

THE SOCIAL MEDIA THICKET FOR BANKRUPTCY JUDGES AND LAWYERS

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By

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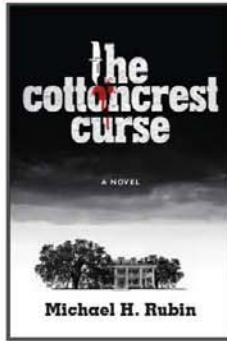
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¹ Mike Rubin is one of the leaders of the multi-state law firm of McGlinchey Stafford PLLC and heads the firm's Appellate Practice Team; he also handles commercial disputes, banking, real estate, and finance matters. He has presented over 400 major papers in the U.S., Canada, and England on legal ethics, finance, appellate law, real estate, and legal writing. He is a past-President of the Bar Association of the U.S. Fifth Circuit, the Louisiana State Bar Association, and the American College of Real Estate Lawyers. He serves as a Life Member of the American Law Institute and is a Commissioner for the Uniform Law Institute (the organization that writes the UCC and other uniform laws). For more than three decades, he also has served as an Adjunct Professor teaching courses in finance, real estate, and advanced legal ethics at the law schools at LSU, Tulane, and Southern University. He is an author of, co-author of, and contributing writer to more than a dozen legal books and over thirty articles, and his works are used in law schools and have been cited as authoritative by state and federal trial and appellate courts. Mike has been honored as the Distinguished Alumnus by the LSU Law School and as the Distinguished Attorney of Louisiana by the Louisiana State Bar Foundation.

Rubin's latest legal book, on Louisiana finance and real estate, is [THE LOUISIANA LAW OF SECURITY DEVICES, A PRÉCIS](#) (Lexis/Nexis). His debut novel, a legal thriller entitled [THE COTTONCREST CURSE](#), has been published by the award-winning LSU Press and is available in your local bookstores, as a hardcover and e-book at the websites of Amazon and Barnes & Noble, and as an audio book on Audible and iTunes. Next year, Suhrkamp will be publishing a German language edition of the novel. Publishers Weekly calls [THE COTTONCREST CURSE](#) a "gripping debut mystery"; the Chicago CBA Record says that the "story is gripping, the writing is masterful" and "Rubin has struck 'gold' in his debut novel"; and the Southern Literary Review praises the novel, calling it "literary fiction" taking "readers on an epic journey."



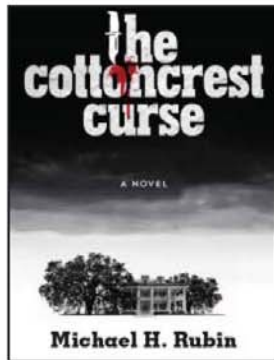
At this year's American Library Association's annual meeting in San Francisco, it was announced that Rubin's novel won the IndieFab Gold Award and was named the best thriller and suspense novel published by a university or independent press in 2014.

Book Details

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

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

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



Praise for "The Cottoncrest Curse"

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

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

"Michael Rubin proves himself to be an **exceptional storyteller.**" "The powerful epic is **expertly composed in both its historical content and beautifully constructed scenery.** I highly recommend picking up this book."
James Carville,
Political strategist and commentator

"Rubin takes his readers on a **compelling multigenerational journey** that begins with the Civil War and ends in the present day. **'The Cottoncrest Curse' is impeccably researched, deftly plotted, and flawlessly executed.**..Michael Rubin is a gifted and masterful storyteller. Highly recommended."
Sheldon Siegel,
New York Times best-selling author of the Mike Daley/Rosie Fernandez novels

"Trust me: this is a fun read, a **page turner likely to keep you up all night.**" "*The Cottoncrest Curse* is skillfully and intricately plotted." "Through it all, the writing is sharp, vivid and compelling."
LSBA Journal

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

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

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

Michael H. Rubin is a former professional jazz pianist who has played in the New Orleans French Quarter, a former radio and television announcer, a nationally-known speaker and humorist who has given over 400 presentations throughout the country, and a full-time practicing attorney who helps manage a law firm with offices from the West Coast to the Gulf Coast to the East Coast.

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**THE SOCIAL MEDIA THICKET FOR
BANKRUPTCY JUDGES AND LAWYERS²**
Fifth Circuit Bankruptcy Bench/Bar Conference

1. AN OVERVIEW OF THE ETHICAL ISSUES

When more than half of all in-house counsel report turning to social media for news and information, when 84-year old Rupert Murdoch uses Twitter, when the fastest growing cohort on Facebook consists of those over 50, when the Association of Corporate Counsel as well as the American Bankruptcy Institute user groups on LinkedIn and are on Facebook, and when bloggers regularly break important stories and appear on television and radio news broadcasts, there can be no doubt that social media permeates society. No lawyer can afford to ignore it.³

Lawyers and law firms are increasingly using social media to build their reputations, to inform their current clients, and to reach potential new clients. A look at recent publications aimed at attorneys shows that lawyers are being told that they “must” be on social media. The ABA has an entire webpage devoted to social media usage by lawyers,⁴ and there are on-line sites purporting to give lawyers a guide to “marketing” themselves through social media,⁵ creating “personal branding.”⁶ The National Law

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

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

⁴ See: http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/social_media.html (last visited 11/24/15)

⁵ See: http://www.attorneyatwork.com/wp-content/uploads/2015/01/Connected-A-Lawyers-Guide-to-Social-Media-Marketing_012815.pdf (last visited 11/24/15)

⁶ See:
[Footnote continued on the next page]

Journal has reported that the “average lawyer pays the company \$2,000 a year to attempt to influence the list or hits that come up when his or her name is punched into search engines.”⁷

An on-line article on use of social media by bankruptcy lawyers notes that many are using Google AdWords, LinkedIn, and even Craigslist.⁸ A quick review of Facebook brings up many posts that could be seen as either purely informational or advertising.⁹

Can the use of social media create ethical problems for attorneys? Can lawyers inadvertently back themselves into ethical corners? Many Internet resources on ethics

<http://upwardaction.com/personal-branding-for-lawyers/> (last visited 11/24/15)

⁷ National Law Journal, January 9, 2012, p.4.

⁸ See: <http://www.creditslips.org/creditslips/2015/01/bankruptcy-attorney-advertising-in-the-digital-age.html> (last visited 11/24/15).

⁹ See, for example, the following Facebook posts, some of which contain videos (last visited 11/24/15):

Cabanillas & Associates, P.C. Attorneys At Law :

Our Long Island Bankruptcy Lawyer Discusses the Chapter 7 Means Test When you file for bankruptcy in New York with primarily consumer debts, it will first be determined whether you qualify for Chapter 7, which is considered a liquidation, or if you must file Chapter 13, which requires establishing a repayment plan. Your Long Island bankruptcy lawyer will explain that this is accomplished through the means test.

and

Hardy Law Group

Dealing with bankruptcy is difficult. We want to help turn your financial turmoil into a concrete foundation, and get you the debt relief you need. Our firm has the most aggressive Chapter 7 bankruptcy lawyers in Reno,

and

Colorado Bankruptcy Law Group, LLC

Denver, Colorado bankruptcy lawyer Peter Mullison discusses how bankruptcy can help stop foreclosure on your home.

and

Oak View Law Group

Choosing the best #attorney for filing #bankruptcy is always very important. - So, don't hurry. Take your time, do some research & then go for your choice. Your decision can save you from further monetary damages. This article can be a great help for you on "how to hire an attorney and what qualities should a bankruptcy attorney must have."

and professionalism provide a resource for research and links to a number of useful sites.¹⁰

Use of social media triggers a number of potential ethical and professionalism concerns,¹¹ including:

- How can courts effectively police the use of social media by parties and witnesses?
- Are there (or should there be) limits on social media contacts between lawyers and judges?
- Can the use of social media by an attorney constitute the practice of law?
- May an attorney ethically use social media to “research” witnesses and adverse experts?
- Are there “unlawful practice of law” issues if an attorney’s social media postings are viewed in a state where the lawyer is not licensed to practice?
- Can the use of social media lead to attorney-client relationships?
- When does the use of social media constitute advertising?¹²
- Can the use of social media lead to sanctions for litigators, what First Amendment issues arise from the use of social media, and are these issues trumped by a lawyer’s obligations as an officer of the court?
- Who has “ownership” of social media information when a lawyer leaves a firm?

It is clear that judges as well as lawyers are increasingly using social media. There are a number of bankruptcy law blogs maintained by lawyers,¹³ and one web site

¹⁰ See, for example the following sites: The ABA Center for Professional Responsibility, <http://www.abanet.org/cpr/links.html>; The Thomas Cooley Law School ethics site, http://www.cooley.edu/ethics/other_sites_of_interest.htm; the Cornell Law School Professionalism web links page, <http://www3.lawschool.cornell.edu/faculty-pages/wendel/ethlinks.htm>; the Georgetown Law Library legal ethics link page, http://www.ll.georgetown.edu/guides/legal_ethics.cfm, and the Santa Clara University business ethics links page, <http://scu.edu/ethics/links/links.cfm?cat=BUSI>.

¹¹ See, e.g., Robert L. Shaver “*Legal Ethics Rules Apply To Attorneys’ Social Media And Websites*,” 53 Advocate (Idaho) 15 (2010).

¹² See, e.g., Michael E. Lackey Jr. “*Lawyers And Social Media: The Legal Ethics Of Tweeting, Facebooking And Blogging*,” 28 Touro Law Review 149 (2012). Also see: Alan B. Goldfarb, Carole A. Levitt, Mark E. Rosch, and Cyrus D. Mehta “*Navigating The Social Network: Applying Ethics Rules To Blogs, Facebook, Twitter, And Other Social Media*,” 1916 PLI/Corp. 549, Practising Law Institute, Corporate Law and Practice Course Handbook Series, PLI Order No. 29279 (Nov. 2011).

¹³ See, e.g. (all sites last visited 11/24/15):
<http://www.abi.org/member-resources/blogs>
<http://stevesathersbankruptcynews.blogspot.com/>
<http://business-finance-restructuring.weil.com/>
<http://www.bankruptcylawinsights.com/>
<http://bankruptcy.cooley.com/>
<http://www.morrisjames.com/blogs-Delaware-Business-Bankruptcy-Report>

even contains a “quick survey of blogs written by judges.”¹⁴ Whether this is appropriate, whether there can be a social media relationship between lawyers and judges, and, if so, under what circumstances, have all been the subject of state judicial ethics opinions as well as cases.¹⁵

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

¹⁴ See: <http://www.lawsitesblog.com/2013/04/a-quick-survey-of-blogs-written-by-judges.html> (last visited 4/21/14).

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

¹⁶ For more on social media and admissibility under state and federal law, see: Pamela W. Carter and Shelley K. Napolitano, “Social Media: An Effective Evidentiary Tool,” 61 La. Bar Journal 331 (2014) and Grant J. Guillot, “Evidentiary Implications of Social Media: An Examination of the Admissibility of Facebook, MySpace and Twitter Postings in Louisiana Courts,” 61 La. Bar Journal 338 (2014). Also see: Michael R. Holt and Victoria San Pedro, “Social Media Evidence: What You Can't Use Won't Help You: Practical Considerations for Using Evidence Gathered on the Internet,” 88 Fl. Bar Journal 8 (2014). Also consider: Peter N. Thompson, 11 Minn. Prac., Evidence § 901.01 (4th ed.), §901.01, citing in FN 20 to “M. Anderson Berry and David Kiernan, ‘Voodoo Information’: Authenticating Web Pages in Federal Court,” 8 No. 1 INTERNET L. & STRATEGY 1 (Jan. 2010) (discussing how to authenticate web pages); Deborah R. Eltgroth, Note, Best Evidence and the Wayback Machine: Toward A Workable Authentication Standard For Archived Internet Evidence, 78 FORDHAM L. REV. 181 (2009) (discussing admissibility of archived internet evidence); Jonathan D. Frieden and Leigh M. Murray, The Admissibility of Electronic Evidence Under the Federal Rules of Evidence, 17 RICH. J. L. & TECH. 5 (2010) (discussing admissibility of electronic evidence); Michelle Sherman, The Anatomy of A Trial With Social Media and the Internet, 14 No. 11 J. OF INTERNET L.1 (2011) (discussing admissibility of social media evidence); Randy Wilson, Admissibility of Web-Based Data, 52 THE ADVOC. 31 (2010) (discussing admissibility of web-based material).”

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

2. CONTROL OF SPECTATOR USE OF SOCIAL MEDIA

The use of smart phones is ubiquitous. It has been said that a typical smart phone has more technological capacity than all the computers that guided the Apollo space program.¹⁷

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

If “courts frequently find it difficult to prevent jurors from participating in social media during trials,”¹⁸ then how difficult is it for courts to control the use of social media in the courtroom by observers, litigants, and attorneys? Judges who seek to control cell phone and Internet usage may be faced with the prospect of banning such devices from the courtroom, or issuing warnings (stern or not) ranging from “don’t use it in my courtroom” to “don’t get on social media during this trial, even if you’re only viewing it and not posting on it,” to “don’t get on the Internet during this trial.” And then there is the problem of policing such admonitions.

No warning or confiscation of equipment, however, will necessarily prevent a courtroom observer, witness, or attorney from going to his or her smart phone or computer in the evening and logging onto social media. Courts are divided on how to deal with this. Even in cases involving social media usage by juries, courts reach difference conclusions.¹⁹

¹⁷ thenextweb.com claims that “one Google search uses the computing power of the entire Apollo space mission.”

<http://thenextweb.com/google/2012/08/28/fun-fact-one-google-search-uses-computing-power-entire-apollo-space-mission/> (last visited 5/17/13).

¹⁸ George B. Delta and Jeffrey H. Matsuura, “Law of the Internet,” Aspen Publishers, Copyright © 2014 CCH Incorporated., 2014-1 Supplement, Chapter 17: E-Government.

¹⁹ See, e.g., Hon. Amy St. Eve, Hon. Charles P. Burns, & Michael A. Zuckerman, “More from the #Jury Box: The Latest on Juries and Social Media,” 1 Duke Law & Technology Review 65 (2014):

“*United States v. Fumo*, 655 F.3d 288, 306 (3d Cir. 2011), as amended (Sept. 15, 2011) (Juror’s Facebook comments on the case were “vague” and “virtually meaningless.” They did not prejudice the defendant and did not amount to grounds for a mistrial.)

Khoury v. ConAgra Foods, Inc., 368 S.W.3d 189 (Mo.App. W.D. 2012), reh’g denied (May 1, 2012) (Removal of juror due to possibility of anti-corporate bias was not abuse of trial court’s discretion, when during voir dire juror was asked a question that reasonably could have been interpreted as soliciting disclosure of possible bias against corporations, juror did not

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3. USE OF SOCIAL MEDIA BY JUDGES

a. THE CASE OF THE TECH-SAVVY JUDGE

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

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

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

b. DISCUSSION ABOUT “THE CASE OF THE TECH-SAVVY JURIST”

There is a growing body of “judicial ethics” opinions giving guidance to state and federal judges about the use of social media, but there is no unanimity on the proper answer to the questions of how, when and under what circumstances a judge may join,

disclose any such bias in response to the question, and juror's social network page and blog allegedly contained material relating to “corporate criminals, credit rating agencies, economic warfare, and socialism”).

Juror No. One v. Superior Court, 206 Cal. App. 4th 854, 142 Cal. Rptr. 3d 151 (2012), reh'g denied (June 21, 2012), review denied (Aug. 22, 2012) (Juror made various postings to Facebook about the trial during the course of the trial. The court then conducted an investigation to determine if there was misconduct. The court of appeal ruled that the Stored Communications Act did not prohibit ordering a subpoena to produce juror's Facebook records from the time the trial was conducted.)

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

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

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

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

participate in, or be active in social media sites. The National Center for State Courts tries to track this information. According the NCSC,²⁰ the answers range from:

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

California

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

Florida

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

Kentucky

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

Maryland

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

Massachusetts

Massachusetts Committee on Judicial Ethics, Opinion No. 2011-6 (Dec. 28, 2011). This advisory opinion provides guidance on the parameters of Code-appropriate judicial use of Facebook for a judge who is making the transition from private practice to a judgeship with the Trial Court. The opinion concludes, "*The Code does not prohibit judges from joining social networking sites*, thus you may continue to be a member of Facebook, taking care to conform your activities with the Code. A judge's "friending" attorneys on social networking sites creates the impression that those attorneys are in a special position to influence the judge. Therefore, the Code does not permit you to "friend" any attorney who may appear before you."

New York

Advisory Opinion 08-176. Advisory Committee on Judicial Ethics (Jan. 29, 2009). This opinion states, "Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, *he/she may join and make use of an Internet-based social network.* A judge choosing to do so

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- No, a judge may not “friend” a lawyer who may appear before the judge;
- Yes, a judge may “friend” a lawyer who might one day appear before the judge;
- Maybe a judge can “friend” a lawyer, but proceed with caution;
- It’s great that a judge joins a social networking site because being a “member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge.”²¹

There are fewer reported cases than there are ethics opinions, but do not appear to use a consistent analysis and appear to reach differing conclusions, including:²²

should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."

Ohio

Ohio Judicial Ethics Advisory Opinion 2010-7. Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline (Dec. 3, 2010). This opinion answers the question, "May a judge be a “friend” on a social networking site with a lawyer who appears as counsel in a case before the judge?" Ohio's Board of Commissioners on Grievances & Discipline finds that *a judge may be a “friend” on a social networking site with a lawyer who appears as counsel in a case before the judge*, but cautions, “As with any other action a judge takes, a judge’s participation on a social networking site must be done carefully in order to comply with the ethical rules in the Code of Judicial Conduct.”

Oklahoma

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

South Carolina

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

²¹ See NCSC’s web page reporting on South Carolina’s Opinion No. 17-2009, footnote 20, above.

²² For a more detailed look at this area, see Judge Craig Estlinbaum, “Social Networking and Judicial Ethics, 2 St. Mary’s Journal on Legal Malpractice and Ethics 2 (2012).

- It is possible to bring disqualification proceedings against a judge who has “friended” on Facebook a lawyer who is representing a client in a case that the judge is handling.²³
- A judge should not “friend” a witness in a case.²⁴
- The fact that a judge’s name is mentioned in a party’s Facebook posting as having met with that party’s father is not enough to require recusal of the judge.²⁵
- The fact that a judge had a Facebook “friend” who was a witness is not enough to disqualify the judge, although it was a basis to “scrutinize the judge’s impartiality.”²⁶

²³ See: *Domville v. State*, 103 So. 3d 184 (Fla. Dist. Ct. App. 2012), reh'g denied (Jan. 16, 2013), reh'g denied, 4D12-556, 2013 WL 163429 (Fla. Dist. Ct. App. Jan. 16, 2013) (allegations in defendant's motion to disqualify trial judge, that the judge was a social networking website “friend” of the prosecutor assigned to his case, were sufficient to create impression in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial, and thus, motion was legally sufficient to require disqualification.) The Court noted an earlier Florida Judicial Ethics opinion indicating that that “when a judge lists a lawyer who appears before him as a “friend” on his social networking page this ‘reasonably conveys to others the impression that these lawyer ‘friends’ are in a special position to influence the judge.’”

²⁴ See *Ynclan v. Woodward*, 237 P.3d 145, 151 (OK 2010), stating:

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

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

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

²⁶ *State v. Madden*, 2014 WL 931031 (Ct. Crim. App. TN, 3/11/14), cert. den. 135 S.Ct. 1509 (2015):

In this case, although one Facebook “friendship” was sufficient to scrutinize the judge's impartiality, the record does not demonstrate more than a “virtual” acquaintance between the trial judge and the prospective witness. To the extent that any appearance of impropriety arose from this acquaintance, it was diminished by the trial court's action in fully disclosing his ties with MTSU and his concession that he had once met the witness in-person and had been Facebook friends with the prospective witness. It also bears noting that this witness was 1 of 1500 Facebook friends of the trial judge. He was not a witness to the murder and his testimony at trial focused primarily on the team's zero-tolerance drug policy. Appellant's frustration with the trial judge's action in “defriending” the Facebook connections without her knowledge, however, is

[Footnote continued on the next page]

- A hearing examiner’s inappropriate comments on a social networking site did not mandate recusal.²⁷
- A judge should not “text” a prosecutor during a trial about a witness on the stand.²⁸
- A “designation of trial judge as ‘friend’ of victim's father on social media website was insufficient to show bias, as basis for recusal.”²⁹

4. USE OF SOCIAL MEDIA BY LITIGATORS BEFORE OR DURING LITIGATION

a. THE CASE OF THE TECH-SAVVY PLAINTIFF’S LITIGATOR

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

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

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

understandable. Certainly, the better practice would have been for the trial judge to acknowledge the Appellant's discovery of the Facebook connections and consult with the parties prior to deleting them. However, given that Tennessee permits trial judges to engage in social media, deleting or “defriending” a potential witness before trial is the best remedy to avoid passive receipt of unwanted online communications during trial. A reasonable person in possession of the same facts and circumstances would conclude that there was no basis to question the judge's impartiality in this case; therefore, the judge did not abuse his discretion in denying the motion to recuse.

²⁷ See *Doe v. Sex Offender Registry Board*, 81 Mass.App.Ct. 904, 906, 959 N.E.2d 990, 993 (Mass. App. 2012)

We agree with the Superior Court judge that certain comments that the hearing examiner had posted on a coworker's page on the social networking Web site Facebook, while inappropriate,[FN4] did not require her recusal. Nonetheless, we emphasize that citizens confined pursuant to G.L. c. 123A, and their counsel, are entitled to a quasi judicial proceeding conducted with the utmost dignity and attention to law.

FN4. In the words of the Superior Court judge, “[t]his argument [for recusal] brings forward a most unfortunate episode wherein the hearing officer in this case was publicly reported as writing remarks on a social net-working website that diminished the seriousness of her work as a SORB officer.”

²⁸ See the discussion in Carson Guy, “Get Smart: How cellphones and social media are impacting the law – from jurors tweeting during trial to prosecutors texting judges,” 76 Texas Bar Journal 972 (2013).

²⁹ From the Westlaw summary of *Youkers v. State*, 400 S.W.3d 200 (Tex.App.-Dallas May 15, 2013) petition for discretionary review refused (Aug 21, 2013)

b. THE CASE OF THE TECH-SAVVY DEFENDANT’S LITIGATOR

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

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

Noah files a discovery request asking for:

- (a) access to all of the plaintiff’s social media accounts;
- (b) copies of all social media postings (including photos) by the plaintiff for a period of one year prior to the accident through the date of the discovery request;
- (c) a list and complete copy of everything that the plaintiff has deleted from her social media sites for a period of one year prior to the accident through the date of the discovery request;
- (d) the plaintiff’s passwords to her social media accounts;

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

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

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

On the other hand, Veead’s asking his paralegal to “friend” Dee on Facebook may lead to problems under Rule 4.2³⁰, which prohibits an attorney from contacting someone

³⁰ ABA Model Rule 4.2 states:

Rule 4.2 Communication With Person Represented By Counsel
In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

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

Louisiana Rule 4.2 states:

Unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order, a lawyer in representing a client shall not communicate about the subject of the representation with:

- (a) a person the lawyer knows to be represented by another lawyer in the matter; or
- (b) a person the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of a represented organization and

[Footnote continued on the next page]

whom the lawyer knows or has reason to know is represented by counsel. Moreover, the paralegal's trying to "friend" Dee without revealing that the paralegal is doing this for an attorney who will be suing Dee and Dee's employer raises questions under Rule 8.4.³¹

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- (1) who supervises, directs or regularly consults with the organization's lawyer concerning the matter;
 - (2) who has the authority to obligate the organization with respect to the matter; or
 - (3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Texas Rule 4.02 states:

- (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- (b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- (c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.
- (d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

³¹ ABA Model Rule 8.4 states (emphasis supplied)

Maintaining The Integrity Of The Profession: Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

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

Background

The Louisiana Supreme Court adopted this rule on January 21, 2004. It became effective on March 1, 2004, and has not been amended since. This rule is identical to ABA Model Rule of Professional Conduct 8.4 (2002) with two substantive differences.

First, Model Rule 8.4(b) brands a criminal act as "misconduct" only if the crime "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." See Model Rules of Prof'l Conduct R. 8.4(b). In contrast, Louisiana Rule 8.4(b) (2002) casts a wider net by branding as "misconduct" any criminal act by a lawyer—irrespective whether it casts doubt on the lawyer's honesty, trustworthiness or fitness to practice. The rule has this effect as a result of the inclusion of the language "especially one that" between "criminal act" and "that reflects." [1]

[Footnote continued on the next page]

There is a growing body of legal literature on this subject,³² and Bar Associations reach different conclusions in their published ethics opinions.

Second, paragraph (g) is not found in the Model Rules. This paragraph prohibits Louisiana lawyers from threatening to present criminal or disciplinary charges “solely to obtain an advantage in a civil matter.” Although no similar provision exists in Model Rule 8.4, see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 92-363 (1992), the ABA has issued a formal ethics opinion condemning the practice, see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-383 (1994).

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

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

Other states also have different approaches. For example, Kansas and Missouri Rules 8.4 are substantially similar to the Model Rule. Kansas adds a catch-all provision at 8.4(g), under which “engag[ing] in any other conduct that adversely reflects on the lawyer's fitness to practice law” constitutes professional misconduct, while Missouri’s 8.4(c) includes language regarding to undercover government investigations and 8.4(g) prohibits “manifest[ing] by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation,” except when those or “similar factors” are issues.

³² See, for example: Allison Clemency, *"Friending," "Following," and "Digging" Up Evidentiary Dirt: The Ethical Implications of Investigating Information on Social Media Websites*, 43 Ariz. St. L. J. 1021 (2011); Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. Mem. L. Rev. 355 (2010); Margaret M. DiBianca, *Ethical Risks Arising from Lawyers' Use of (and Refusal to Use) Social Media*, 12 Del. L. Rev. 179 (2011); Steven C. Bennett, *When Lawyers Troll for "Friends"*, 36-APR Mont. Law. 25 (Apr. 2011) (discussing state ethical opinions which consider whether an attorney should ethically be allowed to “friend” relevant parties to a case on Facebook).

Also see the following materials, gathered in FN14 of Jay E. Grenig and , William C. Gleisner, III, 1 eDiscovery & Digital Evidence § 6:8: “Akin, How to Discover and Use Social Media-Related Evidence, Litigation, Winter 2011, at 32; Wallace, The Discoverability of Social Media Evidence, 79 U.S.L.W. 2531 (May 17, 2011); Murray, Electronically Stored Information: How E-Mail, Texting, and Your Facebook Friends Can Affect Your Divorce, 34 Family Advocate 26 (2011); Lynn, Social Media Discovery: What You Need to Know to Be Prepared, 79 U.S.L.W. 2415 (Apr. 26, 2011); Demay, The Implications of the

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For example, the Missouri Bar has issued an Informal Advisory Opinion stating that an “attorney’s request to be invited as a friend of Plaintiff’s Facebook/MySpace account would be a ‘communication’ for the purpose of Rule 4-4.2. Attorney may not send such a communication directly to plaintiff, in light of that rule.”³³ The San Diego County Bar has come out with an opinion barring any ex parte contact through social media with a potential witness without revealing the “reason” for the contact.”³⁴ On the other hand, the Oregon Bar appears to permit “friend” contacts under certain conditions³⁵ and the New Hampshire Bar notes that there is a split in authority on this issue.³⁶

Social Media Revolution on Discovery in U.S. Litigation, *The Brief*, Summer 2011, at 55; Witte, *Your Opponent Does Not Need a Friend Request to See Your Page: Social Networking Sites and Electronic Discovery*, 41 *McGeorge L. Rev.* 891 (2010); Viscounty & Barry, *How Discoverable Is Social Media Content?*, *Los Angeles & San Francisco Daily Journal*, Dec. 10, 2010; Menzies & Polischuk, *Is Your Client an Online Social Butterfly?*, *Trial*, Oct. 2010, at 23, 24; Kisthardt & Handschu, *Using Social Network Site Evidence in Family Law Cases: Finding Posts Impeaching the Credibility of a Spouse May Be Easy, but Ensuring Their Admissibility Often Is Not*, *Nat’l L.J.*, Sept. 2010, at 28.”

³³ Missouri Bar Informal Advisory Opinion 20090003.

³⁴ See San Diego County Bar Association Op. 2011-2, found at <https://www.sdcbabar.org/index.cfm?pg=LEC2011-2> (last visited 04/22/14):

Social media sites have opened a broad highway on which users may post their most private personal information. But Facebook, at least, enables its users to place limits on who may see that information. The rules of ethics impose limits on how attorneys may obtain information that is not publicly available, particularly from opposing parties who are represented by counsel.

We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney’s ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney’s duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn’t have “friends” like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship. In our view, this strikes the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented.

³⁵ See Oregon Bar Op. 2013-189, found at <https://www.osbar.org/docs/ethics/2013-189.pdf> (last visited 04/22/14):

Facts:

Lawyer wishes to investigate an opposing party, a witness, or a juror by accessing the person’s social networking website. While viewing the publicly available information on the website, Lawyer learns that there is additional information that the person has kept from public view through privacy settings and that is available by submitting a request through the person’s website.

Questions:

1. May Lawyer review a person’s publicly available information on a social networking website?
2. May Lawyer, or an agent on behalf of Lawyer, request access to a person’s non-public information?

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The broad-ranging social media discovery requests by defense attorney Noah Holdsbard raise a different set of issues. Now the questions revolve around the relevancy of the information sought and whether the discovery requests are overbroad. This is a rapidly developing field, and courts are just beginning to grapple with these issues. Some courts have set a high standard for relevancy³⁷ and others have indicated that an *in camera* review is appropriate.³⁸ Many attorneys contend that information on social media sites is no different than any other letter or document that a party has in his or her possession that must be disclosed during litigation if it has potential relevancy or can lead to the discovery of relevant evidence.³⁹

3. May Lawyer, or an agent on behalf of Lawyer, use a computer username or other alias that does not identify Lawyer when requesting permission from the account holder to view non-public information?

Conclusions:

1. Yes.
2. Yes, qualified.
3. No, qualified

³⁶ New Hampshire Bar Ethics Advisory Opinion 2012-13/05, found at http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp (last visited 04/22/14):

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

³⁷ See, e.g., *Kregg v. Maldonado*, 98 A.D.3d 1289, 951 N.Y.S.2d 301 (2012) (Discovery request, by manufacturer and distributor of motorcycle that motorcyclist was driving when he was involved in accident, which sought entire contents of social media internet accounts maintained by or on behalf of motorcyclist, was overbroad, in personal injury action against manufacturer and distributor seeking recovery for motorcyclist's injuries; defendants' request for access to accounts was made without factual predicate with respect to relevancy of the evidence, as there was no contention that information in accounts contradicted motorcyclist's claims for diminution of enjoyment of life.)

³⁸ See, e.g., *Offenback v. L.M. Bowman, Inc.*, 1:10-CV-1789, 2011 WL 2491371 (M.D. Pa. June 22, 2011) (Plaintiff sued relating to a vehicular accident claiming physical and mental injuries. Defendant sought discovery of his Facebook and MySpace accounts. Plaintiff claimed those accounts were irrelevant to his cause of action and beyond the scope of discovery. After an *in camera* review, the court ordered Plaintiff to produce information from his Facebook account.)

³⁹ See, for example, the articles listed in footnote 32, above.

On the other hand, can an attorney for someone who might be a litigant or witness tell the client to “cleanse” his or her social media sites. Several Bar Associations have issued opinions on the issue indicating that this is not a problem as long as “there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence.”⁴⁰ But, of course the critical question always is, why is the client cleansing a page upon the advice of a lawyer. Thus far, these ethics opinions appear to duck the issue, using phrases such as: “What constitutes an “unlawful” obstruction, alteration, destruction, or concealment of evidence is a legal question, outside the scope of an ethics opinion.”⁴¹ There is at least one reported case of a lawyer being disciplined for advising

⁴⁰ See

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

New York County Law Association Ethics Opinion 745 (7/2/13),
https://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf (last visited 12/09/15), stating that: “An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages, consistent with the principles stated above. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on “private” social media pages, and what may be “taken down” or removed.”

The Philadelphia Bar Association appears to have differing views on the subject.

Formal Opinion 2014-300 http://www.aceeds.org/wp-content/uploads/2014/11/PABarAssoc_EthicalObligationsAttorneysSocialMedia.pdf (last visited 12/9/15) states (emphasis supplied):

This Committee concludes that:

1. Attorneys may advise clients about the content of their social networking websites, *including the removal or addition of information*.
2. Attorneys may connect with clients and former clients.
3. Attorneys may not contact a represented person through social networking websites.
4. Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.
5. Attorneys may use information on social networking websites in a dispute.
6. Attorneys may accept client reviews but must monitor those reviews for accuracy.
7. Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
8. Attorneys may generally endorse other attorneys on social networking websites.
9. Attorneys may review a juror’s Internet presence.
10. Attorneys may connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his or her official duties

On the other hand, Professional Guidance Committee Opinion 2014-5 (July 2014),
http://philadelphiabar.org/WebObjects/PBAReadOnly_woa/Contents/WebServerResources/CMSResources/Opinion2014-5Final.pdf (last visited 12/9/15), states that a “lawyer may instruct a client to make information on the social media website ‘private’ but may not instruct or permit the client to delete/destroy a relevant photo, link, text or other content, so that it no longer exists.

⁴¹ Florida Bar Opinion 14-1, footnote 40, above. Also see the statement in the NYCLA Op. 745 (footnote 40, above): “Attorneys’ duties not to suppress or conceal evidence involve questions of substantive law and are therefore outside the purview of an ethics opinion.”

a client to delete material from a Facebook page after a request for production had been sent.⁴²

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

a. THE CASE OF THE TECH-SAVVY LAWYER

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

Lucy recently had a post on foreclosure issues, the problems lenders have encountered in cases, and how borrowers have stopped foreclosure proceedings. Included in her “Practical Tips” section is this statement:

Always check the public records. If the entity that is suing you is not listed on the public records as the owner of your note, you can have a claim against them on numerous theories, including fraud on the court, misrepresentation, and, perhaps, even RICO!

Is Lucy’s post something that would constitute the “practice of law”?

What if Lucy’s post also had a “sample pleading” section that readers could use to draft oppositions to foreclosures?

b. DISCUSSION ABOUT “THE CASE OF THE TECH-SAVVY LAWYER”

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

Many states, like Louisiana, have statutory provisions on the unlawful practice of law.⁴³ In addition, Section 5.5 of the Louisiana Rules of Professional Conduct, while

⁴² *In the Matter of Matthew B. Murray*, 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422 (Virginia State Bar Disciplinary Board July 17, 2013). Among the stipulated facts were:

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

⁴³ See R.S. 37:2121 *et seq.*

R.S. 37:212. "Practice of law" defined

A. The practice of law means and includes:

[Footnote continued on the next page]

- (1) In a representative capacity, the appearance as an advocate, or the drawing of papers, pleadings or documents, or the performance of any act in connection with pending or prospective proceedings before any court of record in this state; or
- (2) For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect;
 - (a) The advising or counseling of another as to secular law;
 - (b) In behalf of another, the drawing or procuring, or the assisting in the drawing or procuring of a paper, document, or instrument affecting or relating to secular rights;
 - (c) The doing of any act, in behalf of another, tending to obtain or secure for the other the prevention or the redress of a wrong or the enforcement or establishment of a right; or
 - (d) Certifying or giving opinions, or rendering a title opinion as a basis of any title insurance report or title insurance policy as provided in R.S. 22:512(17), as it relates to title to immovable property or any interest therein or as to the rank or priority or validity of a lien, privilege or mortgage as well as the preparation of acts of sale, mortgages, credit sales or any acts or other documents passing titles to or encumbering immovable property.

B. Nothing in this Section prohibits any person from attending to and caring for his own business, claims, or demands; or from preparing abstracts of title; or from insuring titles to property, movable or immovable, or an interest therein, or a privilege and encumbrance thereon, but every title insurance contract relating to immovable property must be based upon the certification or opinion of a licensed Louisiana attorney authorized to engage in the practice of law. Nothing in this Section prohibits any person from performing, as a notary public, any act necessary or incidental to the exercise of the powers and functions of the office of notary public, as those powers are delineated in Louisiana Revised Statutes of 1950, Title 35, Section 1, et seq.

C. Nothing in this Section shall prohibit any partnership, corporation, or other legal entity from asserting or defending any claim, not exceeding five thousand dollars, on its own behalf in the courts of limited jurisdiction or on its own behalf through a duly authorized partner, shareholder, officer, employee, or duly authorized agent or representative. No partnership, corporation, or other entity may assert any claim on behalf of another entity or any claim assigned to it.

D. Nothing in Article V, Section 24, of the Constitution of Louisiana or this Section shall prohibit justices or judges from performing all acts necessary or incumbent to the authorized exercise of duties as judge advocates or legal officers.

R.S. 37:213. Persons, professional associations, professional corporations, and limited liability companies entitled to practice law; penalty for unlawful practice

A. No natural person, who has not first been duly and regularly licensed and admitted to practice law by the supreme court of this state, no corporation or voluntary association except a professional law corporation organized pursuant to Chapter 8 of Title 12 of the Revised Statutes, and no partnership or limited liability company except one formed for the practice of law and composed of such natural persons, corporations, voluntary associations, or limited liability companies, all of whom are duly and regularly licensed and admitted to the practice of law, shall:

- (1) Practice law.
- (2) Furnish attorneys or counsel or an attorney and counsel to render legal services.
- (3) Hold himself or itself out to the public as being entitled to practice law.
- (4) Render or furnish legal services or advice.
- (5) Assume to be an attorney at law or counselor at law.
- (6) Assume, use, or advertise the title of lawyer, attorney, counselor, advocate or equivalent terms in any language, or any phrase containing any of these titles in such manner as to convey the impression that he is a practitioner of law.
- (7) In any manner advertise that he, either alone or together with any other person, has, owns, conducts, or maintains an office of any kind for the practice of law.

B. This Section does not prevent any corporation or voluntary association formed for benevolent or charitable purposes and recognized by law from furnishing an attorney at law to give free assistance to persons without means.

C. Any natural person who violates any provision of this Section shall be fined not more than one thousand dollars or imprisoned for not more than two years, or both.

D. Any partnership, corporation, or voluntary association which violates this Section shall be fined not more than five thousand dollars. Every officer, trustee, director, agent, or employee of a corporation or voluntary association who, directly or indirectly, engages in any act violating any provision of this Section or assists the corporation or voluntary association in the performance of any such violation is subject to the penalties prescribed in this Section for violations by a natural person.

R.S. 37:214. Visiting attorneys of other states: reciprocity

Except as provided in this Section, no person licensed or qualified to practice as an attorney at law or as an attorney and counsellor at law in any other state and temporarily present in this state shall practice law in this state, unless he has been first duly licensed to practice law by the supreme court of this state or unless he acts in association with some attorney duly licensed to practice law by the supreme court of this state.

Nothing in this Chapter prevents the practice of law in this state by a visiting attorney from a state which, either by statute or by some rule of practice accorded specific recognition by the highest court of that state, has adopted a rule of reciprocity that permits an attorney duly licensed and qualified to practice law in this state to appear alone as an attorney in all courts of record in the other state, without being required to be admitted to practice in such other state, and without being required to associate with himself some attorney admitted to practice in the other state.

Whoever violates any provision of this Section shall be fined not more than one thousand dollars or imprisoned for not more than two years, or both.

R.S. 37:215. Procedure by visiting attorney for recognition in Louisiana courts under reciprocity rule

Whenever any visiting attorney desires to exercise the privilege of appearing alone as counsel of record in any case in any court of record in this state, under the provisions of the second paragraph of R.S. 37:214, he shall, before filing the first pleading or other appearance on behalf of his client in the cause, produce evidence satisfactory to the court before which he wishes to appear, or to the

[Footnote continued on the next page]

based on the ABA Model Rules, contain a number of additional provisions that are unique to Louisiana.⁴⁴ On the other hand, Louisiana RPC 8.5 is identical to the ABA

presiding judge if there be two or more judges of the court, to the effect that the state in which he is then licensed and qualified to practice law has in force a statute or rule of practice of the character specified in R.S. 37:214. Upon the judge being satisfied of this, he shall enter an order authorizing the appearance of the visiting attorney before his court in the case. This order shall specifically refer to the appropriate statutory provision or to the requisite judicial recognition of the appropriate rule of practice of the other state in question.

R.S. 37:216. Filing of pleadings by visiting attorney under reciprocity rule; proofs required by clerk

No clerk of any court of record in this state shall file any pleading, brief, or other appearance signed on behalf of any party or litigant solely by a visiting attorney, unless it or some prior pleading, brief, or appearance filed in the cause by the visiting attorney is accompanied by an order of court of the character specified in R.S. 37:215. If any such pleading, brief, or other appearance is inadvertently filed without a compliance with the provisions of R.S. 37:215, it may be ordered stricken from the record ex parte on motion of any party at interest, or by the court of its own motion.

⁴⁴ Louisiana RPC 5.5 states:

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
- (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
- (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
- (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
- (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

- (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission and that are provided by an attorney who has received a limited license to practice law pursuant to La. S. Ct. Rule XVII, §14; or
- (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e)(1) A lawyer shall not:

- (i) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a disbarred attorney, during the period of disbarment, or any person the attorney knows or reasonably should know is an attorney who has permanently resigned from the practice of law in lieu of discipline; or
- (ii) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a suspended attorney, during the period of suspension, unless first preceded by the submission of a fully executed employment registration statement to the Office of Disciplinary Counsel, on a registration form provided by the Louisiana Attorney Disciplinary Board, and approved by the Louisiana Supreme Court.

(e)(2) The registration form provided for in Section (e)(1) shall include:

- (i) the identity and bar roll number of the suspended attorney sought to be hired;
- (ii) the identity and bar roll number of the attorney having direct supervisory responsibility over the suspended attorney throughout the duration of employment or association;
- (iii) a list of all duties and activities to be assigned to the suspended attorney during the period of employment or association;
- (iv) the terms of employment of the suspended attorney, including method of compensation;
- (v) a statement by the employing attorney that includes a consent to random compliance audits, to be conducted by the Office of Disciplinary Counsel, at any time during the employment or association of the suspended attorney; and
- (vi) a statement by the employing attorney certifying that the order giving rise to the suspension of the proposed employee has been provided for review and consideration in advance of employment by the suspended attorney.

(e)(3) For purposes of this Rule, the practice of law shall include the following activities:

- (i) holding oneself out as an attorney or lawyer authorized to practice law;

[Footnote continued on the next page]

Model Rule,⁴⁵ but both Mississippi's⁴⁶ and Texas' version⁴⁷ differs from the Model Rule, and both deal with advertising

Examples of statutes and rules from other states include Missouri (which has statutory provisions on unlawful practice⁴⁸ as well as its own version of ABA Model Rule

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- (ii) rendering legal consultation or advice to a client;
 - (iii) appearing on behalf of a client in any hearing or proceeding, or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body operating in an adjudicative capacity, including submission of pleadings, except as may otherwise be permitted by law;
 - (iv) appearing as a representative of the client at a deposition or other discovery matter;
 - (v) negotiating or transacting any matter for or on behalf of a client with third parties;
 - (vi) otherwise engaging in activities defined by law or Supreme Court decision as constituting the practice of law.
- (e)(4) In addition, a suspended lawyer shall not receive, disburse or otherwise handle client funds.
- (e)(5) Upon termination of the suspended attorney, the employing attorney having direct supervisory authority shall promptly serve upon the Office of Disciplinary Counsel written notice of the termination.

⁴⁵ Louisiana RPC 8.5 (and the ABA Model Rule 8.5) provide:

Rule 8.5. Jurisdiction

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

⁴⁶ The Mississippi version directly speaks to lawyer advertising found in Mississippi, and it does not appear to differentiate between online ads, blogs or internet postings that may be treated as ads, or billboards and television advertising. Mississippi Rule 8.5 states (emphasis supplied):

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer advertises, provides or offers to provide any legal services to be performed in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

⁴⁷ Texas Rule 8.05 provides (emphasis supplied):

(a) A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined in this state for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04.

(b) A lawyer admitted to practice in this state is also subject to the disciplinary authority of this state for:

(1) an advertisement in the public media that does not comply with these rules and that is broadcast or disseminated in another jurisdiction, even if the advertisement complies with the rules governing lawyer advertisements in that jurisdiction, if the broadcast or dissemination of the advertisement is intended to be received by prospective clients in this state and is intended to secure employment to be performed in this state; and

(2) a written solicitation communication that does not comply with these rules and that is mailed in another jurisdiction, even if the communication complies with the rules governing written solicitation communications by lawyers in that jurisdiction, if the communication is mailed to an addressee in this state or is intended to secure employment to be performed in this state.

⁴⁸ See Mo. Ann. Stat. §§ 484.010, 484.020.

§ 484.010:

[Footnote continued on the next page]

5.5, concerning multi-jurisdictional practice)⁴⁹ and Kansas (which does have a statutory definition of the practice of law but rather appears to follow the definition adopted by the Kansas Bar Association Unauthorized Practice of Law Committee).⁵⁰ Further, the

1. The “practice of the law” is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.

2. The “law business” is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

§ 484.020:

1. No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association, partnership, limited liability company or corporation, except a professional corporation organized pursuant to the provisions of chapter 356, RSMo, a limited liability company organized and registered pursuant to the provisions of chapter 347, RSMo, or¹ a limited liability partnership organized or registered pursuant to the provisions of chapter 358, RSMo, engage in the practice of the law or do law business as defined in section 484.010, or both.

2. Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association, partnership, limited liability company or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association, partnership, limited liability company or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri.

3. It is hereby made the duty of the attorney general of the state of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the person, firm, association, partnership, limited liability company or corporation liable hereunder, to institute all suits necessary for the recovery by the state of Missouri of such amounts in the name and on behalf of the state.

⁴⁹ Mo. Rule 5.5:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

- (1) except as authorized by this Rule 4 or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
- (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted and authorized to practice law in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in this jurisdiction that:

- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
- (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction if the lawyer or a person the lawyer is assisting is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
- (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted and authorized to practice law and are not services for which the forum requires pro hac vice admission;
- (4) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
- (5) are not within Rule 4-5.5(c)(2), (c)(3), or (c)(4) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted and authorized to practice law.

(d) A lawyer admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law and provide legal services in this jurisdiction that are provided to the lawyer’s employer or its organizational affiliates if the lawyer has obtained a limited license pursuant to Rule 8.105 or a general license pursuant to other provisions of Rule 8.

(e) A lawyer shall not practice law in Missouri if the lawyer is subject to Rule 15 and, because of failure to comply with Rule 15, The Missouri Bar has referred the lawyer’s name to the chief disciplinary counsel or the commission on retirement, removal and discipline.

⁵⁰ The Kansas definition can be found at:

[Footnote continued on the next page]

(Last visited 5/17/13).

DEFINITION OF THE PRACTICE OF LAW

A. General Definition: The practice of law is ministering to the legal needs of another person and the application of legal principles and judgment with regard to the circumstances or objectives of another person which require knowledge of legal principles or the use of legal skill or knowledge. This includes but is not limited to:

- (1) Holding one's self out in any manner as an attorney, lawyer, counselor, advisor or in any other capacity which directly or indirectly represents, or creates any perception, that such person is either (a) qualified or capable of performing or (b) is engaged in the business or activity of performing any act constituting the practice of law as herein defined
- (2) Giving advice, counseling or rendering services to any person concerning or with respect to their legal rights or any matter involving the application of legal principles to rights, duties, obligations or liabilities.
- (3) Selecting, drafting, or completing any legal document or agreement involving or affecting the legal rights of a person.
- (4) Representing of another person in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
- (5) Negotiating or settling of a claim, legal right or responsibility on behalf of another person.
- (6) Engaging in an activity which has traditionally been performed exclusively by persons authorized to practice law, and
- (7) Engaging in any other act which may indicate an occurrence of the unauthorized practice of law in the State of Kansas as established by case law, statute, ruling, or other authority.

"Documents" includes, but is not limited to, contracts, deeds, easements, mortgages, notes, releases, satisfactions, leases, options, articles of incorporation and other corporate documents, articles of organization and other limited liability company documents, partnership agreements, affidavits, prenuptial agreements, wills, trusts, family settlement agreements, powers of attorney, notes and like or similar instruments; and pleadings and any other papers incident to legal actions and special proceedings.

The term "person" includes a natural person, corporation, company, partnership, firm, association, organization, society, labor union, business trust, trust, financial institution, governmental unit and any other group, organization or entity of any nature, unless the context otherwise dictates.

The term "Kansas Lawyer" means a natural person who has been duly admitted to practice law in this State and whose privilege to do so is then current and in good standing as an active member of the bar of this State.

B. Exceptions. Whether or not it constitutes the practice of law, the following activity by a non-lawyer, who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted:

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

Kansas version of ABA Model Rule 5.5 appears not to contain all the provisions of either the Model Rules or of the equivalent Missouri Rule.⁵¹

While many cases deal with attempted unlawful practice of law issues from the standpoint of non-lawyers attempting to represent others in court, fewer cases deal with transactional law issues. Nonetheless, it is instructive to look at a sampling of opinions on transactional law.

For example, the Rhode Island Bar Association has issued a report indicating that a non-lawyer who advertised on the Internet as a “low cost paralegal” for transactional document preparation had engaged in the unlawful practice of law.⁵²

Massachusetts has held that certain matters involving real estate closings and transactional work constitute the practice of law.⁵³ This rule is broadly accepted in other states. See, for example, opinions in Arkansas,⁵⁴ Ohio,⁵⁵ Delaware,⁵⁶ and South Carolina.⁵⁷

⁵¹ Kansas Rule 5.5 states:

A lawyer shall not:

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

⁵² See: *In re Low Cost Paralegal Services*, 19 A.3d 1229 (R.I. 2011). Among the findings were that “Low Cost Paralegal Services and Dominique M. Salazar a/k/a Michelle Salazar have engaged in the unauthorized practice of law in Rhode Island in violation of G.L. 1956 § 11–27–12 by falsely holding itself/herself out to Rhode Islanders, through internet advertising targeting Rhode Island, as competent and qualified to prepare legal documents for uncontested divorce and to assist with a child support problem, which conduct constitutes “the practice of law” as defined in § 11–27–2(4).”

⁵³ See: *Real Estate Bar Ass'n for Massachusetts, Inc. v. National Real Estate Information Services*, 459 Mass. 512, 514, 946 N.E.2d 665 (Mass. 4/25/11): “Nevertheless, we conclude that the closing or settlement of the types of real estate transactions described in the record require not only the presence but the substantive participation of an attorney on behalf of the mortgage lender, and that certain services connected with real property conveyances constitute the practice of law in Massachusetts.”

⁵⁴ See, e.g.: *Creekmore v. Izard*, 236 Ark. 558, 565, 367 S.W.2d 419, 423–24 (1963) (preparation of deeds, mortgages, and bills of sale constitutes the practice of law) and *Pope County Bar Ass'n, Inc. v. Suggs*, 274 Ark. 250, 256, 624 S.W.2d 828, 830–31 (1981).

⁵⁵ See: *Disciplinary Counsel v. Foreclosure Alternatives, Inc.*, 127 Ohio St.3d 455, 940 N.E.2d 971,976 (Ohio 12/23/10): “Based upon the facts in this case, we have no difficulty concluding that FAI, Alexakis, and Lance Trester engaged in the unauthorized practice of law. The general business plan adopted by FAI as well as the specific handling of the Chandler matter and the foreclosure against the second homeowner demonstrate that FAI, Alexakis, and Lance Trester (1) gave advice to homeowners in the context of pending or threatened foreclosure proceedings, in particular, advice concerning whether to continue making mortgage payments and the wisdom of legal alternatives such as bankruptcy, (2) made representations to creditors on behalf of homeowners facing foreclosure, and (3) evaluated for and with homeowners the terms and conditions of settlement in the foreclosure proceedings.”

Note, however, that in both Kansas and Missouri, certain types of activities related to real estate transactions are not considered the unauthorized practice of law, and may be performed by non-lawyers.⁵⁸

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

On the other hand, are Lucy's "Practical Tips" an attempt to "ghost-write" pleadings for a potential *pro se* litigant?⁵⁹

Some courts have looked askance at this, indicating that "ghostwriting" pleadings may be sanctionable.⁶⁰ Some state bar associations have banned the "ghostwriting" of

⁵⁶ See, e.g., *Nieves v. All Star Title, Inc.*, 2010 WL 4227057 (Del.Super. 10/22/10), aff'd at 21 A.3d 597 (Del.Super. 6/14/11) (text in WESTLAW, NO. 724, 2010), discussing the decision in *In re Mid-Atlantic Settlement Services, Inc.* 755 A.2d 389, 2000 WL 975062 (Del. May 31, 2000) (TABLE), "which adopted the conclusions of the Board on the Unauthorized Practice of Law that real estate settlements constitute the practice of law, and that the closing of a loan secured by Delaware real estate generally must be conducted by a Delaware attorney. All Star moved to dismiss Nieves' Complaint for failure to state a claim upon which relief could be granted. Specifically, All Star denied that Nieves' Complaint established that it had breached any legally-recognized duty or caused him cognizable damages. All Star also adopted the position that Nieves' suit constituted an attempt to secure private enforcement of this state's rules against the unauthorized practice of law.

⁵⁷ See: *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 698 S.E.2d 244, 247-48 (S.C.App. 5/6/10): "As early as 1987, lending institutions doing business in South Carolina were on notice that they could not prepare legal documents in connection with a mortgage loan without review by an independent attorney and that the loan closing had to be supervised by an attorney. See *State v. Buyers Serv. Co.*, 292 S.C. 426, 431-434, 357 S.E.2d 15, 18-19 (1987) (holding that a commercial title company's employment of attorneys to review mortgage loan closing documents did not save the company's preparation of those documents from constituting the unauthorized practice of law and that the closings should be conducted only under an attorney's supervision), modified by *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003); see also *Doe Law Firm v. Richardson*, 371 S.C. 14, 17, 636 S.E.2d 866, 868 (2006) (citing *Buyers* and *McMaster*) (clarifying that a lender may prepare legal documents for use in financing or refinancing a real property loan as long as an independent attorney reviews them and makes any corrections necessary to ensure their compliance with the law and reaffirming that mortgage loan closings should be conducted only under an attorney's supervision)."

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

⁵⁸ See Mo. Ann. Stat. §§ 484.025; quoted in footnote 48, above.

⁵⁹ For an article discussing this issue, see Lindzey Schindler, "Skirting The Ethical Line: The Quandary Of Online Legal Forms," 16 *Chapman Law Review* 185 (2012).

⁶⁰ See the discussion in *Couch v. Jabe*, 2010 WL 1416730 (W.D.Va. Apr 08, 2010):

[Footnote continued on the next page]

pleadings and letters. Texas appears to permit “ghostwriting” assistance for pro se parties, but places strict limitations on when and how this can be done.⁶¹

“The court notes that plaintiff states in a footnote that he ‘asked counsel for Prison Legal News to draft this motion on his behalf. They are Steven Rosenfield and Jeffrey Fogel . . . [Plaintiff] then revised counsels’ draft motion.’ (Mot.(no.28) n. 1.) Although plaintiff’s footnote may have saved counsel from violating an ethical duty of candor, Virginia Legal Ethics Opinion No. 1592 (1994), “ghostwriting” motions for a pro se plaintiff is contrary to the spirit of the Federal Rules of Civil Procedure and the privilege of liberal construction afforded to pro se litigants. See Fed.R.Civ.P. 11(a), (b). See also *Duran v. Carris*, 238 F.3d 1268, 1272-73 (10th Cir.2001); *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir.1971); *Johnson v. Bd. of County Comm’rs*, 868 F.Supp. 1226, 1230-32 (D.Co. Nov.17, 1994), result affirmed by on different reasoning and analysis on appeal, 85 F.3d 489 (10th Cir. 1996); *Klein v. H.N. Whitney. Goadby & Co.*, 341 F.Supp. 699, 702-03 (S.D.N.Y. Nov.22, 1971); *Klein v. Spear, Leeds & Kellogg*, 309 F.Supp. 341, 342-43 (S.D.N.Y. Jan.20, 1970) (discussing ghostwriting and duty of candor). “When appropriate, the court can make an additional inquiry in order to determine whether [Rule 11] sanctions should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court.” Fed.R.Civ.P. 11 advisory committee’s note. For future reference, if an attorney wishes to notify the court of parallel proceedings after a pro se party contacts him or her, counsel is encouraged to file a letter with the court instead of drafting pleadings. Further inquiry by the undersigned into plaintiff’s allegations is presently unnecessary. However, any additional instances or allegations of ghostwriting would be appropriately adjudicated.”

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

Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P.

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

⁶¹ See Texas Ethics Opinion 635 (2013), found at <http://www.legalethictexas.com/Ethics-Resources/Opinions/Opinion-635.aspx> (last visited 4/22/14), which states, in its conclusion:

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

For example, West Virginia has an ethics opinion distinguishing between ghostwriting pleadings, which is deemed inappropriate, and assisting a client in filling out forms, which is deemed appropriate under certain circumstances.⁶² The states that have issued opinions on this are split, with some banning the practice, some limiting the practice, and others agreeing it is permissible.⁶³

Compare, for example, the differing analysis of this issue by Missouri, Kansas, and the ABA. It has been reported that the online supplier of legal forms, “LegalZoom,”⁶⁴ entered into a settlement of a case in Missouri, where it had been accused of engaging in the unlawful practice of law.⁶⁵ On the other hand, the ABA has issued an ethics opinion indicating that ghostwriting is perfectly acceptable and does not

⁶² See West Virginia L.E.O. 2010-01, “Ghostwriting or Undisclosed Representation: What is Permissible and What is Not Permissible,” stating, in part, that “attorneys who write letters or other documents on behalf of an individual do not have to disclose their identities **if the letter or document is not intended to be filed with a tribunal, or authorship is not otherwise required by law**” (emphasis supplied).

⁶³ See Peter Geraghty, “Ghostwriting,”

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

(last accessed 5/17/13):

“There have been a number of state bar ethics opinions that pre-date the ABA Formal Opinion. As discussed and cited in New Jersey Advisory Committee on Professional Ethics Opinion 713 (2008), some of these opinions do not require disclosure. See, Los Angeles County Bar Ass’n Professional Responsibility and Ethics Comm. Op. 502 (1999); Los Angeles County Bar Ass’n Professional Responsibility and Ethics Comm. Op. 483 (1995) and State Bar of Arizona Comm. on the Rules of Professional Conduct Op. 05-06 (2005).

Other opinions have found that ghostwriting is unethical per se. See, Iowa Supreme Court Bd. of Professional Ethics and Conduct Op. 94-35 (1995); Iowa Supreme Court Bd. of Professional Ethics and Conduct Op. 96-31 (1997); Association of the Bar of the City of New York Comm. on Professional and Judicial Ethics Op. 1987-2 (1987); New York State Bar Ass’n Comm. on Professional Ethics Op. 613 (1990).

Still other opinions find that there is a duty to disclose when the lawyer’s assistance is extensive, substantial or significant. See, Alaska Bar Ass’n Ethics Comm. Op. 93-1 (1993); Connecticut Bar Ass’n Comm. on Professional Ethics Op. 98-5 (1998); Delaware State Bar Ass’n Comm. on Professional Ethics Op. 1994-2 (1994); Florida State Bar Ass’n Comm. on Professional Ethics Op. 79-7 (2000); Massachusetts Bar Ass’n Comm. on Professional Ethics Op. 98-1 (1998); New Hampshire Bar Ass’n Ethics Comm., Unbundled Services -- Assisting the Pro se Litigant (1999); Kentucky Bar Ass’n Op. E-343 (1991); Utah State Bar Ethics Comm. Op. 74 (1981).”

⁶⁴ For specific discussions about LegalZoom, see Brandon Schwarzentraub, “Electronic Wills & The Internet: Is LegalZoom Involved In The Unauthorized Practice Of Law Or Is Their Success Simply Ruffling The Legal Profession’s Feathers?” 5 Estate Planning and Community Property Law Journal 1 (2013), found at <http://www.thecodicil.org/home/comments/Schwarzentraub.pdf> (last visited 6/26/13), and the Schindler article cited in footnote 59, above.

⁶⁵ See the report found at:

<http://www.abajournal.com/news/article/legalzoom-can-continue-to-offer-documents-in-missouri-under-proposed-settle/>

and

<http://www.globenewswire.com/newsroom/news.html?d=230108>

(both sites last accessed 5/17/13).

Also see footnote 69, below.

violate the RPC,⁶⁶ and Kansas has issued an ethics opinion allowing ghostwriting as long as the document bears a notice that it was “prepared with assistance of counsel.”⁶⁷

The concept of “ghostwriting,” as can be seen, overlaps with the issue of providing legal forms, whether those forms are used for litigation purposes or for transactional matters. At least one Florida court has held that selling legal forms is acceptable and does not constitute the unlawful practice of law.⁶⁸ On the other hand, courts have found there to be a distinction between merely supplying a form and helping someone fill out a form (even if the assistance is electronic and on-line) – the latter (in some states) may constitute the unlawful practice of law.⁶⁹

⁶⁶ ABA Formal Opinion 07-446, “Undisclosed Legal Assistance to Pro Se Litigants” (2007) (a lawyer can furnish ghostwriting assistance without disclosing to the court or to the opposing party under certain circumstances): “Whether the lawyer must see to it that the client makes some disclosure to the tribunal (or makes some disclosure independently) depends on whether the fact of assistance is material to the matter, that is, whether the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the part of the client, thereby involving the lawyer in conduct violative of Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c). In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation.”

⁶⁷ See Kansas Bar Association Legal Ethics Opinion No. 09-01, Nov. 24, 2009, concluding that ghostwriting is permissible in Kansas as long as ghostwritten pleadings or documents clearly state that they were “Prepared with Assistance of Counsel”, “the attorney’s name, bar number, address or other identifying information need not be included.”

⁶⁸ See: *Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1194 (Fla.1978):

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

⁶⁹ See, e.g., *Janson v. LegalZoom.com, Inc.*, 802 F.Supp.2d 1053 (W.D.Mo. 8/2/11):

In its Motion for Summary Judgment, Defendant LegalZoom argues that, as a matter of law, it did not engage in the unauthorized practice of law in Missouri. Thus, the Court must decide whether a reasonable juror could conclude that LegalZoom did engage in the unauthorized practice of law, as it has been defined by the Missouri Supreme Court. See *First Escrow*, 840 S.W.2d at 843 n. 7 (“the General Assembly may only assist the judiciary by providing penalties for the unauthorized practice of law, the ultimate definition of which is always within the province of this Court”); *Eisel*, 230 S.W.3d at 338–39 (reaffirming that “[t]he judiciary is necessarily the sole arbiter of what constitutes the practice of law,” and finding no conflict between § 484.020 and the Missouri judiciary’s regulation of the practice of law).

Plaintiffs argue that the Missouri Supreme Court has declared on multiple occasions that a non-lawyer may not charge a fee for their legal document preparation service. Defendant responds that its customers—rather than LegalZoom itself—complete the standardized legal documents by entering their information via the online questionnaire to fill the document’s blanks, which it concedes that customers never see. While the parties dispute the proper characterization of the underlying facts, there is no dispute regarding how LegalZoom’s legal document service functions.

[Footnote continued on the next page]

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

a. THE CASE OF THE BROADLY-READ LAWYER

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

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

As can be seen by the materials in in this paper, what constitutes the practice of law varies from state-to-state. Even if Lucy’s activities are perfectly acceptable in State A, they may not be in States B, C, or D.⁷⁰

7. INADVERTENT ATTORNEY-CLIENT RELATIONSHIPS

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

Arnie Attorney is a prolific user of Facebook, Linked-In, Twitter, PartnerUp,⁷¹ Ryze,⁷² Networking for Professionals,⁷³ Jase,⁷⁴ and Ziggs.⁷⁵

It is uncontroverted that Defendant LegalZoom's website performs two distinct functions. First, the website offers blank legal forms that customers may download, print, and fill in themselves. Plaintiffs make no claim regarding these blank forms. Indeed, this function is analogous to the “do-it-yourself” kit in Thompson containing blank forms and general instructions regarding how those forms should be completed by the customer. Such a “do-it-yourself” kit puts the legal forms into the hands of the customers, facilitating the right to pro se representation.

It is the second function of LegalZoom's website that goes beyond mere general instruction. LegalZoom's internet portal is not like the “do-it-yourself” divorce kit in Thompson. Rather, LegalZoom's internet portal service is based on the opposite notion: we'll do it for you. Although the named Plaintiffs never believed that they were receiving legal advice while using the LegalZoom website, LegalZoom's advertisements shed some light on the manner in which LegalZoom takes legal problems out of its customers' hands. While stating that it is not a “law firm” (yet “provide[s] self-help services”), LegalZoom reassures consumers that “we'll prepare your legal documents,” and that “LegalZoom takes over” once customers “answer a few simple online questions.” [Doc. # 119 at 51–52.]

⁷⁰ See, e.g., Lanctot, “*Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*,” 30 Hofstra L. Rev. 811 (2002).

⁷¹ <http://www.partnerup.com/>

⁷² <http://www.ryze.com/>

⁷³ <http://networkingforprofessionals.com/>

⁷⁴ <http://www.jasezone.com/>

[Footnote continued on the next page]

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

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

“My house is in foreclosure. A guy I know promised that he could stop the foreclosure for a \$1,000 fee. I paid the fee and the foreclosure is continuing. Any ideas on what I can do now?

Concerned Homeowner”

Arnie quickly responds with information about the FTC rule on loan modifications and the liability of those who don’t comply with the rules.⁷⁶

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

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

The general rule is that the attorney-client relationship is formed by looking at what the client believed, not what the lawyer intended.⁷⁷

Articles have cautioned about how the Internet can lead to inadvertent attorney-client relationships.⁷⁸

⁷⁵ <http://www.ziggs.com/>

⁷⁶ See 16 C.F.R. Part 322: Mortgage Assistance Relief Services; Final Rule and Statement of Basis and Purpose.

Also see: <http://www.ftc.gov/opa/2010/11/mars.shtm> (last accessed 5/17/13).

⁷⁷ See Cydney Tune and Marley Degner, “Information Technology Law Institute 2009: Web 2.0 and the Future of Mobile Computing: Privacy, Blogs, Data Breaches, Advertising, and Portable Information Systems,” Practising Law Institute, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, PLI Order No. 19051, 962 PLI/Pat 113 (2009):

“In general, courts and other disciplinary bodies have found that an attorney-client relationship exists when the client reasonably relies on the advice of the attorney. The test focuses on the client’s subjective perceptions and beliefs. Attorneys must take care that undesired attorney-client relationships are not unwittingly formed by blogging or maintaining a profile on a social networking site.

Attorney blogs and social networking profiles should contain a disclaimer, making it clear that information provided on the blog or social networking site is not intended to create an attorney-client relationship. Disclaimers of any and all liability that might arise from the contents of the blog or social networking profile could also be used. However, such provisions may not be enforceable unless a user affirmatively accepts the terms. Disclaimers are also likely to be unenforceable if they are inconsistent with the subsequent conduct of the parties.”

Can Arnie prevent an inadvertent attorney-client relationship if he puts a disclaimer in every posting?⁷⁹ ABA Model Rule 1.2(c) (which was adopted verbatim in Louisiana) states that “a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” Can Arnie even craft an appropriate disclaimer? If he does, does it undermine his marketing efforts? Does it make his posting less likely to be read? Moreover, even if Arnie’s disclaimer is deemed “reasonable,” will a court or disciplinary authority (or the “Concerned Homeowner, who later sues Arnie for alleged malpractice) believe that it is reasonable to expect that someone who reads the post and responds has given “informed consent”?

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

First, his “public” posting of advice to Concerned Homeowner may have created a breach in Arnie’s duty of confidentiality to the client.⁸⁰ See ABA Model Rule 1.6. This Rule cautions that a “fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.”

Second, Arnie’s posting may have violated rules on contacts with prospective clients. ABA Model Rule 7.3(a) was amended in 2012 to prohibit “real-time electronic contact” to “solicit professional employment” from someone with whom the lawyer does not previously have a “close personal or prior professional relationship.”⁸¹ Louisiana has

⁷⁸ See, e.g., Carrie Pixler and Lori A. Higuera, “Social Media: Ethical Challenges Create Need for Law Firm Policies,” 47 Arizona Attorney 34 (2011); Abigail S. Crouse and Michael C. Flom, “Social Media for Lawyers,” 67 Bench and Bar of Minnesota 16 (2010); Catherine J. Lancot, “Attorney-Client Relationships in Cyberspace: The Peril and the Promise,” 49 Duke Law Journal 147 (1999); and Nelson, “Is a Visitor to Your Firm’s Homepage Your Client?” 69-SEP Wis. Law. 25 (1996).

⁷⁹ For more on this, see the quotation at footnote 77, above.

⁸⁰ For more on this, see: Andrea Utecht and Abraham C. Reich, “Successful Partnering Between Inside and Outside Counsel,” Chapter 31, footnote 10:

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

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

⁸¹ ABA Rule 7.3 currently reads:

Rule 7.3 Solicitation of Clients
[Footnote continued on the next page]

not adopted any portion of Model Rule 7.3; it is a portion of the rule that is “reserved” and “intentionally left blank.”

Mississippi’s version of Rule 7.3 appears to track the ABA Model Rule. The Texas Rule is far more detailed and expansive than the ABA Model Rule.⁸² While Louisiana does not have Rule 7.3, it does have provisions in Rule 7.4 concerning “direct solicitation” that can be triggered by electronic communications,⁸³ for Louisiana Rule 7.6 concerns electronic communications.⁸⁴

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- (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
- (1) is a lawyer; or
 - (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
- (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
 - (2) the solicitation involves coercion, duress or harassment.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

⁸² Texas Rule 7.03 (found at <https://www.legaethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct/VII--INFORMATION-ABOUT-LEGAL-SERVICES/7-03-Prohibited-Solicitations---Payments.aspx> last visited 04/22/14) deals with electronic contact. While it appears to exempt web sites, some may claim that it may be broadly read to reach blogs and tweets, because it speaks to “live, interactive” electronic communications. Rule 7.03 provides (emphasis supplied):

- (a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f), seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in-person or telephone or other electronic contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:
- (1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;
 - (2) the communication contains information prohibited by Rule 7.02(a); or
 - (3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.
- (b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.
- (c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by Rule 1.04(f) or by paragraph (b) of this Rule.
- (d) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).
- (e) A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.
- (f) As used in paragraph (a), "regulated telephone or other electronic contact" means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. **For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.**

⁸³ Louisiana Rule 7.4 provides (emphasis supplied):

[Footnote continued on the next page]

Rule 7.4. Direct Contact With Prospective Clients

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

(b) Written Communication Sent on an Unsolicited Basis.

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

- (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than thirty days prior to the mailing of the communication;
- (B) it has been made known to the lawyer that the person does not want to receive such communications from the lawyer;
- (C) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;
- (D) the communication contains a false, misleading or deceptive statement or claim or is improper under subdivision (c)(1) of Rule 7.2; or
- (E) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

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

- (A) Unsolicited written communications to a prospective client are subject to the requirements of Rule 7.2.
- (B) In instances where there is no family or prior lawyer-client relationship, a lawyer shall not initiate any form of targeted solicitation, whether a written or recorded communication, of a person or persons known to need legal services of a particular kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment unless such communication complies with the requirements set forth below and is not otherwise in violation of these Rules:
 - (i) Such communication shall state clearly the name of at least one member in good standing of the Association responsible for its content.
 - (ii) The top of each page of such written communication and the lower left corner of the face of the envelope in which the written communication is enclosed shall be plainly marked "ADVERTISEMENT" in print size at least as large as the largest print used in the written communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the "ADVERTISEMENT" mark shall appear above the address panel of the brochure or pamphlet and on the inside of the brochure or pamphlet. Written communications solicited by clients or prospective clients, or written communications sent only to other lawyers need not contain the "ADVERTISEMENT" mark.
- (C) Unsolicited written communications mailed to prospective clients shall not resemble a legal pleading, notice, contract or other legal document and shall not be sent by registered mail, certified mail or other forms of restricted delivery.
- (D) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, any unsolicited written communication concerning a specific matter shall include a statement so advising the client.
- (E) Any unsolicited written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member of that person shall disclose how the lawyer obtained the information prompting the communication.
- (F) An unsolicited written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.

⁸⁴ La. Rule 7.6 states (emphasis supplied):

Rule 7.6. Computer-Accessed Communication

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

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

[Footnote continued on the next page]

Other states have taken different approaches than either adopting the Model Rules verbatim in this regard or going the route that Louisiana took.⁸⁵

Third, Arnie's response to Concerned Homeowner may have triggered a conflict of interest.⁸⁶ Without knowing exactly who the Concerned Homeowner is, who the lender is, or who else might have an interest in the property, Arnie cannot clear conflicts and thus may have violated Model Rules 1.7 and 1.9.

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

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- (1) shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law;
 - (2) shall disclose one or more bona fide office location(s) of the lawyer or law firm or, in the absence of a bona fide office, the city or town of the lawyer's primary registration statement address, in accordance with subdivision (a)(2) of Rule 7.2; and
 - (3) are considered to be information provided upon request and, therefore, are otherwise governed by the requirements of Rule 7.9.

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

- (1) the requirements of subdivisions (b)(1), (b)(2)(A), (b)(2)(B)(i), (b)(2)(C), (b)(2)(D), (b)(2)(E) and (b)(2)(F) of Rule 7.4 are met;
- (2) the communication discloses one or more bona fide office location(s) of the lawyer or lawyers who will actually perform the services advertised or, in the absence of a bona fide office, the city or town of the lawyer's primary registration statement address, in accordance with subdivision (a)(2) of Rule 7.2; and
- (3) the subject line of the communication states "LEGAL ADVERTISEMENT". This is not required for electronic mail communications sent only to other lawyers.

* * *

⁸⁵ For example, Kansas Rule 7.3(a) differs only slightly from the Model Rule and provides:

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

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

- (1) is a lawyer; or
- (2) has a family, closer personal, or prior professional relationship with the lawyer.

Kansas merely adds the phrase "from a prospective client", and uses "closer" rather than "close" in (a)(2).

Contrast this with Missouri Rule 7.3(a), which does not use the Model Rule's wording but deals with the same issue:

Missouri Rule 7.3: Direct Contact with Prospective Clients

This Rule 7.3 applies to in-person and written solicitations by a lawyer with persons known to need legal services of the kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment.

(a) In-person solicitation. A lawyer may not initiate the in-person, telephone, or real time electronic solicitation of legal business under any circumstance, other than with an existing or former client, lawyer, close friend, or relative.

⁸⁶ See, e.g., James Q. Walker, "Ethical Issues For Corporate Lawyers: Social Media, Multiple Representation And Conflict Waivers," 214 PLI/NY 285, Practising Law Institute, New York Practice Skills Course Handbook Series, PLI Order No. 29598 (Dec. 2011).

Fifth, if Arnie is held to have created attorney-client relationship but has given bad advice, will he be covered by his malpractice insurance?⁸⁷

8. WHEN DOES USE OF SOCIAL MEDIA CONSTITUTE ADVERTISING?

a. THE CASE OF THE CLEVER URL

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

“You need a fighter on your side in the courtroom. Barrister, Barrister, and Solicitor are bulldog lawyers who’ll fight to protect your rights!”

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

Every one of Billie’s Tweets⁸⁸ and Facebook responses has this signature:

Billie “Bulldog” Lawyer, an expert litigator.
www.bulldoglawyer.com.

⁸⁷ See a discussion of this issue by Christine D. Petruzzell, “Don’t Go Blindly Into That Law Blog,” 20 New Jersey Lawyer, the Magazine 80 (2008):

In New Jersey, this is illustrated by the controversy triggered in early 2007 by the Chubb Group of Insurance Companies, one of the largest carriers of lawyers’ professional liability insurance. Initially, upon learning of a law blog proposed by a New Jersey firm, Chubb declined to provide coverage, stating that “this is not a risk they are interested in undertaking.” Shortly thereafter, Chubb modified its position, stating that it would insure this new form of communication “within select parameters.”

Chubb distinguished between what it described as an “informational blog,” that presents information or provides a forum for the discussion of issues in a neutral way, and an “advisory blog,” by which a law firm offers advice, for example through a question and answer format, and often being interactive, potentially establishing attorney-client relationships that can lead to malpractice suits. Although Chubb stated that its underwriters would evaluate each submission on its own merits, Chubb suggested that it may not provide coverage on what it deemed to be an “advisory blog,” which, by its nature, increases the risk of a malpractice lawsuit against the firm. Referencing the risks presented by advisory blogs, Chubb noted it is often difficult to perform conflict checks, and that comments/questions are posed by consumers in states where the attorney may not be licensed to practice. In contrast, Chubb noted that informational blogs, which it defined as a forum for discussion of issues in a neutral unbiased way, “pose a minimal level of risk from Chubb’s underwriting perspective.”

⁸⁸ See: Tom Mighell, “Avoiding A Grievance In 140 Characters Or Less: Ethical Issues In Social Media And Online Activities,” 52 The Advocate (Texas) 8 (2010).

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

b. DISCUSSION ON THE CASE OF THE CLEVER URL

While the ABA Rules of Professional Conduct permit Internet advertising,⁸⁹ the ABA Rules do not specifically address the form or contents of such advertising, other than prohibiting false and deceptive advertising⁹⁰ and prohibiting direct electronic communications with potential clients under limited circumstances.⁹¹

Louisiana has specific rules on advertising and a detailed procedure for pre-approval of ads. See, for example, Louisiana’s Rule 7.6, quoted at footnote 84, above. Nothing in Louisiana’s rule seems to exempt postings on Facebook or Linked-In, tweets on Twitter, or blogs. Texas likewise has detailed advertising provisions contained in its Rules 7.01 *et seq.*

Louisiana and Texas are only two of many states that regulate advertising on websites. Each state’s rules are distinct,⁹² and many state bar associations have issued formal opinions on the use of the Internet and advertising. See, for example, state bar advertising rules in Arizona,⁹³ Virginia,⁹⁴ and Florida.⁹⁵ In the words of a California Bar

⁸⁹ ABA RPC Rule 7.2(a): “Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.”

⁹⁰ ABA RPC 7.1: “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

⁹¹ ABA RPC 7.3: Direct Contact With Prospective Clients (emphasis supplied)

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

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or *electronic communication* or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.

⁹² See, for example, Adam R. Bialek, Paris A. Gunther, and Scott M. Smedresman, “Attorney Web Sites: Ethical Issues Are Only the Beginning,” 81 New York State Bar Journal 10 (2009).

⁹³ State Bar of Arizona Ethics Opinion 97-04: Computer Technology; Internet; Advertising and Solicitation; Confidentiality 04/1997.

⁹⁴ Virginia State Bar Rule 7.2, See:

[Footnote continued on the next page]

Formal Opinion: “There is no certain method or form of notice that provides assurance that an attorney’s Internet web site will not be found to be an advertisement, holding oneself out as available to practice law or the unauthorized practice of law in other jurisdictions.”⁹⁶

New Jersey has issued an ethics opinion stating that a lawyer who participates in a web service that directs potential clients to a local lawyer violates the state bar’s advertising prohibitions.⁹⁷

<http://www.vsb.org/pro-guidelines/index.php/rules/information-about-legal-services/rule7-2/> (last accessed 5/17/13).

⁹⁵ See Rules Regulating the Florida Bar, Rules 4-7.4 through 7.8:
<http://www.floridabar.org/divexe/rtfbb.nsf/WContents?OpenView&Start=1&Count=30&Expand=4.8#4.8>
(last accessed 12/09/15).

⁹⁶ See: The State Bar of California Standing Committee on Professional Responsibility And Conduct Formal Opinion No. 2001-155, which includes this statement (emphasis supplied):

This leaves two options for California attorneys who maintain Internet web sites for their law practices. They can choose to use their web site to advertise in multiple jurisdictions. This is not necessarily inappropriate, but it requires that they assure themselves that they are complying with any applicable rules of the different jurisdictions involved, including rules governing the unauthorized practice of law (assuming that there is no inconsistency in the applicable rules that would make this impossible). Alternatively, they can take steps to make clear that they are not advertising in other jurisdictions.

There is no certain method or form of notice that provides assurance that an attorney’s Internet web site will not be found to be an advertisement, holding oneself out as available to practice law or the unauthorized practice of law in other jurisdictions. We make the following suggestions as examples of the kind of statements which, if accurate, might assist in avoiding regulation in other jurisdictions: 1) an explanation of where the attorney is licensed to practice law, 2) a description of where the attorney maintains law offices and actually practices law, 3) an explanation of any limitation on the courts in which the attorney is willing to appear, and 4) a statement that the attorney does not seek to represent anyone based solely on a visit to the attorney’s web site.

⁹⁷ See: Opinion #43, New Jersey Committee on Advertising (June 2011), found at:
<https://www.judiciary.state.nj.us/notices/2011/n110629a.pdf> (last accessed 12/9/15)
The opinion states:

The Internet company offers a group of websites concerning bankruptcy. The websites include general information about what debts may be discharged and the difference between a chapter 7 and chapter 13 bankruptcy, and offers to connect visitors to the website (“Users”) with a bankruptcy attorney. Respondents stated that the company takes actions to ensure that its websites have a high ranking on various Internet search engines (“search engine optimization”). The Committee focused on one specific website with which the New Jersey attorneys were participating. Attorneys who participate in this website pay for the exclusive rights to a geographical area, by zip code. When a User seeking an attorney provides his or her zip code and contact information, the website will identify the sole participating attorney for the pertinent geographical area. The website does not inform the User that the search for a bankruptcy attorney is completed the moment he or she inputs a zip code. Rather, the website home page invites the User to “get a free evaluation from a local bankruptcy attorney” by filling out a form. The website states that “step 1 of 5” for the free evaluation is to provide the User’s zip code and select a reason

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In addition, some states have indicated that a URL itself may constitute a violation of the advertising rules.⁹⁸

The federal courts have gotten involved, and there are two decisions in the last two years from the U.S. Second⁹⁹ and Fifth Circuits¹⁰⁰ on what form of regulation of lawyer advertising is permissible.

Recently, the Virginia Supreme Court in the *Hunter* case¹⁰¹ squarely faced the interrelationship of blogging, advertising, First Amendment rights, and Bar discipline. Hunter maintained a blog on his firm's website; the blog primarily focused on cases that Hunter handled successfully for his criminal clients. The blog gave the name of the cases (which revealed the name of the clients). While the blog was not interactive, the website had a link where readers could click to "contact us."

for considering bankruptcy. The website explains that the User must provide the zip code because "the law varies from state to state."

⁹⁸ See: Georgetown University Law Center Continuing Legal Education, 16th Advanced Computer and Internet Law Institute 2003 Washington, DC March 6, 2003 "*Ethics: Managing Today's New Internet Risks*," 2003 WL 22002074. This article states (footnotes omitted):

"The ethical rules governing a law firm's use of a domain name draw from the rules applicable to the use of "trade names." Under Rule 7.5(a) a "trade name" used by a private law firm cannot imply a connection with a government agency or with a public or charitable legal services organization. Domain names may be regarded as "professional designations" subject to Rule 7.5 (a). Therefore, it would be improper for a private firm to use the primary domain of ".org" or ".gov." Instead, a private law firm must use a URL with the ".com" designation. Virginia's Standing Committee on Lawyer Advertising and Solicitation (SCOLAS) has stated that it is misleading and deceptive for an attorney or attorneys to advertise using a corporate, trade or fictitious name unless the attorney or attorneys actually practice under such name. The usage of a corporate, trade, or fictitious name should include, among other things, displaying such name on the letterhead, business cards, and office sign.

By using the domain name to identify the firm's website, the domain name is a form of public communication regarding the lawyers' services and therefore the domain name is subject to Rule 7.1's prohibition against false, fraudulent, misleading or deceptive claims or statements. The Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline issued Ethics Opinion 99-4 (June 4, 1999) which specifically addresses domain names. The opinion states that it is not improper for an attorney to use a domain name different from the law firm's actual name, provided that the domain name is not a "false, fraudulent, misleading, deceptive, self-laudatory or unfair statement." In addition, the domain name cannot "imply special competence or experience." Thus, for example, a domain names such as "divorcesquickandcheap.com" or "personalinjuryspecialists.com" would violate the cited rules.

⁹⁹ *Alexander v. Cahill*, 598 F.3d 79, 92–95 (2d Cir.2010), *cert. denied*, — U.S. —, 131 S.Ct. 820, 178 L.Ed.2d 576, 79 U.S.L.W. 3102 (2010).

¹⁰⁰ *Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 1/31/11).

¹⁰¹ *Hunter v. Virginia State Bar*, 285 Va. 485, 744 S.E.2d 611 (Va. Supreme Court, Feb. 18, 2013), 2013 WL 749494.

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

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

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

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

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

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

Other commentators, prior to the *Hunter* case, had reached the same conclusion that blogs could be treated as advertising.¹⁰²

¹⁰² See: Leigh Jones, "Will Law Firm Blogs Be Regulated as Advertising?" The National Law Journal, October 11, 2006, <http://www.law.com/jsp/article.jsp?id=1160471119300> (last accessed 5/17/13).

Also see Judy M. Cornett, "The Ethics of Blawging: A Genre Analysis," 41 Loyola University Chicago Law Journal 221 (2009), which cites, among other sources: Sarah Hale, "Lawyers at the Keyboard: Is Blogging Advertising and If So, How Should It Be Regulated?," 20 Geo. J. Legal Ethics 669 (2007); Connor Mullin, "Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers," 20 Geo. J. Legal Ethics 835 (2007); Adrienne E. Carter, "Blogger Beware: Ethical Considerations for Legal Blogs," 14 Rich. J.L. & Tech. 5 (2007); and Justin Krypel, "A New Frontier or Merely a New Medium? An Analysis of the Ethics of Blawgs," 14 Mich. Telecomm. & Tech. L. Rev. 457 (2008).

9. **POSSIBLE “INAPPROPRIATE” OR EVEN SANCTIONABLE USAGE OF SOCIAL MEDIA IMPACTING LITIGATORS; FIRST AMENDMENT ISSUES VS. A LAWYER’S OBLIGATIONS AS AN OFFICER OF THE COURT**

a. THE CASE OF THE DISGRUNTLED LITIGATOR

Billie “BullDog” Barrister is in the midst of a lengthy trial. Judge Eileen Tudor Sentor, at the close of the day’s hearing, has issued a ruling that Bulldog is convinced is dead wrong and constitutes obvious reversible error.

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

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

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

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

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

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

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

b. DISCUSSION OF THE CASE OF THE DISGRUNTLED LITIGATOR

Courts clearly have the inherent powers to punish lawyers for behavior that does not violate state or federal statutes or court rules.¹⁰³ Courts have sanctioned and disbarred lawyers for improperly accusing a judge of incompetence and bias.¹⁰⁴

¹⁰³ *Chambers v.. Nasco, Inc.*, 501 U.S. 32 (1991).

¹⁰⁴ See: *In re Evans*, 801 F.2d 703 (4th Cir.1986), where a lawyer was disbarred for criticizing a judge without investigating the basis of the charge. *Evans* stated that the “failure to investigate, coupled with his unrelenting reassertion of the charges ... convincingly demonstrates his lack of integrity and fitness to practice law.” *Evans* also stated: (emphasis supplied):

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There is always a tension between the “robust debate” that the First Amendment allows and improper criticism of the court by an officer of the court.¹⁰⁵ Lawyers, however, have a duty under RPC 8.2 not to make false or reckless statements about a judge,¹⁰⁶ and courts have tended to enforce Rule 8.2 sanctions even when the lawyer has claimed that his or her activities or words were protected by the First Amendment.¹⁰⁷ Other courts also have found that, as an officer of the court, an attorney’s First Amendment rights may be more limited than those of the public,¹⁰⁸ and the U.S. Supreme

A court has the inherent authority to disbar or suspend lawyers from practice. *In re Snyder*, 472 U.S. 634, 105 S.Ct. 2874, 2880, 86 L.Ed.2d 504 (1985). This authority is derived from the lawyer's role as an officer of the court. *Id.* Moreover, as an appellate court, we owe substantial deference to the district court in such matters:

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

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

¹⁰⁵ See, for example, the statement in *Fieger v. Thomas*, 872 F.Supp. 377, 385 (E.D. Mich. 1994), quoting with approval from another opinion:

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

¹⁰⁶ ABA RPC 8.2(a):

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

¹⁰⁷ See, e.g., *Board of Professional Responsibility, Wyoming State Bar v. Davidson*, 205 P.3d 1008 (Wyo.,2009); and *Notopoulos v. Statewide Grievance Committee*, 277 Conn. 218, 890 A.2d 509 (Conn.,2006).

¹⁰⁸ See, e.g. *In re Pyle*, 283 Kan. 807, 821, 156 P.3d 1231 (Kan. 2007):

In re Johnson, 240 Kan. 334, 729 P.2d 1175 (1986), was a contested case in which this court found that Johnson should be disciplined for false, unsupported criticisms and misleading statements about his

[Footnote continued on the next page]

Court has cautioned lawyers who have argued that their First Amendment rights may not be circumscribed by their status as attorneys.¹⁰⁹

For example, lawyers have been sanctioned for language used in their court filings, including unfounded allegations of *ex parte* contacts,¹¹⁰ for statements accusing courts of ignoring the law to achieve a result,¹¹¹ for statements in a letter that a judge is

opponent in a county attorney election campaign. In its discussion of the First Amendment and lawyer speech, this court said:

“A lawyer, as a citizen, has a right to criticize a judge or other adjudicatory officer publicly. To exercise this right, the lawyer must be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms. Unrestrained and intemperate statements against a judge or adjudicatory officer lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.” *Johnson*, 240 Kan. at 336, 729 P.2d 1175.

Our *Johnson* case also stands for the proposition that a lawyer cannot insulate himself or herself from discipline by characterizing questionable statements as opinions.

¹⁰⁹ See: *In re Cobb*, 445 Mass. 452, 838 N.E.2d 1197, 1210 (Mass. 2005):

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

¹¹⁰ See, e.g., *Board of Professional Responsibility, Wyoming State Bar v. Davidson*, 205 P.3d 1008, 2009 WY 48 (Wyo. 4/7/09, where a lawyer was sanctioned for, among other things, putting the following language into a court filing:

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

¹¹¹ See: *In re Wilkins*, 777 N.E.2d 714, 715-716 (Ind. 10/29/02), where an appellate lawyer stated in a brief (and received a sanction, which was reduced on rehearing, 782 N.E.2d 985 (Ind.2003)):

The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.

[Footnote continued on the next page]

“an embarrassment to this community,”¹¹² and for Internet postings containing unfounded accusations against a judge.¹¹³

10. “OWNERSHIP” OF SOCIAL MEDIA INFORMATION WHEN A LAWYER LEAVES A FIRM.

a. THE CASE OF THE FIRM-HOPPING LAWYER

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

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

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

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

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

Some have asserted the ownership “of a material in a blog should be assessed no differently from ownership of any other works of authorship.”¹¹⁴ Thus, many authors on the subject look to general copyright law.¹¹⁵

Therefore questions that arise include:

Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).

¹¹² *Notopoulos v. Statewide Grievance Committee*, 277 Conn. 218, 890 A.2d 509 (Conn.,2006).

¹¹³ See: *Office of Disciplinary Counsel v. Wrona*, 589 Pa. 337, 908 A.2d 1281 (Pa.,2006).

¹¹⁴ Lisa M. Brownlee, “Assets & Finance: Audits and Valuation of Intellectual Property, Internal Controls, Materiality, and Investment,” Chapter 5, Section 5:85.

¹¹⁵ See: Jon M. Garon, “Wiki Authorship, Social Media and the Curatorial Audience,” 1 Harv. J. Sports & Ent. L. 95 (2010).

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

11. SOCIAL MEDIA SCREENING OF JOB APPLICANTS

Every potential employee whom you interview is probably using social media. In Texas, 68.6 percent of the population uses the Internet and over 50% of Internet users are on Facebook.¹¹⁶ Worldwide, it is estimated that there are over 144 billion active users,¹¹⁷ 50% of whom log in on a daily basis.¹¹⁸

And that’s just Facebook. Twitter has over 300 million “active users” monthly,¹¹⁹ with 500 million Tweets per day¹²⁰ and roughly 34.7 million of them are adults in the USA.¹²¹ Instagram also has 300 million monthly users in the USA accessing it via mobile devices, surpassing Twitter’s USA mobile device usage.¹²² Even Snapchat reports that it has 100 million daily active users.¹²³

If you look at all social media sites, it is estimated that 73% of all adults use social media sites,¹²⁴ and almost 90% of 18-29 year olds use these sites.¹²⁵ The top 10 social

¹¹⁶ See: <http://www.internetworldstats.com/unitedstates.htm> (last visited 7/22/15).

¹¹⁷ See: <http://expandedramblings.com/index.php/by-the-numbers-17-amazing-facebook-stats/> (last visited 7/22/15).

¹¹⁸ See: <https://blog.kissmetrics.com/facebook-statistics/> (last visited 7/22/15).

¹¹⁹ See: <http://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/> (last visited 7/22/15).

¹²⁰ See: <https://about.twitter.com/company> (last visited 07/08/14).

¹²¹ See: <http://www.statista.com/statistics/183585/adult-twitter-users-in-the-us-since-2009/> (last visited 7/8/14)

¹²² See: <http://www.pbs.org/newshour/rundown/instagram-reaches-200-million-users-passes-twitter-u-s-mobile-use/> (last visited 07/08/14).

¹²³ See: <http://expandedramblings.com/index.php/snapchat-statistics/> (last visited 7/22/15).

¹²⁴ See <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (last visited 07/08/14).

¹²⁵ *Id.*

media sites through July of 2015 are reported to be (in order of the estimated unique monthly visitors¹²⁶):

- Facebook
- Twitter
- LinkedIn
- Pinterest
- Google Plus+
- Tumblr
- Instagram
- VK
- Flickr
- Vine

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

Recent law review articles about using social media to screen potential job applicants¹²⁷ have common themes, including:

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

a. ISSUES INVOLVING USING SOCIAL MEDIA CHECKS ON POTENTIAL EMPLOYEES¹²⁸

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

One problem that arises immediately is how you determine which potential employees' sites to check out. Do you do it before they come in for an interview? Do

¹²⁶ See: <http://www.ebizmba.com/articles/social-networking-websites> (last visited 07/22/15).

¹²⁷ See, for example: Eric D. Bentley, "The Pitfalls of Using Social Media Screening for Job Applicants," 29 ABA Journal of Labor and Employment Law 1 (2014); Dorothy M. Bollinger, "Social Media and Employment Law: A Practitioners Primer," 20 Temple Political and Civil Rights Law Review 323 (2011); Daniel R. Anderson, "Restricting Social Graces: The Implications of Social Media for Restrictive Covenants in Employment Contracts," 72 Ohio Stat. Law Journal 881 (2011).

¹²⁸ For more detail on this entire area, see the Eric Bentley article, footnote 127, above.

you use a social media check to figure out which applicants you want to invite in for an interview?

A pre-interview social media check may trigger a concern under Title VII if it is later alleged that you screened and then didn't interview someone based on their "race, color, religion, sex, or national origin."¹²⁹

If you look at applicants' social media postings, it could reveal something about their age (either directly or through a picture), which could then raise issues under the Age Discrimination in Employment Act.¹³⁰

What if social media postings reveal something about an applicant's potential disability? If you don't hire the applicant, that may raise concerns under the American with Disabilities Act¹³¹ or even the Genetic Information Nondiscrimination Act.¹³²

And these are just the federal laws. Many states also have anti-discrimination laws that need to be consulted. One commentator has stated that "[e]mployment conditioned on an employer's access to one's online social media is likely a violation of state anti-discrimination laws."¹³³

Finally, what if your screening actually reveals that a potential employee might be a physical or safety threat? If you decide to hire that person and they later harm someone, there may be a "negligent hiring" claim brought.¹³⁴

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

Well, not only can your searches be traced, but metadata can even reveal how long you spent on the search for each individual applicant. Did you spend 5 minutes on all females but only 1 minute on all males? Did you spend 15 seconds on all African-American applicants but 5 minutes on each white applicant? Did the time you spent bear any relation to whom you called in for an interview or whom you hired, and would a jury believe you if there was a consistent disparity (or even one telling disparity)¹³⁵?

¹²⁹ 42 U.S.C. §2000e-2(a)(1).

¹³⁰ Cf. *McCann v. Tex. City Ref. Inc.*, 984 F.2d 667 (5th Cir. 1993), cited by Bently, *supra*.

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

¹³² 42 U.S.C. §2000ff-1(a). See Bently, *supra*, citing *Leone v. N.J. Orthopaedic Specialists, P.A.*, 2012 WL 1535198 (D.N.J. 4/12/27).

¹³³ See Scheinman (*infra*, fn 147, 44 McGeorge L. Rev. at 734),

¹³⁴ See *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907 (Minn. 1983), discussed in Bently, *supra* at p. 10.

¹³⁵ See Bently, *supra*, at pp. 3-4.

More importantly, under Title VII, a disgruntled applicant may bring a disparate impact claim challenging the employer's allegedly facially neutral policy of screening all applicants' social media sites.¹³⁶

What happens if you call applicants in and if, during the interview, you discuss the social media sites they're using so that you can later check them out? Is that "safer" than pre-screening applicants' social media sites before they're called in? The issues under Title VII may remain. Plus, if the applicants have privacy settings in place for their sites and you ask about those settings or ask to access those sites, you may be in the territory of the Stored Communications Act.¹³⁷

And what if you find out, after the interview (during a social media check) that the applicant is a big supporter of unions and your applicant loves unions. Now you may have triggered the National Labor Relations Act, even in regard to those who are not yet employees.¹³⁸

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

b. BOTTOM LINE ON SCREENING OF POTENTIAL EMPLOYEES:

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

12. SOCIAL MEDIA ISSUES FOR CURRENT EMPLOYEES

Once you've hired an employee, the concern about social media usage may only intensify. What are your employees doing on Internet-accessible devices you've supplied, be they laptops, smart-phones, or desktops? What sites are they accessing during working hours? Are they browsing sites you don't want them using? Are they sharing confidential information? Are they not working but rather shopping? After all, Cyber Monday (the first Monday after Thanksgiving) is huge because employees are back at work after the holidays and have the office's high speed internet access. In 2013, Cyber Monday shattered all records with 2.29 billion spent with online retailers in just one day,¹³⁹ which was a 16% increase over 2012,¹⁴⁰ with almost a third of those orders coming via mobile devices.¹⁴¹

¹³⁶ See Bentley, *supra*. p. 4.

¹³⁷ See: Nicholas D. Beadle, "A Risk Not Worth the Reward: The Stored Communications Act and Employers' Collection of Employees' and Job Applicants' Social Networking Passwords, 1 Am. U. Bus. L. Rev. 397 (2012), cited by Bentley, *supra*.

¹³⁸ See *Parexel International*, 356 N.L.R.B. No. 82, 2011 WL 288784 (1/28/11), cited by Bentley, *supra*.

¹³⁹ See: <http://www.internetretailer.com/2013/12/03/cyber-monday-shatters-online-spending-record> (last visited 07/08/14).

Monitoring your employees' social media usage is important to many businesses. It is a way of finding out whether your employees are working on the job or goofing off. It is a way to prevent employees from visiting web sites your business finds inappropriate. And this monitoring is big business, with many companies offering services that monitor everything, down to the keystroke, as well as providing tracking and blocking devices for your network.¹⁴²

The claim some make is that 1/3 of employees spend at least 2 hours a week online, which means that for a law firm with 16 employees with an average wage of \$20/hr., the loss amounts to thousands of dollars of unproductive time per month.¹⁴³

Some monitoring software will even detect keywords and take screenshots of the sites your employees are visiting,¹⁴⁴ even if the device is offline.¹⁴⁵ Others even claim to listen to what's being said on a phone call.¹⁴⁶

The law review articles on social media issues involving current employees¹⁴⁷ also have common themes, including:

¹⁴⁰ See: <http://www.usatoday.com/story/tech/2013/12/03/cyber-monday-sales-record/3855391/> (last visited 07/08/14).

¹⁴¹ See: <http://marketingland.com/record-setting-cyber-monday-sales-rise-18-percent-mobile-drove-a-third-of-orders-67020> (last visited 07/08/14).

¹⁴² See, e.g., a rating of some of these services at: <http://employee-monitoring-software-review.toptenreviews.com/> (last visited 07/08/14).

¹⁴³ *Id.*

¹⁴⁴ See, for example: Spector 360, http://cms.spector360.com/lands/employee-monitoring-software/?utm_source=GOOGLE&utm_medium=PPC&refer=46643&cid=70170000000LvQc&keyword=Employee%20Monitoring%20Software&placement=&gclid=CJ3Zmf2it78CFQ-Cfgodrr4AyA (last visited 07/08/14).

¹⁴⁵ See: Spytech: <http://www.spytech-web.com/index.shtml> (last visited 07/08/14).

¹⁴⁶ See: Mobistealth: http://www.mobistealth.com/package-selection.php?phone_id=534&product_type=ALL (last visited 07/07/14)

¹⁴⁷ *See, for example:* Eric Raphan and Sean Kirby, "Policing the Social Media Water Cooler: Recent NLRB Decisions Should Make Employers Think Twice Before Terminating an Employee for Comments Posted on Social Media Sites," 9 *Journal of Business and Technology Law* 75 (2014); Pat Lundvall and Megan Starich, "Employer Social Media Policies and the National Labor Relations Act: Walking the Fine Line Between Prohibited Disparagement and Protected Employee Speech," 20 *Nevada Lawyer* 8 (2012); Darin M. Klemchut and Sita Desai, "Can Employer Monitoring of Employee Social Media Violate the Electronic Communications Privacy Act?" 20 *Intellectual Property and Technology Law Journal* (2014); Michelle Scheinman, "Cyberfrontier: New Guidelines for Employers Regarding Employee Social Media," 44 *McGeorge L. Review* 731 (2013); Saby Ghoshray, "Employer Surveillance Versus Employee Privacy: The New Reality of Social Media and Workplace Privacy," 40 *North Kentucky Law Review* 593 (2013).

- Do you monitor social media access by employees?
 - How do employee privacy concerns interact with employer needs?
 - How do you monitor?
 - Must you give notice?
 - What can you monitor?
- What can you do if you find something that causes concern on an employee’s social media post.
 - First Amendment Issues
 - Electronic Communications Privacy Act
- Fair Labor Standards Act Issues

a. MONITORING SOCIAL MEDIA USAGE OF YOUR EMPLOYEES

Does your social media policy inform your employees that everything they do on the office-supplied device is monitored? If you haven’t done that, do your employees have a reasonable expectation of privacy,¹⁴⁸ and if you have done that, does your policy implicate any state laws?¹⁴⁹

If your monitoring software allows you to discern your employees’ login and password information for their social media sites, then aspects of the federal Computer Fraud and Abuse Act¹⁵⁰ come into play.¹⁵¹

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

¹⁴⁸ For a general discussion, see the Ghoshray article, *supra*. The privacy statutes implicated include the following, listed by Bollinger, *supra*, at fn; 17:

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

¹⁴⁹ As an example of a state law that impacts on this area, see Louisiana R.S. 51:1951 et seq., the “Personal Online Account Privacy Protection Act.”

¹⁵⁰ 18 U.S.C. §1030.

¹⁵¹ *Cf.* Lothar Determann & Robert Sprague, “Intrusive Monitoring: Employee Privacy Expectations Are Reasonable in Europe, Destroyed in the United States,” 26 Berkeley Tech. L. J., 979 (2011), cited by Scheinman, *supra*.

If you've monitored employee sites on office-owned equipment, what do you do with that information? If your employees are posting comments on their social media sites involving working conditions, then they may be protected by the N.L.R.B. as "protected, concerted activity"¹⁵² or may be protected under whistle-blower statutes.

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

c. BOTTOM LINE FOR EXISTING EMPLOYEES.

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

13. CONCLUSION

Lawyers who are not using social media are being left behind as more and more people employ it as their primary means of obtaining information and interacting with others. Lawyers who use social media, however, need to be cautious so that they are not ensnared by the thicket of ethical rules and professionalism concerns that might apply. Ultimately, judges will be the final arbiters of what social media usage involving lawyers and litigants is appropriate (and discoverable) and in what context.

¹⁵² *But see* Raphan's and Kirby's discussion about where the "protected concerted activity" line might be drawn. 9 J. Bus. & Tech. L. at 76-80. *Also see* Lundvall and Starich's article, *supra*.