years and, if so, to describe any serious illnesses that may have befallen them during that time. On your site, you also describe, at length, your theories about all of the wrongdoing committed by XYZ Corp. and the many ways in which you contend that XYZ’s top management has made efforts to skirt environmental legislation, including through bribery of relevant officials and other criminal activity.

Is this something that you can or should do?
Notes on Faculty

**Denise E. Backhouse** is an associate and senior member of Morgan Lewis's eData Practice. She counsels and defends clients primarily in the areas of securities and financial industry litigation and business and corporate disputes. Her responsibilities have included conducting and advising on all phases of discovery, including the preservation, collection, review, and production of large volumes of eDiscovery and defending client IT personnel in depositions. Ms. Backhouse has engaged in eDiscovery motion practice in multiple jurisdictions and has worked on discovery responses to the Securities and Exchange Commission, FINRA, and state attorneys general. She is a member of The Sedona Conference Working Groups on eDiscovery and International eInformation Management.

**Chris Dale** qualified as an English solicitor in 1980 after reading History at Oxford. He was a litigation partner in London and then a litigation software developer and litigation support consultant before turning to commentary on electronic disclosure / discovery. He runs the e-Disclosure Information Project which disseminates information about the court rules, the problems, and the technology to lawyers and their clients, to judges, and to suppliers. He is a member of Senior Master Whitaker's Working Party which drafted the new Practice Direction and Electronic Documents Questionnaire. He writes the UKs only authoritative and objective web site and blog on the subject and is a well-known speaker and commentator in the UK, the US and other common law jurisdictions.

**Jeremy R. Feinberg** is the Statewide Special Counsel for Ethics at New York’s Office of Court Administration. In that capacity, he oversees the Judicial Campaign Ethics Center and provides ethics training, support and advice to the approximately 15,000 non-judicial employees of the Unified Court System. He also serves as one of the staff counsel to the Advisory Committee on Judicial Ethics, the panel of judges that provides ethical advice and opinions for all members of the New York State Judiciary. Mr. Feinberg frequently lectures on legal ethics at CLE programs around the state and contributes writings on ethics issues to the New York Professional Responsibility Report. He is an adjunct professor of ethics and professional responsibility at Columbia Law School. He previously has served as a guest lecturer and instructor at a number of New York area law schools. He is a member of the New York City Bar Association’s Committee on Professional Responsibility and Council on Judicial Administration and has previously served on its Committee on Professional Ethics and its Committee on Professional Discipline. He was also a member of the New York State CLE Board. Mr. Feinberg is also OCA’s Statewide Special Counsel for the Commercial Division. In that role, he provides support and assistance to all of the Commercial Division courts throughout New York, and serves as a liaison between the Bench and the commercial Bar. Before joining OCA in January 2006, Mr. Feinberg was a senior litigation associate at the New York office of Proskauer Rose LLP where he handled sports law, commercial litigation, and ethics matters for the firm’s clients. He served as law clerk to Hon. Judith S. Kaye, Chief Judge of the New York Court of Appeals, from December 1996 to December 1998. He is a 1995 graduate of Columbia Law School and a 1992 graduate of Columbia College.
**Ronald C. Minkoff** is a member of Frankfurt Kurnit Klein & Selz, P.C. In addition to his commercial litigation practice, he represents attorneys in a wide variety of matters, including partnership disputes, disciplinary cases and legal malpractice actions. Mr. Minkoff has his J.D. Degree from Columbia law School, Class of 1980. He was an attorney at the Nassau County Legal Aid Society (1983-85) and a member of Fennell & Minkoff 1987-94) and Beldock Levine & Hoffman (1994-2001) before joining Frankfurt Kurnit. He is the former Chair of the Committee on Professional Discipline of the New York City Bar Association, a current member of the Committee on Professional Responsibility and a past member of Committee on Professional and Judicial Ethics. He is also a member of the New York State Bar Association’s Committee on Professional Discipline and Committee on Standards of Attorney Conduct of the New York State Bar Association. He is a past President of the Association of Professional Responsibility Lawyers (“APRL”), and served on the APRL Board for seven years. He is currently a member of the ABA Standing Committee on Professionalism and the Policy and Implementation Committee of the ABA Center for Professional Responsibility. He served as the Chair of subcommittees of APRL and the New York City Bar Association regarding the ABAB Commission on the Model Code of Judicial Conduct, and is the co-chair of the APRL Committee on Guantanamo Bay. He is an Adjunct Professor of Professional Responsibility at Brooklyn Law School, and has written and lectured extensively on topics involving the law of lawyering, including the attorney-client privilege, the ethical duties of lawyer/directors, multijurisdictional practice and the obligations of departing law partners.

**Ronni D. Solomon** focuses her practice on the management of major discovery matters as a member of King & Spalding's E-Discovery Practice Group. She serves as National E-Discovery Counsel for large corporations providing guidance on e-discovery issues, including both litigation preparedness and discovery strategy in active litigation. Ms. Solomon has been quoted in a number of publications on e-discovery issues, including *The Wall Street Journal*, the *American Bar Association’s Litigation News* and the *Atlanta Business Chronicle*, and has written e-discovery articles featured on *law.com*. Ms. Solomon has been a litigator for over fourteen years. Prior to joining King & Spalding, she was a corporate discovery specialist for one of the largest e-discovery companies in the industry where she advised and consulted with in-house counsel of large corporations on electronic discovery strategies. She leverages the knowledge she gained on the vendor side to help clients select the most efficient e-discovery tools and strategies and significantly reduce their total vendor and review costs. Ms. Solomon is active in electronic discovery and records management industry groups. She is co-chair of the Electronic Discovery Subcommittee of the Pretrial Practice and Discovery Committee of the Litigation Section of the American Bar Association. She was appointed by U.S. District Court Judge Timothy Batten to be on a committee to provide recommendations to the U.S. District Court for the Northern District of Georgia regarding amending its local rules to address e-discovery issues. Ms. Solomon is a member of The Sedona Conference Working Group on Electronic Document Retention and Production and is currently the team leader for the Social Media drafting team. Ms. Solomon is on the Advisory Board of the Association of Certified E-Discovery Specialists, the Board of Directors of The American Society of Forensics and E-Discovery, is the former Director
of the Atlanta Chapter of Women in E-Discovery, and is a member of the Association of
Records Managers and Administrators, Inc. (ARMA).