The Legal Ethics of Social Networking

(Part I of II)

By Nicole Hyland[*]

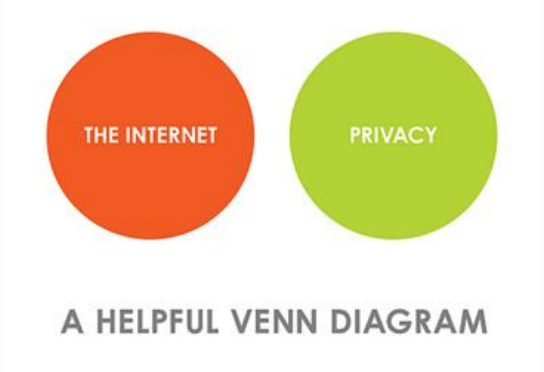
Social networking has become so ubiquitous it is easy to forget that it is a relatively recent development. Friendster, considered the "Grandaddy" of social networks, was launched in 2002.[1] 2003 saw the birth of MySpace and LinkedIn.[2] Twitter was launched in 2006, the same year that Facebook became available to the general public.[3] 2009 appears to have been a tipping point: Facebook hit the 200 million users mark; Twitter broke a major news story; the Oxford English Dictionary selected "Unfriend" as the word of the year.[4] Time spent on social networking sites exceeded time spent on email for the first time.[5] Even if you expand the definition of social networking to include blogging, chat rooms, or internet bulletin boards, these platforms were not generally available to the public until the 1990s.

The perception of social media as a realm inhabited exclusively by teenagers, college students and Internet geeks is also long gone. A 2012 Pew Research Center study found that 77 percent of Internet users between ages 39 and 49 use some form of social media.[6] The same is true for 52 percent of Internet users aged 50 to 64.[7] Lawyers are no exception. A 2012 study by the American Bar Association reported an increase in social media use by lawyers over the previous two years.[8] Of the 823 ABA members who responded to the questionnaire, 96 percent reported that they use a social network or online community for non-professional purposes. As for professional purposes, 38 percent used Facebook (up from 34 percent in 2011), 94 percent of respondents used LinkedIn (a slight drop from 95 percent in 2011), and 11 percent used Twitter (up from 6 percent). Twenty-two percent of respondents reported that their law firms maintain a blog, up from 15 percent in 2011.

As lawyers expand their presence on social media, some of them are starting to face disciplinary charges, sanctions, and embarrassing publicity for a variety of missteps.[9] As I have previously written, I believe most mistakes lawyers make on social media are driven by four basic errors.[10] First, they falsely believe that much of their on-line behavior exists in a kind of privacy bubble, which allows them to control who can see their activities. Second, they fail to appreciate that their social media activities are governed by the same ethics rules as their "real world" conduct.[11] Even when they are aware of this fact, however, they lack clarity on how to apply those rules to social media. Third, they underestimate or misuse social media as an investigative or discovery tool. Fourth, they fail to advise their clients adequately regarding their own use of social media. The first two categories primarily affect lawyers who use social networking for personal or professional reasons, whereas the last two categories affect all lawyers, even those who do not engage in social networking.[12] Part One of this article will look at examples of the first two categories and discuss how courts, ethics committees, and disciplinary committees are responding. Part Two of the article will examine the third and fourth categories and will conclude with practical tips on how to stay out of trouble on social media.

Error No. 1: "The Internet Privacy Bubble Allows Me to Control Who Sees My Social Media Activity"

At a CLE program on social media, one of the other panelists shared the following useful slide on privacy and the Internet:[13]



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Anyone who uses the Internet will instinctively recognize the fundamental (and quite serious) truth behind this humorous diagram. Yet, even experienced social media users routinely forget this basic principle. One notorious example involved a public defender, Anya Cintron Stern, who posted a photo of her client's leopard-print underwear on her Facebook page.[14] The client's family had brought fresh clothes to the defendant during his murder trial and, while a corrections officer was inspecting the clothes, Ms. Stern took a photo of the briefs with her cell phone. She posted the photo during a break in the proceedings, along with the comment that her client's family believed it was "proper attire for trial."[15] The incident evidently came to light when someone in Ms. Stern's Facebook network reported it to the judge. The judge declared a mistrial and Ms. Stern was fired from her job as a public defender. Although she had set her Facebook privacy settings to "friends" only, that precaution did not shield her from public scrutiny. Once you put something on the Internet, you lose control over where it goes and who can see it.

A research lawyer for a Kansas appeals court, Sarah Peterson Kerr, learned this lesson the hard way after posting several critical tweets about former Attorney General, Phill Kline during an ethics proceeding.[16] According to news reports, Kerr referred to Kline as a "naughty, naughty boy" and criticized his facial expressions during the hearing. She tweeted "Why is Phil Klein [sic] smiling?" and "There is nothing to smile about, douchebag." She also predicted that Kline would be disbarred for seven years as a result of the ethics charges, which included misleading others during an investigation of abortion providers. The following statement by Kerr after she was fired from her job encapsulates the flawed thinking behind Error No. 1:

> *I didn't stop to think that in addition to communicating with a few of my friends on Twitter I was also communicating with the public at large*, which was not appropriate for someone who works for the court system. . . . I apologize that because the comments were made on Twitter – and thus public – that they were perceived as a reflection on the Kansas courts.[17]

Kerr's tweets may have implications that extend far beyond her individual conduct. In January 2013, Kline filed a motion to stay any decision on his disciplinary charges on the ground that Kerr's tweets reflect a "pervasive" and "very public anti-Kline bias" within the court system.[18] The motion seeks production and in camera review of "all internal files and all electronic and social media communications of the law clerks and research attorneys" assigned to any judges or other participants in the disciplinary process in any phase of Kline's case. Misguided tweeting also got Arizona attorney, Rachel Alexander, into hot water during a disciplinary proceeding.[19] Alexander had been suspended for six months and a day as a result of certain ethical violations she committed in her handling of a RICO lawsuit. On appeal, the Arizona Supreme Court rejected Alexander's argument that "remorse" for her conduct was a mitigating factor that should reduce her punishment.[20] The Court pointed to the fact that, during the disciplinary hearing, Alexander "posted to her personal website and published on her Twitter account another person's column describing the disciplinary proceedings as 'nothing but a trumped-up, meritless witch hunt' that unfairly targeted Alexander for her conservative views."[21] Based at least in part on her tweets, the Court held that "[r]easonable evidence supports the panel's finding that Alexander is not remorseful."[22]

Admittedly, the cases described above are extreme examples, which tend to receive disproportionate media attention.[23] The problem with extreme examples is that most lawyers who read about them fail to identify with the bad behavior. They believe – in most cases correctly – that they would never do something as imprudent as posting their client's underwear on Facebook or tweeting inflammatory remarks about a pending case. Nevertheless, intelligent and cautious lawyers may inadvertently commit milder forms of Error No. 1. Consider whether the following behavior may be problematic:

- A sleep-deprived corporate associate posts a Facebook update complaining about working late on a closing for a demanding and unappreciative client.

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- A lawyer posts about an off-color remark made by a judge during a court conference.

- A lawyer conducting legal research comes across a recent court decision she thinks is idiotic. She tweets a snarky comment about the decision to her Twitter followers. Unbeknownst to her, many lawyers in her firm routinely appear before the judge that issued the decision.

- A lawyer obtains an adjournment of a Friday court hearing claiming she has to leave town unexpectedly for a family emergency. The following Monday, she is tagged in Facebook photos of her best friend's bachelorette party in Las Vegas.

Some of these examples may violate specific ethics rules, while others probably do not. The larger question is whether the lawyers would reconsider their behavior if they knew their social media posts were being reviewed by clients, employers, colleagues, adversaries, or judges. That should be the default assumption when using social media.

Error No. 2: "The Ethics Rules Don't Apply to Informal Social Media Activities"

The casual nature of social networking can create a false impression that it is exempt from the formal ethical rules that govern lawyer conduct. This misconception is compounded by the lack of clear guidance on how to apply existing ethics rules to social media. Most of our current ethics rules were created in the early days of the Internet, before anyone had heard of social media. As lawyers grow more dependent on the Internet and all it has to offer, bar associations and grievance committees are struggling to fit the square peg of the ethics rules into the round hole of social networking. This task becomes more challenging as social media platforms evolve and expand their features. One day, ethics lawyers were debating whether tweets should be regulated as advertisements or solicitations, given that the 140 character limitation makes it virtually impossible to include disclaimers.[24] The next day, they were debating whether lawyers can ethically accept LinkedIn endorsements, a feature that was introduced in September 2012.[25]

Leaders in the ethics world have also become stymied over whether the ethics rules should be updated to account for this increased reliance on technology. Some believe the ethics rules are hopelessly outdated and must be revised. Others believe the rules reflect high-level principles that can be interpreted and applied to new technologies.[26] This second school of thought places the burden primarily on bar associations and ethics committees to provide the necessary guidance on how to apply the existing rules to social networking. Yet, it is difficult for state and local ethics committees to keep pace with rapid technological changes. As a result, some ethics committees are reluctant to issue opinions on social media (or other technology-related subjects) out of concern that their opinions will quickly become outdated. [27] Even when ethics committees do tackle social media issues, they try to limit references to specific platforms, technologies or features, which may become obsolete within a few years. Consequently, ethics opinions on social media tend to focus on general, overarching principles, which may be of limited use to someone looking for concrete guidance. Given all this uncertainty, a lawyer trying to navigate the social media landscape can start to feel like a driver armed with a malfunctioning GPS unit loaded with a foreign roadmap.[28] Having said that, attorneys should be mindful of the following ethical pitfalls on social media.

Advertising and Solicitation

One of the biggest hazards for lawyers on social media is the potential to violate advertising or solicitation rules.[29] There are several reasons for this. First, advertising rules tend to be drafted broadly and can be interpreted to cover a variety of seemingly innocuous communications. Second, lawyers are generally less familiar with advertising rules than they are with rules they interact

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with on a daily basis, such as confidentiality rules. It is much easier for a well-intentioned lawyer to inadvertently violate an advertising rule online than to reveal client confidential information (although that happens too, as discussed below). Third, First Amendment issues may impact the enforceability or interpretation of advertising and solicitation rules, making it difficult to predict outcomes. Courts have held certain attorney advertising rules to be unconstitutional or have limited their application.[30] This area of constitutional law remains in flux, making the enforceability of certain advertising and solicitation rules uncertain.

A recent case from Virginia illustrates this last point. The case involved a Virginia criminal defense attorney, Horace Frazier Hunter, who writes for his law firm blog "This Week in Richmond Criminal Defense."[31] Most of Hunter's blog posts reported on the positive outcomes of cases he handled, although these were interspersed with some "generalized, legal posts and three discussions about cases that he did not handle."[32] The Virginia State Bar charged Hunter, *inter alia*, with violating ethical rules that prohibit advertisements that are likely to create an "unjustified expectation about the results the lawyer can achieve" and require disclaimers to be included on certain legal advertisements.[33] Hunter appealed the case to the Virginia Supreme Court, arguing that his blog posts constituted protected political speech under the First Amendment. The Court held that Hunter's blog constituted "commercial speech" and was, thus, subject to regulation by the state bar.[34]

One thing that the *Hunter* case makes clear is that reasonable minds can disagree over where the line should be drawn between commercial and non-commercial speech.[35] Consequently, a lawyer can cross that line without realizing it. A fundamental question that has not yet been answered is whether an attorney's social media site constitutes attorney advertising. Although ethics committees have long held that law firm websites constitute attorney advertising,[36] few so far have taken a position on social media. The opinions that exist focus – rightly in my view – on specific statements, rather than on whether social media sites, as a rule, constitute lawyer advertising. For example, a California ethics opinion issued in late 2012 analyzed five social media posts by an attorney to determine whether they violated the state's advertising rules.[37] Under the California rules, a communication qualifies as advertising if it concerns the lawyer's "availability for professional employment."[38] Applying that standard, the Committee concluded that a post stating "Case finally over. Unanimous verdict! Celebrating tonight." did not constitute a regulated "communication" under California's advertising rules.[39] By contrast, adding the phrase "Who wants to be next?" to a similar post transformed it into a regulated "communication," because it suggested the attorney's "availability for professional employment."[40] Likewise, posts that included statements such as "tell your friends to check out my website" and "call me for a free consultation" constituted "communications" under the advertising rules. On the other hand, a post announcing "Just published an article on wage and hour breaks. Let me know if you would like a copy." was not a "communication" because it did not "concern 'availability for professional employment,'" but merely related "information regarding an article that she has published and is offering to provide copies."[41]

Your mileage may vary depending on your jurisdiction. Slight variations in definitions or regulations could lead to different results. For example, in contrast to California's definition, the ABA Model Rules of Professional Conduct (the "RPCs") defines "Advertisement" as a "public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm."[42] In addition, even among states that have adopted the Model Rule, there may be significant differences in how advertisements are defined or regulated. Consider whether any of the following activities would violate the advertising or solicitation rules in your state:

- Excited after a string of courtroom victories, a lawyer hastily posts on Facebook "Just won another motion to dismiss! Looks like I'm on a roll."[43]

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- A friend, wishing to be supportive and perhaps hoping for reciprocation, posts a glowing recommendation of a lawyer's legal services on LinkedIn.[44]

- An attorney who primarily practices Intellectual Property law includes "Intellectual Property Law" in LinkedIn's "specialties" field.[45]

- A lawyer retweets the following tweet from one of her clients without comment: "my lawyer just got me a huge settlement. She's the best lawyer in town!"[46]

- A landlord-tenant lawyer posting a response to a question in a chat room devoted to tenants' rights issues adds: "feel free to e-mail me directly if you have more questions about this issue or are looking for representation."[47]

- A personal injury lawyer searches on Twitter for tweets by victims of a recent mass disaster and tweets back "I have represented other victims of similar disasters. Contact me if you need a lawyer."[48]

- A lawyer offers a prize as an incentive to join his social media network.[49]

If an attorney's online communication is deemed to be an advertisement or solicitation, it may not necessarily be prohibited. It may, however, be subject to strict regulations, such as the inclusion of certain types of information, disclaimers or notices such as "Attorney Advertising." In addition, some jurisdictions require lawyers to get preapproval for advertisements, file copies with their local bar association, or maintain copies in their own files for several years. Complying with these rules may be overly burdensome, if not impossible, given the fast-moving pace of most social media activity. As California ethics attorney, Diane Karpman, has observed "[t]he mechanisms and basic ideas of social media are almost fundamentally incompatible with many states' rules on attorney advertising."[50] More than one commentator has noted that including a disclaimer in a tweet is virtually impossible: "A tweet has only 140 characters, so you can't comply with the disclosure rules and say anything meaningful . . . Some disclosures are longer than 140 characters."[51]

Given the lack of clear guidance, it may be tempting to rely on a marketing or social media consultant to ensure compliance with state advertising rules. This is generally a mistake. Consultants – even those with a law degree – are unlikely to understand or know how to apply the ethics rules. A young lawyer, Dannitte Mays Dickey, was publicly reprimanded based on statements he made in several online profiles, including describing himself as a "specialist," misstating his law school graduation date as 2005 instead of 2008, listing approximately 50 practice areas in which he had little or no experience, and making unsubstantiated statements about the quality of his services and comparisons to other lawyers' services.[52] According to the opinion, the lawyer "relied on company representatives who were lawyers and non-attorney web designers who assured him that the advertisements would comply with respondent's ethical requirements."[53] Such assurances may be comforting when you are building your online presence, but are meaningless when you are staring down the barrel of a disciplinary complaint.[54]

Other Ethical Risks of Using Social Media

In addition to potential advertising violations, lawyers on social media face a wide range of ethical risks. These may include violating rules that protect client confidentiality, inadvertently creating attorney-client relationships, engaging in the unlicensed practice of law, violating rules about communicating with third parties who either are – or are not – represented by counsel, engaging in deception,[55] and more.

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Disclosing Client Confidential Information

It goes without saying that lawyers should not disclose confidential information relating to their clients on social media. Historically, the dual obligations of confidentiality and loyalty have been the hallmarks of the attorney-client relationship. Every jurisdiction has adopted a professional ethics rule protecting the confidentiality of client information. Yet, distinguishing between what is and is not a protected client confidence is not always simple. Many attorneys believe they can discuss public information about a client matter or even nonpublic information as long as they do not reveal the client's identity. Others may erroneously believe that client confidentiality is coextensive with attorney-client privilege.

Yet, the scope of client confidentiality is far broader than many attorneys realize. RPC 1.6, for example, extends the duty of confidentiality to any "information relating to the representation of a client." Even in jurisdictions that have narrowed the definition of confidential information, the duty of confidentiality extends far beyond the attorney-client privilege. In New York, for example, confidential information is defined to include "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."[56] These confidentiality rules apply equally to online and "real life" behavior. The main difference is that an indiscrete but private conversation with a close friend is less likely to come to light than a status update posted to 495 of your Facebook "friends." The other drawback of the Internet is that, once you put something up there, you can never really take it down. The evidence is there. Forever.

Blabbing about client information online can be a costly mistake. A notorious example involved Illinois public defender, Kristine Ann Peshek, who posted detailed blog entries about several of her cases in 2007 and 2008.[57] She referred to her clients either by first name, a derivative of their first name, or their jail identification number. In one post, she wrote "[t]his stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch.'"[58] In another, she wrote "'Dennis,' the diabetic whose case I mentioned in Wednesday's post, did drop as court ordered, after his court appearance . . . . Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge . . . swearing he was clean."[59] Ms. Peshak was charged with improper disclosure of client confidential information and received a 60-day suspension in Illinois and reciprocal discipline in Wisconsin.[60] Although the disciplinary consequences were relatively light, the professional fallout was more significant. Not only was Ms. Peshek fired from her job of 19 years, but her name will forever be associated with this embarrassing incident.[61]

There is no doubt that Ms. Peshak's posts contained confidential information about her clients. But what about closer calls? Under the broad definitions of confidentiality, would it be unethical for an attorney to retweet an article about the anticipated corporate restructuring of a high profile corporate client? Are lawyers permitted to post Facebook updates on courtroom victories they achieve for their clients? The *Hunter* case, discussed above, takes a small step towards answering these questions. There, in addition to being charged with advertising violations, Hunter was charged with violating his duty of confidentiality under Rule 1.6 by posting information about his past cases. The Virginia Supreme Court held that, to the extent the information was publicly available, it was protected by the First Amendment and was not subject to state regulation. It is important to keep in mind, however, that this is just one decision by one state court. Unless you hope to become the next test case for the constitutional limits of client confidentiality, you should avoid posting anything on social media that falls within your state's definition of client confidential information. In many cases, this means refraining from posting even publicly-available information. While ethics commentators correctly advise lawyers to be familiar with privacy settings and other features,[62] the best practice is to steer clear of posting any client information without express written consent. Once client information has been posted on the Internet, even the most stringent privacy settings will not keep it secure inside the mythical "privacy bubble."

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Unintentionally Creating Attorney-Client Relationships

Attorneys who engage in social networking may inadvertently create prospective or actual attorney-client relationships. By doing so, these attorneys unwittingly assume duties of loyalty, confidentiality, and competence towards virtual strangers. Of course, similar risks have existed for as long as lawyers have attended cocktail parties or other social events, where casual conversations may lead to discussions about personal legal issues. In addition, the advent of lawyer websites in the 1990s, which allowed non-clients to submit unsolicited messages about their legal problems, created new opportunities for lawyers to inadvertently create attorney-client relationships.[63] Similar concerns also arose with Internet chat rooms, where attorneys could answer legal questions posed by laypersons in "real time." Ethics opinions on the subject caution lawyers not to offer legal "advice" or answer specific legal questions, but suggest that providing legal "information" may be permissible.[64] One such opinion elucidates the distinction between legal "advice" and legal "information" as follows:

> Providing legal information involves discussion of legal principles, trends, and considerations – the kind of information one might give in a speech or newspaper article, for example. Providing legal advice, on the other hand, involves offering recommendations tailored to the unique facts of a particular person's circumstances. Thus, in discussing legal information, lawyers should be careful to emphasize that it is intended as general information only, which may or may not be applicable to an individual's specific situation.[65]

These same principles should apply to social media communications. The safest way to avoid forming an attorney-client relationship is to refrain from giving legal advice or answering specific legal questions. Using adequate disclaimers will help as well, but they will not override the substance of the communication itself.[66]

The consequences of inadvertently creating an attorney-client relationship online are serious. The unwelcome new relationship may create a conflict with an existing client that will – at best – necessitate an embarrassing conversation with the client, and could lead to the loss of an important or lucrative representation. In addition, the lawyer may face liability for failing to protect the new client's interest in some way, such as advising the client of an important deadline or necessary course of action.

Even if no formal attorney-client relationship is created, social media interactions may give rise to prospective client relationships, which are covered by RPC 1.18. Although a detailed discussion of that rule is beyond the scope of this article, a 2012 New York ethics opinion provides helpful guidance for lawyers attempting to navigate New York's version of RPC 1.18.[67] A threshold issue under Rule 1.18 is whether the individual involved qualifies as a "prospective client." As the New York opinion explains, a "prospective client" is one "who discusses with a lawyer 'the possibility of forming a lawyer-client relationship with respect to a matter,'" even though the discussion does "not result in a lawyer-client relationship."[68] The rule makes clear, however, that not everyone who communicates with a lawyer concerning a potential matter is a "prospective client." Specifically, the rule excludes "a person who communicates unilaterally to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of a representation, or communicates with a lawyer for the purpose of disqualifying the lawyer from handling certain material adverse representations."[69] Therefore, if a lawyer receives an unsolicited message on social media containing the details of a potential legal matter, the sender will likely not be considered a "prospective client."[70] If, however, the lawyer encourages the communication or continues to discuss the legal matter over the Internet, there is a much greater likelihood that the sender will be considered a "prospective client," with all the attendant rights.

Again, the consequences of triggering a prospective client relationship are serious. A lawyer who has had discussions with a prospective client about a matter: (1) "is restricted from using or revealing information learned in the consultation to the same extent

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that a lawyer would be restricted with regard to information of a former client" and (2) "may not represent a client with materially adverse interests in the same or a substantially related matter if the information received from the prospective client could be significantly harmful to the prospective client in that matter" unless certain criteria are met.[71]

Unauthorized Practice of Law

A lawyer whose social media practices put her at risk of forming attorney-client relationships is, by extension, at risk of committing unauthorized practice of law ("UPL"). The borderless nature of the Internet makes it easy to communicate with people all over the country and the world. An attorney might not know where all of her social media contacts are located. Although the Internet is global, however, "the practice of law is still bound by jurisdictional limits."[72] All U.S. jurisdictions have rules and, in some cases, criminal statutes that prohibit lawyers from practicing law where they are not licensed.[73] The same precautions that help lawyers avoid forming inadvertent relationships should protect them from inadvertently committing UPL. As noted above, lawyers should refrain from providing legal advice or answering specific questions posted by social media connections. Lawyers should also be careful not to hold themselves out as being available or willing to practice law outside the jurisdictions where they are licensed.

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Part II of this article will address the third and fourth errors of social networking: the misuse of social media as an investigatory or discovery tool and the failure to advise clients adequately about their own social media use. It will conclude with some practice tips on how to stay out of trouble on social media.

Notes

[*] Nicole Hyland is counsel to the Litigation Group and Professional Responsibility Group at Frankfurt Kurnit Klein & Selz PC; and is the vice-chair of the MLRC Ethics Committee.

[1] http://en.wikipedia.org/wiki/Friendster; *The Brief History of Social Media* [hereinafter Brief History], available at http://www.uncp.edu/home/acurtis/NewMedia/SocialMedia/SocialMediaHistory.html.

[2] *Brief History*, *supra* note 1.

[3] Before 2006, Facebook was available only to college students (2004) and high school students (2005). *Id.*

[4] *See id.*; Belinda Goldsmith,"*Unfriend" Named Word of 2009*, Reuters, Nov. 17, 2009, available at http://www.reuters.com/article/2009/11/17/us-words-unfriend-idUSTRE5AG09H20091117.

[5] Sannon Awsumb, *Social Networking Sites: The Next E-Discovery Frontier*, Bench & Bar of Minnesota, Vol. 66, No. 10, Nov. 2009, available at http://www.mnbar.org/benchandbar/2009/nov09/networking.html.

[6] Maeve Duggan & Joanna Brenner, *The Demographics of Social Media Users – 2012*, Feb. 14, 2013, available at http://pewinternet.org/Reports/2013/Social-media-users/Social-Networking-Site-Users.aspx?view=all. The study focused on Facebook, Twitter, Instagram, Pinterist, and Tumblr. Facebook was found to be the most popular among all age groups.

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[7] *Id.*

[8] Robert J. Ambrogi, *ABA Survey Shows Growth in Lawyers' Social Media Use*, Aug. 16, 2012, available at http://www.lawsitesblog.com/2012/08/aba-survey-shows-growth-in-lawyers-social-media-use.html.

[9] Attorneys are not the only ones committing costly social media gaffes. In 2009, a North Carolina judge was publicly reprimanded for "friending" an attorney on Facebook and exchanging posts about a pending case. *Matter of Terry*, Inquiry No. 08-234, N.C. Jud. Standards Comm. (2008), available at http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf. By contrast, a Texas judge recently handled an unwelcome *ex parte* communication on Facebook in textbook fashion, by refusing to engage in the discussion, immediately disclosing the message to counsel, and reporting it to the appropriate authorities. See Stephanie Francis Ward, *Judge's Facebook Friendship Didn't Indicate Bias*, State Appellate Court Rules, ABA Journal, May 21, 2013, available at http://www.abajournal.com/news/article/jurists_facebook_friendship_doesnt_indicate_bias_says_appellate_court/. Several ethics opinions from around the country have addressed judges' use of social media and have reached varying conclusions. *Compare* Okla. Jud. Ethics Adv. Panel Op. 2011-3 (2011) (judges may not "friend" anyone who appears them in court), Mass. Jud. Ethics Comm. Op. 2011-6 (2011) (judges may not "friend" lawyers who may appear before them), Cal. Judges Ass'n Jud. Ethics Comm. Op. 66 (2010) (judges may not "friend" lawyers with cases pending before them), *and* Fla. Jud. Ethics Adv. Comm., Formal Op. 2009-20 (2009) (judges may not "friend" lawyers who appear before them), *with* ABA Formal Op. 462 (2013) (social media connection with a lawyer, absent other connections, will not generally require recusal), Md. Jud. Ethics Comm., Formal Op. 2012-07 (2012) (same), Ohio Bd. Of Comm'rs on Grievances and Discipline, Formal Op. 2010 -7 (2010) (judges may have social media connections with lawyers as long as relationship otherwise comports with ethics rules), Ky. Jud. Ethics Comm., Formal Op. JE-119 (2010) (judges should consider whether social media connections with lawyers, along with other factors, require disclosure or recusal), S.C. Jud. Dep't Adv. Comm. on Standards of Jud. Conduct, Op. 17-2009 (magistrate judge may have social media connections with lawyers as long as they do not discuss anything related to judge's judicial position), and N.Y. Jud. Ethics Comm., Informal Op. 08-176 (2009) (approving judges' use of social media but advising appropriate discretion).

[10] Nicole Hyland, *The Ethics of Social Media Use*, Legal Ethics Forum, Jan. 14, 2013, available at http://www.legalethicsforum.com/blog/2013/01/prudent-social-media-practices-for-lawyers.html.

[11] While the main focus of this article is the application of legal ethics rules, this principle also applies to other rules and laws that govern online behavior, such as privacy, publicity, intellectual property, and defamation laws. Attorneys should be careful to comply with all such substantive laws, as well as any social media policies adopted by their employers and terms of service imposed by the social media platforms themselves.

[12] Naturally, there is significant overlap among the four categories. Error No. 1 can lead an attorney directly into an ethical violation, thereby committing Error No. 2. In addition, many instances of Error No. 3 are subsets of Error No. 2 – in other words, lawyers may misuse social media as an investigatory or discovery tool in ways that violate the ethics rules.

[13] Image courtesy of Dave Hoffman, available at http://www.flickr.com/photos/buriednexttoyou/5095255302/in/set-72157622392282137/.

[14] David Ovalle, *Lawyer's Facebook Photo Causes Mistrial in Miami-Dade Murder Case*, The Miami Herald, Sep. 13, 2013, available at http://www.miamiherald.com/2012/09/12/2999630/lawyers-facebook-photo-causes.html.

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[15] *See id.*

[16] John Milburne, *Kansas Court Staffer Suspended Over Kline Tweets*, A.P., Nov. 17, 2012, available at http://www.kansascity.com/2012/11/16/3920875/kansas-court-staffer-suspended.html; Steve Fry, *Kline Attorney Wants Probe Into Law Clerk's Anti-Kline Tweets in Supreme Court Hearing*, Nov. 16, 2012, Topeka Capital Journal, available at http://cjonline.com/news/2012-11-16/kline-attorney-wants-probe-law-clerks-anti-kline-tweets-supreme-court-hearing; Jack Cashill, *Court Clerk Suspended After Tweeting Pro-Abortion Comments*, WND, Nov. 16, 2012, available at http://www.wnd.com/2012/11/court-clerk-suspended-after-tweeting-pro-abortion-comments/.

[17] Fry, *supra* note 16 (emphasis added).

[18] http://klinecasefile.com/documents/Kline%20-%20Motion%20to%20Stay%20Action%20+%20Appendices%20-%2001-17-2013.pdf, at 2.

[19] *Matter of Alexander*, No. SB-12-0039-AP (Az. 2013), available at http://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2013/SB-12-0039-AP.pdf.

[20] *Id.* at 35-36.

[21] *Id.* at 36.

[22] *Id.* at 1.

[23] *Id.* Another case that received significant media attention concerned a Florida lawyer, Sean Conway, who agreed to a public reprimand for posting negative comments online about a judge. *See* John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. Times, Sept. 9, 2009, available at http://www.nytimes.com/2009/09/13/us/13lawyers.html?_r=0. Frustrated with what he viewed as the judge's biased attitude against criminal defendants, Conway posted a blog entry calling her an "evil, unfair witch" with an "ugly condescending attitude." *Id.* The Florida Supreme Court upheld the sanction, holding that Mr. Conway's comments were not protected by the First Amendment. *Id.; see also* John Kindley, *Judges to blogging lawyers: Don't call us 'Evil, Unfair Witches' or we'll put a hex on you*, Sept. 13, 2009, available at http://www.peoplevstate.com/?p=258; Steven Seidenberg, Seduced*: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous*, ABA Journal, Feb. 1, 2011, available at http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/.

[24] *See*, e.g., Seidenberg, *supra* note 23.

[25] *See*, e.g., Rachel M. Zahorsky, *Do LinkedIn Endorsements Violate Ethics Rules*, ABA Journal, May 21, 2013, available at http://www.abajournal.com/news/article/do_linkedin_endorsements_violate_legal_ethics/; Andrew Perlman, *The Ethics of Accepting LinkedIn Endorsements*, Legal Ethics Forum, Jan. 3, 2013, available at http://www.legalethicsforum.com/blog/2013/01/the-ethics-of-accepting-linkedin-endorsements.html (cautioning lawyers against accepting endorsements outside their competencies or conditioned on reciprocity).

[26] For example, the ABA Commission on Ethics 20/20, which was formed specifically to review the ABA Model Rules of Professional Conduct ("RPCs") in light of technological advances, proposed no revisions to Rule 7.2, which governs lawyer

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advertising, and virtually no substantive revisions to its comments. *See* Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, Touro L. Rev. Vol. 28: No. 1, Art. 7, at p. 161 (2012). According to the article a "co-chairwoman of the ABA Commission explained that '[t]hough the Model Rules were written before these technologies had been invented, their prohibition of false and misleading communications apply just as well to online advertising and other forms of electronic communications that are used to attract new clients today.'" Id. (citation omitted). Some states have begun to take modest steps towards revising their rules to account for new technologies. In April 2013, for example, the Pennsylvania Disciplinary Board proposed changes to the ethics rules based on recommendations by the ABA Commission. *See* Notice of Proposed Rulemaking (Apr. 13, 2013), available at http://www.pabulletin.com/secure/data/vol43/43-15/652.html.

[27] Although numerous ethics opinions discuss websites, email, chat rooms, and other Internet-based activities, only a handful of opinions deal directly with social networking. Given the wide range of ethical issues raised by social networking, many questions remain unanswered. *See*, e.g., Or. Op. 2013-189 (seeking to connect on social media with party represented by counsel violates "no contact" rule); Cal. State Bar Comm. on Prof'l Resp. and Conduct ("Cal") Formal Op. 2012-186 (2012) (determining whether social media posts violate attorney advertising rules); N.Y. City Bar Ass'n Comm. on Prof'l and Jud. Ethics ("NYCBA") Formal Op. 2012-2 (2012) (addressing attorney use of social media to research jurors); N.Y. State Bar Ass'n Comm. on Prof'l Ethics ("NYSBA") Op. 873 (2011) (addressing whether lawyers may offer prize to people to join lawyers' social network); ABA Formal Op. 10-457 (2010) (online activities that promote law practice constitute advertising); NYSBA Op. 843 (2010) (accessing public portion of individual's social media network does not violate ethics rule prohibiting deception); NYCBA Formal Op. 2010-2 (2010) (attorney may use real name and profile to send "friend request" to unrepresented party without disclosing purpose for seeking information); Phil. Bar Ass'n Prof'l Guidance Comm. ("Phil.") Op. 2010-6 (2010) (addressing ethical implications of social media interactions); S.C. Ethics Adv. ("S.C.") Op. 09-10 (2009) (discussing ethics of client testimonials on social media sites such as LinkedIn); Phil. Op. 2009-02 (2009) (lawyer seeking access to the social network of a potential witness must reveal the lawyer's connection to the matter or true purpose for seeking access); Or. State Bar Legal Ethics Comm. ("Or.") Op. 2005-164 (2005) (accessing opposing party's public website does not violate "no contact" rule).

[28] Attorneys in a supervisory position also face the daunting task of figuring out how much responsibility they have for supervising the social media activities of subordinate lawyers and nonlawyers. *See* RPC 5.1 (supervisory lawyers must make "reasonable efforts to ensure that other lawyers in the law firm conform to these Rules"); RPC 5.3 (supervisory lawyers "shall adequately supervise the work of the nonlawyer, as appropriate").

[29] RPCs 7.1 through 7.5 relate to lawyer advertising and solicitation. Some form of the RPCs have now been adopted by 49 states and the District of Columbia. California is the sole exception, but has its own advertising and solicitation rules at Cal. Bus. & Prof. Code §§ 6157-6159.2 and Cal. Rules of Prof. Conduct 1-400. Individual versions of the rules in each state can vary significantly, so attorneys should look to their own state rules for guidance.

[30] *See, e.g., Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (ban on direct mail solicitations held unconstitutional); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (attorney advertising constitutes commercial speech).

[31] The April 2013 issue of MLRC MediaLawLetter included an article about the decision in *Hunter v. Virginia State Bar* entitled "Virginia Supreme Court Rules Lawyer Blog is Commercial Speech," by James L. McGuire.

[32] *Hunter v. Virginia State Bar*, No. 121472, 2013 WL 749494, *6 (Va. Feb. 28, 2013).

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[33] *Id.* at *3.

[34] *Id.* at *5. It is important to note that *Hunter* does not hold that all lawyer blogs constitute commercial speech. Many lawyer blogs lack the characteristics that convinced the majority in Hunter to treat the blog as legal advertising. *See, e.g.*, Richard Zitrin, *Viewpoint: Court Struggles to Regulate Attorney Blogging*, The Recorder, May 17, 2013, available at http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202600303577&Viewpoint_Court_Struggles_to_Regulate_Attorney_Blogging&slreturn=20130422121421 (noting that Hunter is "very unusual, if not unique, on its facts").

[35] Two Virginia Supreme Court justices, Lemons and McClanaham, dissented from the majority opinion, arguing that Hunter's blog posts "are political speech that is protected by the First Amendment."

[36] *See, e.g.*, ABA Formal Op. 10-457 (Information that typically appears on lawyer websites constitutes "communication about the lawyer or the lawyer's services" and is, therefore, "subject to the requirements of Model Rule 7.1").

[37] Cal. Formal Op. 2012-186, available at http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202012-186%20%2812-21-12%29.pdf.

[38] Cal. Rules of Prof'l Conduct, R. 1-400.

[39] Cal. Formal Op. 2012-186, at 4.

[40] *Id.*

[41] *Id.* at 6.

[42] RPC 1.0(a).

[43] One might argue that such a post could be misleading if it is "presented in a way that might give the reader the unjustified expectation of getting the same result." Thomas A. Gillgian, Jr., *Social Networking Sites and the Ethical Issues They Create*, DRI Today, Sep. 12, 2011, available at http://dritoday.org/feature.aspx?id=143 (citing RPC 7.1, cmt. 3).

[44] Lawyers may be responsible for ensuring that third party content complies with the relevant advertising rules, particular where the lawyer either controls the content or relies on it in some way. *See, e.g.*, S.C. Op. 09-10.

[45] Several jurisdictions prohibit attorneys from using words such as "specialist," "certified," or "expert" unless they possess specific qualifications. *See, e.g.*, N.Y. Rules of Prof'l Conduct, R. 7.4(a) (2011); Az. Comm. on Ethics & Prof'l Resp. ("Az.") Informal Op. 97-04 (1997) (lawyer may not state in an online chat that he "specializes" in an area of law unless he is certified by the state bar in that practice area). On the other hand, a lawyer is generally permitted to "communicate the fact that the lawyer does or does not practice in particular fields of law." RPC 7.4(a).

[46] This statement may be prohibited by rules that bar lawyers from making unsubstantiated comparisons to other lawyers' services. See Susan Cartier Liebel, *12 Social Media Ethics Issues for Lawyers*, May 11, 2010, available at http://solopracticeuniversity.com/2010/03/11/a-dozen-social-media-ethics-issues-for-lawyers/.

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[47] A New York ethics opinion concluded that, although lawyers "may provide general answers to legal questions" in Internet chat rooms, they may not "engage in 'solicitation' in violation of Rule 7.3." NYSBA Op. 899 (2011). Thus, a lawyer may not "post a proposal offering his or her legal services" on a chat room or "post a response that encourages everyone on the site to retain the lawyer." *Id.* Surprisingly, the opinion does not address whether answering questions in a chat room may give rise to an actual or prospective attorney-client relationship. This issue is discussed further below.

[48] Most states' solicitation rules would prohibit this communication, unless the recipient was a former or current client or had some other prior relationship with the tweeter. *See* Liebel, *supra* note 46. A California ethics opinion addressed similar conduct by a lawyer in an Internet chat room dedicated to victims of a mass disaster. Cal. Formal Op. 2004-166 (2004).

[49] This was the subject of a New York ethics opinion, which concluded that offering a prize may constitute an "advertisement" if the "primary purpose of the prize offer is the retention of the attorney." NYSBA Op. 873. If the offer is targeted to specific recipients and if a significant motive is pecuniary gain, it will also constitute a "solicitation" and be subject to additional requirements. *Id.*

[50] Seidenberg, *supra* note 23 (quoting California ethics attorney Diane Karpman).

[51] *Id.; see also* Lackey & Minta, supra note 26, at 150; Thomas A. Gillgian, Jr., *Social Networking Sites and the Ethical Issues They Create*, DRI Today, Sep. 12, 2011, available at http://dritoday.org/feature.aspx?id=143 ("If a tweet regarding a trial victory constitutes an advertisement, it would be nearly impossible to incorporate a state-specific disclosure or disclaimer in 140 characters.").

[52] *Matter of Dickey*, No. 27090 (S.C. 2012), available at http://www.sccourts.org/opinions/displayOpinion.cfm?caseNo=27090.

[53] *Id.*

[54] In Mr. Dickey's case, the outcome would likely be the same, regardless of whether his statements constituted "advertisements." Any content posted by lawyers on social media must not be false or deceptive. *Compare* RPC 7.1(a)(1) (prohibiting advertisements that contain "statements or claims that are false, deceptive or misleading), *with* RPC 8.4(c) (prohibiting lawyers from engaging generally in "conduct involving dishonesty, fraud, deceit or misrepresentation").

[55] These last two examples are covered in Part Two of this article, which will discuss the use of social media as an investigatory and discovery tool. In addition, certain fee-based services, such as attorney referral and crowdsourcing websites, also raise ethical issues about fee-splitting. Those issues are beyond the scope of this article.

[56] N.Y. Rule of Prof'l Conduct, R. 1.6. It expressly excludes "(i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." *Id.*

[57] *Matter of Peshek*, Complaint, No. 6201779 (Wis. 2009) [hereinafter Peshek Complaint], available at https://www.iardc.org/09CH0089CM.html.

[58] *Id.*

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[59] *Id.*

[60] *In re Disciplinary Proceedings against Kristine Ann Peshek*, No. 2011AP909–D, (Wis. 2011), available at http://caselaw.findlaw.com/wi-supreme-court/1572272.html.

[61] *Peshek* Complaint, *supra* note 57.

[62] *See*, e.g., Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, ABA, July 28, 2011, available at http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html (discussing privacy settings and noting that "[t]o effectively protect client and other confidential information, lawyers need to be . . . familiar with how each social media tool or application functions").

[63] Ethics opinions recommend using "click though" disclaimers stating that the website content does not constitute legal advice and that no attorney-client relationship is formed as a result of any communications that occur through the website. *See, e.g.*, ABA Formal Op. 10-457 (discussing risk of creating attorney-client relationship through attorney website). *But see* Cal. Formal Op. 2005-168 (2005) (disclaimer may not be sufficient to prevent formation of attorney-client relationship); NYCBA Formal Op. 1998-2 (1998) (use of a "disclaimer may not necessarily serve to shield Law Firm from a claim that an attorney-client relationship was in fact established by reason of specific on-line communications"); Utah State Bar Ethics Op. 96-12 (1997) (attorney-client relationship cannot be disclaimed where other indicia of relationship exist).

[64] *See, e.g.*, Fla. State Bar Comm. on Advertising, Adv. Op. A-00-1 (2010) (responding to specific legal questions online may create attorney-client relationship); D.C. Bar Ass'n ("D.C.") Ethics Op. 316 (2002) (lawyer answering questions in chat room should avoid giving legal advice); Az. Ethics Op. 97-04 (1997) (lawyers should not answer specific legal questions online, but may provide general information); Ill. State Bar Ass'n Comm. on Prof. Conduct Op. 96-10 (1997) (lawyers giving legal advice in chat rooms "should be mindful that the recipients of such advi[c]e are the lawyer's clients, with the benefits and burdens of that relationship").

[65] D.C. Ethics Op. 316 (2002).

[66] ABA Formal Op. 10-457 (disclaimer may be "undercut" if lawyer acts "contrary to its warning").

[67] *See* NYCBA Formal Op. 2012-03 (2012). The opinion does not, unfortunately, address whether and to what extent social media interactions may implicate Rule 1.18.

[68] *Id.*

[69] *Id.*

[70] *See, e.g.*, S.D. Bar Ass'n Ethics Op. 2006-1 (2006); Az. Ethics Op. 04-02 (2004) (no duty of confidentiality to individuals who unilaterally email information to attorneys). *But see* ABA Formal Op. 10-457 (law firm website that invites submission of information may give rise to prospective client relationship); N.H. State Bar Ass'n Ethics Op. 2009-2010/1 (2009) (law firm websites that invite members of the public to email attorneys may trigger prospective client duties); Mass. State Bar Ass'n Op. 07-01 (in absence of website disclaimer, unsolicited email sent through a law firm website imposes duty of confidentiality).

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[71] NYCBA Op. 2012-03.

[72] Lackey & Minta, *supra* note 26, at 162.

[73] *See, e.g.*, RPC 5.5(a) (prohibiting lawyers from practicing "in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction"); N.Y. Jud. L. § 478 (making the unauthorized practice of law a criminal violation).