



REFLECTIONS ON CURRENT TOPICS IN LEGAL ETHICS & SOCIAL MEDIA

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Prepared by students at the University at Buffalo School of Law,
The State University of New York
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(taught by Professor Kim Diana Connolly)

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¹ This document reflects combined individual work of students enrolled in the Summer 2016 Ethics in Practice course at the University at Buffalo School of Law, The State University of New York. This document is a compilation of student research, and should not be construed to provide legal advice. It has not been edited in detail for content by the professor, and any views therein should not be ascribed to the law school, the university, or the professor. Likewise, please be patient if you come across differences among approaches to citation or slight formatting inconsistencies. This document should be recognized, however, as a set of work reflecting a significant amount of solid research by enthusiastic students voting to take on an extra project and thereafter working hard during a summer school course!

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1) Introduction and Overview²

As Wikipedia (a product of the social media world) makes clear, concretely defining the term “social media,” even in the year 2016, is challenging.³ However, it is beyond dispute that social media has become a central part of many people’s day to day lives, including those engaged in the practice of law. This modern reality led a class of students from the University at Buffalo School of Law, The State University of New York to choose this area for a joint topic to explore for credit in their summer Ethics in Practice course.

As their research in this report has shown, social media and digital communications have developed at a historically unprecedented pace. Sir Tim Berners-Lee created the World Wide Web just twenty-seven years ago; the ARPANET (predecessor of the Internet) was first established between several major US universities in 1969.⁴ It quickly became popular: in 2000, roughly 43% of the US population used the Internet.⁵ Since then it has become even more popular: as of July 2016, that estimate has more than doubled to 88%.⁶ Moreover, the variety of uses and expanding access to the internet across the United States and throughout

² Several students contributed substantially to the introductory section, including Anthony Chabala, Michael Enright, Russel Shanahan, and Charlotte Werner-Kohler. Appreciation for assistance in compiling and editing this document goes to Elisa Lackey, Interim Paralegal to the Clinical Legal Education Program at the University at Buffalo School of Law, The State University of New York.

³ Wikipedia’s attempt to define social media suggests they “are computer-mediated tools that allow people, companies and other organizations to create, share, or exchange information, career interests, ideas, and pictures/videos in virtual communities and networks. The variety of stand-alone and built-in social media services currently available introduces challenges of definition; however, there are some common features (1) social media are Web 2.0 Internet-based applications (2) user-generated content (UGC) such as text, digital photo or digital video posts are the lifeblood of the social media organism (3) users create their own profiles for the website or app, which is designed and maintained by the social media organization and (4) social media facilitate the development of online social networks by connecting a user’s profile with those of other individuals and/or groups.” Wikipedia, *Social Media*, https://en.wikipedia.org/wiki/Social_media (citations omitted)(last accessed July 2, 2016).

⁴ Internet Live Stats, *United States Internet Users*, <http://www.internetlivestats.com/internet-users/us/> (last accessed July 2, 2016).

⁶ *Id.*

the world has, in the view of many, changed our lives substantially.⁷ As a result, those in the legal profession are called upon to engage in regular examination of the ethics of internet usage in the legal services industry.

For example, civil litigation is often affected by things that take place out of the courtroom:⁸ sometimes jurors are influenced by misinformation from commercial news outlets⁹, sometimes litigant's goals change because of changed dynamics in personal relationships¹⁰, and sometimes even statutes change (e.g., tort reform).¹¹ Yet there are some who have concluded the most powerful influence from outside the courtroom is now social media.¹² Just because civil litigation starts, litigants often don't stop using social media services.¹³

Yet social media can present dangers. As an example, while many see the purpose of social media as breaking down social barriers and making people accessible, this is in tension with society's vested interest in keeping judges socially isolated for the sake of objectivity.¹⁴

⁷ Caitlin Dewey, *36 ways the Web has changed us*, WASH. POST. (Mar. 12, 2014), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2014/03/12/36-ways-the-web-has-changed-us/><https://www.washingtonpost.com/news/arts-and-entertainment/wp/2014/03/12/36-ways-the-web-has-changed-us/> (last accessed July 1, 2016).

⁸ John K. Villa, *Advocacy Outside the Courtroom: To What Extent Can Counsel Comment on Pending Litigation? Your Company Has Been Sued by A Notorious Plaintiff's Class Action Lawyer, Who in A Press Conference Accused Your Client of Fraud*, ACC Docket, Nov./Dec. 2004, at 104, 108.

⁹ Judge Sharen Wilson, Judge Cynthia Stevens Kent, *Handling Capital Cases Dealing with the Media*, 16 TEX. WESLEYAN L. REV. 159 (2010).

¹⁰ See *Shapray v. Shapray*, 236 Ga. 393, 223 S.E.2d 802 (1976).

¹¹ Patricia W. Hatamyar, *The Effect of "Tort Reform" on Tort Case Filings*, 43 VAL. U. L. REV. 559, 560 (2009).

¹² Nathan L. Hecht & Marisa Secco, *Juries and Technology: Revised Texas Civil Jury Instructions Include Warnings About the Internet and Social Media*, 60 THE ADVOC. (TEXAS) 50, 50 (2012).

¹³ Robert L. Haig, *Com. Litig. in New York State Courts*, N.Y. PRACTICE, § 113:1 (4th ed.).

¹⁴ Susan Criss, *The Use of Social Media by Judges*, 60 THE ADVOCATE 18 (2012).

The ever-changing nature of social media, however, often presents ethical dilemmas to the judiciary, but offers no clear precedent.

What makes this so difficult? Social media has grown into a complex and dynamic world, where content can be uploaded with a click of a button and allows for real time communication.¹⁵ Social media involves an expansive range of activity including news stories, personal information, and easy (in fact, often impulsively and unrestrained) transmission through public portals of thoughts and beliefs that are better kept private.¹⁶ Given these realities combined with the world of an adversarial legal system, should ethical boundaries of informal investigation aim to strike a balance between policies favoring liberal discovery and those protecting the legal profession and the public?¹⁷

New York lawyers (the state in which the law students who authored the sections of this report are studying) have been considering the ethical issues related to social media for quite some time. Reflecting on its most recent public guidelines on the issue, the July 2015 *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association*,¹⁸ the American Bar Association Journal summarized the underlying message as "lawyers need to develop appropriate social media skills and recommend appropriate social media practices."¹⁹ Given the evolving nature of the issues, one expert

¹⁵ Elizabeth Colvin, *The Dangers of Using Social Media in the Legal Profession: An Ethical Examination in Professional Responsibility*, 92 U. DET. MERCY. L. REV. 1, 5 (2015).

¹⁶ Emily A. Vance, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 FORDHAM L. REV. 367, 379-382 (2015).

¹⁷ Agnieszka McPeak, *Social Media Snooping and Its Ethical Bounds*, 46 ARIZ. ST. L.J. 845, 849 (2014).

¹⁸ New York State Bar Ass'n, *SOCIAL MEDIA ETHICS GUIDELINES OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION OF THE NEW YORK STATE BAR ASSOCIATION*, June 2015, available at <http://www.nysba.org/socialmediaguidelines/> (hereinafter NYSBA's GUIDELINES).

¹⁹ Martha Neil, *LEGAL ETHICS: New York bar section releases social media guidelines for lawyers*, ABA JOURNAL, June 2015, available at http://www.abajournal.com/news/article/new_york_bar_mulls_proposed_social_media_rules_for_lawyers.

suggested these guidelines be viewed as “an instructional guide — not so much as best practices — and allow for modifications.”²⁰

The introduction to the NYSBA’s GUIDELINES help clarify the evolving nature of this area:

Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools used by legal professionals and those with whom they communicate. Particularly, in conjunction with the increased use of mobile technologies in the legal profession, social media platforms have transformed the ways in which lawyers communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more sophisticated, so too do the ethical issues facing lawyers. . . . These Guidelines are guiding principles and are not “best practices.” The world of social media is a nascent area that is rapidly changing and “best practices” will continue to evolve to keep pace with such developments. Moreover, there can be no single set of “best practices” where there are multiple ethics codes throughout the United States that govern lawyers’ conduct. In fact, even where jurisdictions have identical ethics rules, ethics opinions addressing a lawyer’s permitted use of social media may differ due to varying jurisdictions’ different social mores, population bases and historical approaches to their own ethics rules and opinions.²¹

Building on some of the issues that the NYSBA’s GUIDELINES grappled with, this document reflects a compilation of individually-performed research by University at Buffalo School of Law student that explore the following topics (you can see more details in the foregoing Table of Contents): ethical issues in advertising and communication; ethical issues re social media and informal discovery; spoliation ethics of spoliation when dealing with information in cyberspace, social media pitfalls when working with judges, social media issues when involved with juries, and social media concerns when working in civil litigation settings. The independent work of individual students has been woven into this document by people

²⁰ Michael Petro, *NYS Bar Association updates social media guidelines*, BUFFALO L. J. (June 29, 2015), available at <http://www.bizjournals.com/buffalo/blog/buffalo-law-journal/2015/06/nysbar-association-updates-social-media-guidelines.html>.

²¹ *Id.* at 1.

who are both studying to enter the legal profession, and who have grown up in an era of social media.

What does their research conclude? Nothing completely new and definitive yet. Why? Because while social media may in a number of cases present original conundrums, often it simply presents new opportunities to explore age-old ethics issues. So the new issues to consider in assessing legal ethics and social media in 2016 are intermixed with simply applying existing rules and norms in an updated context. Accordingly, the legal ethics of social media offers opportunities to both explore brand new terrain, and apply existing norms with to innovative facts.

University at Buffalo School of Law Ethics in Context students share this document knowing that parts of will be out of date within months of its publication. However, we share these thoughts on the “brave new world” of social media legal ethics with hope some readers may obtain some helpful information from the sections that follow.

Thank you for reading this work. Should you have any questions or comments, please email law-clinic@buffalo.edu. You can also get in touch with individual authors at the email addresses set forth at the outset of their sections.

2) Ethical Pitfalls of Social Media in Legal Advertising Activities (Lead Author: Charlotte Werner-Kohler²²)

The legal ethics surrounding Internet and social media usage is a continuing area of concern for practitioners under increasing pressure to maintain an on-line presence. Particular ethical pitfalls exist with real-time communication platforms, web-based recommendation sites, blogs, and professional networking profiles. This section will examine social media advertising, professional profiles, communication exchange, and review management and highlight the rules of conduct that must be carefully observed. This writer also means to encourage attorneys who are Internet avoiders, to take the e-plunge with confidence and explore the benefits of social media for bettering your practice and the industry as a whole.

a) Advertising

Today, over 60% of law firms boast a website of some kind although the nature of the content and the interactivity of these sites vary tremendously. Only 53% of law firm web sites have organized content and only 3% have personalized content of any kind. A surprising 68% of sites do not offer any e-mail contact information and 27% of sites fail to offer a telephone number for further contact. These statistics highlight the need for lawyers to understand and apply the guidelines for social media usage as it becomes increasingly indispensable in the modern practice of law. Veteran practitioners have been understandably reluctant to embrace these technologies, but even more recently admitted lawyers still tend to avoid technology for fear of running afoul of ethics or security requirements or due to lack of familiarity with the most common platforms. In order to encourage expanded use of social media, the ABA

²² Charlotte Werner-Kohler just finished her first year of law school, and can be reached at cwernerk@buffalo.edu.

created the Technology Recourse Center page in 2010.²³ That page provides fundamental information for non-social media-savvy lawyers.²⁴

Despite the complexity of the issue, attorneys can often rely on the simple principle that ethics guidelines apply to on-line legal practice methods just as they do to the traditional modes of practice.²⁵ However, a number of state bar associations have moved to provide practitioners with specific guidance in the area of social media ethics. The New York State Bar Association's Commercial and Federal Litigation Section produced and published such guidelines and updated them in 2015.²⁶ The document, entitled SOCIAL MEDIA ETHICS GUIDELINES, includes seven guidelines addressing areas from general competence to communication with the judiciary. Guideline 2 is relevant to advertising. Entitled *Applicability of Advertising Rules*, it sets out "do's" and "don'ts" specifically in regard to LinkedIn profiles and Twitter postings. It references both the New York Rules of Professional Conduct²⁷ and the New York County Lawyers Association Professional Ethics Committee Opinion No. 748.²⁸ Not surprisingly, the GUIDELINES assert that if a lawyer's on-line profile offers only personal information and makes little or no reference to professional pursuits, is exempt from ethical rules governing the practice of law. Note that while no ethical rules require it, some may prefer to keep personal and family life details separate from professional information.

Guideline 2 also concludes that a lawyer's professional profile does not constitute advertising so long as the information posted is limited to basic education and employment background details. Lawyers can specify notable positions or career distinctions earned without

²³ Catherine S. Reach, *A Guided Tour of Social Media*, A.B.A. Legal Tech. Res. Ctr., 2 (2010).

²⁴ *Id.*

²⁵ A.B.A. *Model Rules of Prof'l Conduct*.

²⁶ N.Y. State Bar Ass'n *Social Media Ethics Guidelines*, Com. and Fed. Litig. Sec. (June 9, 2015).

²⁷ N.Y. *Rules of Prof'l Conduct* (May 1, 2013).

²⁸ N.Y. Cty. *Lawyers Ass'n Prof'l Ethics Comm. Formal Op. 748* (Mar. 10, 2015).

running afoul of ABA Model Rule 7.4, which forbids false or misleading advertising.²⁹ Under Rule 7.4, a lawyer may not state or imply that she is a specialist unless she has been certified by a state approved organization in a particular field of law. This can present a pitfall for attorneys if a narrow or obscure practice area were construed as an implication of specialty or expert status. The language used is key to distinguishing a specialty claim from an assertion of experience and often include phrases such as, "limits her practice" or "focuses her practice" to avoid the appearance of a conferred specialty. Of course, it is important to acknowledge that not all social media platforms and situations are as straight forward as the above scenario.

For example, the LinkedIn endorsement feature and testimonial option present a more difficult problem in regard to implied specialization. These elements often present information that exceeds basic professional background and are populated not by the profile holder but by colleagues or coworkers or friends. Additionally, an endorsement may simply be inaccurate and portray the lawyer as skilled or accomplished in an area that she is not. Guideline 2 speaks to this conundrum directly: a lawyer's LinkedIn profile that "includes subjective statements regarding an attorney's skills, areas of practice, endorsements, or testimonials from clients or colleagues... is likely to be considered advertising."³⁰

The ABA Model Rule 7.1 requires that attorney advertising include certain disclaimers such as "prior results do not guarantee a similar outcome" or "Attorney Advertising" when endorsements or testimonials are employed.³¹ A potential pitfall in this area may arise when an attorney is less than vigilant in monitoring his or her profile to remove offending endorsements or testimonials that could imply a specialization to the casual viewer. Testimonials about accomplishments may also be problematic when lacking the required disclaimers, if they could create unjustified expectations about the outcomes a lawyer can

²⁹ *A.B.A. Model Rules of Prof'l Conduct*, R. 7.4.

³⁰ *N.Y. State Bar Ass'n Social Media Ethics Guidelines*, Com. and Fed. Litig. Sec. (June 9, 2015).

³¹ *A.B.A. Model Rules of Prof'l Conduct*, R. 7.1.

obtain for clients. Guideline 2 reminds lawyers that they are responsible for the content of their social media profiles and must endeavor to remove or hide offending content if possible (or ask that the commentator remove it).

b) Managing Online Reviews

Even when lawyers are not actively advertising or establishing social media profiles, there are still internet trends that involuntarily expose lawyers to on-line consumers. The growing demand for low-cost legal services and the proliferation of one-stop multi service websites encourage consumers search for a lawyer on-line rather than using traditional means like personal referrals. Legalproductivity.com reports that in 2016, over 35% of legal consumers start their search for an attorney with on-line resources.³² On-line consumers are faced with a barrage of lawyer rating sites such as avvo.com, lawyers.com, yelp.com, or lawyerratingz.com, all which provide some sort of structured search platform and a rating option that may include numerical systems as well as narratives. On such websites, an ethical violation may arise if an attorney responds without regard to the ethical rules publically to an unflattering rating.

For example, an attorney practicing in Chicago, Illinois was formally reprimanded for revealing confidential client information in the course of responding to negative comments posted by a former client on www.avvo.com.³³ Illinois Attorney Registration Hearing Board found that the lawyer went too far in responding to the client's accusation when she posted a response that named the nature of the client's actions, which led to dismissal from his employment and to the loss of his employment suit. The attorney had no previous disciplinary issues and expressed remorse for her conduct. Specifically, the Illinois Attorney Registration

³² Lisa Pansini, *10 Surprising Stats on Law Firm Websites [Infographic]* (June 18, 2016), <http://www.legalproductivity.com/lega-marketing/law-firm-websites-infographic><http://www.legalproductivity.com/lega-marketing/law-firm-websites-infographic>

³³ *In Re Tsamis*, Comm. File No. 2013PR00095 (Ill. 2013).

and Disciplinary Commission regarded her conduct as inconsistent with ABA Rules 1.6(a), 1.15(d)³⁴ and rule No. 4.4 of the Illinois Rules of Professional Conduct.³⁵

How then can a lawyer manage this minefield of social media ratings while remaining within ethical confines? The latitude of ABA Rule 6.1(b)(5)(i) seems quite narrowly construed when it comes to revelations made by lawyers who believe they are defending themselves against accusations of wrongdoing.³⁶ In New York, NYSBA Opinion 1032 applies the self-defense exception to client confidentiality duties in settings of formal proceedings such as lawsuits or disciplinary inquiries, but not to defensive rebuttals of negative web postings.

Several industry support sites have reviewed various options that range from ignoring rating sites entirely to filing defamation suits. A review of recent legal news on this subject finds a small number of cases where a lawyer or a firm chose to sue for defamation and landed vindication or a big money verdict or both.³⁷ However, there are far more stories of lawyers coming under disciplinary review for taking public action against disgruntled former clients. General counsel for avvo.com, Josh King, has weighed the possible responses and offered advice with practice longevity in mind.³⁸ King explains that negative reviews from former clients are for the most part unavoidable for even the most skilled and attentive attorneys because clients are unpredictable and regularly have unrealistic expectations.

The ethical and proactive lawyer should use such posts as akin to market research, and parlay negative posts into greater credibility. A reactive, defensive, and possibly unethical public response to an unflattering review is worse than no response at all and can lead to

³⁴ *A.B.A. Model Rules of Prof'l Conduct*, R. 1.6, 1.15, 1.18, 6.1, 7.4.

³⁵ *Ill. Rules of Prof'l Conduct*, 4.4.

³⁶ *N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1032* (Oct. 30, 2014)).

³⁷ Steven Fairley, *Haters Gonna Hate: How to Handle a Negative Online Review*, ATTORNEY AT LAW MAGAZINE, Sept. 24, 2015, available at <http://attorneyatlawmagazine.com/long-island>.

³⁸ Josh King, *Your Business: Someone Online Hates You*, THE RECORDER, Aug. 16, 2013, available at <http://www.therecorder.com>.

disciplinary consequences. The Bar Associations of Los Angeles, California and San Francisco, California tackled the ethics of refuting web-based reviews and found that public response is not prohibited but that it must remain “proportionate and restrained” and must avoid disclosure of confidential client information.³⁹ In 2014, the New York State Bar Association Committee on Professional Ethics Issues Opinion No. 1032 echoed the California advice. The opinion reiterated that the “self-defense” exception to the duty of client confidentiality set forth in Rule 1.6 is applicable only in formal proceedings.⁴⁰

c) Unintended Attorney-Client Relationship

Many lawyers would agree effective legal representation relies on the attorney-client relationship and its attendant privileges in most practice areas. This opinion is supported in part by the number of ABA Model Rules, comments and formal opinions that concern the proper establishment and recognition of that relationship. Law firm websites and search sites both often include an electronic contact form where a consumer can ask questions or request further direct contact. Although these features are convenient for consumers and lawyers alike, they present potential attorney-client relationship problems. Such communications may create certain expectations in the consumer, which the lawyer may not perceive, and which may run afoul of ABA Model Rule 1.18.⁴¹ An attorney-client relationship is formed when an individual manifests intent that a lawyer should render legal services to that individual and a lawyer manifests consent to do so or fails to decline to do so. Does the simple submission of an electronic query form establish such a relationship? Is such a relationship established when a lawyer responds to the query? This is an area where lawyers must exercise extreme caution.

Social Media Guideline 3 clearly prohibits lawyers from providing specific legal advice through social media outlets expressly because it may be found to create an attorney-client

³⁹ *L.A. Cty. Bar Ass’n Prof’l Resp. and Ethics Comm., Formal Op. 525* (Dec. 6, 2012).

⁴⁰ *A.B.A. Model Rules of Prof’l Conduct*, R. 1.6.

⁴¹ *Id.*, R. 1.18.

relationship and may improperly disclose protected information. However, the guidelines distinguish e-mail from other public social media settings, and it is not considered a real-time or interactive communication. In fact, the guideline directs attorneys to use e-mail in the event that a potential client initiates a specific request seeking to retain a lawyer during real-time social media communications. In such a case, the prohibition is not applicable and attorneys who respond to electronic queries via person-to-person mail are best guided by ABA rule 1.18, which sets out duties to prospective clients.⁴² Even if no service relationship ensues, the attorney is ethically obligated to protect confidentiality and declare her intentions in regard to representation such that the relationship is entered into knowingly. Comment five of ABA Rule 1.18 suggests that web sites offering a contact opportunity should disclaim the existence of any attorney-client relationship except upon the completion of an express agreement and should further caution consumers not to provide confidential or sensitive information before such an agreement is made.⁴³

In contrast to more public websites, law firm websites often include an electronic contact form where a consumer can ask questions or request further direct contact. Although these features are convenient for consumers and lawyers alike, they present an even more immediate potential attorney-client relationship problem. Such communications may create certain expectations in the consumer, which the lawyer may not perceive and which may run afoul of ABA rules. An attorney-client relationship is formed when an individual manifests intent that a lawyer should render legal services to that individual and a lawyer manifests consent to do so or fails to decline to do so. Does the simple submission of an electronic query form establish such a relationship? Is such a relationship established when a lawyer responds to the query? Clearly this is an area wherein lawyers must exercise extreme caution.

⁴² *Id.*

⁴³ *Id.*

d) Section Conclusion and Recommendations

Lawyers who desire the business and professional advantages that can come through social media can take comfort in knowing that ABA and state bar association rules in many cases still apply to internet conduct in much the same way they due to traditional practice modalities. Yet the industry as a whole has started to show a more rapid acceptance of social media as an intrinsic element of modern practice, and many state bar associations have provided specific guidelines and formal ethics opinions that have specific applications in the social media context. These guides are narrow examinations of the ethical use of Internet and social media platforms that will only multiply in the coming years as familiarity grows and innovation expands.

In many practice areas, firms that resist these technologies are likely to be passed over by potential clients and left behind by competitors who establish and mold their Internet presence. Not every lawyer or law firm chooses to advertise but those who do would be well served to use the necessary disclaimers whenever possible. It is certainly better to be on the right side of ABA Rule 7.1, concerning communications about services, than to be faced with a disciplinary inquiry.⁴⁴

When Internet and social media tools are effectively and ethically put to use, solo practitioners and large firms alike can expand their practice and contribute to the legal community. Lawyers who monitor sites like avvo.com or Yelp.com can better shape the message that potential clients and employers see. Setting up alerts that keeps one informed of new postings is a proactive way to protect a practice and portray a positive image. Developments will continue at lightning speed. It might be hypothesized that the only certainty about the practice of law in modern times is that the pace of historic technological changes like mimeograph to photocopier or typewriter to computer will seem glacial in comparison.

⁴⁴ *A.B.A. Model Rules of Prof'l Conduct, R. 7.1*

3) Legal Advertising and Communication on Social Media (Lead Author: Yik Cheng⁴⁵)

In the digital era, different social media sites like Facebook, Twitter, LinkedIn, YouTube, and Google+ have become more and more popular among lawyers to create professional accounts or pages to increase their public presence and attract more clients. As of April 2016, Facebook had 1.59 billion monthly active users; Instagram had 400 million users, Twitter had 320 million users, and LinkedIn had 100 million users.⁴⁶ Social media sites have become efficient, cost-effective, and market-oriented tools, effectively competing with conventional marketing methods such as brochures, billboards, or yellow page ads.

Most corporations have found that they must use social media to promote their products or services to target markets. Legal service providers are no exception when advertising their legal services to potential clients. For instance, some non-profit legal services have set up Facebook pages to increase public awareness of their mission, or posted YouTube videos to share their clients' story; some lawyers use business-oriented platforms like LinkedIn to build more relationships and gain endorsements; and some law firms use Twitter accounts to tout litigation news and their accomplishments.⁴⁷

The relevant ethical implications, naturally, have garnered attention from the legal profession, as social media has included increasing advertisements and communications. As two experts wrote in a 2013 article entitled *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*: "inappropriate use of

⁴⁵ Yik Cheng just finished her first year of law school, and can be reached at aeoyik@gmail.com.

⁴⁶ Leading social networks worldwide as of April 2016, ranked by number of active users (in millions), <http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited June 26, 2016).

⁴⁷ Michael E. Lackey Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 153 (2012).

social media in the legal world can result in the release of confidential information, a waiver of the attorney client-privilege, or disciplinary action[,]”and noted that social media use can “often blur the lines between private communication and public advertisement.”⁴⁸

a) Rules and Regulations on Social Media Legal Advertising

ABA Model Rule 7.2 permits lawyers to “advertise services through written, recorded or electronic communication, including public media.” Jurisdictions have interpreted their regulations differently regarding using social media for advertising. For example, the Supreme Court of Florida granted the Florida Bar’s proposal to amend advertising rules so that lawyers’ websites are subject to the regulations for the traditional forms of advertising.⁴⁹ The California Bar, in the meantime, explicitly concluded that under that state Bar’s Rules, “[m]aterial posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a ‘communication’[.]”⁵⁰ The Texas Bar expanded the regulation of attorney video advertising to include social media sites like YouTube, Myspace, or Facebook.⁵¹

In some states, social media profiles or pages have been deemed advertisements. For example, LinkedIn has the option to import an attorney’s e-mail

⁴⁸ *Id.* at 156, 158.

⁴⁹ Supreme Court of Florida, *In Re: Amendments to the Rules Regulating the Florida Bar*, Lawyers Advertising Rules subchapter, 4-7 No. SC11-1327, 6-7 (Jan. 31, 2013), <http://www.floridasupremecourt.org/decisions/2013/sc11-1327.pdf>.available at <http://www.floridasupremecourt.org/decisions/2013/sc11-1327.pdf>.

⁵⁰ The State Bar of California, *The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2012-186*, 1 (2012) [hereinafter *Opinion No. 2012-186*]. [http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202012-186%20\(12-21-12\).pdf](http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202012-186%20(12-21-12).pdf) (last visited June 26, 2016). [http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL_2012-186_\(12-21-12\).pdf](http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL_2012-186_(12-21-12).pdf) (last visited June 26, 2016).

⁵¹ Lackey, *supra* note 47, at 160.

addresses and send automatic invitations, which might include the persons who the attorney is not supposed to contact. A LinkedIn invitation from a lawyer's account in Connecticut has been interpreted to potentially be an advertisement subject to regulation.⁵²

In New York, attorney advertisement has been defined 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." NY Rule 1.0(a). At the same time, New York Rules of Professional Conduct Rule 7.4(a) allows law firms and lawyers to identify the areas of law in which they practice. In 1998, the New York State Bar Association's Professional Ethics Opinion 709 stated that "advertising via the Internet ... is permissible as long as the advertising is not false, deceptive or misleading, and otherwise adheres to the requirements set forth in the Code."⁵³ In the more recent 2013 Ethics Opinion 972, however, the New York State Bar Association specifically prohibited lawyers from using the word "Specialties" on a social media site for advertising, unless the attorneys are certified by a governmental or authorized organization.⁵⁴ Similarly, the Arizona State Bar also developed a rule that a lawyer cannot state that s/he "specializes" in a particular area of law in an online chat unless s/he is certified in that area of law with the state bar.⁵⁵ Because of this rule throughout a variety of jurisdictions, LinkedIn eventually deleted the option for users to add "specialties" to their profiles.⁵⁶ Multiple other states are

⁵² *Id.* at 158.

⁵³ New York State Bar Association Committee on Professional Ethics, Opinion #709 (Sep. 16, 1998).

⁵⁴ New York State Bar Association Committee on Professional Ethics, Opinion #972 (June 26, 2013).

⁵⁵ Lackey, *supra* note 47, at 159.

⁵⁶ Donna Serdula, *Bye Bye Specialties* (2012), <http://www.linkedin-makeover.com/2012/03/03/bye-bye-specialties>.

following along, and some other terms, like “expert” or “certified”, are also prohibited by many states.⁵⁷ Therefore, lawyers or law firms should be very prudent with their words when they post advertisements on social media sites, and make sure that these ads comply with current rules and regulations in the states they are licensed.

b) Attorney-Client Relationship & Communications

Many view the original intent of social media as allowing for connecting and socializing among family and friends, yet its convenient features also help lawyers to facilitate and improve attorney-client communications, as well as relationships between associates. For example, lawyers can use chat rooms or instant messaging via social media to conduct immediate communication. On Facebook or LinkedIn, lawyers can create a group for discussion of legal issues or any concerned topics. Professional ethical rules still apply to communication made through social media. Lawyers need to be careful when using social media sites, and specifically not reveal any potential confidential information.

ABA Model Rule 1.6(a) protects lawyer-client confidentiality and prohibits lawyers from 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[.]” Rule 7.1 states that a lawyer “shall not make a false or misleading communication about the lawyer or the lawyer's services.” This rule has extended to statements posted on blogs and social media sites.⁵⁸ In general, lawyers must refrain from giving “fact-specific legal advice and should instead stick to discussing general legal topics and information.” Some jurisdictions, like

⁵⁷ Lackey, *supra* note 2, at 159.

⁵⁸ Patricia E. Salkin, *Social Networking and Land Use Planning and Regulation: Practical Benefits, Pitfalls, and Ethical Considerations*, 31 PACE L. REV. 54, 58 (2011).

Arizona, require lawyers to “treat online discussion groups and chat rooms the same way they treat offline legal seminars for lay people”.⁵⁹

Other platforms, such as photo-sharing sites like Instagram or Facebook, allow users to inadvertently share pictures or posts containing confidential information to the public. This could lead to the lawyer being subject to discipline. Also, some postings could potentially be damaging to a client’s pending matters. Lawyers should take this into consideration when communicating with their clients and proactively prevent potentially confidential information from being shared on social media. Likewise, geo-mapping sites like Foursquare can also “leak” confidential information such as a user’s location.⁶⁰ An attorney might inadvertently reveal an investigatory trip or provide sensitive tips to an opposing party through this kind of social media and possibly hurt a client’s case.

More recently, some companies have begun to provide legal services on their websites where attorneys answer questions without triggering formal legal representation, such as providing one-off advice through websites like LawPivot and LegalZoom. The advice offered by those attorneys is often directed at a question posed by a single client; but to help others, it may be “archived” on a public website, and intended to provide assistance to future searchers with similar questions in addition to helping the original poster who sought the advice.⁶¹ Therefore, the rule of confidentiality might be violated inadvertently in these settings. Similarly, sites like Avvo provide an online community for people to seek free or paid legal advice. When a user posts a question, various attorneys will post their brief answers to the question. To deal with the ethical issue, however, these website ensures that each of their answers

⁵⁹ Lackey, *supra* note 47, at 164.

⁶⁰ *Id.* at 155.

⁶¹ Cassandra Burke Robertso, *Private Ordering in the Market for Professional Services*, 94 B.U.L. REV. 179, 202 (2014).

includes a detailed disclaimer stating that the answer is for general information only, should not be taken as legal advice, and does not create attorney-client relationship with particular lawyers or their firms.

Whether there would be any side effects from use of these social media applications might also depend on how clearly the regulation bodies provide guidelines to lawyers. Professor Salkin's 2011 article, *Social Networking and Land Use Planning and Regulation: Practical Benefits, Pitfalls, and Ethical Considerations*, discusses a California Bar Association advisory opinion in 2004 which stated that chat room communication is not, by itself, prohibited solicitation under Rule 1-400(B), but Rule 1-400(D)(5) prohibits communications that intrude or cause duress. This opinion gave clear warning to land use attorneys in California not to solicit clients through some chat rooms when their original purpose was to provide emotional support for disaster victims.⁶² And in 2012, the California Bar Association issued another advisory opinion, concluding that if the communication conveyed by an attorney on social media falls within Rule 1-400, s/he will be subject to advertising rules.⁶³ Using a slightly different approach, the D.C. Bar Association regarded chat room communications as "less coercive than in-person communications and ... potential clients have the option to ignore the communications," but also cautioned that lawyers need to be careful about establishing attorney-client relationships in chat rooms.⁶⁴ Therefore, lawyers should bear the rules on communications on social media in mind to avoid building unintended attorney-client relationships, which might result in discipline.

⁶² Salkin, *supra* note 58, at 76.

⁶³ See *Opinion No. 2012-186*, *supra* note 53.

⁶⁴ Salkin, *supra* note 58, at 80.

c) Online Discount Coupons

Groupon and similar services provide users e-coupons for substantial discounts from local businesses for their products or services. Some lawyers or law firms use Groupon to attract new clients by offering services at a discount for such things as drafting wills, tax consulting, mediation, and preparing legal documents services.⁶⁵ For example, in a search for New York City in early July, eight offers were available, up to a discounted rate of 88%.⁶⁶

Groupon and other such services can present several ethical challenges. When a lawyer advertises on Groupon, there are no upfront costs, but the website takes “a share of the revenue” when customers purchase the legal service.⁶⁷ ABA Model Rule 5.4(a) states that “a lawyer or law firm shall not share legal fees with a nonlawyer.” This rule has been interpreted in varying ways in different jurisdictions. For example, North Carolina deems Groupon’s sharing of the revenue as “fee-sharing with a nonlawyer” and thus not allowed.⁶⁸ In Missouri, however, the payment of a share on such a website is considered as paying a fee for advertisement.⁶⁹

New York allows the use of Groupons by attorneys, as set forth in its 2011 Ethics Opinion 897.⁷⁰ That opinion noted some important caveats, however:

⁶⁵ Groupon Press, *Our Mission*, <https://www.groupon.com/press/about-groupon> (last visited July 7, 2016).

⁶⁶ Groupon, (search New York, NY) <https://www.groupon.com>, (last visited July 7, 2016).

⁶⁷ Samantha Carlin, *How Much Does It Cost to Advertise on Groupon?* (January 31, 2013), <https://www.groupon.com/merchant/blog/how-much-does-it-cost-to-advertise-on-groupon>.

⁶⁸ Debra Cassens Weiss, *Proposed NC Ethics Opinion Says Lawyers Can’t Ethically Offer Groupon Deals*, (January 19, 2011), http://www.abajournal.com/news/article/proposed_n.c._ethics_opinions_says_lawyers_cant_ethically_off_er_groupon_dea.

⁶⁹ *Id.* at 1.

⁷⁰ New York State Bar Association Committee on Professional Ethics, Opinion 897, *Marketing of legal services by use of a “deal of the day” or “group coupon” website* (Dec. 13, 2011), available at <http://www.nysba.org/CustomTemplates/Content.aspx?id=4711>.

A lawyer may properly market legal services on a 'deal of the day' or 'group coupon' website, provided that the advertisement is not false, deceptive or misleading, and that the advertisement clearly discloses that a lawyer-client relationship will not be created until after the lawyer has checked for conflicts and determined whether the lawyer is competent to perform a service appropriate to the client. If the offered service cannot be performed due to conflicts or competence reasons, the lawyer must give the coupon buyer a full refund. The website advertisement must comply with all of the rules governing attorney advertising, and if the advertisement is targeted, it must also comply with Rule 7.3 regarding solicitation.⁷¹

Services such as Groupons may also present other ethical conundrums. Lawyers who use such marketing tools need to consider both conflicts check contingencies, trust account issues, and have a mechanism to refund any unused amount of an advance discount purchase to the client.⁷² As the ABA's Standing Committee on Ethics and Professional Responsibility noted in an opinion entitled *Lawyers' Use of Deal-of-the-Day Marketing Programs*, "[w]hile the Committee believes that coupon deals can be structured to comply with the Model Rules, it has identified numerous difficult issues associated with prepaid deals and is less certain that prepaid deals can be structured to comply with all ethical and professional obligations under the Model Rules."⁷³

The future of websites such as Groupon will undoubtedly evolve - as of October 2015, Groupon was the most-visited coupon website in the United States, and sees approximately 30 million unique monthly visitors.⁷⁴ In the states that allow online discount coupons to be used for legal services, the ethical parameters will likely become clearer over time.

⁷¹ *Id.*

⁷² American Bar Ass'n, Formal Opinion 465, *Lawyers' Use of Deal-of-the-Day Marketing Programs* (Oct. 21, 2013), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_465.authcheckdam.pdf.

⁷³ *Id.*

⁷⁴ Statistics and facts about Groupon, <http://www.statista.com/topics/824/groupon/> (last visited July 7, 2016).

d) Solicitation and Recommendation of Legal Services

Social media sites' diversified functions can also have ethical implications on legal services' business solicitation and recommendation from their clients. Model Rule 7.3(a) prohibits a lawyer from soliciting professional employment by "real-time electronic contact ... when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain" unless the person contacted is a lawyer, or has a family, close personal, or prior professional relationship with the lawyer. This indicates that a lawyer cannot use the "invite" function or instant messaging to contact Facebook friends, or direct message followers on Twitter for the purpose of soliciting professional employment, unless that person falls within the categories enumerated by Rule 7.3. The lawyer, however, is allowed to post updates or to tweet not directed to a specific client. Comment 1 to Rule 7.2 states that improper solicitation are impermissible "because of the chance that an attorney may be intimidating or can unduly influence an overwhelmed prospective client."⁷⁵

A testimonial (a posted review to recommend a product or service) is a common way that attorneys receive promotion. On social media, testimonials can be made in various ways. For example, on Facebook a client can comment on her attorney's post with a recommendation and rate a law firm's service. On Twitter, a client can mention a lawyer or a law firm's username with "@" sign, and the tweet will appear on both the client and the lawyer or law firm's timeline. On Avvo, there is an attorney directory including client reviews, disciplinary actions, and peer endorsements to encourage user participation, for both attorneys and clients. The website also rates each attorney according to her publicly-available information from the bar and encourages individuals to make a report if she finds that the information of an attorney is incorrect. This rating system displays "Attention" if there is disciplinary action against a lawyer, and it can be

⁷⁵ *Id.* at 75.

increased by peer endorsements. Lawyers will risk losing licenses if they falsify data to increase their ratings.⁷⁶ Both the client reviews and Avvo ratings are vital for certain attorneys who use such websites to solicit business. Therefore, attorneys must be careful when using any recommendations they receive from clients for public presence or soliciting new business.

e) How to Use Social Media but Avoid Negative Ethical Outcomes

Broadly speaking, each jurisdiction provides some general guidelines to attorneys' using social media for marketing, communication, and advertising. For example, guidelines direct attorneys not to post confidential information, make false or misleading statements about legal services, or create an unintended attorney-client relationship on social media sites. With the fast-changing technologies and developing online legal communities, however, current rules and regulations provide few clear guidelines to clarify some existing issues.

The legislative bodies and organizations with authority should adapt to the change and provide more updated rules to prevent ethical violation. These legislative bodies might consider regularly consulting technology experts if possible, for it is likely that the popular social media trend will motivate more and more law firms, non-profit legal services, and lawyers to use them in the future.

In the meantime, lawyers engaging with social media should be mindful to check all updated rules in their jurisdiction, and contemplate how the rules would be applied in various situations when using different types of social media to avoid pitfalls. They should also explore the convenient tools and customized settings equipped as much as possible on each social media site. For example, a Facebook post or a blog can be set as "private," rather than "public," and sent to one or more target users; a YouTube

⁷⁶ *The Avvo Rating explained*, https://www.avvo.com/support/avvo_rating (last visited June 26, 2016).

video likewise can be published as “unlisted” or “private” for intended audience only. These settings should be carefully checked before a message is posted to avoid confidentiality issues.

Lawyers and law firms should be very cautious when hiring internet marketing companies to generate website traffic, increase social media presence, and create leads. If the marketing company is not familiar with the ethical rules in the legal world, unintended ethical violations may occur. A law firm would be well-advised to have its ethic experts and internet marketers work together to make sure everything is within the boundary of rules and regulations. All attorneys should consider encrypting their sensitive information as much as possible and think discreetly before posting or responding to anything online openly to avoid possible ethical implication or discipline. Attorneys should also pay close attention to whether their use of testimonials, client reviews, or endorsements for advertising conforms to the rules of their states.

4) Spoliation Ethics in Cyberspace: A Last Call for Late-Bloomers, Newcomers, and Strangers to the Social Mediaverse (Lead Author: Ralph Tolbert)⁷⁷

Whether posting a picture of you and your friends at a summer beach party or reuniting with a classmate from school, social media has become the virtual café by which we connect as well as share our thoughts and feelings with the people we care about the most. The rise of smart-phones and tablets allow us to access and transmit data as well as communicate across the globe in a manner and speed unprecedented in the course of human history. No matter how ordinary these devices and activities become, few people realize how their social media activity might be perceived and utilized in a court of law. At the click of a mouse, the words, pictures, and videos we post online whilst in the most festive and candid of moods can come back to haunt us, often at the price of our freedom, finances, or both. As law students and future practicing attorneys, it is critical for us to be aware of these implications so as to help our clients appropriately manage their social media content and avoid unintended violations of the law.

a) An Indispensable Legal Tool in a Brave New World

Photos, messages, and other content stored and transmitted through cyberspace are increasingly serving as treasure-troves for lawyers in search of evidence to further their case. A February 2010 survey conducted by the American Academy of Matrimonial Lawyers revealed that 81 percent of the attorneys responding reported finding and using evidence from social networking sites in their cases.⁷⁸ The most popular online source for evidence according to the study was Facebook, recording that

⁷⁷ Ralph Tolbert just finished his second year of law school, and can be reached at ralphtol@buffalo.edu.

⁷⁸ Michael C. Smith, *Social Media Update*, 62 The Advocate (Texas) 197 (2013).

66 percent of respondents had used content from the social media mega-network to further their case.

This phenomenon not only implicates the growing use of social media by lawyers as a tool for competitive advantage, but a deepened understanding of the ethical implications in the age of digital technology. According to the New York County Bar Association, the duty of competence gives rise to an “obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the client’s position emanating from the client’s use of social media.”⁷⁹ Guideline No. 1 of the New York State Bar Association’s Social Media Ethics Guidelines states that “a lawyer has a duty to understand the benefits and risks and ethical implications associated with social media, including its use as a mode of communication, an advertising tool and a means to research and investigate matters.”⁸⁰ Although the ABA Model Rules do not yet acknowledge social media directly in the context of spoliation, several ethical rules are inevitably at play and can be caught in the crosshairs of this matter, including Rule 1.4 (Communication), Rule 3.4 (Fairness to Opposing Party and Council), and Rule 8.4 (Misconduct).

b) A Duty to Preserve Social Media Evidence

As a general rule under the Federal Rules of Civil Procedure, parties to a pending or probable lawsuit owe a duty of care to preserve evidence—electronic or otherwise—that they know, or should know is relevant to the litigation of their case.⁸¹ Violation of this obligation is called “spoliation,” described as the destruction or significant alteration of evidence as well as the failure to preserve evidence for another’s use in pending or

⁷⁹ N.Y. Cnty. Lawyers' Ass'n, Ethics Op. 745 (2013).

⁸⁰ New York State Bar Ass’n, SOCIAL MEDIA ETHICS GUIDELINES OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION OF THE NEW YORK STATE BAR ASSOCIATION, June 2015, available at <http://www.nysba.org/socialmediaguidelines/>.

⁸¹ Fed. R. Civ. P. 34. Rule 34.

future litigation. The borders of spoliation seem to stretch far and wide as it has been held to cover just about everything, ranging from the expected various electronic media such as hard drive files and email communication, to the most relatively benign of a Web Page. Accordingly, every piece of potential evidence may become fair game, and thus should be considered with the highest scrutiny before your client deletes any content belonging to their account.

The duty to preserve and disclose evidence in New York is governed by NYCPLR §3101, which requires a “full disclosure of all matter material necessary in the prosecution or defense of an action.” This requirement is not without limit, however, as the requesting party must show both that the requested materials to be relevant and that there is a “substantial need for the materials needed and that their acquiring would not cause an undue hardship to obtain the equivalent by other means.” (See *Giacchetto v. Board of Educ. Of Patchogue-Medford Union Free School District*⁸² and *Del Gallo v. City of New York*.⁸³). Under this subsection, a party has twenty (20) days to reply to opposing counsel’s discovery request.

Spoliation is an activity almost universally abhorred by the courts and its effects have both ethical as well as financial implications for legal practitioners. Ethically speaking, spoliation has the distasteful effect of “undermining the search for truth and fairness by creating a false picture of the evidence before the trier of fact.” *Cedars-Sinai Medical Center v. Superior Court*.⁸⁴ Underlying this sentiment are the high premiums placed on preserving the due process rights of litigating parties as well as safeguarding the legitimacy of our legal system overall. From a financial standpoint, a spoliator can impose undue monetary damage to their opposing party, as “destroying evidence can

⁸² No. CV 11-6323(ADS)(AKT), 2013 WL 2897054 (E.D.N.Y. May, 2013).

⁸³ 43 Misc.3d 1235(A) (N.Y. Sup. Ct. 2014).

⁸⁴ 74 Cal.Rptr.2d 248, 253 (1998).

also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or to develop other evidence, which may be less accessible, less persuasive, or both.”⁸⁵

c) Allied Concrete Co. v. Lester: A Cautionary Tale in Social Media Spoliation

Many experts regard *Allied Concrete Co. v. Lester*⁸⁶ to be the quintessential social media spoliation case. During the pendency of this wrongful death action, the Allied Concrete’s attorney was able to gain access to the plaintiff’s Facebook page after being contacted by the Plaintiff via private message. Shortly thereafter, the Allied Concrete’s attorney issued a discovery request seeking the printed production of content from the Plaintiff’s Facebook account, including all photos, status updates, and messages received as well sent. This procedural request seemed simple enough.

After receiving this discovery request, however, counsel for the Plaintiffs gave word through his paralegal to instruct plaintiff to “clean up” his Facebook and Myspace accounts so as to avoid “blow-ups” of this content at trial. A particular point of concern for the attorney was a Facebook picture of the plaintiff holding a beer can while sporting a T-shirt on which was printed “I ♥ hot moms.” Plaintiff proceeded to delete 16 photos from his Facebook page, which was followed by his attorney’s signed and served answer to the opposing counsel’s discovery request that stated “I [Plaintiff] do not have a Facebook page on the date this is signed.” This statement that was technically true when signed, was an unethical one, nevertheless.

Needless to say, upon discovering the order of events, the court was none too happy about the attorney and his client’s collusion. As a result of their misconduct, the

⁸⁵ Id. at 252.

⁸⁶ 736 S.E. 2d 699 (Va. 2013).

Court later sanctioned the attorney in the amount of \$542,000 and Plaintiff the amount of \$180,000 to cover Allied Concrete's attorneys' fees and additional expenses related to the litigation. Penalties from such spoliation improprieties may prove just as harsh, including a five-year suspension (see *In the Matter of Matthew B. Murray*⁸⁷ and VSB Docket Nos. 11-070-088405 and 11-070-088422 [Virginia State Bar Disciplinary Board July 17, 2013]), dismissal of a claim, granting judgment in favor of a prejudiced party, suppression of evidence, and an adverse inference of the evidence presented, referred to as a "spoliation inference."⁸⁸ (See *Mosaids Technologies v. Samsung Electronics*).⁸⁹ Sanctions for spoliation of evidence under New York Law are governed by CPLR § 3126.

In addition to discovery and evidentiary sanctions, some jurisdictions (Illinois, for example, see *Rodgers v. St. Mary's Hospital of Decatur*)⁹⁰ have recognized spoliation as an independent tort where the defendant can be sued for "spoliation of evidence." New York is not one of these jurisdictions (see *Ortega v. City of New York*).⁹¹ In defense of this position, state courts believe that the traditional remedies are adequate in addressing the destruction of evidence.⁹² This rule may change in the future as many plaintiffs continue to implore New York courts to recognize a separate cause of action for spoliation.

⁸⁷ Virginia State Bar Disciplinary Board, <http://www.vsb.org/docs/Murray-092513.pdf>.

⁸⁸ Under this remedy, the court instructs the jury to presume that destroyed evidence, if produced, would have been adverse to the party that destroyed it.

⁸⁹ 348 F. Supp. 2d 332, 335 (D.N.J. 2004).

⁹⁰ 149 Ill.2d 302 (1992).

⁹¹ 9 N.Y.3d. 69 (2007).

⁹² James T. Killelea *Spoliation of Evidence Proposals for New York State*, 7 BROOKLYN L. REV. 1045 (2005).

Sanctions for evidence spoliation also apply to Twitter, the microblogging social network that hosts an estimated 320 million active users a month.⁹³ One of the major cases to deal with this issue in New York was *People v. Harris*.⁹⁴ There, a criminal proceeding took place where the District Attorney's Office issued Twitter, Inc. a subpoena for Twitter to hand over the Defendant's user information including all tweets that were posted between a specified period. Twitter moved to quash this request on the grounds that it would cause them an undue burden, but this defense was ultimately shot down. In the opinion, the Judge declared: "If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have gifted to the world."⁹⁵

d) Suggestions for Moving Forward

There are some proactive steps that an attorney can take to avoid the ruinous pitfalls of spoliation. Scott McConchie, partner at Sherin and Lodgen, writes: "[i]t seems obvious that an attorney may instruct to use discretion when posting on social media, or even advise the client to refrain from posting altogether. This is akin to instructing your client on what to wear to court. Impressions matter."⁹⁶ In Florida, a lawyer may also advise a client to increase privacy settings on an account during the pre-litigation stage so that the client's profile is not publicly available.⁹⁷

⁹³ Shawndra G. Jones, Esq., *Laying the Foundation: Review and Use of Evidence from Social Media, Getting your Evidence In*. Axinn, Veltrop & Harkrider LLP, Jan. 20, 2016.
<http://www.nysba.org/workarea/DownloadAsset.aspx?id=61144>

⁹⁴ 36 Misc.3d. 868 (2012).

⁹⁵ *Id.* at 874.

⁹⁶ The National Law Review, *Social Media and Spoliation: Can a Client Delete Her Facebook Posts?*, Sept. 29, 2014, available at <http://www.natlawreview.com/article/social-media-and-spoliation-can-client-delete-her-facebook-posts>.

⁹⁷ Professional Ethics of the Florida Bar Proposed Advisory Opinion 14-1, Jan. 23, 2015.
[https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/B806500C941083C785257E730071222B/\\$FILE/14-01%20PAO.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/B806500C941083C785257E730071222B/$FILE/14-01%20PAO.pdf?OpenElement).

To safeguard against inadvertent spoliation, it is important for attorneys to advise their clients to preserve their electronic information. Margaret DiBianca, attorney at Young Conaway Stargatt & Taylor, LLP reminds us that social networks like Facebook and Twitter offer their users the ability to download all of the content from their account. Although these self-help measures can greatly decrease accidental spoliation, DiBianca suggests that "it may be prudent to employ the assistance of a third-party vendor. Tools such as CloudPreservation and X1 Social Discovery are two examples of commercially available tools that are specifically designed for archiving and collecting social media content."⁹⁸

In the ever-changing world of technology, knowledge of the procedural and ethical guidelines for social media is not something a lawyer can take lightly when spoliation is a possibility. Failing to preserve evidence has proven to be a costly indiscretion for attorneys and clients alike to whom courts have shown little mercy. As children of the social media age and soon-to-be entrants to the legal profession, we must be doubly aware of the implications of its usage to properly instruct our clients on how to proceed.

⁹⁸ Margaret DiBianca, Esq., *Discovery and Preservation of Social Media Evidence*. American Bar Association, (Jan 2014), available at http://www.americanbar.org/publications/blt/2014/01/02_dibianca.html.

5) Use of Social Media for Informal Discovery: Ethical Considerations (Lead Author: T. Michael Enright⁹⁹)

Social media has grown into a complex and dynamic world, where content can be uploaded with a click of a button and allows for real time communication.¹⁰⁰ Social media includes an expansive range of activity like news stories, personal information, thoughts and beliefs one has which can be made impulsively and unrestrained from more traditional sources of information.¹⁰¹ Ethical boundaries of informal investigation should aim to strike a balance between policies favoring liberal discovery and those protecting the legal profession and the public.¹⁰²

Social media provides a new area for lawyers to conduct informal discovery and gather information to narrow their focus and discovery requests for evidence. This new and developing source of information comes with a host of issues a lawyer must consider to avoid conducting unethical practices. This section will be broken into three major areas of discussion: (1) overview and discussion of several relevant ABA Model Rules of Professional Responsibility; (2) analysis of important state ethics committee's opinions on the topic to determine if there are general rules for informal discovery practice; and (3) exploration of areas where the Model Rules can be improved, proposing means of providing direct guidance to practitioners.

⁹⁹ T. Michael Enright finished his second year of law school, and can be reached at tenright@buffalo.edu.

¹⁰⁰ Elizabeth Colvin, *The Dangers of Using Social Media in the Legal Profession: An Ethical Examination in Professional Responsibility*, 92 U. DET. MERCY. L. REV. 1, 5 (2015).

¹⁰¹ Emily A. Vance, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 FORDHAM L. REV. 367, 379-382 (2015).

¹⁰² Agnieszka McPeak, *Social Media Snooping and Its Ethical Bounds*, 46 ARIZ. ST. L.J. 845, 849 (2014).

The many variations of social media and optional privacy settings on each platform make the answer complex to questions as to whether a lawyer may use social media to undertake a myriad of lawyering activities. These activities include: investigating a case, serving a complaint, conducting discovery, impeaching a witness, selecting jurors, and supporting a recusal motion.¹⁰³ Given this broad scope, where do lawyers find general guidelines for the ethical questions?

Model ethical rules are a suitable place to begin. In the context of social media, ethical rules reinforce the proposition that the use of technology and social media is becoming a requirement in the practice of the law.¹⁰⁴ A lawyer may be found not competent or diligent by neglecting to investigate social media in order to discover certain easily identifiable sources of information.¹⁰⁵ A few of the current ABA Model Rules are relevant to social media and informal discovery of evidence. However, what do lawyers do when there are no rules or guidelines for discovery techniques through social media? In this case many of the published authors in this area strongly suggest lawyers take a conservative approach when it comes to using social media for informal discovery.¹⁰⁶

¹⁰³ Jan L. Jacobowitz & Danielle Singer, *Social Media and the Law: The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U. MIAMI L. REV. 445, 457 (2014).

¹⁰⁴ *Id.* at 465.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

a) Several Applicable ABA Model Rules and Ethical Opinions – An Overview

Current ABA Model Rules are implicated through the use of social media for informal discovery such as the due diligence and competence requirements,¹⁰⁷ rules prohibiting attorney communication with a represented party,¹⁰⁸ the rule prohibiting the use of a third party to commit conduct which is prohibited by the lawyer (Rule 5.3), and the rule prohibiting tactics of deceit, fraud, or misrepresentation.¹⁰⁹ These rules will be further explained and analyzed in relation to their relevance with practitioners' use of social media for informal discovery of evidence.

Informal discovery of evidence includes observing public movements, interviewing witnesses, searching records, and now performing web searches such as exploring social media websites to compile and aggregate personal data.¹¹⁰ This latter and new approach provides new information that is easy and cheap to access. Informal searches can be conducted to find social media accounts that are public from a few clicks on a computer. Lawyers routinely seek information about other parties and witnesses outside formal discovery procedures to better their understanding of facts and litigation strategies, and to make more informed discovery requests.¹¹¹

¹⁰⁷ Model Rules of Prof'l Conduct R. 1.3 (2013) states, in relevant part: "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

¹⁰⁸ Model Rules of Prof'l Conduct R. 4.3 (2013) states, in relevant part: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter..."

¹⁰⁹ Model Rules of Prof'l Conduct R. 8.4 (c) (2013) states, in relevant part: "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *See also* Agnieszka McPeak, *Avoiding Misrepresentation in Informal Social Media Discovery*, 17 SMU SCI. & TECH. L. REV. 581, 583 (2014).

¹¹⁰ Robert Keeling, Tami Weerasingha-Cote & John-Paul Schnapper-Casteras, *Neither Friend nor Follower: Ethical Boundaries on the Lawyers Use of Social Media*, 24 CORNELL J. L. & PUB. POL'Y 145, 147 (2014).

¹¹¹ *Id.*

It is important to note that the current ABA Model Rules do not expressly mention social media. But there is a path from which to seek indirect guidance. First, current rules impose a duty of due diligence that requires lawyers to be competent and pursue all sources of evidence that may be necessary to establish and prepare the claim or defense for a client.¹¹² Generally, it is ethically acceptable for a lawyer to view social media information that is made “public” through individuals’ profiles.¹¹³ Alternatively, information that is made “private” is generally inaccessible without a court order.¹¹⁴

Secondly, Model Rules 4.2 and 4.3 are relevant in terms of a lawyer’s use of social media for informal discovery. Rule 4.2 prohibits counsel from communicating with people who have retained counsel. This applies to communication through social media. The question becomes more challenging when considering nuances; is “friending” someone on a social media considered communication?¹¹⁵ Rule 4.2 may address this issue in part. A lawyer may not try to friend a represented person to gain access to information that is private without first making a formal discovery request through a judge.¹¹⁶ Also, Rule 4.3 makes it clear a lawyer is prohibited from trying to friend a person through deceit, fraud, or misrepresentation of the lawyer’s disinterest in the case. Additionally, a lawyer has an affirmative duty to make reasonable efforts to correct a misunderstanding if one exists in communication with a party.¹¹⁷

¹¹² Jasmine V. Johnson, *Completing the Map: The Next Step in Guiding the Ethical Use of Social Media by Legal Professionals*, 28 GEO. J. LEGAL ETHICS 597, 604 (2015).

¹¹³ See, e.g., N.Y. State Bar Ass’n Comm. Prof’l Ethics, Formal Op. 843 (2010); Oregon State Bar Ass’n, Formal Op. 2013-189 (2013).

¹¹⁴ *Id.*

¹¹⁵ See Oregon State Bar Ass’n, Formal Op. 2013-189 (2013), available at <https://www.osbar.org/docs/ethics/2013-189.pdf> (finding that there is no violation if the lawyer who sent a friend request lacked actual knowledge at the time the request was made that the person was represented).

¹¹⁶ *Richards v. Hertz Corp.*, 953 N.Y.S.2d, 654, 656 (2012).

¹¹⁷ *Keeling* at 147.

Lastly, Rules 5.3 and 8.4 are applicable regarding lawyers' use of social media. Specifically, Rule 5.3 prohibits lawyers' use of a third party to contact an individual through social media if the lawyer is prohibited from such conduct. For example, a lawyer cannot ask an administrative office staff to friend a person of interest in order to avoid implicating Rule 4.2. Misrepresentation is a risk when performing informal social media discovery.

Rule 8.4 (c) prohibits lawyers' use of conduct involving dishonesty, fraud, deceit, or misrepresentation. This prevents lawyers from using false stories or pretenses to friend individuals in an attempt to gain access to private information. The ABA published an ethics opinion in 2011 on this point for clarification.¹¹⁸ A lawyer cannot "mastermind" a deceptive plot of communication for a client to engage in communication with a represented person to obtain "private" (confidential) information.¹¹⁹ For example, a lawyer directing a client to pose as a long lost friend to gain unfettered access to the person's privacy-protected information on their social media account would be a violation of Rule 8.4 (c).¹²⁰

Current ABA Model Rules have been interpreted by a limited number of state and local ethical committees through publication of formal ethic opinions. The first major opinion came in 2005 regarding a lawyer's use of social media for informal discovery. The Oregon Bar was tasked determining whether a lawyer could visit an adverse party's

¹¹⁸ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461 (Aug. 4, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_11_461_nm.authcheckdam.pdf.

¹¹⁹ *Id.*

¹²⁰ *See Richards* at 656 (finding that a party trying to gain access to private information on social media must make a formal discovery request and show that at least some of the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information that has a bearing on the claim).

website to gather information that may be relevant to the pending litigation.¹²¹ The opinion narrowed its attention to Model Rule 4.2 (communication with a represented person and noted that the rule applies regardless of the form of communication). The opinion stated that accessing a social media website was no different from reading a magazine article or purchasing a book written by that adversary.¹²² The opinion reasoned that the goal of 4.2, (to ensure that represented persons have the benefit of their lawyer's counsel) was not diminished through the action of visiting a website; therefore, this tactic did not violate the rule.¹²³

The Philadelphia Bar was faced with a question in 2009 of whether a lawyer could use a third party to friend a witness in order to obtain private access to information to impeach the witness's testimony at trial.¹²⁴ In that situation, the lawyer used an investigator to friend the witness, and this raised ethical issues under Rules 5.3 and 8.4. The bar determined that a lawyer cannot instruct a third party to do something from which the lawyer is personally barred from doing under Rule 5.3. Also, in that case the opinion stated the conduct was prohibited because the friend request omitted a material fact. The investigator who contacted the witness had a primary goal that was beyond the typical use of the social media platform: to assist the lawyer in the lawsuit.¹²⁵

¹²¹ Or. Bar. Ass'n, Formal Op. 2005-164 (2005), available at <http://www.osbar.org/docs/ethics/2005-164.pdf>

¹²² *Id.* at 452-54.

¹²³ *Id.*

¹²⁴ Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02, at 1-2 (Mar. 2009), available at http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

¹²⁵ *See Id.* at 4-5 (citing numerous cases decided in various jurisdiction that all decided that there is zero tolerance for lawyer's using deception for informal discovery through social media, no matter how noble the reason for doing so).

Building on the Philadelphia opinion, in 2010 the New York State Bar compared using social media to deceive a witness to gain access to private information versus doing it in person.¹²⁶ The NY opinion made it clear that such an approach is an ethical violation – to make a friend request falsely portraying themselves to be a long lost friend increases the chance of gaining access to desired information unethically.¹²⁷ The New York opinion also made a distinction between accessing private information and public information on social media. The opinion concluded that accessing public information does not violate rule 8.4 because it is like accessing print media or publically accessible information.¹²⁸ The opinion failed, however, to clearly address what “public” information specifically referred to, as well as what exactly private information includes.

One year later, the San Diego Bar published a formal opinion examining whether a lawyer representing a client in a case for wrongful discharge could ethically friend other employees who worked for the company.¹²⁹ The targeted workers were identified as employees who were potentially unhappy with their employer and would be inclined to have left a negative footprint online through social media.¹³⁰ The opinion agreed with the Philadelphia opinion that the lawyer should disclose affiliation and purpose for the friend request, but that the lawyer’s client is free to send a friend request to employees (though the court acknowledged it is likely to be rejected).¹³¹

¹²⁶ N.Y. State Bar Ass’n, Comm. on Prof’l Ethics, Op. 843 (Sept. 10, 2010), available at <http://www.nysba.org/CustomTemplates/Content.aspx?id=5162>.

¹²⁷ *Id.* at 2.

¹²⁸ *Id.*

¹²⁹ San Diego Cnty. Bar Legal Ethics Comm., Op. 2011-2 (May 24, 2011), available at <https://www.sdcba.org/index.cfm?pg=LEC2011-2>.

¹³⁰ *Id.*

¹³¹ *Keeling* at 148.

Though plentiful, recent opinions provide little concrete guidance on how lawyers may permissibly seek information from social media sites through informal discovery. Furthermore, neither the ABA's Model Rules nor any state version explicitly address social media in any way. These decisions above provide a few dots on the map, but the only consistent conclusion is that "publicly" available information is fair game.¹³²

In an attempt to be helpful, in 2015 the Commercial and Federal Litigation Section of the New York State Bar Association issued a revised and detailed set of social media guidelines.¹³³ The guidelines cover a range of various scenarios, but they are not binding on disciplinary proceedings and have not been formally adopted by the full State Bar Association. Also, they do not go far in advising practitioners in the use of social media as a means for informal discovery. At this point, practitioners view the rules as allowing informal discovery of social media accounts. Informal discovery through social media is limited to information that is publically available: this has been deemed the only clear boundary line and practitioners have thus propagated it.¹³⁴ Limiting informal discovery to strictly public accessible information in every instance is extraordinarily conservative and could hinder a client's case if key pieces of relevant evidence are missed.

In summary, a few common themes materialize from the set of opinions from the local and state bar associations. All the opinions accept that there is a clear line between "public" and "private" information on social media websites.¹³⁵ The sources do not, however, define the difference between the two. Instead, it is assumed that it

¹³² *Id.*

¹³³ Commercial & Fed. Litig. Section, N.Y. State Bar Ass'n, Social Media Ethics Guidelines (2014), available at <http://www.nysba.org/socialmediaguidelines>

¹³⁴ *Id.*

¹³⁵ *Keeling* at 150.

speaks for itself. Yet this distinction in practice is not as clear as the opinions assume. The rules fail to explain why or how the designation of information as “public” or “private” should be a relevant when considering in the application of the cited rules of professional conduct.¹³⁶ Another common thread to note between the opinions is that there is a duty to disclose certain information such as an affiliation with the lawyer or the lawyers’ interest in the litigation even if the information is given through the use of social media.¹³⁷

b) How to Improve Current Model Rules on Social Media Use of Informal Discovery: Conclusion and Recommendations

The several state and local bars’ formal ethical opinions that address the issue have sought to limit informal discovery of social media content by attempting to distinguish a bright-line rule between what is “private” and “public” information.¹³⁸ This is neither practical nor helpful because it is vague, leaving practitioners uncertain. When put to the test, the prudent lawyer thus takes a conservative approach when using social media as a tool for informal discovery. This may not be where the rules should be taking the bar. The State Bar Ethic’s Committees and drafters of the ABA Model Rules should acknowledge the unique nature of social media information.

In the near future, the ABA should publish guidelines for practitioners’ use of social media for informal discovery through a “best practices” section that specifically address the practical concerns faced on a day to day basis. Additionally, the ABA should adopt new model rules that apply broadly to social media. Social media is here to stay (at least for the foreseeable future). It only makes sense for the legal community to

¹³⁶ *Id.* at 161.

¹³⁷ *Id.*

¹³⁸ Steven C. Bennett, *Ethical Limitations on Informal Discovery of Social Media Information*, 36 AM. J. TRIAL ADVOC. 473, 483 (2013).

have clear guidelines for practitioners in order for them to play by the same rules. One state in particular has identified the unique nature of social media.

Delaware has identified the need for further clarification of a lawyer's ethical duties relating to current technology, such as social media.¹³⁹ A commission was created to provide guidance to practitioners who had technology-related issues.¹⁴⁰ This commission created a "best practices" and "knowledge bank" for members of its bar to access content that contains relevant opinions and various published materials on technology-related issues.¹⁴¹

The ABA could very easily adopt an approach like Delaware and create a best practice area on their website for issues directly related to social media to help create guidelines for practitioners. A best practices approach has three main advantages: (1) best practices are non-binding, they do not contravene other ethics rules because they are supplemental and can be deemed inadmissible in any tribunal (like Delaware's best practices); (2) allows for flexibility and timeliness – traditional rule making process is slow to react to ever changing technology; (3) best practices can be adopted and modified for each jurisdiction's local needs.¹⁴² This would increase certainty and improve consistency of how practitioners use social media for informal discovery. The ABA should go one step further.

¹³⁹ Angieszka McPeak, *Social Media Snooping and its Ethical Bounds*, 46 ARIZ. ST. L.J. 845, 858-59 (2015).

¹⁴⁰ See Order In Re: Commission on Law and Technology, 1 (2013) available at <http://www.courts.state.de.us/declt/docs/CommissionOnLawTechnologyOrder.pdf> (stating its purpose is to "...provide sufficient guidance and education in the aspects of technology and the practice of law so as to facilitate education in the aspects of technology and the practice of law so as to facilitate compliance with the Delaware Lawyers Rules of Professional Responsibility.").

¹⁴¹ Angieszka McPeak, *Social Media Snooping and its Ethical Bounds*, 895-96

¹⁴² *Id.*

Additionally, new model rules should be adopted by the ABA. The rules should not be focused on the nuances of technology. Rather, they should identify broad principles that are applicable to every platform of social media and provide clear and defined boundaries of what is acceptable conduct for practitioners during informal discovery. For instance, a rule designed to identify what exactly “public” and “private” information means in the social media context. Also, under what circumstance each can be accessed would eliminate uncertainty of the published ethical decisions discussed above. Moreover, model rules should be adopted by the ABA that specifically outline the prohibited type of communication by lawyers through the use of social media.

Some commentators have argued that new technologies always create fears within the legal community of how the Model Rules will address ethical issues and it has always worked out fine.¹⁴³ The argument continues by drawing a connection between social media and past emerging technologies such as telephones and emails. The conclusion is that current rules will address the ethical issues of social media adequately, just like past emerging technologies.¹⁴⁴

The major difficulty with this argument is the utter absence of how much different social media is today from past new emerging technologies. Social media records information online, which the author makes accessible to the public. Email and telephone conversations do not have the same public footprint implications as social media, nor has it the same dominance as a form of communication and entertainment. Moreover, social media is not merely communication but is more comparable to a public/private journal of one’s daily activity, which is why it is has become such a crucial aspect of informal discovery.

¹⁴³ Helen W. Gunnarsson, *Legal Technology/Ethics: Friending Your Enemies, Tweeting Your Trials: Using Social Media Ethically*, IL BAR JOURNAL, Vol. 99, No. 10, 499-500 (Oct. 2011).

¹⁴⁴ *Id.*

Practitioners should remain reluctant to risk their licenses by using assertive informal discovery tactics through social media ... at least until more ethical opinions are published and widely accepted, new and expansive model rules are adopted, and best practices are published by the ABA. Unfortunately, the lack of guidance has created a conservative approach to using social media as a tool for informal discovery. This is a detriment to clients in cases where strong tactics of informal discovery through social media could provide a great resource of evidence. Yet, this is the reality facing lawyers and their clients within the U.S, at least until the ABA or other authorities provide more guidance.

6) Fair Weather “Friends” In an Ethical Hurricane (Lead Author: Anthony Chabala¹⁴⁵)

While the purpose of social media is to break down social barriers and make people accessible, society has a vested interest in keeping judges socially isolated for the sake of objectivity.¹⁴⁶ One could argue that a judge’s online relationship with any parties involved in a legal matter could positively or negatively impact his or her professional obligation. The ever-changing nature of social media, however, often presents ethical dilemmas with no clear precedent. First, this section discusses how the definition of the word “friend” varies depending on context, and thanks to the social media platform Facebook, that definition has never been more blurred. Second, this section provides a brief overview of the limitations some states have placed on judges. Lastly, this section reviews various instances where judges engaged in social media pitfalls.

a) With Whom Can Judges Be “Friends”?

The Merriam-Webster Dictionary defines “friend” as “a person who you like and enjoy being with.”¹⁴⁷ On Facebook, the world’s most popular social networking website, the user builds his or her own page and accepts or requests to be “friends” with people.¹⁴⁸ Becoming Facebook friends can mean a variety of things, but in most cases allows the “friend” to see what information a person posts on that page, comment on that page, “like” items on that page, see who the other person is friends with, plus

¹⁴⁵ Anthony Chabala just finished his second year of law school, and can be reached at achabala@buffalo.edu or anthonychabala@yahoo.com.

¹⁴⁶ ¹⁴⁶ Susan Criss, *The Use of Social Media by Judges*, 60 THE ADVOCATE (TEX.) 18 (Fall 2012).

¹⁴⁷ Merriam-Webster, definition of “friends,” <http://www.merriam-webster.com/dictionary/friends>.

¹⁴⁸ Evan E. North, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. Kan. L. Rev. 1279 (2010).

other activities.¹⁴⁹ Moreover, being a “friend” unlocks some or all of the safeguards that keep non-friends out of a “locked” page. However, unlike those described under the Merriam-Webster definition, often times, Facebook friends have never met each other. People can research each other based on similar interests and become Facebook friends while never once being on the same continent. A resulting tension with Facebook and the legal system comes from the use of the word “friend,” for should a judge be able to hear a case where s/he is “friends” with an attorney? A defendant? A witness? A juror?¹⁵⁰ The fear of corruption, or the appearance of corruption lurks beneath all the regulations regarding social media and judges.

The American Bar Association’s Model Code of Judicial Ethics has some rules that many believe sufficiently address all issues that can arise involving social media. Model Rule 2.9(A) is often applied when judicial conduct on social media is an issue. Rule 2.9(A) states, “[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter”¹⁵¹ This rule is meant to protect parties on any side gaining procedural or tactical advantage during judicial proceedings.¹⁵² Additionally, Rule 3.5 clearly prohibits an attorney from actively communicating ex parte with a judge during the proceeding via any means, including social media.¹⁵³ Likewise, Rule 8.4(f) can implicate lawyers in potential judicial ethical violations: a lawyer who attempts to friend a judge could potentially be found to “(f)

¹⁴⁹ *Id.*

¹⁵⁰ John G. Browning, *Why Can’t We Be Friends? Judges’ Use of Social Media*, 68 U. MIAMI L. REV. 487, 497.

¹⁵¹ A.B.A Model Rule of Prof’l Conduct, R 2.9(A).

¹⁵² Hope A. Comisky & William M. Taylor, *Don’t Be A Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas-Discovery, Communications with Judges and Jurors, and Marketing*, 20 TEMP. POL. & CIV. RTS. L. REV. 297, 308-09 (2011)).

¹⁵³ *Id.*

knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.”¹⁵⁴

Yet the current Model Code, or any code, cannot possibly predict the future of social media and the complications that will come with it. Nevertheless, any part of the code that could encompass all future social media platforms and a judge’s use of it would not be narrowly tailored enough to be fair to those the rule would affect. For example, a rule such as, “A judge may only use the internet for information and never type anything except words into a search engine,” might solve the social media issues of today, but this rule takes away a large part of the judge’s freedom and limits his or her speech in a gargantuan way. Obviously, there is no simple answer, but luckily, each state is able to craft its own rules in effort to minimize social media issues.

b) The Different Perspectives Amongst States.

In the United States, each state has its own Code of Judicial Conduct that applies to state court judges. The Model Code, or the rules governing Federal court judges, is often used as a template that states use when crafting their own code. Cultural relativity, population, and politics all play key roles in the development of a state’s Code of Judicial Conduct. As this section reveals, the aims of the states are similar, but the means they use often vary.

The stars at night are not the only things big and bright in Texas, for the caution signs regarding judges’ use of social media in that state are clear and ubiquitous. Texas, like all states, has canons of judicial ethics and conduct that must be honored.¹⁵⁵ In the most recent decision from Texas, in *In re Slaughter*, the Supreme Court of Texas analyzed whether a Texas judge violated two sections of the Texas Code of Judicial

¹⁵⁴ A.B.A Model Rule of Prof’l Conduct, R 8.4(f).

¹⁵⁵ See Texas Code of Judicial Conduct: Canon 3; see also Texas Code of Judicial Conduct: Canon

Conduct, namely canons: 3(B)(10) (stating that a judge “shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case.”) and 4(a) (stating “[a] judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or (2) interfere with the proper performance of judicial duties.”).¹⁵⁶

In re Slaughter is a case where the judge was accused of violating 3(B)(10) and 4(a)(1) when she talked about facets of the case.¹⁵⁷ Here, the judge wrote about the stage the case was in, the nickname the papers gave the case, and the size of the box built for the defendant. Moreover, her “friends” said things like, “Hang ‘Em High.” Since the judge showed no major impropriety or inability to be objective, the Special Court Review held that the judge was not guilty. Given the discretion each state possesses when developing its own judicial code, behaviors like this could just as easily resulted in a different verdict in another jurisdiction.

Coincidentally, in 2016, a Texas judge also surnamed Slaughter published an article regarding Texas courts and social media. Slaughter offered the following common sense tips to help judges navigate social media:

“1. Don't be stupid. ... Ex parte contact with a judge on Facebook is still improper ex parte contact. 2. Remember, if it's on the Internet, it never goes away. Before you post that picture or post that rant, remember that ten years from now someone will be able to dig it up. ... 4. If you wouldn't say something to a business acquaintance or at a cocktail party, don't say it on social media. Think twice before hitting send. See rule No. 2 above. ... Corollary

¹⁵⁶ *In re Slaughter*, 480 S.W.3d 842, 846 (Tex. Spec. Ct. Rev. 2015).

¹⁵⁷ *Id.* at 846.

to rule No. 4: Anything you post on the Internet can and will be used against you.”¹⁵⁸

Some states have very strict rules. Florida, Massachusetts, and Oklahoma are three of minority states that totally bar judges from becoming “friends” with those who could potentially come before them in court.¹⁵⁹ The rationale behind this ban is the appearance of impropriety and fear of favoritism when a judge oversees a trial and only one of the attorneys is “friends” with the judge. Both Arizona and California strictly regulate judges’ social media access. For example, in Arizona and California, a judge may have a social media account, he or she may “friend” people in his or her jurisdiction, but the judge cannot have any social media ties to anyone involved with a case pending before him or her.¹⁶⁰ Both Kentucky and Maryland allow judges to use social media so long as they adhere to those local ethical guidelines.¹⁶¹

Some states are more liberal. New York has perhaps the most liberal view of judges on social media. Here, a judge is permitted to use social media and does not have to recuse him or herself for simply being “friends” with a person.¹⁶² In New York, the law requires there be one step more than just the website link between the judge and a party. For instance, talking about the trial or giving advice to one party on social media would be outside of the scope of permissibility.¹⁶³

¹⁵⁸ See 48B Tex. Prac., Tex. Lawyer & Jud. Ethics § 26:5 (2016 ed.).

¹⁵⁹ Florida Supreme Court, *Judicial Ethics Advisory Committee*, (Nov. 17, 2009), <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>.

¹⁶⁰ National Center for State Courts, *Social Media and the Courts*, (May 5, 2014), <http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=Judicial%20Ethics%20Advisory%20Opinions%20on%20Social%20Media>.

¹⁶¹ *Id.*

¹⁶² New York State Bar Ass’n, Formal Op. 08-176 (2009), <http://www.courts.state.ny.us/ip/judiciaethics/opinions/08-176.htm>.

¹⁶³ New York State Bar Ass’n, Formal Op. 23-39 (2013), <http://www.nycourts.gov/ip/judiciaethics/opinions/13-39.htm>.

In sum, judges should sufficiently verse themselves in both the Federal, Model Code and the judicial code for the state in which they sit. Since judges are typically far less nomadic than other professionals bound by a code of conduct, time spent analyzing the local and federal code is a wise investment.

c) Judges are Judged for Social Media Pitfalls

The gambit of violations of the Judicial Code of Ethics and the Model Rules varies widely. From lying to broadcasting details of cases as they are being litigated, the offenses judges have partaken are largely considered gross errors in common sense. A range of recent decisions involving common social media mishaps has set the tone for defining the limits of ethical behavior for judges.

For example, one case made it clear that a judge cannot post misleading information on social media. In *In re Dempsey*, the judge was found to be in violation of the model rules (and 7(A)(3)(d)(ii) of the Code of Judicial Conduct)¹⁶⁴ when he exaggerated his years of professional judicial experience on Facebook. The timing of this falsification is suspect considering it took place during an election. In another situation, a judge should not boast on social media that he has a celebrity football player in his courtroom. In Texas, a judge went on Facebook and posted that he had a celebrity football player in his small town courtroom. The football player was a local celebrity, and although the judge did not give a specific name, he gave enough facts that it was easy for a local resident to identify this Heisman winning player.¹⁶⁵

Another case made it clear that a judge cannot use social media to advise clients. In the case of *Black v. Woods*, a judge was found to be in violation of the

¹⁶⁴ *In Re Dempsey*, 29 So. 3d 1030, 1033 (Fla. 2010).

¹⁶⁵ Jason Cohen, Bum Steer: *The Judge Who Facebooked Johnny Football's Speeding Ticket* (Jan. 23, 2013), <http://www.texasmonthly.com/its-always-football-season/bum-steer-the-judge-who-facebooked-johnny-footballs-speeding-ticket/>.

judicial code of ethics when he used social media to advise the plaintiff in the proceedings before him on how to overcome a drug possession charge.¹⁶⁶ The plaintiff was one of the judge's former girlfriends, and he seemingly believed his social media conversations would not be made public. Additionally, in a Cleveland, Ohio court, a judge who regularly used social media to anonymously disclose court proceedings was caught when one of her readers pieced together the puzzle of clues she left.¹⁶⁷

In another situation, a North Carolina judge was on the bench during a trial. The judge was Facebook friends with one of the trial's attorneys. The judge asked the attorney a question in chambers to which the attorney then posted on Facebook as an open-ended question. The judge later went on Facebook, saw the question, and answered it. Opposing counsel found this out and believed there was favoritism involved.¹⁶⁸ In yet another situation, a disabled victim of child abuse posted a video of herself being beaten on YouTube years after the event. This was posted in hopes of bringing issues of child abuse to light, however the aims of the act were trumped by the fact that the father doing the beating was a family court judge.¹⁶⁹ While ethical guidelines were established with the hopes of providing guidance and boundaries to judges' social media behavior, clearly from the volume of indiscretions, even judges are subject to poor judgment.

¹⁶⁶ Katheryn Hayes Tucker, *Ga. Judge Steps down Following Questions About Facebook Relationship with Defendant*, LAW.COM (Jan. 7, 2010, 12:00 AM) (Jan. 7, 2010, 12:00 AM), LAW.COM. (Jan.

¹⁶⁷ Kashmir Hill, *Judge of the Day* (Mar. 26, 2010), <http://abovethelaw.com/2010/03/judge-of-the-day-shirley-strickland-saffold>.

¹⁶⁸ Daniel Smith, *When Everyone Is the Judge's Pal: Facebook Friendship and the Appearance of Impropriety Standard* (2012), <http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1016&context=jolti>.

¹⁶⁹ Neetzan Zimmerman, *Texas Supreme Court Reinstates Family Law Judge Who Was Caught On Camera Beating His Disabled Daughter* (Nov. 7, 2012, 1:46PM), <http://gawker.com/5958544/texas-supreme-court-reinstates-family-law-judge-who-was-caught-on-camera-beating-his-disabled-daughter>.

d) Conclusion and Recommendations

There is still much to be adjudicated in the world of judges and social media. Hopefully, by staying current with his or her state's social media guidelines and using common sense while online, a judge will stay on the proper side of the bench and avoid the shame of conducting a social media folly. However, given how fast social media is changing, one might wonder how established ethical guidelines could possibly keep up with developing trends in the virtual world. For example, how do counterfeit social media accounts play a role in the appearance of impropriety? This topic has not been explored in much depth, and the lack of guidance on this matter may result in further social media indiscretions. In addition, interestingly, while much has been said about whether or not judges can be Facebook friends with certain people, it is unclear how judges are supposed to sever ties once already friends.¹⁷⁰ Until all facets of social media policy are examined from a broad to narrow level, we will likely continue to see examples of judges making cringe-worthy blunders.

¹⁷⁰ Kelly Lynn Anders, *Ethical Exits: When Lawyers and Judges Must Sever Ties on Social Media*, 7 CHARLESTON L. REV. 187, 196-97 (2013).

7) Social Media's Effects on Juries (Lead Author: Casey Pagano)¹⁷¹

This section examines the difficulties social media has created for maintaining an impartial jury. It will explore changing jury instructions to improve the ability of courts to ensure the necessity of impartial juries. It will also discuss lawyers' ethical duties under the Model Rules of Professional Responsibility (the "Rules") regarding their conduct with jury members and particularly, jury members' social media accounts.

a) Juror Misconduct: Use of Social Media During Criminal Trials

The Sixth Amendment guarantees every criminal defendant a right to a trial by an impartial jury of his or her peers. The widespread use of social media has made that fundamental right increasingly harder to ensure. The rise of social networking sites has been accelerated by the use of smartphones and makes it almost impossible to monitor juror use during trial. At the end of 2011, forty-six percent of United States cell phone users owned smartphones, and sixty percent of new cell phones purchased were smartphones.¹⁷² Most people of the developed world rarely leave home without internet-capable devices. On average, Americans spend about three hours per day on social networking applications on their mobile devices.¹⁷³ "In a society where every passing thought and mundane life experience are potential topics for an email, text message, or tweet, it is hardly surprising that jurors are tempted to post their courthouse experiences in 'real time'."¹⁷⁴

¹⁷¹ Casey Pagano just finished her second year of law school, and can be reached at caseypag@buffalo.edu.

¹⁷² Michael K. Kiernan & Samuel E. Cooley, *Juror Misconduct in the Age of Social Networking*, FDCC Quarterly/Winter 2012, http://www.thefederation.org/documents/v62n2_kiernan.pdf.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 182.

There have been a growing number of cases where juror misconduct has occurred through improper use of social media during trials. Through use of social media, jurors have the ability more than ever to gain insight on the parties, lawyers, judge and witnesses. A prospective juror in a murder trial Tweeted, “[g]uilty, guilty ... I will not be swayed. Practicing for jury duty.” The juror's conduct in that case was particularly concerning because, as the juror later explained, he had “merely tweeted out of habit.”¹⁷⁵ A Connecticut juror wrote on Facebook that jury duty was “boring,” and pleaded for “[s]omebody [to] get me outta here.” She then wrote, “Guilty:)” on her Facebook page the day of the verdict.¹⁷⁶ In 2011, the Arkansas Supreme Court reversed a death sentence because a juror Tweeted about the case during the trial.¹⁷⁷ These examples are only a few of many occurrences that portray how as some scholars have suggested, the rise of social networking services has “wreak[ed] havoc” in the jury box.¹⁷⁸

b) Changing jury instructions to include social media concerns/warnings/restrictions

It is a judge's duty to vigilantly monitor for potential jury misconduct during a trial. There is an apparent trend that the most effective way to deter inappropriate social media use is to address it directly through jury instruction. Likewise, a growing understanding that jurors need to be advised about social media use more explicitly and

¹⁷⁵ Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, DUKE L. & TECH. REV., Mar. 13 2012, at 14.

¹⁷⁶ *Id.*; See also *United States v. Ganius*, No. 08-CR-224, 2011 WL 4738684, at *3 (D. Conn. Oct. 5, 2011).

¹⁷⁷ *Dimas-Martinez v. State*, No. CR 11-5, 2011 WL 6091330, at *1 (Ark. Dec. 8, 2011); See also Jeannie Nuss, *Death Row Inmate Gets New Trial After Juror Tweet*, USA TODAY (Dec. 8, 2011) <http://usatoday30.usatoday.com/tech/news/story/2011-12-08/juror-tweet-death-row/51741370/1>, 8, 2011) <http://usatoday30.usatoday.com/tech/news/story/2011-12-08/juror-tweet-death-row/51741370/1>.

¹⁷⁸ Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, DUKE L. & TECH. REV., Mar. 13 2012, at 8.

more frequently throughout the trial is increasingly accepted. Furthermore, jury instructions are changing to include prohibitions against using social media to communicate about their jury service and conducting research on the internet about a pending case. The instruction should be meaningful and should include reminders to all jurors such as: they took an oath, their duty is an important part of the legal system and there are people depending on them to abide by their oath. Some courts have posters mounted in jury deliberation rooms or other areas where jurors congregate reminding them of their duties.¹⁷⁹

There were some modifications to address social media in 2012, after a survey of federal trial judges was conducted by the Federal Judicial Center at the request of the Conference Committee on Court Administration and Case Management (CACM).¹⁸⁰ CACM updated the Model Jury Instructions on “The Use of Electronic Technology to Conduct Research on or Communicate about a Case” to address some of the federal judges’ concerns. The instructions jurors receive before trial now read in part:

I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror’s violation of these instructions.¹⁸¹

¹⁷⁹ *Revised Jury Instructions Hope to Deter Juror Use of Social Media During Trial*, (Aug. 21, 2012), <http://www.uscourts.gov/news/2012/08/21/revised-jury-instructions-hope-deter-juror-use-social-media-during-trial>.

¹⁸⁰ *Id.*

¹⁸¹ Proposed Model Jury Instructions, The Use of Electronic Technology to Conduct Research on or Communicate about a Case, June 2012, <http://www.uscourts.gov/file/3159/download>.

Additionally, the instructions for the close of the case now read in part:

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.¹⁸²

The federal courts have adopted these model instructions, but the issue of social media use in jury instructions varies throughout state courts. According to a 2015 report by a social media committee of the New York State Bar Association, jurors in New York should be warned more often and more explicitly about their use of social media during trials. The topic of this study was among the issues discussed at the NYSBA annual meeting in February, 2016.¹⁸³ The committee believes that "the increasing pervasive usage of social media by jurors requires affirmative and proactive intervention by reminding jurors not to engage in improper electronic communications....[w]ithout such proactive intervention, social media usage will threaten the integrity of the jury system."¹⁸⁴ The report recommends adding warnings

¹⁸² *Id.*

¹⁸³ Joel Stashenko, *Jurors Need to Be Warned About Using Social Media, Report Says*, NEW YORK LAW JOURNAL, (Jan. 27, 2016), <http://www.newyorklawjournal.com/id=1202748060582/Jurors-Need-to-Be-Warned-About-Using-Social-Media-Report-Says?mcode=0&curindex=0&curpage=ALL..http://www.newyorklawjournal.com/id=1202748060582/Jurors-Need-to-Be-Warned-About-Using-Social-Media-Report-Says?mcode=0&curindex=0&curpage=ALL>.

¹⁸⁴ Social Media Jury Instructions Report, The Social Media Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, available at <http://www.nysba.org/workarea/DownloadAsset.aspx?id=61616>.

to jurors that social media communications they may view as "private" can be publically viewed. According to the committee, the revisions should also warn prospective jurors that lawyers "may conduct research on or monitor you" from public sites and that it is not improper for lawyers to do so.¹⁸⁵ The report also recommends courts display posters warning jurors of the consequences of improper social media use, such as being sanctioned by the court.¹⁸⁶

c) Precautions to "voir Google(ing)"

In light of the ever-increasing use of social media, lawyers should be vigilant in following the Rules regarding jurors. It is important that lawyers today know how to handle juror research and juror misconduct without violating the Rules. There is no question that social media plays an important role in the lives of most potential jurors. Facebook now has more than 1.1 billion users; Twitter's expanding user base "tweets" 350,000 comments every minute compared to 100,000 a year ago; and 120 new LinkedIn accounts are created every minute.¹⁸⁷ This fact makes it increasingly enticing to hop on Facebook or some other social media outlet to do some quick background research. But lawyers should take warning.

i) Rule 3.5: Impartiality and Decorum of the Tribunal

The Rules provide that a lawyer shall not communicate with a juror or prospective juror ex parte during any proceeding unless authorized to do so by law or court order.¹⁸⁸ Although there is no Rule that explicitly addresses social media contact,

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See Hon. Amy J. St. Eve, Hon. Charles P. Burns, & Michael A. Zuckerman, *More From the #Jury Box: The Latest On Juries and Social Media*, 12 Duke Law & Tech. Rev. 64, 67 (2014).

¹⁸⁸ See A.B.A. Model Rules of Prof'l Conduct, R. 3.5(b).

the ABA has published an opinion providing some guidance on this issue.¹⁸⁹ According to the opinion, a lawyer may view a potential juror or juror's "internet presence" before or during a trial; however, the lawyer may not communicate with the juror. Communication would include sending a "friend request" on Facebook or some other form of access request on other social media sites.¹⁹⁰ However, if a setting in a particular social media site informs the juror of the lawyer's viewing of his/her information, it is not considered a "communication" with the juror.¹⁹¹

ii) Rule 8.4: Misconduct

Another issue that has come up is lawyers "communicating" with jurors on social media through other employees. Lawyers "friending" or sending other access requests to social media accounts before or during a trial through other people is also a violation of the Rules. Rule 8.4 provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or "engage in conduct that is prejudicial to the administration of justice."¹⁹² So, it is important that lawyers remain informed that there are proper ways to conduct jury research and there are improper ways.

iii) Rule 1.1: Competence

Comment 8 to Rule 1.1 states that a "lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology..." as part of the requirement that lawyers provide competent

¹⁸⁹ See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466, Lawyer Reviewing Jurors' Internet Presence (Apr. 24, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See A.B.A. Model Rules of Prof'l Conduct, R. 8.4.

representation.¹⁹³ Therefore, “accidental” invasion of privacy on a juror’s social media site is not excusable. The ABA opinion provides that a lawyer is expected to be aware of the terms, conditions and privacy settings of social media sites.¹⁹⁴ Lawyers are expected to know what is acceptable and what is not as far as researching jurors online goes. Some courts have determined that lawyers should conduct online research of potential jurors as a matter of lawyer competence and due diligence.¹⁹⁵ In fact, some states have held that lawyers are *required* to research prospective jurors online during the voir dire process.¹⁹⁶ However, the research cannot go as far as to what is considered “communicating”, as discussed above.

iv) Rule 3.3: Candor Toward the Tribunal

So, what can attorneys do if they discover juror misconduct? The ABA opinion states that when a lawyer becomes aware of juror misconduct, Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures, including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to a proceeding.¹⁹⁷ Currently, it is unclear if there is an affirmative obligation for a lawyer to report juror misconduct that does not rise to the level of “criminal or fraudulent.” However, there can be serious consequences for a lawyer who fails to report juror misconduct. For example, in 2012, a defendant found guilty of tax fraud was not given a new trial even

¹⁹³ See A.B.A. Model Rules of Prof’l Conduct, R. 1.1.

¹⁹⁴ A See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 466, Lawyer Reviewing Jurors’ Internet Presence (Apr. 24, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf.

¹⁹⁵ Justin Rice & Kyle Lansberry, *Finding the Bad Juror: Don’t Let Juror Misconduct Lead to Mistrial or Lawyer Misconduct*, 57 No. 4 DRI For Def. 22 (2015).

¹⁹⁶ See *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010).

¹⁹⁷ See A.B.A. Model Rules of Prof’l Conduct, R. 3.3.

after the court found there was juror misconduct because the defendant's lawyer had sufficient information to suspect the misconduct at various stages during the trial and failed to report it.¹⁹⁸ The court stated, "[p]rior to the verdict, [the defendant's] attorneys knew or with a modicum of diligence would have known that [the] voir dire testimony was false and misleading."¹⁹⁹ The court also noted that a lawyer's knowledge demanded swift action by the lawyer by bringing the matter to the Court's attention.²⁰⁰ This is just one example of why lawyers must stay cognizant of the Rules regarding what is appropriate conduct on a potential juror or juror's social media sites. If lawyers obtained information unethically it is difficult for them to report it to the court out of fear of being reprimanded themselves.

d) Conclusion and Recommendations

There is no question that the rise of social media has created some interesting challenges when it comes to juries. By taking actions to safeguard jury impartiality, such as changing jury instructions, and making sure lawyers remain abreast of the ever changing issues that arise with the use of technology, we can strive to safeguard the jury system that is historically an important part of our justice system. I agree with a member of the NYSBA social media committee member who has stated, "Both issues—the ethical guidelines and instructing jurors about social media—are fluid because of the continuing development of communications technology and how it is used." Because of their fluidity, he recommends the reports be updated every few years; but in order to do our due diligence within the profession, the reports should be updated as often as possible.

¹⁹⁸ *U.S. v. Daugerdas*, 867 F. Supp. 2d 445, 449 (S.D.N.Y. 2012).

¹⁹⁹ *Id.* at 476.

²⁰⁰ *Id.* at 464.

8) A Brief Look at Social Media Concerns and Possible Solutions, in Civil Litigation (Lead Author: Russell Shanahan ²⁰¹)

a) Introduction

Civil litigation is often affected by things that take place out of the courtroom.²⁰² For example, sometimes jurors are influenced by misinformation from commercial news outlets,²⁰³ goals of litigants change because of changed dynamics in personal relationships,²⁰⁴ and even statutes change, as in the case of tort reform.²⁰⁵ Perhaps the most powerful influence from outside the courtroom is now social media.²⁰⁶ Just because civil litigation starts does not mean litigants stop using their social media services.²⁰⁷ In this section, the negative effects of social media on plaintiffs in civil litigations will be evaluated using two case studies – the first being the landmark Pennsylvania case of *McMillen v. Hummingbird Speedway, Inc.* in which the courts allowed the defense to compel the plaintiff to produce information hidden behind the privacy setting of his Facebook page, and the second being the New York case *Melissa "G" v. N. Babylon Union Free Sch. Dist.* in which the plaintiff's immense Facebook page was used as a toolbox for the defense. Then, possible future solutions to reduce

²⁰¹ Russel Shanahan just finished his second year of law school, and can be reached at russelsh@buffalo.edu.

²⁰² John K. Villa, *Advocacy Outside the Courtroom: To What Extent Can Counsel Comment on Pending Litigation? Your Company Has Been Sued by A Notorious Plaintiff's Class Action Lawyer, Who in A Press Conference Accused Your Client of Fraud*, ACC Docket, November/December 2004, at 104, 108.

²⁰³ Judge Sharen Wilson, Judge Cynthia Stevens Kent, *Handling Capital Cases Dealing with the Media*, 16 TEX. WESLEYAN L. REV. 159 (2010).

²⁰⁴ See *Shapray v. Shapray*, 236 Ga. 393, 223 S.E.2d 802 (1976).

²⁰⁵ Patricia W. Hatamyar, *The Effect of "Tort Reform" on Tort Case Filings*, 43 VAL. U. L. REV. 559, 560 (2009).

²⁰⁶ Nathan L. Hecht & Marisa Secco, *Juries and Technology: Revised Texas Civil Jury Instructions Include Warnings About the Internet and Social Media*, 60 The Advoc. (Texas) 50, 50 (2012).

²⁰⁷ Robert L. Haig, *Com. Litig. in New York State Courts*, N.Y. Practice, § 113:1 (4th ed.).

damage to plaintiffs will be proposed for social media services, for the attorneys involved in civil litigation, and for the courts.

b) How social media has affected personal injury cases in the past:

Social media has affected personal injury cases across the country over the past decade. One of the first landmark cases highlighting the effect social media can have on a plaintiff's civil case took place in Pennsylvania.²⁰⁸ In 2010, Bill R. McMillen Sr. filed a suit against Josie Lee Wolfe (along with Hummingbird Speedway, Inc., and Dave Resigner) in an effort to recover damages for injuries he sustained at the hand of Wolfe.²⁰⁹ McMillen was allegedly rear ended by Wolf during the cool down lap after a stock car race.²¹⁰ Following the accident McMillen sustained "substantial injuries including: "permanent impairment, loss and impairment of general health, strength, and vitality, and inability to enjoy certain pleasures of life."²¹¹

One of the Defendant's in the case (Hummingbird) asked whether or not McMillen was a member of any social media network sites in its interrogatories.²¹² Hummingbird stated that if McMillen was a member, he needed to provide his username, log in information, and password in answer to the interrogatories.²¹³ McMillen argued that the Facebook page was confidential and that he was not required to turn over his password and login information.²¹⁴ The defendant then viewed the "public portion" of his Facebook page and found comments about his attendance on a

²⁰⁸ See *McMillen v. Hummingbird Speedway, Inc.*, No. 113 - 2010 CD, 2010 WL 4403285 (Pa. Ct. C.P. Sept. 9, 2010)

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

fishing trip, and his attendance at the Daytona 500.²¹⁵ The defendants filed a motion to compel in order to gain access to the “private portion” of McMillen’s Facebook to see if they “contained further evidence pertinent to his claim.”²¹⁶ More specifically, Hummingbird wanted “to determine whether or not the plaintiff has made any other comments which impeach and contradict his disability and damages claim.”²¹⁷

McMillen tried to argue that the content on the “private portion” of his Facebook page fell under an evidentiary privilege.²¹⁸ He argued that because his communications were only shared among his private friends on his social media networking site, they should be considered confidential.²¹⁹ However, these arguments were not successful. The Court stated that there is not an evidentiary privilege for social media users.²²⁰ It also stated that there is no statute or case law that would privilege the information.²²¹ The Court also noted that social media sites do not require the same privacy as attorney client privilege, or patient physician privilege, in order to function.²²² The Court went on to say that the purpose of social media is to make basic friendships not to store confidential information.²²³ Accordingly, the Court held that under Pennsylvania law, “where there is an indication that a person’s social network sites contain

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

information relevant to the prosecution or defense of a lawsuit... access to those sites should be freely granted."²²⁴

Time magazine picked up the McMillen case and featured it as one of two cases cited in its article entitled "Even Your 'Friends Only' Facebook Material Can Be Used in Court."²²⁵ The article warns readers to be careful posting on Facebook because their postings, "might end up being used against you in a court of law."²²⁶ The article goes on to warn readers "you might end up as your own worst enemy in any future lawsuits as opposing counsels use your Facebook updates or photos to prove their case – whether or not they're normally available for public viewing."²²⁷

Another more recent New York case also explores the role that social media is taking in our civil court system. The case involves a personal injury claim in New York's Suffolk County Supreme Court.²²⁸ Here, Plaintiff is referred to as Melissa "G" (due to the fact she was sexually abused by a teacher) and the defendants were North Babylon Union Free School District, Sean C. Feeney and John Micciche.²²⁹ The teacher, Danny Cuesta, was already found guilty in criminal court for engaging in sexual acts with Ms. "G".²³⁰ The Plaintiff was suing the school district for "Repeated sexual injury and assault; nightmares and sleep deprivation, potential exposure to sexually transmitted diseases, missed time from school and school opportunities, emotional distress, mental

²²⁴ *Id.*

²²⁵ Graeme McMillan, *Even Your 'Friends Only' Facebook Material Can Be Used in Court*, Time, May 25, 2011.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Melissa "G" v. N. Babylon Union Free Sch. Dist.*, 48 Misc. 3d 389, 6 N.Y.S.3d 445 (N.Y. Sup. Ct. 2015).

²²⁹ *Id.*

²³⁰ *Id.*

distress, legal process trauma, alienation of affections, loss of enjoyment of life, post-traumatic stress disorder, loss of employment, loss/impairment of educational and employment opportunities, educational expenses.”²³¹

The Defendant filed a motion to compel the Plaintiff’s complete unedited Facebook account. The Defendants wanted all “postings, status reports, e-mails, photographs and videos posted on her web page to date”.²³² The Plaintiff’s counsel opposed the defendant’s motion to compel.²³³ To support their motion, the defendant’s proceeded to submit printed pages from the Plaintiff’s Facebook page.²³⁴ The postings submitted were accessible to the general public.²³⁵ The content of the printed pages included the Plaintiff engaged in recreational activities and “activities with her boyfriend . . . ; at work in a veterinary hospital; rock climbing; and out drinking with friends.”²³⁶ The Defendants claimed that the both the private and public portions of Plaintiff’s Facebook page contained information that was material and necessary to their defense.²³⁷

The Suffolk County Supreme Court said that the statutory scope of discovery provided in CPLR 3101(a) applies to social media provided that the defendant’s show that it has bearing on the plaintiff’s claim.²³⁸ Defendant was also expected to establish that the information “contradicts or conflicts with the plaintiff’s alleged restrictions,

²³¹ *Id.*

²³² *Id.* at 391.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

disabilities, and losses, and other claims.”²³⁹ The court simultaneously noted that relevant Facebook postings are not shielded from discovery due to any “privacy settings” from Facebook.²⁴⁰ The court held that the Plaintiff must turn over all of the account data except private messages between the plaintiff and her friends from the “one-on-one” messaging option.²⁴¹ The court also noted that “the fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress”.²⁴²

In both of these instances, negative evidence from the plaintiff’s social media accounts was allowed into litigation. Therefore, social media may leave plaintiffs much more vulnerable to attacks of credibility. Their life is out there for everyone to see the good, the bad, and the ugly. Had these plaintiffs brought suit twenty years ago it is possible that none of this information would have impacted their case. The NY Supreme Court has taken judicial notice that even on accounts with the privacy setting active “subscribers to these [social media] sites share their political views, their vacation pictures, and various other thoughts and concerns that subscribers deem fit to broadcast to those viewing on the Internet.”²⁴³ The Supreme Court has mirrored the standards given in the above analyzed cases.²⁴⁴ Scholars have discussed the way people use social media in the legal context and come to the conclusion that people do not always think before they post.²⁴⁵ People who are in the habit of posting what they

²³⁹ *Id.*

²⁴⁰ *Id.* at 393.

²⁴¹ *Id.*

²⁴² *Id.* Citing *Giacchetto v. Patchogue–Medford U.F.S.D.*, 293 F.R.D. 112, 115 (E.D.N.Y. 2013).

²⁴³ Robert L. Haig, Com. *Litig. in New York State Courts*, N.Y. Practice, § 113:17 (4th ed.) Citing *Fawcett v. Altieri*, 960 N.Y.S.2d 592, 594, (Sup Ct. 2013).

²⁴⁴ *Id.*

²⁴⁵ *Tony G. Puckett*, SHE ‘TWEETED’ WHAT?!, Oklahoma Employment Law Letter, March 2014

are feeling at that moment on social media need to be aware that whatever they post will be memorialized for future use in litigation.

c) Future Solutions

i) Reform Situated Within the Social Media Sites

One solution to protecting the balance between a plaintiff's privacy rights and the defendant's rights could be accomplished cheaply and quickly. If the social media companies were required by law to add an additional account privacy setting entitled "in litigation," it would be an effective tool in preserving justice. After selecting the "in-litigation" setting a warning would pop up every time a litigant went to post on their Facebook (or other type of social media) page stating "This may effect your litigation - do you want to post?". This would be effective because it does not infringe on anyone's rights and it warns the plaintiff of the possible risk associated with posting information during litigation.

ii) Reform From Attorneys

Attorneys could also be urged or directed to inform their clients of the possible risks of using social media during litigation. It could be a good practice for the attorney to have the client sign an agreement stating that they acknowledge that anything they say on social media should be treated as public information.

iii) Reform From The Courts

The courts could amend their rules for accepting discovery requests to require them to be more narrowly tailored for social media.²⁴⁶ This would help to protect the balance between civil plaintiff's privacy rights and the interests of the defendants.

²⁴⁶ See *Scipione v. Advance Stores Co.*, No. 8:12-cv-687-T-24AEP, 2013 WL 646405, at 1 (M.D. Fla. Feb. 21, 2013).

The courts could also hash out a standard for authenticating social media posts and evidence that comes from social media communications. Courts in criminal cases have pointed out that there are authentication issues because of how easy it is for social media accounts to get hacked.²⁴⁷ Although some criminal courts have said that the courts should authenticate social media communications on a case by case basis²⁴⁸, I think in civil matters it would be more equitable to come up with a standard for authenticating communications that more fairly balances the plaintiff's rights.

Some courts have appointed outside specialists known as "special masters" to handle social media requests.²⁴⁹ These "special masters" when appointed "compile the text messages and postings on Facebook and other pages, determine what was and was not relevant, and then give plaintiffs an opportunity to object before the content was produced."²⁵⁰ Perhaps the courts could employ "special masters" in all cases involving social media in order to preserve the rights of civil plaintiffs.

d) Conclusion and Recommendations

Hopefully, from this analysis the reader can appreciate how social media can negatively affect plaintiffs in civil litigation. The two case studies offered serve as an all-too-familiar model of the corrupting power from sources outside the courtroom on civil litigation. The remedies proposed in the section above seek to thwart self-destructive use of social media by plaintiffs.

²⁴⁷ See *State v Eleck*, 23 A.3d 818 (Conn. App. Ct. 2011).

²⁴⁸ See *In re F.P.*, 878 A.2d 91 (Pa. Super. Ct. 2005).

²⁴⁹ Zoe Rosenthal, "Sharing" with the Court: The Discoverability of Private Social Media Accounts in Civil Litigation, 25 Fordham Intell. Prop. Media & Ent. L.J. 227, 260 (2014) Citing *EEOC v. Original Honeybaked Ham Co. of Georgia*, 11-cv-02560-MSK-MEH, 2012 U.S. Dist. LEXIS 1060285 (D. Colo. Nov 7, 2012);

²⁵⁰ *Id.*

9) Some suggestions for further reading

a) Relevant Rules

- A.B.A. Comm. on Ethics & Prof'l Responsibility, Formal Op. 466, Lawyer Reviewing Jurors' Internet Presence (Apr. 24, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf
- A.B.A. Model Rules of Prof'l Conduct, R. 1.6, 1.15, 1.18, 6.1, 7.4, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html
- Ill. Rules of Prof'l Conduct, 4.4, available at http://www.illinoiscourts.gov/supremecourt/rules/art_viii/ArtVIII_NEW.htm#4.4
- L.A. Cty. Bar Ass'n Prof'l Resp. and Ethics Comm., Formal Op. 525 (Dec. 6, 2012), available at https://www.lacba.org/docs/default-source/ethics-opinions/ethics-opinion-525_12_6_12_rev.pdf?sfvrsn=2
- The Social Media Committee of the Commercial and Federal Litigation Section of the New York State Bar Association. Social Media Jury Instructions Report, available at <http://www.nysba.org/workarea/DownloadAsset.aspx?id=61616>
- N.Y. State Bar Ass'n Social Media Ethics Guidelines, Com. and Fed. Litig. Sec. (June 9, 2015), available at <http://www.nysba.org/socialmediaguidelines/>
- N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1020 (Sept. 12, 2014), available at <http://www.nysba.org/CustomTemplates/Content.aspx?id=52001>
- N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1032 (Oct. 30, 2014), available at <http://www.nysba.org/CustomTemplates/Content.aspx?id=52969>
- N.Y. Cty. Lawyers Ass'n Prof'l Ethics Comm. Formal Op. 748 (March 10, 2015), available at https://www.nycla.org/siteFiles/Publications/Publications1748_0.pdf
- N.Y. Rules of Prof'l Conduct (May 1, 2013), available at https://www.nycla.org/siteFiles/NYRulesofProfessionalConduct4109_362.pdf
- Pa. Bar Ass'n Comm. on Ethics, Formal Op. 2014-300, (2014), available at [https://www.pabar.org/members/catalogs/Ethics Opinions/formal/F2014-300.pdf](https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/F2014-300.pdf)

- Proposed Model Jury Instructions, The Use of Electronic Technology to Conduct Research on or Communicate about a Case, June 2012, <http://www.uscourts.gov/file/3159/download>.

b) Recommended Primary Sources (in alphabetical order, not in order of importance)

- Attorney at Work, *Connected: A Lawyer's Guide to Social Media Marketing*, https://www.attorneyatwork.com/wp-content/uploads/2015/01/Connected-A-Lawyers-Guide-to-Social-Media-Marketing_012815.pdf (last accessed July 2, 2016).
- Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois. In the Matter of Tsamis, Commission No.2013PR00095, <http://www.iardc.org/13PR00095CM.html>
- Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 135 (2009).
- Stacey Blaustein, Melinda McLellan & James A. Sherer, *Digital Directions for the Analog Attorney: Data Protection, E-Discovery, and The Ethics of Technological Competence in Today's World of Tomorrow*, 22 RICH. J.L. & TECH 1 (2016).
- John G. Browning, *Feature: Ethics & Law: The Digital Detractor*, 77 TEX. B. J. 610, July, 2014.
- Hope A. Comisky & William M. Taylor, *Don't Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas - Discovery, Communications with Judges and Jurors, and Marketing*, 20 TEMP. POL. & CIV. RTS. L. REV. 297, 298 (2011).
- Cynthia L. Dahl, *Making "Friends" with the #Ethics Rules: Avoiding Pitfalls in Professional Social Media Use*, 43 AIPLA Q.J. No. 1 155 (2015).
- Steven Fairley, *Haters Gonna Hate: How to Handle a Negative Online Review*, ATTORNEY AT LAW MAGAZINE, Sept. 24, 2015, available at <http://attorneyatlawmagazine.com/long-island>
- Ellen Eidelbach Pitluk, *Symposium: Social Media: Ethical Issues for Lawyers Involving the Internet*, 60 THE ADVOCATE 21, Fall 2012.
- Jan L. Jacobowitz & Danielle Singer, *The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U MIAMI L. REV. 445 (2014).
- James T. Killelea *Spoliation of Evidence Proposals for New York State*, 70 Brooklyn L. Rev. 1045 (2005), available at <http://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1432&context=blr>.

- Josh King, *Your Business: Someone Online Hates You*, THE RECORDER, Aug. 16, 2013, available at <http://www.therecorder.com>
- Clinton T. Magill, *Discovering Snapchat: How Will Snapchat and Similar Self-Destructing Social Media Applications Affect Relevance and Spoliation Under the Federal Rules of Civil Procedure?*, 9 CHARLESTON L. REV. 365 (2015).
- New York State Bar Ass'n, SOCIAL MEDIA ETHICS GUIDELINES OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION OF THE NEW YORK STATE BAR ASSOCIATION, June 2015, available at <http://www.nysba.org/socialmediaguidelines/>
- Lisa Pansini, *10 Surprising Stats on Law Firm Websites* [Infographic] (June 18, 2016), available at <http://www.legalproductivity.com/legal-marketing/law-firm-websites-infographic>.
- Saleel V. Sabnis, *Attorney Ethics in the Age of Social Media*, AMERICAN BAR ASSOCIATION LITIGATION COMMITTEE, June 8 2016, available at <http://apps.americanbar.org/litigation/committees/professional/articles/spring2016-0616-attorney-ethics-age-social-media.html>.
- Catherine Sanders Reach, *A Guided Tour of Social Media*, A.B.A. LEGAL TECH. RES. CTR., 2 (2010).
- Hon. Amy J. St. Eve, Hon. Charles P. Burns, & Michael A. Zuckerman, *More From the #Jury Box: The Latest On Juries and Social Media*, 12 Duke Law & Tech. Rev. 64, 67 (2014).
- Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, Duke L. & Tech. Rev., March 13 2012, at 14.
- Kathleen E. Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" it*, 41 U. MEM. L REV. 355 (2010).