funds should it prevail." [54] Here, by contrast, there are no allegations—and certainly no proof—that the receiver or its counsel would be unable to pay back the awards if Baron prevails. Moreover, there are only a few interested parties; a far cry from the "thousands" of distributed claimants that would make practical recovery an impossibility. We discussed another exception in *Walker v. United States Department of Housing and Urban Development.*[55] There, we reviewed a fee award in the context of a desegregation consent decree, and held that given the "ongoing and possibly permanent nature of monitoring and preventing further changes to the City Consent Decree, it is unlikely that there ever will be a 'final judgment' for this court to review." [56] In this case, while the litigation has lingered, we cannot conclude that it will continue on forever.

We hold that that collateral order doctrine does not provide a basis for appellate jurisdiction.

III.

We DISMISS this appeal for want of appellate jurisdiction.

54. *In re Deepwater Horizon,* 732 F.3d 326, 332 n. 3 (5th Cir.2013); *see also S.E.C. v. Forex Asset Mgm't LLC,* 242 F.3d 325, 330 (5th Cir.2001) (concluding that the *Cohen* exception applied when "the assets from the receivership will be distributed, and likely unrecoverable, long before the action ... is subject to appellate review").

55. 99 F.3d 761 (5th Cir.1996).

56. *Id.* at 766.

UNITED STATES of America, Plaintiff–Appellant

v.

Kenneth BOWEN; Robert Gisevius; Robert Faulcon; Anthony Villavaso; Arthur Kaufman, Defendants–Appellees.

No. 13–31078.

United States Court of Appeals, Fifth Circuit.

Aug. 18, 2015.

Background: Following defendants' convictions on various charges of falsifying reports and making false statements as police officers, in connection with police shootings following Hurricane Katrina, defendants filed motion for new trial. The United States District Court for the Eastern District of Louisiana, Kurt D. Engelhardt, J., 969 F.Supp.2d 518 and 969 F.Supp.2d 546, granted the motion. Government appealed.

Holdings: The Court of Appeals, Edith H. Jones, Circuit Judge, held that:

(1) in light of breadth of government's misconduct, which included three supervisory-level federal prosecutors posting anonymous online comments to newspaper articles about the case throughout its duration, and continued obfuscation about the misconduct, defendants were not required to show prejudice, and

(2) even if defendants were required to show prejudice, actual prejudice existed.

Affirmed and remanded for new trial.

Edward C. Prado, Circuit Judge, filed a dissenting opinion.

1. Criminal Law ⇐1139, 1158.35

In reviewing whether the district court abused its discretion in the grant of a new trial, the court of appeals reviews questions of law de novo, but the district court's findings of fact must be upheld unless they are clearly erroneous. Fed. Rules Cr.Proc.Rule 33, 18 U.S.C.A.

2. Criminal Law ⇐938(1)

Newly discovered evidence, as basis for granting a new trial, need not relate only to guilt or innocence, but may be relevant to any controlling issue of law. Fed.Rules Cr.Proc.Rule 33(b)(1), 18 U.S.C.A.

3. Criminal Law ⇐913(1)

If a court finds that a miscarriage of justice may have occurred at trial, this is classified as such an exceptional case as to warrant granting a new trial in the interest of justice. Fed.Rules Cr.Proc.Rule 33(a), 18 U.S.C.A.

4. Criminal Law ⇐913(1)

A miscarriage of justice, which warrants a new trial, harms the substantial rights of a defendant, and it may consist of errors and omissions considered for their cumulative effect on the trial proceedings. Fed.Rules Cr.Proc.Rule 33(a), 18 U.S.C.A.

5. Criminal Law ⇐913(1), 938(1)

As an overarching principle, for any new trial motion, including a motion based on newly discovered evidence, the interest of justice must be considered. Fed.Rules Cr.Proc.Rule 33(a), (b)(1), 18 U.S.C.A.

6. Habeas Corpus ⇐481

To obtain habeas relief on collateral review, based on constitutional trial error, a habeas petitioner must establish that the constitutional trial error had a substantial and injurious effect or influence in determining the jury's verdict; in other words, the habeas petitioner must establish actual prejudice.

7. Criminal Law ⇐1166.10(1)
Habeas Corpus ⇐481

Constitutional trial errors, which occur during the presentation of a case to the jury, and for which actual prejudice must be shown in order to obtain habeas relief, are distinguished from structural defects in the prosecution, like denial of counsel, that require automatic reversal of a conviction.

8. Habeas Corpus ⇐481

The rule that, to obtain habeas relief on collateral review, based on constitutional trial error, a habeas petitioner must establish actual prejudice, does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

9. Criminal Law ⇐919(1)

Breadth of government's misconduct, which included three supervisory-level federal prosecutors posting anonymous online comments to newspaper articles about the case throughout its duration, the leak of a cooperating witness's guilty plea, and continued obfuscation about the misconduct, made the case an unusual one in which defendants were not required to show actual prejudice in order to obtain new trial, in prosecution of defendants for various charges of falsifying reports and making false statements as police officers, in connection with police shootings following Hurricane Katrina; online commenting

alone, which breached all standards of prosecutorial ethics, gave the government a surreptitious advantage in influencing public opinion, the venire panel, and the trial itself, and because the government refused to adequately investigate its errors, covered up what it knew to be misleading omissions, and in some instances lied directly to the district court, the district court could neither uncover the extent of the prosecution's transgressions nor determine the severity of the prejudice suffered by defendants. Fed.Rules Cr.Proc. Rule 33(a), 18 U.S.C.A.

10. District and Prosecuting Attorneys ⇐8(3)

Although statements to the press may be an integral part of a prosecutor's job, and may serve a vital public function, that function is strictly limited by the prosecutor's overarching duty to do justice, and those who wield the power to make public statements about criminal cases must be guided solely by their sense of public responsibility for the attainment of justice.

11. Criminal Law ⇐919(1)

Even if defendants, who were convicted of various charges of falsifying reports and making false statements as police officers, in connection with police shootings following Hurricane Katrina, were required to show actual prejudice from government's misconduct in order to obtain a new trial, such prejudice existed as to the misconduct, which included three supervisory-level federal prosecutors posting anonymous online comments to newspaper articles about the case throughout its duration, the leak of a cooperating witness's guilty plea, and continued obfuscation about the misconduct; seven of 12 seated jurors had visited the newspaper's website in the months preceding trial, jurors who visited the website appeared to have a lower opinion of the honesty of police officers from city's police department, and inflammatory and biased online comments to news articles must have affected defendants' approaches to their defense, the testimony of government's cooperating witnesses and defense witnesses, or decisions on whether to testify as defense witnesses. Fed.Rules Cr.Proc.Rule 33(a), 18 U.S.C.A.

12. Criminal Law ⇐919(1)

Even when a district court finds that prosecutorial misconduct occurred, it must also normally find that the misconduct in question actually prejudiced the defense, in order for a new trial to be warranted, and prejudice depends on the extent to which the particular misconduct contributed to a guilty verdict.

13. Judges ⇐49(1)

Removal of a judge from a case, based on partiality, is a rare and disfavored order.

14. Judges ⇐49(1)

For the court of appeals to remove a district judge from a case, based on partiality, the court of appeals must be persuaded that the judge's conduct might reasonably cause an objective observer to question the judge's impartiality, and three considerations go into this decision: (1) whether the judge would reasonably be able on remand to have substantial difficulty in laying aside his previously expressed views or findings that have been declared erroneous; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether the efficiency costs involved in reassignment outweigh the benefits to the appearance of fairness.

15. Judges ⇐49(1)

Removal of district judge from the case, based on alleged partiality, was not warranted, upon affirmance of judge's order for new trial, in prosecution of defendants for falsifying reports and making

false statements as police officers, in connection with police shootings following Hurricane Katrina; district judge conscientiously responded to the novel events in the case as they unfolded through ongoing revelations of prosecutorial misconduct.

Elizabeth Dorsey Collery, Esq., Barbara Bernstein, Thomas Evans Chandler, Trial Attorney, Jessica Dunsay Silver, Christopher Jackson Smith, Trial Attorney, Lisa J. Stark, U.S. Department of Justice, Washington, DC, Kevin G. Boitmann, Assistant U.S. Attorney, Theodore R. Carter, III, Assistant U.S. Attorney, U.S. Attorney's Office, New Orleans, LA, for Plaintiff–Appellant.

Robin Elise Schulberg, Attorney, Covington, LA, for Defendant–Appellee Kenneth Bowen.

Christopher Albert Aberle, Mandeville, LA, for Defendant–Appellee Robert Gisevius.

Lindsay Alexis Larson, III, Esq., King, Krebs & Jurgens, P.L.L.C., for Defendant–Appellee Robert Faulcon.

Timothy Allison Meche, Attorney, New Orleans, LA, for Defendant–Appellee Anthony Villavaso.

William P. Gibbens, Esq., Ian Lewis Atkinson, Esq., Attorney, Schonekas, Evans, McGoey & McEachin, L.L.C., Stephen D. London, New Orleans, LA, for Defendant–Appellee Arthur Kaufman.

Richard C. Stanley, Esq., Thomas Patrick Owen, Jr., Esq., Stanley, Reuter, Ross, Thornton & Alford, L.L.C., New Orleans, LA, for Defendant–Appellee Michael Magner.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JONES, CLEMENT, and PRADO, Circuit Judges.

EDITH H. JONES, Circuit Judge:

In the anarchy following Hurricane Katrina, a group of heavily armed New Orleans police officers were dispatched to the Danziger Bridge in response to an emergency call reporting shots being fired at police. There, amid chaos, they shot and killed two unarmed men, one of them developmentally disabled, and wounded four other unarmed civilians. The police then allegedly orchestrated a cover-up to deny what happened. Some of those involved were tried by the state, but a mistrial was ordered. The federal government took over the prosecution and has also bungled it. Five former officers have been convicted of serious crimes and received lengthy sentences. Yet they appear in this court as Appellees, and the federal government as the Appellant, because the district court granted a new trial.

The reasons for granting a new trial are novel and extraordinary. No less than three high-ranking federal prosecutors are known to have been posting online, anonymous comments to newspaper articles about the case throughout its duration. The government makes no attempt to justify the prosecutors' ethical lapses, which the court described as having created an "online 21st century carnival atmosphere." Not only that, but the government inadequately investigated and substantially delayed the ferreting out of information about its in-house contributors to the anonymous postings. The district court also found that cooperating defendants called to testify by the government lied, an FBI agent overstepped, defense witnesses were intimidated from testifying, and inexplicably gross sentencing disparities re-

sulted from the government's plea bargains and charging practices.

Like the district court, we are well aware of our duty normally to affirm convictions that are tainted only by harmless error. In this extraordinary case, however, harmless error cannot even be evaluated because the full consequences of the federal prosecutors' misconduct remain uncertain after less-than-definitive DOJ internal investigations. The trial, in any event, was permeated by the cumulative effect of the additional irregularities found by the district court. We conclude that the grant of a new trial was not an abuse of the district court's discretion.

The following discussion cannot be fully understood without reference to the district court's lengthy, comprehensive, and careful opinions in which it evaluated the prosecutorial misconduct as it was revealed to the district court and made significant findings of fact on which we rely. This opinion summarizes only the highlights of those findings. *See United States v. Bowen (December Order)*, No. 10–204, 2013 WL 6531577 (E.D.La. Dec. 12, 2013); *United States v. Bowen (September Order)*, 969 F.Supp.2d 546 (E.D.La.2013); *United States v. Bowen (November Order)*, 969 F.Supp.2d 518 (E.D.La.2012).

BACKGROUND

A federal grand jury returned a 25–count indictment against former New Orleans Police Department ("NOPD") officers Kenneth Bowen, Robert Gisevius, Robert Faulcon, Anthony Villavaso, and Arthur "Archie" Kaufman for their roles in the Danziger Bridge shootings and ensuing alleged cover-up. The indictment charged defendants with civil rights, firearms, conspiracy, and obstruction of justice offenses; only Faulcon was indicted for actually making a fatal shot.[1]

Several other former police officers indicted at the same time pled guilty, and most testified at trial for the government. Despite their egregious behavior at the Danziger Bridge, the cooperating defendants received much lighter sentences because the government agreed not to charge a series of firearms offenses that carry substantial minimum required, consecutive sentences.

Emotions ran high as the prosecution progressed. Local news coverage of the impending federal indictments was punctuated by press leaks "from unnamed sources" that tended to favor the government. One cooperating defendant, Lehrmann, signed a confidential plea agreement, and a magistrate judge sealed the Information against him. One day before Lehrmann was scheduled to enter the plea in open court, the Associated Press and the *New Orleans Times–Picayune*, the local paper of record, published articles announcing that fact. The district court ordered the government to attempt to find the leak, but the order bore no fruit.

Concomitantly, commenters on the website for the *New Orleans Times Picayune* vigorously debated the significance of the case and the guilt of the individual perpetrators and the entire New Orleans Police Department. The indictments were handed down on July 12, 2010, the trial occurred over a two week period from late June to early July 2011, and the defendants were found guilty on nearly all counts. There is no dispute that the district court conducted a thorough and con-

1. Another defendant's case was severed and separately tried. *See United States v. Dugue*, — F.3d —.

scientious jury voir dire based on the information known at the time.[2]

During the interim between the verdict and sentencing, events reflecting shocking breaches of prosecutorial ethics were revealed and then compounded by further breaches. To make a very long story short, the district court was led on a "legal odyssey" by the government that began in March 2012 when another target of federal investigation in New Orleans discovered that a high-ranking Assistant United States Attorney, Senior Trial Counsel Sal Perricone, had been posting comments to Nola.com under multiple assumed names.[3] Perricone's comments frequently involved other matters pending in the United States Attorney's Office ("USAO") and were inflammatory, highly opinionated, and pro-prosecution. Perricone's comments were soon also tied to the Danziger Bridge prosecutions and were shown to have begun well before the indictments and continued through trial. He castigated the defendants and their lawyers and repeatedly chastised the NOPD as a fish "rotten from the head down." Within ten days of the March 2012 revelation of Perricone's comments, he resigned as an AUSA, and then-United States Attorney Jim Letten issued a press release attempting to confine any online misconduct to Perricone alone.

Prompted by the revelation of Perricone's comments, the defendants moved for a new trial based on the commenting and repeated press leaks that, they contended, had inflamed public opinion against them. In addition to the prejudicial atmosphere, they charged that the government induced coerced guilty pleas and procured false testimony to secure convictions at any cost.

The district court's first hearing on these allegations occurred in June 2012. At the hearing, United States Attorney Letten was flanked by his First Assistant United States Attorney and Chief of the Office's Criminal Division Jan Mann as he promised "gospel truth" that no one else had commented on stories related to pending cases.[4] Additionally, the DOJ's chief prosecutor in this case, Barbara Bernstein, represented to the district court that no member of "the trial team" had commented online. The district court acutely observed that its concern about leaks and publicity was not limited to the "team" but extended to all of the federal government. The district court repeatedly expressed skepticism that a new trial would be required, but it ordered the USAO to conduct two investigations. The first asked the government to reveal who had leaked the Lohman guilty plea to the press. The second, responsive to the defendants' claims about online activity, was to verify that only Perricone had publicly commented about the case and to catalog the comments chronologically.

Jan Mann was tasked by Letten to conduct the investigations within the New Or-

2. Post-trial, the defendants filed an initial motion for new trial within a month, the issues in which are not relevant here.

3. Perricone's and later First United States Attorney and Chief of the Office's Criminal Division Jan Mann's identities were uncovered by forensic comparison of their characteristic writing styles in the online comments and in court filings. The forensic expert in question had previously assisted the FBI in identifying the Unabomber.

4. Letten averred: "In terms of Perricone, Judge, I will tell you right now on the record that ... neither I, nor Jan Mann, nor people in positions of authority in our office, to my knowledge did not have any knowledge of, nor did we authorize, nor did we procure or have any knowledge of Sal Perricone anonymously posting comments about cases or anything like that whatsoever until we learned about it in the filing. That is Gospel truth."

leans office. She reported back to the district court with assurances that Perricone was the sole culprit in the USAO and that the defense was likely responsible for press leaks.[5]

These incomplete initial reports failed to overcome the district court's concerns. The district court's opinion explains several deficiencies, *November Order*, 969 F.Supp.2d at 533–38, but it suffices here to note that Perricone, now a private citizen, had not been questioned under oath by Jan Mann. The catalog of Perricone's comments obtained by the district court reflected those he composed as "HenryL.Mencken_1951" but did not include comments he submitted under alternative monikers.

Surprisingly, in the first week of August, while the district court's inquiries were still being pursued, an extensive interview of Perricone was published in *New Orleans Magazine*. The interview was both revelatory and self-serving. Revelatory, *inter alia*, was the information that Perricone had actually posted comments about pending USAO matters under not one but several assumed names. Self-servingly, he stated his commenting was "my secret," that he had been motivated to post comments only to defend the practices of his office, and that no one else in the office, specifically Letten and Jan Mann, had known of his activity.

The district court was pondering a request by the defendants to hold a hearing on their motion for a new trial. While responses from the USAO had up to this point been under seal, the district court identified several categories of emails produced by the government that the district court believed could be relevant to the extent of possible misconduct. After hearing both sides about whether those documents should be revealed to the defendants, the district court ordered all but one produced under a protective order. The district court also set a status conference at which Perricone would testify under oath.

At that October 10, 2012 status conference, attended by DOJ representatives, Jan Mann, and defense counsel, Perricone testified extensively. From the district court's perspective, Perricone raised further questions about the possible involvement of the local FBI in press leaks and about online monikers that he affirmed he did not use, specifically those of "eweman" and certain variations on "campstblue." Postings under these additional names had come to the district court's attention because their content implied they might have been written by insiders to the prosecution. Perricone admitted to using several monikers, but he could not recall if he had used others. He also stated that he posted generally at nights and on weekends, although a handful were written in his office at work. A colloquy toward the end of this hearing led the district court shortly afterward to write Jan Mann seeking information on whether any personnel associated with the federal courts might also have been posting comments online. Jan Mann responded on October 19 with a letter that included the following statements:

> Prior to the Perricone incident, I was not a follower of nola.com postings and had no real sense of what was happening there.... In trying to express these thoughts about human failings and flaws, about hypocrisy and hidden agen-

5. In another case being handled by the New Orleans USAO, Jan Mann as lead counsel also stood silent while the court repeated Letten's assurances that only Perricone had commented unethically. *United States v. Broussard*, No. 2:11–CR–299, 2014 WL 3489725 (E.D.La. July 14, 2014), *aff'd*, 595 Fed.Appx. 441 (5th Cir.2015).

das, I did not intend to suggest that anyone else in particular was posting. If I was so perceived, I regret it.

Before it could take testimony from another former AUSA,[6] as the district court put it "Another Shoe Drops/Another 'Secret'—Friday November 2, 2012," a lawsuit was filed alleging that Jan Mann had been commenting, as "eweman." About forty inappropriate comments under this moniker had appeared on the Nola.com website from November 2011 until Perricone was exposed in March 2012. The suit alleged that "approximately 63 percent of the posts by [First AUSA Mann] appear with comments posted by Perricone, and they frequently reply to express consistency with the points of view expressed by the other." *November Order*, 909 F.Supp.2d at 530. It took four days, plus a specific request by the district court, before Letten informed the district court that indeed, Jan Mann had "much to his surprise" admitted her activity on Nola.com.

The district court's hearing to take testimony from Magner occurred on November 7, with Letten (standing in for Jan Mann), representatives of the DOJ, and defense counsel. Magner yielded insights into the possible knowledge of other AUSAs and office personnel about Perricone's comments. He specifically insinuated that Mann and her husband, AUSA Jim Mann, as friends of Perricone, knew about the commenting. Bernstein from DOJ stated her "surprise" at the original allegations against Perricone and that she was "flabbergasted" and incredulous about Mann's involvement. Bernstein assured the district court that, having interviewed current and former members of "the prosecution team," she was told that none of them had been posting comments. She contended that because the postings were anonymous, the district court had conducted a thorough jury voir dire, and Jan Mann's postings on the Danziger Bridge case apparently post-dated the trial, "the conduct at issue had no effect on the validity" of the verdict against the defendants. *Id.* at 533.

The district court's November 2012 opinion and order summarizing developments to this point culminates with two overlapping questions: (1) what is the full extent of the misconduct, and what are its institutional ramifications; and (2) how does such misconduct, both that which has occurred and what the defendants believe to have occurred, affect the validity of the verdicts under Federal Rule of Criminal Procedure 33? *Id.*

The district court was as yet unable to rule on the motion for a new trial because it was "unfortunately hampered by the inability of the DOJ to provide reliable investigatory answers." *Id.* at 537. The district court's indecision stemmed from an inadequate investigation into the leak of the Lohman guilty plea. Also contributing was Jan Mann's conflicted and untrustworthy role in the investigation. She had stood by in open court while Letten proclaimed "gospel truth" that no one else in his office had posted comments and was the sole AUSA responsible for investigating the extent of online commenting. All the while, the district court surmised, she had to be trying to protect herself from Perricone's fate. While still indicating skepticism that the government's errors

6. Defense counsel had identified Michael Magner. Magner, who had left the USAO, suggested that several people in the office had been posting comments or, contrary to Letten's statement, had either known about or strongly suspected Perricone was doing so. Magner also stated that Jan Mann's husband Jim, another AUSA, was Perricone's closest professional friend, and their offices were next door to each other.

could justify a new trial, the district court made significant preliminary findings:

(1) Certain members of the USAO monitored and reviewed Nola.com articles, in particular the "comment" postings, and shared them with other members of the office;

(2) Some members of the USAO determined that the posts suspiciously seemed to contain confidential, privileged, or sensitive information about a variety of cases in which the office was involved;

(3) Certain members of the USAO commented to each other on their suspicions, particularly concerning commenters named "legacyusa" and "HenryL.Mencken_1951," and linked those posts possibly to Perricone;

(4) Two individuals in the office emailed each other only a week before the Lohman plea and four months before the Danziger Bridge indictments, and indicated that comments concerning the Danziger Bridge incident were written by people "who know a little bit too much about our office . . ."; and

(5) Jan Mann supervised the responses to the district court's attempts to ascertain the extent of online commenting within the office to that point.

The district court quoted a number of the Perricone comments directly relating to the Danziger Bridge prosecution and was worried, particularly in light of the belated identification of Jan Mann as "eweman," whether these were the only unauthorized comments from within the office. The district court reiterated its concern, previously expressed, that at least one cooperating defendant felt coerced into pleading guilty, that the sentences meted out to defendants were shockingly disparate, that FBI Agent William Bezak had used coercive tactics against a defense witness, and that the defense was deprived of live testimony by at least three witnesses who refused to testify at trial when DOJ targeted them for possible perjury charges. Three years after trial, however, not one of those people had actually been charged with a crime.

In sum, the district court ordered DOJ to recommence investigation of both the Lohman leak and the commenting and to finally answer the questions the court had raised. The district court strongly urged DOJ to appoint impartial investigators. This order was entered on November 26, 2012.

Would that this were the end of the story. Two weeks after this order, Letten resigned as United States Attorney, and both Jan Mann and her husband Jim retired with their panoply of federal benefits intact.[7] The DOJ acted on the district court's suggestion by appointing two attorneys—FAUSA John Horn and AUSA Charysse Alexander—from the Northern District of Georgia to conduct an investigation ranging from the New Orleans office of the United States Attorney to the Criminal Division of DOJ.[8] From the end of January until July 2013, Horn and Alexander issued an initial report, followed by

7. At the time, Jim Mann was the supervisor of the USAO's Financial Crimes and Computer Crimes Unit.

8. Much of the information provided in the "Horn reports" remains under seal, but all of the information has been reviewed by this court on appeal. The Horn investigation was duplicated simultaneously by an OPR internal DOJ inquiry, which had begun in July 2012 and was completed in December 2013, following the district court's grant of a new trial. The court's September 2013 opinion granting a new trial refers to the otherwise confidential OPR investigation only when certain materials OPR developed had been revealed to the district court.

four supplemental reports and voluminous supporting material, which are best described as a whirlpool cycling toward and gradually reaching its drainage outlet. From a starting point of generality and vagueness about the misconduct within the USAO and DOJ, the district court painstakingly pried more details and startling information by asking questions two and three times.[9]

For example, the district court ascertained that neither Jan Mann nor her husband had ever been placed under oath when being interviewed by Horn and OPR, and each had refused to execute affidavits.[10] The district court finally gained access to Jan Mann's interview, well after it occurred, and found it incomplete.[11] During her OPR interview, she claimed for instance, that she had essentially told Letten about her own online comments back in March 2012, and that she assumed that his conduct and carefully worded statements thereafter were influenced by her confession. Letten, in his interview, denied having been so informed by Ms. Mann. As the district court later queried, who is to be believed?

The district court's curiosity was further piqued by a carefully worded reference in the initial Horn report to comments about the trial posted by a DOJ Civil Rights Division employee (pseudonym "Dipsos") "who had first-hand knowledge of the Danziger Bridge case but was not a member of the prosecution team." Answering the district court's inquiry, the First Supplemental report, filed in late March, stated that this employee was, *inter alia*, "walled off from the prosecution team and was prohibited from having any substantive discussion about the investigation with any member of the prosecution team or any supervisor over the prosecution team." The investigators remained obviously evasive about this person's identity until pointedly questioned by the district court. Not until a May 15 in-chambers hearing with Horn and Alexander was "Dipsos" revealed to be Ms. Karla Dobinski, a decades-long Civil Rights Division attorney, who had actually testified before Judge Engelhardt in her capacity as the head of the DOJ's internal "taint team" in the Danziger Bridge case. Her responsibility in the course of the prosecution was to protect indicted police officers' civil rights.[12] In the October 2012 hearing, Bernstein had not mentioned Dobinski as one of the "prosecution team" whom she queried about online commenting. The district court makes no accusation against Bernstein; we note, however, that her denial of online commenting by the team proved misleading.

9. Again, this recitation simply summarizes a 16–page excerpt from the district court's new trial order, to which the reader is referred for complete details. *September Order*, 969 F.Supp.2d at 554–67.

10. In fact, Jan Mann had not been asked, because her attorney said she would not answer, whether her answers to the original OPR investigatory questions, which had been posed to the employees of the USAO in July 2012, "would have changed," after the revelation of her online activity.

11. The interview was conducted in the presence of an FBI agent, rendering Ms. Mann potentially subject to prosecution under 18 U.S.C. § 1001, but as the district court noted, the DOJ had an inherent conflict of interest in selecting this mode of procedure, for DOJ was not likely to prosecute her while attempting to protect the Danziger Bridge verdicts.

12. Officer Bowen testified before a grand jury pursuant to a court order granting him use immunity. Dobinski's duty was to ensure that during the later federal prosecution, this order was not violated. *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).

Other gaps in the investigation were evident. Neither Perricone nor Jan Mann has acknowledged that the monikers so far discovered to have been used by them are the only ones under which they posted comments. Dobinski is disturbingly vague in her OPR interview about how many other people in her department were aware of her commenting and whether "Dipsos" was her only moniker.[13] DOJ simply refused to follow up with the newspaper reporters who had written articles referencing "two people familiar with the investigation" and "a source close to the probe" concerning the Lohman plea leak. And, "[i]n a truly disappointing and unsettling crucial development, the Second Supplemental Report also indicates that the DOJ could not forensically recover computer data from the USAO's Internet portals for years 2010 and 2011 (prior to December 19, 2011) because 'it did not retain data for the period before that.' " The district court's attempt to discover other online prosecutorial misconduct was thus undermined.

Because of the indeterminacy about the extent of prosecutorial misconduct, the district court was faced with holding a public hearing on the new trial motion in which it would sift live testimony about the Lohman guilty plea leak and prosecutorial remarks about the Danziger Bridge case. Critical testimony would have been developed from the conflicting statements by prosecutors themselves, including Letten, on these subjects. The district court desisted from this potentially embarrassing course of action in part because of the additional delay, but more so based on its conclusion that a critical mass of unethical and unprofessional deeds supported a new trial.[14] In ninety pages, the district court develops the grounds for granting a new trial.

13. *See* the district court's Order and Reasons dated December 12, 2013 at pp. 8–12, which quotes Dobinski's vague answers. Just one example:

> Q: But is it correct that um that you're not saying you're a hundred percent sure there were no other postings? If we found additional postings, it is not going to contradict your position here today?
>
> A: Right.

14. Of course, were the district court's decision to be reversed, it could revert to holding an evidentiary hearing to pursue further the details of the misconduct. In its footnote 127, the district court identifies some of the outstanding issues:

> As HenryL.Mencken—1951, Perricone made two very correct statements: "There are NO secrets in New Orleans...." [record citation], and "Perhaps the truth will surface. God knows, we need more truth in this city." [record citation]. Yet the Court, even with the capable assistance of Mr. Horn and Ms. Alexander, remains unaware of: the identity of the source of the "leak" of the Lohman plea, in possible violation of Rule 6(e); the earlier user IDs of Perricone and Jan Mann, and how many other user IDs might be involved; the identities of ten of the eleven user IDs that were the subject of the DOJ administrative subpoena ...; the information which could have been obtained from a forensic recovery of computer data for years 2010 and 2011 (prior to December 19, 2011) by the DOJ; whether USA Letten agrees with his former First Assistant that she disclosed her online posting activity in March 2012, and whether that information was conveyed to others in DOJ over six months prior to its public disclosure in early November 2012; whether Karla Dobinski's posting was known to others at DOJ; whether "123ac" is an AUSA; whether other government agency employees posted comments on this case, as did government agency employee "A" and whether any of the three defense witnesses who refused to testify at trial will ever be charged with the crimes for which they were threatened prior to this trial. These are but a few of the outstanding issues which would be the subject of an evidentiary hearing. It is anticipated that surely others would surface upon learning further information at such a hearing.

September Order, 969 F.Supp.2d at 624 n. 127.

Factually, the order relies on a number of events. Foremost are the online comments of Perricone and Dobinski, which in tandem tended to create an "On–Line 21st Century 'Carnival Atmosphere'," as graphically depicted in the district court's quotation of all of the comments posted by these two. *September Order*, 969 F.Supp.2d at 588–603. Second is Jan Mann's testimony, which includes the implications that Letten was aware of her online posting activity in March 2012 (when Perricone's postings were first 'outed'); that she suspected and believed Letten had reported up the line to DOJ about the posting; she "believe[d] in her heart" that other AUSAs were also commenting on Nola.com; and she believes that the USAO and DOJ purposefully avoided directly asking its personnel about their online posting while denying that any organized propaganda campaign was occurring in the Danziger Bridge case. Third, the district court evinces doubt about the credibility and tactics of FBI Special Agent Bezak, who at one point appeared to have defied a court order prohibiting contact with defendant Villavaso without his attorneys' presence. After the government produced a corrected timeline of events, Bezak appeared to be cleared of direct misconduct, but his critical chronological error in a significant matter troubled the district court. Additionally, Bezak did himself no credit by attempting to excuse the highly questionable testimony of the government's cooperating defendant Lohman by saying that, "It is Mike Lohman's truth," and "Every person has their own memory, recollection interpretation of events." Bezak had also threatened a potential defense witness with being separated from her three children "for lying," yet this witness was never charged.

The government's tactics extended to the presentation of testimony by cooperating defendant Hunter that was inconsistent and incredible to the point that the district court dismissed Count 10, the only count that depended on Hunter's testimony, and the government has not appealed. That the government was familiar with "problems" in Hunter's testimony is inferable from the district court's finding that the testimony deviated significantly from Agent Bezak's handwritten notes of his previous interview with Hunter. Not only this judge heard testimony from Hunter: Chief Judge Sarah Vance heard his testimony and strongly doubted its credibility and his sincerity in accepting responsibility. Denying the government's request for more lenient treatment, she sentenced him to the maximum eight years imprisonment on charges under a favorable plea agreement for obstructing justice and misprision of a felony. *See id.* at 612.

The disparity between the punishment meted out to cooperating defendants and those who went to trial is stark. The cooperating defendants' participation in the incident and cover-up seems comparable, yet the government threw the book at those who went to trial by stacking firearms charges. As a result of the charging disparity, those who went to trial have been sentenced from thirty-eight to sixty-five years in prison, while the cooperating defendants garnered from five to eight years. In addition to Hunter,[15] another cooperating defendant, Hills, had fired at people on the bridge. Hills pled guilty to misprision/obstruction charges and was sentenced to six and a half years in prison, but he had earlier denied his guilt to his supervisor. He explained that he had to take the plea deal as "the best [he] could get." A third cooperating defendant, Barson, then testified as a "key" government witness.

15. Hunter drove the truck to the Danziger Bridge and shot at Ronald and Lance Madi-

rios, was the only defendant who pled out but was not presented as a witness by the government. Barrios had been present at the bridge and changed his statements about whether he fired on the civilians. Barrios received a five-year sentence. When he testified for the defense, he had to contradict his wife's statements that he had been forced to admit guilt despite his innocence.

Also troubling was the saga of cooperating defendant Jeffrey Lehrmann, who received only a three-year sentence for misprision of a felony. Yet Lehrmann worked hand in glove with Kaufman, who was charged with multiple felonies and received a six-year sentence. In crafting false evidence, Lehrmann went so far as to create a fictitious witness, "Lakeisha Smith," to fortify the defendant officers' stories about the shooting. Lehrmann also falsely charged crimes against Lance Madison, the brother of a murdered, disabled victim. Lehrmann received his favorable plea deal even after he had lied to the federal grand jury. Even more surprising, Lehrmann had been hired as a federal ICE agent during the pendency of the Danziger Bridge investigation and worked as a federal agent for nearly four years. His federal employment terminated several months after his formal guilty plea.

Finally, the district court pointed to its understanding that at least three potential defense witnesses refused to testify following prosecution threats to bring perjury charges against them. As the district court explained, since these witnesses had earlier testified to the grand jury, their transcripts could be offered at trial, but transcripts are never as powerful as live witnesses. In any event, not one of those people was later charged.

In granting the defendants' Rule 33 motion, the district court principally relied on footnote nine of *Brecht v. Abrahamson*, which reserves the possibility that a new trial can in some egregious circumstances be mandated for certain "trial-type" errors even without a showing of prejudice to the defendants. 507 U.S. 619, 638 n. 9, 113 S.Ct. 1710, 1722 n. 9, 123 L.Ed.2d 353 (1993). The court also concluded that the defendants were in fact prejudiced.

In autumn 2011, well before it ordered a new trial, the district court dismissed, for insufficient evidence, and alternatively granted a new trial on Count 10 against Bowen only, Count 12 against Bowen, Gisevius, Faulcon and Villavaso, and Count 13 against Bowen and Gisevius. The government did not oppose, and has not appealed, dismissal of Count 10. Count 10 charged that Bowen kicked Ronald Madison as he lay dying and was supported essentially by the testimony of the government's discredited cooperating defendant Hunter. Counsel for the parties agreed during oral argument that if we affirm the grant of a new trial on all counts other than Count 10, we need not discuss the dismissal of Counts 12 and 13.

The district court issued a subsequent order on December 12, 2013 that, in the course of deciding which documents to unseal for public view, restated and bolstered the district court's new trial findings.[16] In January 2014, the district court stayed further proceedings pending this appeal.

DISCUSSION

The government's appeal, in pertinent part, challenges the district court's new trial decision with arguments why "anonymous online postings by government attor-

16. The court added significant excerpts from OPR materials, plus a caution, with which we agree, that OPR materials still under seal are also revelatory.

neys do not warrant a new trial in this case." As subsidiary points, the government challenges the ruling that other aspects of the prosecution cumulatively harmed the defendants and supported the new trial grant, and it seeks removal of the district judge from further proceedings. We discuss each issue in turn.

[1] In reviewing whether the district court abused its discretion in the grant of a new trial, we review questions of law *de novo*, but the district court's findings of fact must be upheld unless they are clearly erroneous. *United States v. Mann*, 161 F.3d 840, 860 (5th Cir.1998). The district court's lengthy opinions embody hundreds of subsidiary findings, few of which are challenged by the government. With only one exception, the government fails to challenge the district court's findings on the prosecutors' credibility.[17]

[2–4] The motion for new trial here was granted because "the interest of justice so requires," Fed.R.Crim.P. 33(a), and the motion was specifically based on newly discovered evidence. Fed.R.Crim.P. 33(b)(1). Newly discovered evidence need not relate only to guilt or innocence, but may be relevant to any controlling issue of law. C. WRIGHT & S. WELLING, 3 FED. PRACTICE & PROC. § 588, at 448 (2011). If a court finds "that a miscarriage of justice may have occurred at trial, ... this is classified as such an 'exceptional case' as to warrant granting a new trial in the interest of justice." *United States v. Robertson*, 110 F.3d 1113, 1120 n. 11 (5th Cir.1997) (citations and internal quotation omitted). A miscarriage of justice harms the substantial rights of a defendant, and it may consist of errors and omissions considered for their cumulative effect on the trial proceedings. *United States v. Barrett*, 496 F.3d 1079, 1121 (10th Cir. 2007); *see also United States v. Sipe*, 388 F.3d 471, 492 (5th Cir.2004).

[5] The dissent seems to disconnect Rule 33(b)(1), governing the timing of a new trial for newly discovered evidence, from the overarching principle that for any new trial motion, "the interest of justice" must be considered. Rule 33(a). We disagree with the dissent in two respects. First, the dissent would confine the instant analysis to the strictures on newly discovered evidence stated in the case law, which ordinarily require a demonstration of prejudice to the verdict. *See, e.g., United States v. Bowler*, 252 F.3d 741, 747 (5th Cir.2001) (per curiam). We are aware of these strictures, and we note that the other four criteria stated in the case law—that the evidence of illicit government online posting was newly discovered and unknown at the time of trial; the defendants did not lack diligence in discovering the evidence; the evidence is not merely cumulative or impeaching; and the evidence is material—are not challenged by the dissent. *Id.* The problem with this reasoning is that this court has never had occasion to consider how to respond to the unique set of events presented in this case, that is, to online commenting discovered post-verdict and to the inability of the trial court and this court to know even at this point the extent of the prejudicial commenting because of the government's dilatory conduct.

17. The government alleges clear error only in regard to the district court's disbelief of taint team leader Dobinski's explanation why she resorted to Nola.com to be informed about the trial proceedings. Given the nature of her misconduct and its online effect, the district court's finding is lagniappe. The government's challenges to the overall significance of the online postings on jury selection, trial tactics, effect on witnesses and defendants are more on the order of mixed questions of fact and law, *see United States v. Wall*, 389 F.3d 457, 465 (5th Cir.2004), and are discussed as such *infra*.

The *Brecht* analysis, as will be seen, fits this unprecedented scenario and is but a gloss on current Rule 33 precedent; surely the Federal Rules of Criminal Procedure have to accommodate Supreme Court decisions concerning the fundamental fairness of a trial. It is inexplicable hyperbole to predict that this decision renders the *Bowler* standard "meaningless."

Second, the dissent artificially confines the scope of newly discovered evidence to "the identities of the commenters," as if (a) Perricone, Jan Mann and Dobinski were the only commenters, and (b) the "identities" were separable from the inflammatory comments themselves, and therefore (c) the impact of the comments on the voir dire process, trial jurors, witnesses, and defendants are quantifiable. From the state of this record, however, neither we nor the defendants can know who all the commenters were, how many online comments are attributable to biased and vindictive federal government employees acting outside the bounds of their ethical duties, and thus the full impact of the misconduct. What is known, at a minimum, is that seven of twelve seated jurors were familiar with nola.com postings.

I. The Consequences of Anonymous Online Postings

That three supervisory-level prosecutors committed misconduct in connection with the Danziger Bridge prosecution is beyond dispute. Perricone's comments spanned the entire prosecution and went directly to the guilt of the defendants, the collective guilt of NOPD, and the relative competence and integrity of defense counsel versus the USAO. Dobinski's comments stirred the pot by encouraging commenters who were plainly familiar with the trial proceedings, one of whom was Perricone, to keep doing a "public service" with their biased reports. Mann's comments, posted during post-trial sentencing proceedings, displayed partiality toward the prosecution and denigrated the district court and defense counsel in another Danziger Bridge case.

The government acknowledges significant, repeated misconduct by Perricone and Jan Mann and, to a lesser extent, Dobinski. The government concedes that Perricone "intentionally committed professional misconduct" violating (a) federal regulations restricting extrajudicial statements by DOJ personnel relating to civil and criminal proceedings,[18] (b) DOJ policies[19] and (c) court and state bar rules of professional conduct.[20] The government acknowledges that besides his postings in this case, Perricone posted "thousands" of anonymous comments on various topics over the course of several years. As to Jan Mann, the government admits that her postings on Nola.com of "anonymous comments about Department of Justice matters" violated the same rules, although the results of her postings relating to the Danziger Bridge prosecution are mitigated because they allegedly occurred after the trial had concluded. The government also admits that Mann acted dishonestly during the new trial proceedings when she misrepresented facts and allowed them to be misrepresented to the district court. The government rejects Perricone's and Mann's repeated assertions that their pri-

18. *See* 28 C.F.R. § 50.2, *e.g.*, § 50.2(b)(6)(i), (vi): "Observations about a defendant's character" and "[a]ny opinion as to the accused's guilt" will "generally tend[ ] to create dangers of prejudice without serving a significant law enforcement function."

19. *See* United States Attorneys' Manual §§ 1–2.401(E), 1–7.550(f).

20. *See* Rules 53.2, 53.3, 53.5, Local Criminal Rules of the United States District Court for the Eastern District of Louisiana; Rule 8.2, Louisiana Rules of Professional Conduct.

vate, anonymous online commenting could be separated from their professional public duties. As the "taint" team leader for the prosecution, the government observes, Dobinski was prohibited from participating anonymously in a public forum discussing the case, because "several sources of authority broadly prohibit Department attorneys from making any extrajudicial statements regarding a pending matter." [21] Contending, however, that her comments were innocuous and "not intentional" misconduct, the government acknowledges only that Dobinski exercised "poor judgment" in posting comments during the trial.

What the government nowhere confronts is the incomplete, dilatory, and evasive nature of its efforts to respond to the district court's inquiries about the full extent of online activity by government employees and the source of the Lohman plea leak. The district court was stymied and frustrated for more than twelve months (June 2012–July 2013) by the government's tactics, while private sources like a local magazine and an individual under federal investigation repeatedly leapfrogged government admissions of official misbehavior. The district court doggedly pursued the truth about these matters, but to this day the government has never fully answered the district court's legitimate questions.

Ignoring the procedural deficiencies of its misconduct investigation, the government's defense against a new trial consists of two essential premises: first, only a finding of specific prejudice to the verdict will suffice to support a new trial; and second, prejudice was not shown on the record developed in the district court. We disagree that specific prejudice is a necessary prerequisite to a new trial in this *sui generis* case. But even if required, prejudice here was shown both from this pattern of misconduct and evasion and from other abusive prosecutorial actions.

A. *Brecht*

[6–8] The district court concluded that the government's protracted misconduct required a new trial under *Brecht*.[22] In *Brecht*, the Supreme Court held that to obtain relief on collateral review, a habeas petitioner must establish that the constitutional trial error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637–38, 113 S.Ct. at 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). In other words, the habeas petitioner must establish actual prejudice. The Court distinguished such "trial errors," which occur during the presentation of a case to the jury, from "structural defects" in the prosecution, like denial of counsel, that require automatic reversal of a conviction. 507 U.S. at 629–30, 113 S.Ct. at 1717. The Court also stated that its holding:

> does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, *or one that is combined with a pattern of prosecutorial misconduct*, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

Id. at 638 n. 9, 113 S.Ct. at 1722 n. 9 (emphasis added).

The district court found that the government's pervasive misconduct so contami-

21. *See* 28 C.F.R. § 50.2(b)(5); USAM §§ 1-7.401 E, G; Local Rule 53.5.

22. The district court also cited its supervisory power. This ground for relief is disputed by the government, and we neither discuss nor rely on it.

nated every phase of the prosecution that this case, unique "in nature [and] in scope," fit "squarely within" *Brecht's* prejudice exception. *September Order*, 969 F.Supp.2d at 619.

The government argues that (1) the Supreme Court did not create an exception to the prejudice requirement in *Brecht* but merely reserved the possibility for a future decision and (2) thus, prejudice cannot be presumed but must be proven. These contentions assume that the misconduct in this case—online commenting, guilty plea leak, and the incomplete investigation of misconduct—was not *sui generis*. Yet neither the government's efforts nor our additional research reveals cases on point or closely analogous.

One certainty is that the government presents an overly restrictive interpretation of *Brecht* footnote nine. Contrary to the government's position, this court has described the errors contemplated in footnote nine as "hybrid" errors, falling somewhere on a spectrum between structural errors (prejudice presumed) and trial errors (subject to the harmless error standard). *See Burgess v. Dretke*, 350 F.3d 461, 471 (5th Cir.2003). In *Burgess*, this court held that under *Brecht*, "if 'structural' or 'hybrid' error occurs, harmless error review is inappropriate." *Id.; see also Cupit v. Whitley*, 28 F.3d 532, 538 (5th Cir.1994). We interpreted *Brecht* to create a new category of errors, not simply to preserve the possibility of doing so in the future. *See Burgess*, 350 F.3d at 471; *Cupit*, 28 F.3d at 532. And we have interpreted *Brecht* to hold that "a federal court in habeas must generally review a state court's decision using a strict 'harmless error' standard, but that *cases involving 'structural' or 'hybrid' error require reversal regardless of harm.*" *Burgess*, 350 F.3d at 471 (emphasis added).

This court's holdings are in accord with those of the other circuits that have addressed the issue. *See United States v. Harbin*, 250 F.3d 532, 545 (7th Cir.2001) (trial errors described in *Brecht* footnote nine require automatic reversal); *Hardnett v. Marshall*, 25 F.3d 875, 879 (9th Cir.1994) (hybrid footnote nine error is "assimilated to structural error and declared to be incapable of redemption by actual prejudice analysis"). The *Hardnett* court added, "[w]e assume that the facts set out in Footnote Nine are illustrative, not exclusive, and that the key consideration is whether the integrity of the proceeding was so infected that the entire trial was unfair." *Id.* In addition, the Third Circuit, while refusing to recognize footnote nine as "truly" establishing an exception to harmless error, still did not "foreclose the possibility" that such an exception could exist. *Hassine v. Zimmerman*, 160 F.3d 941, 959 n. 29 (3d Cir.1998) (quoting *Brecht*, 507 U.S. at 638 n. 9, 113 S.Ct. at 1710 n. 9).

Most decisions considering the possibility of *Brecht* footnote nine "hybrid" error have declined to grant relief to defendants, because most of the complaints have involved pure trial error.[23] As the Court noted in *Brecht*, when the errors occur during the presentation of the case to the jury, they are amenable to harmless error review "because they may be quantitatively assessed in the context of the evidence as a whole, to determine the effect on the trial." *Harbin*, 250 F.3d at 544 (citing *Brecht*, 507 U.S. at 629, 113 S.Ct. at 1710). But "[n]ot every error ... is easily shoe-

23. *See, e.g., Hassine*, 160 F.3d at 961 (*Doyle* error not egregious enough to warrant footnote nine exception); *Hardnett*, 25 F.3d at 880–81 ("the prosecutor's misconduct did not infect the whole trial"); *Cupit*, 28 F.3d at 538 (unconstitutional admission of hearsay is "classic trial error[ ]").

horned into one of those neat categories. The 'nature, context, and significance of the violation,' for instance, may determine whether automatic reversal or the harmless error analysis is appropriate." *Id.* (citation omitted). Courts must therefore decide where, along the spectrum of errors, those which are not clearly trial type or structural may fall.

The "unprecedented" *Harbin* case, 250 F.3d at 539, is instructive. In *Harbin*, the court allowed the prosecutor to "save" until mid-trial a peremptory juror challenge, which he exercised to replace one juror with an alternate. The replacement juror was not shown to have been biased, nor could any impact on the verdict be proven. Nevertheless, the Seventh Circuit held that the error was precisely the type that "defies harmless error analysis." *Id.* at 545. The defendants had been denied a comparable right to excise a juror during trial not only because they had previously used all of their peremptory challenges, but also because they were not even informed of the possibility of delayed exercise. *Harbin* held that this error affected the fundamental fairness of the trial and demanded a new trial without harmless error proof, because the imbalance in peremptory challenges "gave the prosecutor unilateral discretionary control over the composition of the jury mid-trial." *Id.* at 547–48. And it was "simply impossible as a practical matter to assess the impact on the jury of such an error." *Id.* at 548.

[9] So too here, the breadth of the government's misconduct and continued obfuscation, as the district court found, makes this the "unusual case" contemplated by *Brecht*. The online commenting alone, which breached all standards of prosecutorial ethics, gave the government a surreptitious advantage in influencing public opinion, the venire panel, and the trial itself. And by degrees, the district court was led to conclude that what it had previously considered to be isolated missteps was actually evidence of a pattern of misconduct that permeated every stage of the prosecution. And because the government refused to adequately investigate its errors, covered up what it knew to be misleading omissions, and in some instances lied directly to the court, the district court could neither uncover the extent of the prosecution's transgressions nor determine the severity of the prejudice suffered by the defendants.

The government's unrelenting efforts thus prevented the district court from evaluating the fairness of defendants' trial and thrust the prosecution into the rare territory of *Brecht* hybrid error. Trial errors can be evaluated for harmlessness precisely because the nature and extent of the harm is ascertainable from a review of the record. *Brecht*, 507 U.S. at 629, 113 S.Ct. at 1710. Here, the ability of trial and appellate courts to evaluate the effect of the anonymous comments has been thwarted by the government's subsequent lack of cooperation. There is a fundamental imbalance between the knowledge of the prosecutors, on one hand, and the defendants and courts, on the other, concerning the true extent and significance of the ongoing commenting. This case thus presents the unclassifiable and pervasive errors to which the Supreme Court referred in *Brecht* when it identified a category of errors capable of infecting the integrity of the prosecution to a degree warranting a new trial irrespective of prejudice.

Our conclusion is reinforced by overarching standards of prosecutorial conduct and the nature of their breach.[24] Prosecu-

24. This is not a conclusion that our "supervisory duty" supports a new trial, but a reflection on the prosecution's cynical minimization of its wrongdoing. *Cf. Rideau*, 373 U.S.

tors maintain the integrity, fairness and objectivity of the criminal justice system in part by refraining from speaking in public about pending and impending cases except in very limited circumstances. The government's own list of applicable regulations and ethical rules demonstrates that the prosecutors' obligation of silence extends beyond "confidential and grand jury matters" and beyond the "prosecution team" narrowly defined to include only those who participate in a particular case. Further, there is no dividing line between the prosecutors' professional and private lives with respect to these duties. Had Perricone, Mann, or Dobinski frequented a bar or habitually called in to a radio talk show and blown off steam about the Danziger Bridge prosecution in the terms they used online, their misconduct would have been the same as it is with their anonymous online commentary.

[10] The reasons for prosecutorial self-restraint are manifest.

> Although '[s]tatements to the press may be an integral part of a prosecutor's job, and ... may serve a vital public function,' that function is strictly limited by the prosecutor's overarching duty to do justice.' Those who wield the power to make public statements about criminal cases must 'be guided solely by their sense of public responsibility for the attainment of justice.'

Aversa v. United States, 99 F.3d 1200, 1216 (1st Cir.1996) (quoting *Souza v. Pina*, 53 F.3d 423, 427 (1st Cir.1995)). Insulating the prosecution and trial from bias, prejudice, misinformation, and evidence revealed outside the courtroom are crucial to the fairness of our processes. Equally important, the prosecutor must respect the presumption of innocence even as he seeks to bring a defendant to justice.

Justice Sutherland eloquently captured the prosecutor's calling. A government prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), *overruled on other grounds by Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). In short, that the prosecutors' misconduct was so incongruous with their duties buttresses our conclusion that this is the rare case involving *Brecht* error.

The government rejects that conclusion and contends that prejudice must be proven here, citing cases concerning pretrial publicity, jury selection and extraneous influence on impaneled jurors. *See, e.g., Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010); *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). Initially, we note that under Fed. R.Crim. Proc. 52(a), the gov-

at 728, 83 S.Ct. at 1420 (Harlan, J., dissenting).

ernment bore the burden of proving no prejudice. Moreover, the cases cited by the government are of dubious relevance factually and legally. First, the government cannot obstruct the inquiry into online activity and then claim that there is insufficient proof to support the district court's findings. *Cf. United States v. Derrick*, 163 F.3d 799, 809 (4th Cir.1998) (where prosecutorial misconduct largely consisted of discovery violations, *and violations had been corrected*, any prejudice that might have existed was fully remedied by a new trial order). Second, the true extent of the online misconduct has not yet been fully revealed, and there are strong implications in testimony by Magner and the interviews of Jan Mann and Dobinski and from OPR materials that the online commenting was widely known within the New Orleans USAO and known within DOJ.[25] Third, the DOJ's sluggish approach to uncovering and revealing the extent of postings to the district court suggest a prosecution insensitive—at best—to what it now acknowledges are strict governing legal and ethical standards. Fourth, contrary to the government's assertions, the anonymous nature of the comments does not reduce but increases their pernicious influence. Fifth, cases that concern outside pretrial publicity perpetrated by the press, *e.g. Sheppard v. Maxwell* and *Rideau v. Louisiana*, present neither prosecutorial misconduct nor unquantifiable influences on the proceedings. Sixth, the online comments could have affected not only the venire panel and actual jurors but also cooperating defendants and defense witnesses. Finally, the inevitable impression left by the government's misconduct and ongoing pettifoggery is of a prosecution determined to convict these defendants by any means.

In sum, while a demonstration of prejudice is ordinarily a prerequisite for the grant of a new trial, the Supreme Court specifically identified the type of extraordinary errors that will dispense with this burden.[26] Such errors occurred here. Prosecutorial misconduct commenced even before indictments were handed down and continued throughout trial and into the post-trial proceedings, and that misconduct affected the prosecution and trial in ways that cannot be fully evaluated due to the government's mishandling—to put it politely—of the investigation into cyberbullying. The online anonymous postings, whether the product of lone wolf commenters or an informal propaganda campaign, gave the prosecution a tool for public castigation of the defendants that it could not have used against them otherwise, and in so doing deprived them of a fair trial. The district court's steady drip of discoveries of misconduct infecting every stage of this prosecution, combined with the government's continued obfuscation and deceit, renders this the rare case in which imposition of the *Brecht* remedy is necessary.

B. *Prejudice Proven*

[11] Alternatively, even if a finding of prejudice is required here, the district court did not err in finding that the gov-

25. The court also found incredible Perricone's and Mann's denials that each knew about the other's postings. Too often, each of them posted in reference to the other's observations and unfailingly reinforced their prejudiced views.

26. Although *Brecht* itself concerned habeas relief, "similar or even broader exceptions to the harmless error doctrine should logically apply at the district court level or on direct appeal, which do not involve the especially deferential habeas standard of review." Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1561 (2009).

ernment's misconduct in this prosecution prejudiced the defendants.

[12] Although defendants frequently seek mistrials alleging prosecutorial misconduct, their motions are rarely granted. Even when a district court finds that misconduct occurred, it must also normally find that the misconduct in question actually prejudiced the defense. *United States v. Bowler*, 252 F.3d 741, 747 (5th Cir.2001). Prejudice, in turn depends on the extent to which the particular misconduct contributed to a guilty verdict. *Id.* The online activities here were viewed by Perricone as a "public service," designed among other things to influence the community and put pressure on the various defendants who were being pursued by the AUSO. Dobinski also characterized her encouragement of other commenters about the ongoing trial as a public service. The district court was unable to capture the extent of prejudice during jury selection or trial because the tainted source of the comments had not yet been revealed. On reviewing jury questionnaires for the new trial motion, however, the district court found that seven of twelve seated jurors had visited the Nola.com website in the months preceding trial. Further, according to the district court's review, jurors who visited the website appeared to have a lower opinion of NOPD officers' honesty. *Cf. Harbin*, 250 F.3d at 545 (prejudice presumed despite no proof of bias by replacement juror). From a practical standpoint, the defendants were prejudiced because the district court found its investigation of jury selection process could not be effectively pursued years later. *See, e.g.*, District Court's Order and Reasons, December 12, 2013, at 22–23 (explaining why an inquiry into juror bias so long after trial is unworkable).

Additionally, the district court believed that the government pressured cooperating defendants to seek plea deals and then to shade their testimony against the others. The district court reiterated that government threats of perjury charges against defense witnesses, which had never materialized, prompted several not to testify at the trial. If prosecutorial misconduct must spawn prejudice that is shown to be outcome-determinative, then the congeries of overbearing activities in this trial might not meet that goal. On the other hand, the facts that the government engaged in misconduct, which took place off the record but in public, and that the misconduct was directed at the public but defies investigation because of the government's tactics, should tip toward a finding of prejudice. On-the-record misconduct can be easily evaluated; the misconduct here cannot. Furtive misconduct should not escape remedy simply because it was furtive. *See Sipe*, 388 F.3d at 477 (affirming new trial grant for cumulative prosecutorial errors and omissions).

A prosecutor's status, moreover, enhances the credibility of public comments and magnifies the adverse consequences of the commenter's inappropriate remarks. The prosecutor's comments implicate his or her inside knowledge of prosecutorial activity as they explain the significance of particular events during a case. Bias or vindictiveness in the prosecutor's comments, reflected repeatedly in Perricone's postings, cast doubt on the integrity of the process, as did Jan's Mann's online questioning of the district court's motives in a related Danziger Bridge prosecution. Dobinski's contributions encouraged and approved one-sided reports about the trial. All of these experienced, high-level prosecutors were well aware that they were forbidden, legally and ethically, from making in public the statements they communicated online. They all knew that em-

ployment sanctions should be imposed for their activities if undertaken publicly.

Although the government does not deny the impropriety of online anonymous comments about pending cases, it downplays their prejudicial effects in several ways. First, the government argues that anonymity diminishes the cloak of authority that would otherwise surround the prosecutor's pronouncements. Because the online community does not know that a prosecutor is speaking, it cannot be adversely influenced by his inflammatory opinions. Second, the extent of the publicity surrounding the anonymous comments is uncertain because no one knows how many people read online comments to the newspaper of record. Third, these comments amounted to no more than voices in a chorus of public opinion on the Danziger Bridge trial and were no more likely to exert an influence than those of any other chorister. These arguments are not insubstantial, but they are outweighed by the insidious nature of prosecutorial anonymity, the growing influence of online communications to mold public opinion in our society, and the danger of mob reactions.

Anonymity provokes irresponsibility in the speaker. A prosecutor may attempt to comment anonymously in a pending case, whether in a bar, on a talk radio show, or online. It is hard to cloak one's experiences, however, and listeners can easily infer, as a number of readers within the New Orleans USAO evidently did, that someone with "insider knowledge" is making the comments. The speaker thus trades on his air of self-importance and his special knowledge, while imparting a biased and dramatic flair to his anonymous commentary.

Unlike this court's recent decision in *United States v. McRae*,[27] that there is no "proof" that members of the venire panel or actual jurors read or were influenced by the online comments exacerbates rather than alleviates prejudice here. Anonymous postings prevent uncovering the extent of improper influence, adding injury

27. In *United States v. McRae*, No. 14–30995, 795 F.3d 471, 2015 WL 4542651 (5th Cir. July 28, 2015), this court recently denied a new trial request to a former New Orleans police officer convicted of different crimes in the wake of Hurricane Katrina. The court found no actual or presumed prejudice attending online postings about the case by Sal Perricone. *Id.* at 481–83, 2015 WL 4542651 at *7. That decision is distinguishable for two reasons. Most important, McRae argued only "that the court should presume prejudice where deliberate and egregious government misuse of the media is combined with extensive pretrial publicity adverse to the defendant." He relied principally on the Supreme Court's decision in *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010), which we have distinguished, and not on *Brecht's* identification of "hybrid error." Indeed, the McRae court does not address *Brecht*. Second, unlike in this case, the *McRae* court was not tasked with attempting to uncover the extent of press leaks or government online commenting, nor was it obstructed in doing so by government delays, nor was there cumulative evidence of high-handed prosecutorial tactics, nor was there evidence that members of the jury may have been exposed to the online commenting before the trial, nor were the court's ultimate conclusions founded in grave uncertainty about the extent of government misconduct or the impact on the trial.

Finally, *McRae* and this case share an important characteristic: each decision affirms the trial court's exercise of its discretion to determine whether the "interest of justice" demands a new trial under Rule 33. *See United States v. Wall*, 389 F.3d 457, 465 (5th Cir.2004) (appellate review of district courts Rule 33 decision "is necessarily deferential to the trial court"). The steady trickle of troubling revelations about the ongoing misconduct here undermined "confidence in the jury verdict" even without an explicit connection between the comments and the jury, or between the prosecutors and the case team, that *McRae* viewed as indicative of prejudice.

to the insult of the biased, inflammatory, and improper communications themselves. Had the comments in this case been delivered by the prosecutors without the shield of anonymity, the extent of the harm would have been quantifiable, but their actions eliminated the measurement of harm. Moreover, the government overlooks that potential harm extends not just to jurors but others involved in the case. It is well to assume that the jurors, once impaneled, followed the district court's instructions not to obtain extrinsic information about the trial. For defendants, for the cooperating defendants who testified for the government, and for defense witnesses, however, there are no such restrictions. Only a naif would think that these people, and their families and friends, were not avidly consuming all available sources of information from the inception of the prosecution through trial. Inflammatory and biased online comments to news articles must have affected the participants' approaches to their defense, testimony, or decisions to testify. That there was some influence, although unquantifiable under these circumstances, seems inescapable.

Most pernicious, these attorneys' online comments knowingly contributed to the mob mentality potentially inherent in instantaneous, unbridled, passionate online discourse. These prosecutors created an air of bullying against the defendants whose rights they, especially Dobinski, were sworn to respect. That they were several among dozens of commenters, some of whom may have disagreed with their views, does not dissipate the effect of this online cyberbullying. Just as a mob protesting outside the courthouse has the potential to intimidate parties and witnesses, so do streams of adverse online comments. The impact is felt not only by the defendants but by codefendants pressed to plead guilty or defense witnesses dissuaded from testifying. Preventing mob justice is precisely the goal of prosecutorial ethical constraints. The government here should not be able to shelter under a banner of "no prejudice proved" while the prosecutors acted no better than, and indeed tried to inflame, the public.

For all these reasons, we conclude that the district court did not err in finding that the defendants were prejudiced by the government's misconduct. On this basis, too, the defendants are entitled to a new trial.

The government also argues that official and professional discipline were adequate to rebuke Perricone, Jan Mann, and Dobinski and should have sufficed in lieu of a new trial. Like the district court, we disagree. To begin with, whether those who committed misconduct were disciplined simply does not bear on whether the defendants received a fair trial. It is clear from Perricone, Mann, and Dobinski's testimony, moreover, that none of them is particularly remorseful about the misconduct, and they claimed to believe their individual First Amendment rights were separable from their positions of public trust. Perricone and Jan Mann both resigned from office with benefits as far as the record shows, although they were referred for professional discipline to the State Bar of Louisiana. Dobinski remains in federal employment with only a bare reproof for her online commenting. Their misdeeds are compounded by the government's insouciant investigation, which leaves open only three inferences concerning this prosecutorial breakdown: the government is not serious about controlling extracurricular, employment-related online commenting by its officials; the government feared what it might uncover by a thorough and timely investigation; or the government's investigation was incompetent. Exerting professional discipline on three individual government lawyers does

nothing to solve the systemic problem, and it is not a sufficient answer to the miscarriage of justice in this case.

II. Remove the Judge?

[13, 14] The government's final appellate point asks this court to remove Judge Engelhardt from this case, whatever its future course. Removal of a judge is a rare and disfavored order. *In re McBryde*, 117 F.3d 208, 229 (5th Cir.1997). This court must be persuaded that the judge's conduct "might reasonably cause an objective observer to question [the judge's] impartiality." *Johnson v. Sawyer*, 120 F.3d 1307, 1333 (5th Cir.1997) (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C.Cir.1995) (per curiam)); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864–65, 108 S.Ct. 2194, 2205, 100 L.Ed.2d 855 (1988); 28 U.S.C. § 455(a); 28 U.S.C. § 455(a). Three considerations go into this decision: whether the original judge would reasonably be able on remand to have substantial difficulty in laying aside his previously expressed views or findings that have been declared erroneous; whether reassignment is advisable to preserve the appearance of justice; and whether the efficiency costs involved in reassignment outweigh the benefits to the appearance of fairness. *In re DaimlerChrysler Corp.*, 294 F.3d 697, 700–01 (5th Cir.2002).

[15] Here, there is no basis for removing Judge Engelhardt for conscientiously responding to these novel events as they unfolded. The district court was outright skeptical over the defendants' initial new trial motion predicated on the Perricone revelations. Far from being a non-neutral arbiter, as the government contends, the district court was pushed into novel territory by ongoing revelations—that Perricone had spoken to the press before he had been questioned by DOJ; that Jan Mann had allowed Letten to lie in the district court's face, and she had herself been commenting while purporting to investigate the USAO commenting; that Perricone and Jan Mann seemed not credible on salient points; and that Bernstein, chief prosecutor, kept narrowing the scope of misconduct deliberately and artificially. The district court's failed confidence in the DOJ's ability to reveal the impact of inappropriate commenting led to the district court's strong suggestion for an independent DOJ review of Jan Mann's "investigation." This action was never challenged in the district court as an invasion of constitutional separation of powers, and the special investigator attempted to cooperate with the district court. The district court carefully preserved the *ex parte* nature of much of this investigation for several reasons, including the protection of DOJ employees during the pendency of a separate internal OPR inquiry. Finally, because we have not found the district court's findings erroneous or its conclusions inapt, it would make little sense to remove Judge Engelhardt for doing what was called for under the circumstances.

That Judge Engelhardt expressed his candid views about the government's highly disparate charges between cooperating defendants and those who exercised their right to a jury trial does not provide grounds for removal. Nor does his use of colorful language in his written opinions merit the severe professional sanction of removal from this prosecution. Judge Engelhardt's stylistic choices were likely induced when words like "incredible" and "novel" and "unprecedented" were no longer enough to describe the ongoing revelations of the government's misconduct and incomplete investigation. Judge Engelhardt's style is far outweighed by his thorough, fact-driven approach. The government's motion is meritless.

CONCLUSION

For the foregoing reasons, we find no abuse of discretion in the district court's grant of a new trial to these five defendants. **AFFIRMED; REMANDED FOR TRIAL.**

EDWARD C. PRADO, Circuit Judge, dissenting:

I agree with the majority that the actions of the government attorneys [1] in this case demean the integrity of the judiciary and merit the most severe sanctions. But we "cannot permit" these considerations "to alter our analysis, for we are not at liberty to ignore the mandate" of the Federal Rules of Criminal Procedure "in order to obtain 'optimal' ... results," *Carlisle v. United States*, 517 U.S. 416, 430, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996). Because the majority opinion relies on extraordinary facts to skirt ordinary procedure, I respectfully dissent.

Before this Court is an appeal of a new-trial order granted under Rule 33(b)(1) of the Federal Rules of Criminal Procedure. Rule 33 contemplates two kinds of motions for new trial: one "grounded on newly discovered evidence," and one "grounded on any reason other than newly discovered evidence." Fed.R.Crim.P. 33(b). The former "must be filed within 3 years after the verdict or finding of guilty," whereas the latter "must be filed within 14 days after the verdict or finding of guilty." *Id.*

As the Eleventh Circuit has recognized, "courts apply different standards" depending on whether the motion was filed within fourteen days or after fourteen days.

> The trial court's power with respect to a motion made within [fourteen] days is much broader than one made later than [fourteen] days but within [three] years relying on newly discovered evidence. For motions filed within [fourteen] days, a court has very broad discretion in deciding whether there has been a miscarriage of justice.
>
> After the [fourteen] days, a much more stringent standard applies.

United States v. Hall, 854 F.2d 1269, 1270–71 (11th Cir.1988) (alterations, footnotes, citations, and internal quotation marks omitted) (citing, *inter alia*, *United States v. Rachal*, 473 F.2d 1338, 1343 (5th Cir.1973)); [2] *see also Herrera v. Collins*, 506 U.S. 390, 409, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) ("We have strictly construed the Rule 33 time limits.").

A district court is *without authority* to consider a Rule 33 motion based on anything other than newly discovered evidence unless the motion is filed within the fourteen-day period. *See United States v. Brown*, 587 F.2d 187, 190–91 (5th Cir. 1979); [3] *see also United States v. Campa*,

1. I use "the government attorneys" as shorthand for the handful of individuals in the Eastern District of Louisiana U.S. Attorney's Office and in the Department of Justice who violated their ethical obligations and posted public comments about their cases on NOLA.com. I do not mean to include the many diligent and ethical attorneys who worked in the Office and the Department during this prosecution or who do so now.

2. Several cases refer to the seven-day time period in the previous version of the Rule, which was extended to fourteen days in 2009. Fed.R.Crim.P. 33 advisory committee notes.

3. Rule 33's time limit for many years was considered jurisdictional, *see, e.g., Brown*, 587 F.2d at 189–90 ("A district court has no jurisdiction to consider a new trial motion filed beyond the ... time limit contained in Rule 33...." (footnote omitted)), but in 2005 the Supreme Court clarified that Rule 33 is not a jurisdictional rule but a claim-processing one, though "one that is admittedly inflexible," *Eberhart v. United States*, 546 U.S. 12, 17–19, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) (per curiam). The effect of this change is that the nonmoving party must raise untimeliness as an affirmative defense, *id.* at 19, 126 S.Ct.

459 F.3d 1121, 1154 (11th Cir.2006) (en banc) ("A court may not consider motions for new trial based on any other argument than newly discovered evidence outside the [fourteen-day] period."). Here, the defendants were found guilty on August 5, 2011. Seven days later, the district court granted them additional time to file a Rule 33 motion for a new trial, as contemplated by Rule 45. The defendants' August 22, 2011, motions for a judgment of acquittal and a new trial were timely. On May 18, 2012, after it was revealed that members of the U.S. Attorney's office were commenting on NOLA.com, the defendants filed a new motion for a new trial under Rule 33.

The question, therefore, is whether the district court could have implicitly construed the defendants' May 18, 2012, Rule 33 motion as a renewal of their August 22, 2011, motions for a new trial in "the interest of justice."

Although the Fifth Circuit has not spoken on the matter, a robust circuit consensus—encompassing every court to have considered the issue—supports the conclusion that a later, untimely motion cannot relate back to, amend, or renew an original, timely motion. *See, e.g., United States v. Bramlett*, 116 F.3d 1403, 1405 (11th Cir.1997) (concluding that district courts have no power to construe an untimely motion for a new trial as a renewal of a timely motion);[4] *see also* Fed.Crim. Rules Handbook pt. II ch. VII, Rule 33 ("A trial court cannot construe a motion for new trial, filed outside the appropriate time period, as a 'renewal' of a prior motion ... [or] consider new arguments raised in [such a motion]. A court may not consider motions for new trial based on any other argument than newly discovered evidence outside the time period." (footnotes and internal quotation marks omitted)). In other words, a defendant cannot rely on the fact of having filed a motion that benefits from the broader, "interests of justice" standard when filing a second motion outside the fourteen-day statutory period; he is left with recourse only to the stricter "newly discovered evidence" standard.

Therefore, in the present case, the district court had authority to consider—and we have authority to review—*only* a motion for a new trial based on newly discovered evidence. Neither the district court

403—which the Government did in this case, both before the district court and here.

4. *See also United States v. Gupta*, 363 F.3d 1169, 1175–76 (11th Cir.2004) ("[P]ost-verdict renewed motions filed outside the seven-day period and any extension granted during that period are untimely."); *United States v. Jones*, 45 Fed.Appx. 271, 272 (4th Cir.2002) (per curiam) ("[A] supplement [that] raised distinct issues from the issues raised in [the defendant's] original motion ... cannot relate back to the original motion for timeliness purposes."); *United States v. Henning*, 198 F.3d 247, 1999 WL 1073687, at *2 (6th Cir. 1999) (unpublished) ("Untimely 'renewed' or 'supplemental' motions do not relate back to timely filed motions."), *abrogated on other grounds by Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *as recognized in United States v. Gonzalez*, 420 F.3d 111, 123 (2d Cir.2005); *United States v. Moreno*, 181 F.3d 206, 212 (2d Cir.1999) ("Because this purported motion for a new trial was made far outside the seven-day time limit, and there is no suggestion that the motion is based on newly discovered evidence, it was untimely, and we lack jurisdiction to consider the defendants' argument on appeal."); *United States v. Custodio*, 141 F.3d 965, 966 (10th Cir.1998) ("[A] defendant may not add new arguments in support of a motion for new trial by including them in an amendment filed after the time under Rule 33 has expired."). *But cf. United States v. Cruz–Padilla*, 227 F.3d 1064, 1067–68 (8th Cir. 2000) (treating an untimely amendment as relating back where the written motion filed after the deadline "merely renewed [the defendant's earlier, timely] oral motion on the same grounds, upon which the district court neglected to rule").

nor the majority opinion has applied the appropriate standard:

> In order to warrant a new trial on the basis of newly discovered evidence, [the defendant] must demonstrate that
>
> (1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) *the evidence introduced at a new trial would probably produce an acquittal.*
>
> Unless all factors are met, the motion should be denied.

United States v. Bowler, 252 F.3d 741, 747 (5th Cir.2001) (per curiam) (emphasis added) (quoting *United States v. Lowder*, 148 F.3d 548, 551 (5th Cir.1998)). When the "evidence goes to the fairness of the trial rather than to the question of guilt or innocence," the standard is more burdensome still: a defendant must show a "*substantial possibility* of prejudice." *United States v. Williams*, 613 F.2d 573, 573 (5th Cir.1980) (emphasis added).

This is a stringent test, as well it should be: we have consistently stressed that "[m]otions for a new trial based on newly discovered evidence are disfavored and reviewed with great caution." *Bowler*, 252 F.3d at 747 (citing *United States v. Gonzalez*, 163 F.3d 255, 264 (5th Cir.1998)). Indeed, we recently observed that we knew of *no case* "in which an appellate court affirmed the grant of a Rule 33 motion on grounds of prosecutorial misconduct unrelated to confidence in the jury verdict, merely as a way to punish contemptuous prosecutors." *United States v. Poole*, 735 F.3d 269, 279 (5th Cir.2013). We noted that attorney misconduct, even in the face of ineffective punishment, "[does] not give us license to make Rule 33 something it is not. A new trial remedy is inapposite to the harm where the putative 'wrong' has no effect on our confidence in the verdict or the fairness of the trial." *Id.* at 279 n. 24.

The majority opinion, the district court's order, and the defendant's own briefing all stray far from Rule 33(b)(1)'s narrow standard. Perhaps this is because the defendants advance no credible argument that the newly discovered evidence in this case—the identity of the commenters on NOLA.com—would likely produce an acquittal.

The defendants devote only six pages of their 105–page brief to arguing they were actually prejudiced by the government's conduct; almost none of the contentions in those pages relate to newly discovered evidence. The defendants advance a "theory of government media manipulation," leading to an "overriding tenor of guilt in the community long before trial" and a "prejudicial, poisonous atmosphere." Although they assert that "[t]his 'poisonous atmosphere' and concerted government misconduct had a substantial deleterious effect on the fairness of appellees' trial," they fail to point to *any indication* of actual prejudice resulting from newly discovered evidence, citing instead to a student note for the proposition that "damaging media spin can . . . be used to manipulate negotiation before trial—potentially driving individuals to settle or accept a plea where they otherwise would pursue trial on the merits."

Fatally to the defendants' claim, these arguments are not grounded in *newly discovered* evidence—i.e., the identities of the commenters. Indeed, it is difficult to see how this evidence could possibly have changed the outcome of the proceedings. The district court conducted an extensive voir dire: prospective jurors completed a lengthy questionnaire, and the district court questioned both the venire panel as a

whole and individual jurors in chambers. Then, counsel for both parties questioned the jurors based on their answers to the questionnaires. *Cf. Skilling v. United States*, 561 U.S. 358, 387–92, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). As the government notes, "[n]o defendant moved to strike for cause any juror who actually sat on this case." Throughout the trial, the district court repeatedly instructed jurors to avoid media coverage. It is well settled that "[a] jury is presumed to follow its instructions," *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000), and the defendants have produced *no evidence* to rebut this well-worn presumption.[5]

Most importantly, the truth about Perricone's postings came to light long after judgment was entered in this case. Therefore, even if the jurors had disregarded the court's instructions and read articles on NOLA.com during the trial (we must presume the contrary); even if they had bothered to read the user-generated comments on this public website; and even if they had paid particular attention to the comments posted under Perricone's or Mann's aliases, they *still* would not have known they were receiving impermissible information from a source within the U.S. Attorney's Office. The post-verdict discovery of the posters' identities does not change this conclusion,[6] which proves fatal to the defendants' claim.

The majority opinion reaches a contrary holding.[7] It asserts that this case defies

5. After the identities of the posters came to light, the district court decided its voir dire was "flawed and insufficient." The court reached this conclusion primarily because the voir dire questionnaires indicated that seven of the twelve jurors had visited NOLA.com and the jurors who did not visit NOLA.com tended to agree more strongly with the statement "NOPD officers tend to be honest" than did jurors who were familiar with the site. *Id.* This is a thin reed on which to build an argument for a new trial. As the government notes, this is too small a sample to reach a statistical conclusion. *See Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 621, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974). Indeed, the district court did not find this conclusion significant at the outset of the trial. And, as discussed further in note 14, *infra*, the district court declined to conduct a post-trial hearing to see whether any of the jurors read articles about this case, let alone the *comments*, on NOLA.com.

6. This Court recently reached the same conclusion in a similar case arising from the online misconduct by lawyers in the U.S. Attorney's Office, *United States v. McRae*, No. 14–30995, 795 F.3d 471, 2015 WL 4542651 (5th Cir. July 28, 2015). In my view, *McRae* applied an appropriately narrow frame of inquiry. The majority opinion notes the important differences between *McRae* and the present case. Ante at 361 & n. 27. I write only to express that here, as in *McRae*, we cannot presume prejudice. *McRae*, 795 F.3d at 480–84, 2015 WL 4542651, at *6–8. "Without connecting the online comments to the jury, the new evidence does not call into question the integrity of its verdict." *Id.* at 481, 2015 WL 4542651 at *7.

7. Although the majority opinion holds in the alternative that there was prejudice in this case, its reasoning sweeps far beyond the scope of Rule 33(b)(1): it addresses allegations that the government "pressured cooperating defendants to seek plea deals and then to shade their testimony against the others" and made "threats of perjury charges against defense witnesses, which had never materialized." *Ante* at 356. It also looks to harm that "extends not just to jurors but others involved in the case," such as cooperating defendants and witnesses. *Id.* at 357–58. But these examples fail to persuade: the district court could have examined the role of plea bargaining, witness tampering, and intimidation had the defendants briefed these matters in their original Rule 33 motions filed shortly after the verdict. They did not. And on the basis of the arguments *actually advanced* by the defendants, the district court found that a new trial was not warranted. To the extent that the defendants and the majority opinion cite these practices now as evi-

Rule 33 harmless-error analysis because the district court could not possibly conduct a sufficiently thorough investigation into the extent of any prejudice. But this renders the standard meaningless. A party is not exempted from proving prejudice merely because it is difficult. On the contrary, a defendant who fails to show prejudice is simply not entitled to a new trial under Rule 33, regardless of the severity of the underlying misconduct. Courts cannot throw up their hands in dismay at the size of the task.[8] Neither we nor the district courts in our circuit may ignore our obligation to apply established rules to the record before us.

Rather than engage in ordinary Rule 33 analysis, the majority opinion discards the established standard and opts for the hy-

dence of prejudice, their efforts are unavailing for the simple reason that this evidence is not newly discovered—the only ground for relief invoked by the defendants under Rule 33(b)(1).

The majority opinion also finds prejudice based on "the mob mentality potentially inherent in instantaneous, unbridled, passionate online discourse," *ante* at 358. It remarks: "That [the government attorneys] were several among dozens of commenters, some of whom may have disagreed with their views, does not dissipate the effect of this online cyberbullying." *Id.* The trouble is, the majority opinion fails to show why voir dire was inadequate to insulate the jury from the purported effects of these comments. Nor does it point to portions of the record that show how or why a different outcome might obtain on retrial. Invoking the amorphous specter of social media and cyberbullying—in the district court's words, an "online 21st century carnival atmosphere," *ante* at 339—is insufficient to free defendants of their obligation to prove that the verdict would probably be different.

In sum, instead of requiring the district court to follow our ordinary procedure for proving prejudice, the majority concludes: "That there was some influence, although unquantifiable under these circumstances, seems inescapable." *Ante* at 358. This is not enough to support a new trial based on newly discovered evidence. *See Bowler*, 252 F.3d at 747; *United States v. Riley*, 544 F.2d 237, 241 (5th Cir.1976) ("The likelihood of changing a jury's decision must rise *considerably above the level of speculation* in order to justify a new trial." (emphasis added)).

8. The district court expressly declined to hold an evidentiary hearing to determine the extent of prejudice in this case—offering instead to do so only on remand. December 12 Order and Reasons, at 21 ("Were the Fifth Circuit to agree [that the motion was granted in error], it might well determine that an evidentiary hearing indeed should be held, as was this Court's initial inclination."). In fact, although the district court agreed that "obvious questions remained unanswered," it held out further evidentiary proceedings as a sort of threat should the government appeal: "[F]urther pursuit of testimony and other evidence likely would result in more material revelations confirming the aggressive online activity of DOJ personnel in causing this prosecution to become a cause célèbre in this community, and in the DOJ." *Id.* at 22. The district court itself acknowledged that a thorough post-verdict voir dire would help determine the extent of any prejudice, *id.*, ("[T]he same type of thorough, searching questions employed during the voir dire process ... would have to be asked of the jurors and key trial witnesses"), and it even suggested some questions it might ask:

> [W]hether [the individuals] read particular news articles and/or the comments to the articles on Nola.com during the long timespan pertinent here and, if so, how often; whether they read or were aware of the particular Nola.com postings at issue here; whether they can remember with certainty if they read or were aware of any of the postings at issue here; whether during times relevant they discussed the news articles or comments published on Nola.com even if they did not personally read them; whether they or anyone close to them ever posts or blogs online; and what their opinion is, if any, of persons who do post or blog online.

Id. at 22–23. Nevertheless, the district court declined to hold such a hearing. *See id.* Thus, as the majority seems to accept, the record before us is necessarily devoid of evidence of the impact, if any, of the postings on the jury.

brid-error formulation in footnote nine of *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). I see why the majority finds the *Brecht* standard alluring: it allows the court to consider allegations of witness intimidation and disparate sentencing practices walled off from our inquiry under a Rule 33 motion for newly discovered evidence.[9] But I am not persuaded that the *Brecht* standard is cognizable in this procedural posture.

First, this Court cannot sua sponte apply *Brecht* and ignore Rule 33: we lack authority to affirm a new trial granted without a proper motion. *Brown*, 587 F.2d at 189 (noting that a district court "is powerless to order a new trial except on the motion of the defendant"). The only motion presented to the district court and properly before us is one grounded on newly discovered evidence under Rule 33(b)(1). Second, neither the majority opinion nor the district court has sought to harmonize *Brecht's* hybrid-error formulation with our longstanding five-prong standard for granting a new trial under Rule 33(b)(1). The only logical explanation is that the standards are irreconcilable. Rule 33(b)(1) contemplates a limited inquiry: once the defendant has identified the newly discovered evidence and demonstrated due diligence, relevance, and materiality, the court must look to the prejudicial effect of the omission on the proceedings, as discernible from the record on appeal. *See Bowler*, 252 F.3d at 747. By contrast, *Brecht* error was first proposed in a habeas corpus proceeding. *See Brecht*, 507 U.S. at 622, 638 n. 9, 113 S.Ct. 1710. Courts engaging in collateral review have authority to conduct hearings and collect additional evidence; they are not limited by the record on appeal nor by the requirement that evidence of prejudice be newly discovered. Although I would not foreclose the possibility that a court could analyze *Brecht* error on direct appeal via a motion for a new trial grounded on reasons *other than* newly discovered evidence under Rule 33(b)(2), I am hesitant to be the first court in the country to find *Brecht* error in this procedural posture.

In sum, I would conclude that the district court abused its discretion in granting a new trial. The district court erred in not applying our established Rule 33(b)(1) standard, and the defendants have not carried their heavy burden to prove that "the evidence introduced at a new trial would probably produce an acquittal," *Bowler*, 252 F.3d at 747. In holding otherwise, the majority opinion puts us at odds with binding Fifth Circuit precedent as well as authority from our sister circuits.

It is a fundamental tenet of our legal system that neutral rules must be applied evenly to all. We do not—and indeed we cannot—interpret the Federal Rules of Criminal Procedure differently based on the character of the defendant or the circumstances surrounding his trial. The government attorneys acted deplorably in this case, and their punishment has been unconscionably mild. But a new trial is

9. I do not find the government's charging practice as outrageous as the majority does: offering a reduced charge or sentence to a collaborating coconspirator is commonplace in the federal system. Rarely, if ever, is it grounds for a new trial. *See, e.g., United States v. Cawley*, 481 F.2d 702, 709 (5th Cir. 1973) (declining to grant a new trial where the defendant alleged newly discovered evidence that an indicted coconspirator was never charged despite self-incriminating testimony at trial and noting that the government "has wide discretion in determining whether a prosecution against a particular individual shall be commenced or maintained"); *see also United States v. Scroggins*, 379 F.3d 233 (5th Cir.2004); *cf. United States v. Prout*, 526 F.2d 380 (5th Cir.1976).

not the proper remedy on the record before us. I respectfully dissent.

CENTURY SURETY COMPANY, Plaintiff–Appellant Cross–Appellee

v.

Cylie BLEVINS, individually and as Tutor on behalf of Jeffrey Dugas, II; Jeffrey Dugas, Defendants–Appellees

Sohum, L.L.C., doing business as Regency Inn, Defendant–Appellee Cross–Appellant.

No. 14–31131.

United States Court of Appeals, Fifth Circuit.

Aug. 18, 2015.

Background: Insurer brought action seeking a declaration that, under a commercial general liability (CGL) policy, it was not required to defend or indemnify its insured, a hotel operator, in underlying suit brought by parents of a minor patron who was injured after drinking from frozen carbonated beverage cup containing sodium hydroxide, which he found in the hotel's laundry facility. Insured filed counterclaims for breach of contract, estoppel, vicarious liability, bad faith, and unfair trade practices. The patron's parents filed counterclaims for a declaration that the policy provided coverage in the underlying suit and for payment for all damages. The United States District Court for the Western District of Louisiana, Richard T. Haik, Sr., J., 2014 WL 3407098, granted insurer's motion to dismiss all counterclaims and sua sponte dismissed insurer's declaratory judgment action under the abstention doctrine, and, 2014 WL 5808389, granted insured's motion to amend judgment in part. The parties appealed.

Holdings: The Court of Appeals, Edith Brown Clement, Circuit Judge, held that:

(1) insured's bad faith claim was not limited to prohibited acts set forth in statute imposing on insurer a duty of good faith and fair dealing;

(2) insured could not bring unfair trade practices claim against insurer;

(3) district court was required to provide both notice and an opportunity to respond before it sua sponte dismissed insured's unchallenged counterclaims.

Affirmed in part, reversed in part, vacated in part, and remanded.

1. Declaratory Judgment ⇐394

Court of Appeals reviews the dismissal of a declaratory judgment action for an abuse of discretion. 28 U.S.C.A. § 2201(a).

2. Federal Courts ⇐3587(1)

Dismissals for failure to state a claim are reviewed de novo, and the dismissal will be upheld only if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. Fed. Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

3. Insurance ⇐3349

Under Louisiana law, insured hotel operator's claim that its commercial general liability (CGL) insurer acted in bad faith in refusing to provide coverage in underlying suit brought by parents of minor patron who was injured after drinking from a frozen carbonated beverage cup containing sodium hydroxide, which he found in hotel's laundry facility, was not limited to the prohibited acts set forth in statute impos-

4 St. Mary's J. Legal Mal. & Ethics 440

St. Mary's Journal on Legal Malpractice & Ethics
2014

Comment

Paige A. Thomas [a1]

ONLINE LEGAL ADVICE: ETHICS IN THE DIGITAL AGE

Contents

*441 I. Introduction

Twenty years ago, a person looking for a lawyer would browse the Yellow Pages, [1] seek recommendations from friends and family, or try to recall names from billboards. After obtaining a contact number, the next step was calling and scheduling a meeting with an attorney in his office. Following that initial interview, an agreement for representation could be formally obtained through a letter of engagement or unceremoniously with a simple handshake. But, times have changed. The Internet has flipped this interaction on its head by allowing prospective clients to pose legal questions to attorneys via text and even real-time video chat. [2] This enhanced technology allows attorneys to operate a worldwide storefront at a minimal cost. [3]

Inevitably, however, with the good comes the bad. In the wake of this Internet-driven era, a host of problems concerning privacy rights and consumer usage have emerged. [4] Websites have transformed from personal *442 social outlets into branding machines for professionals and corporations hoping to generate new business. [5] With little-to-no authority in place to adequately address these problems, [6] social media is quickly becoming the next legal ethics battleground. [7] Though social media provides flexible office hours [8] and a worldwide appeal, for attorneys utilizing it in a professional rather than personal capacity, it presents

numerous red flags.[9] Even unintentionally, social media carries serious liability issues for lawyers.[10] This Comment highlights the dangers facing attorneys, and the legal profession at-large, in maintaining an online presence.[11]

***443** The beauty of the old days was the simple fact that individuals had face-to-face interactions with their lawyers, clearly defining the lines of the attorney-client relationship and setting out the scope of work to be performed. This process made for greater accountability between the lawyer and his client. Now, in this Internet age, where immediacy and response time are driving factors in an attorney's online presence, the approach is far more informal. An inherent danger lies in off-the-cuff remarks, made on the Internet, a platform generally associated with distressingly low standards of research, citation and accountability. While an attorney may view these remarks as mere suggestions, if a client perceives them to be legal strategy--or worse, advice--that attorney may be at risk of a malpractice suit.

For example, a client with a legal question may not want to go through the process, time, and expense of researching a lawyer and setting up an interview appointment--only to be told that nothing can be done to resolve the issue. Alternatively, that client could be informed that the research alone may cost thousands of dollars, with no guarantee the research (and expense) would lead to a positive result. However, what if the same client could go online, ask an actual attorney a legal question, and get a response faster, all from the comfort of home and for free?

That hypothetical example is now an actual social-networking platform, thanks to the website LawZam.com.[12] LawZam is essentially an online social networking platform pairing lawyers and clients together for free videoconferencing consultations.[13] Think match.com[14] for attorneys and clients. Since its launch in June 2012,[15] the site has received more than 10,000 members representing nearly all fifty states.[16] The appeal of LawZam and similar sites is that it gives lawyers the ability to "create digital storefronts so prospective clients can determine which lawyer they want."[17] LawZam is not the only Internet service geared toward matching ***444** Internet users with attorneys who provide live answers to legal questions, and in some instances, even representation.[18] Although still in its beginning stages, apparent red flags already exist with this attorney-client matchmaking model.

The sheer number of issues arising from legal social media stem, in part, from the permanent nature of the Internet. Attorneys often do not realize that by making a statement or giving advice through an online forum, they are essentially going "on the record" and are forever linked to those remarks. Attempts to pull it out of the cyber record will not succeed--what users put on the Internet remains there forever.[19]

Another key issue affecting the online legal community is the performance of conflicts checks, or the utter lack thereof.[20] Conflicts-check issues arise in a number of ways, just as they do in the offline world,[21] including, but not limited to: engaging in conversations with prospective clients who present an issue adverse to a current client, taking a stance on an issue inconsistent with your firm or colleagues, and inadvertently establishing an attorney-client relationship.[22] Conducting ***445** conflicts checks may be a passing thought for the attorney giving advice on the Internet, but failure to do so can result in malpractice and grievances with the state bar.[23]

Another common pitfall for the attorney taking to the Internet as a means of offering legal services is negligence. Setting aside the perils of the involuntary reactions discussed above, there is, of course, also a real danger in providing bad advice.[24] Typical examples of this issue arise when attorneys offer advice in an area of law in which they are unfamiliar or give advice on a complex issue without the adequate experience and research to fully appreciate the complexities.[25] This problem is of particular significance with websites like LawZam that tender inexperienced attorneys-- potentially fresh out of law school--who may be struggling to find a job and in need of a quick paycheck.[26] Instead of finding work with a law firm where recent graduates can learn from seasoned attorneys, young lawyers are jumping straight into the practice and exposing themselves to unforeseen liability.

Specific to websites like LawZam, which markets itself as "speed-dating for the legal world,"[27] the idea of matching an attorney with an individual for brief informational screening sessions walks a fine line between acting *446 as a pitchman to gain prospective clients and providing the professional responsibility that the Bar requires. Not only is solicitation of clients unethical, but attorneys selling themselves may lead to misrepresentations and promises that cannot be kept.[28] Furthermore, the unauthorized practice of law is another issue at the forefront of legal social media usage.[29] Specifically, an attorney videoconferencing with clients in different parts of the country, where they are not licensed, could be accused of the unauthorized practice of law.

Without clear guidance on what interactions are permissible in the world of social media, attorneys are encountering ethics problems due to their inability to apply outdated ethics rules to new technology.[30] Social media has a powerful presence in society that will continue to grow in the future. Yet, even at its current stage of development, it directly impacts practitioners on a daily basis--from their credibility and reputation, to their inability to practice law after disbarment for unethical conduct, and the broad principle of losing clients to these virtual outlets. This Comment provides practitioners with a better understanding of the apparent risks in social media use, as seen through the LawZam website model, and how to navigate these uncharted waters absent American Bar Association (ABA) and state regulations directly addressing social media. In doing so, attorneys may better be able to assess the benefits and burdens of maintaining an online presence while not running afoul of professional responsibility rules.[31]

*447 II. Online Legal Forums

"'Social media' is an umbrella term for social interaction using technology . . . with any combination of words, pictures, video, or audio."[32] The term applies to a range of online forums, such as social networking sites (namely Facebook), blogs, micro blogs (Twitter), and other dynamic websites.[33] Since the birth of Facebook in 2004,[34] social media's exponential growth into the commercial market has whipped corporations and media service providers into a frenzy.[35] Thanks to this emergence of online forums, today almost anything can be accomplished with the click of a mouse--even hiring an attorney.[36]

A. The LawZam Model

Marketed as a social networking platform, LawZam provides a forum in which Internet users seeking legal advice may visit and engage in free, live, face-to-face consultations with attorneys.[37] In that sense, the LawZam model is not unlike a dinner party host, bringing people together in an environment that facilitates open communication and mutual gain. Upon arrival at the website, visitors have several options in their quest for legal advice. First and foremost, visitors may search for a lawyer by a particular *448 area of law, geographic region, or even by name.[38] If that is not appealing, they may live chat or video conference any attorney currently logged on to the website, or leave a message for an offline attorney to schedule a future meeting time.[39] Thus, any attorney registered with LawZam is never more than a few clicks away. As an added feature, visitors may sidestep the entire process of selecting a lawyer by simply typing their question in the "Ask a Lawyer" dialogue box on its main webpage, and waiting for a response from one of LawZam's more than ten thousand practicing advocates.[40] Once a legal match is made,[41] visitors may carry on with representation just as if they had stepped into that lawyer's office.[42]

In March 2013, LawZam announced the release of its mobile application for use on iPhones and iPads, allowing an even broader range of accessibility as legal consumers can now text chat lawyers and video conference from virtually anywhere.[43] While this level of access to legal aid is unprecedented, it is not without value to the typical consumer. According to the ABA's Standing Committee on the Delivery of Legal Services Harris Poll, 18% of respondents said "they would be 'very likely' or 'somewhat likely'" to look for a lawyer to handle a matter through social networking sites.[44] Certainly, the message is clear. Society is

shifting toward capitalizing on technological advancements, particularly when such advancements come with the benefits of ease and immediacy, at only a minimal or no added expense for the consumer. [45]

***449 B. The Blogosphere**

Another popular forum for online legal advice, and the subject of its own numerous ethics opinions, is the world of constantly updated, unfiltered, user generated, bulletins, called blogs. [46] "Blogs" [47] attempt to mimic stream-of-consciousness by combining text, pictures, videos, newspaper articles, and even other websites in a form that would be recognizable to a typical diarist. [48] Blogging, the idiom for updating a blog, has gained traction as yet another way for people to discuss opinions and observations on a particular topic, with the added ability to have viewers post questions or provide commentary. [49] The blog's operator, who can range from a single individual to a group of authors or even a company or institution, invites discussion by posting a prompt message, on a discrete issue. [50]

Blogs, once just a platform for moderated discussion boards, are now a driving force in business. [51] In fact, today, the share of American companies using blogs for marketing purposes is nearly 40%, with those ***450** same companies benefiting from nearly 55% more overall website traffic. [52] While these figures alone are noteworthy, their ramifications for the future are astounding--even in the legal profession. Nearly half of those polled by the ABA's Standing Committee on the Delivery of Legal Services stated that they would use the Internet as a resource for finding legal aid in some fashion. [53] In addition to the 18% mentioned by the Standing Committee poll as being likely to seek legal counsel through social networking sites, another 15% stated they were likely to use blogs; and further, 14% acknowledged they were likely to turn to some form of email discussion lists. [54] These results suggest that now more than ever people are going online in search of legal assistance.

C. Legal Websites, A Broad Range

While LawZam's use of videoconferencing and emphasis on venue rather than service make it unique in the field, providing online legal advice is hardly an exclusive model. Joining the online legal revolution, and its growing market share, a number of websites offer visitors the ability to pose legal questions and receive answers. [55] These sites vary in a number of ways, from what they offer--whether it is forms, advice or even representation--to what they charge, but the same theme bleeds through: the days of finding a lawyer at a dinner party, or by referral from a neighbor, while perhaps not over, are certainly numbered.

These websites typically feature columns highlighting recent legal questions with their respective responses provided by designated legal experts. [56] Some websites even supply other services, such as publishing ***451** legal forms for consumer use, explanations of how to take certain legal action pro se, or, like LawZam, client-attorney matching. [57] So, not only can a potential client "meet" an attorney before moving forward, that attorney is now essentially with that client at all times--only an instant message away.

III. Governing Ethics Principles

A. Evolution of the ABA's Rules of Professional Responsibility [58]

The original body of rules governing lawyer conduct and ethics was the 1908 Canons of Professional Conduct (Canons). [59] The Canons were considered merely aspirational guidelines and consisted of thirty-two "rules." [60] In 1964, the ABA House of Delegates formed a Special Committee on Evaluation of Ethical Standards--otherwise referred to as the "Wright Committee"--to determine whether revisions were needed for the then-current edition of the Canons. In response, the Wright Committee

rewrote the rules of professional conduct and replaced the Canons of Professional Conduct in 1969 with the Model Code of Professional Responsibility (Model Code), which stood until 1982. [61]

*452 The Model Code retained the aspirational character of the 1908 Canons through an "Ethical Considerations" section, but added, among other things, [62] a "Disciplinary Standards" section which contained black letter mandatory standards. [63] In 1977, the House of Delegates tasked the Kutak Commission to evaluate "whether existing standards of professional conduct provided comprehensive and consistent guidance for resolving the increasingly complex ethical problems in the practice of law." [64] After thorough research and study, the Kutak Commission determined that another piecemeal amendment would not result in a comprehensive collection of law governing the legal field. [65] As a result, since 1983, lawyers' obligations have been governed by the restyled American Bar Association's Model Rules of Professional Conduct (Model Rules). [66] Most states have now adopted these Model Rules. [67]

*453 Consistent with its tradition of rule drafting, the ABA established the Ethics 2000 Commission in 1997. [68] The Ethics 2000 Commission was charged with updating and recommending changes to the 1983 Model Rules, a task similar to those of the Wright Committee and Kutak Commission. [69] Of particular concern for the Ethics 2000 Commission was attempting to reform the Model Rules and provide national uniformity among jurisdictions. [70] The ABA's Model Rules continue to reflect a nationally recognized framework for implementing professional conduct standards, [71] and have been modified as recently as 2013. [72]

B. Texas Disciplinary Rules of Professional Conduct

In 1909, the Texas Bar Association adopted the Texas Canons of Ethics (Texas Canons), [73] modeled after the then-existing ABA Canons of Professional Ethics. [74] Those Texas Canons were in effect until 1971 when the Texas Code of Professional Responsibility replaced them (Texas Code). [75] Following the ABA's adoption of the Model Rules in 1983, the *454 State Bar of Texas also began considering those rules for possible incorporation. [76] The Texas committee charged with evaluating the 1983 Model Rules determined that it would incorporate the Model Rules' "'restatement' format"-- comprised of black letter law followed by commentary. [77] This development was a departure from the existing Texas Code [78] format, which mirrored the ABA Code consisting of canons. [79]

In 1989, both the Supreme Court of Texas and the Texas Court of Criminal Appeals adopted the Texas Lawyer's Creed. [80] The creed is a mandate for professionalism, which, according to Judge Lamar McCorkle, "gave voice to the cornerstones and timeless principles of justice and fairness of our profession." [81] One year later, the Texas Code was repealed *455 and replaced with the Texas Disciplinary Rules of Professional Conduct (Texas Rules) [82] by an overwhelming approval of 84.14%. [83] Essentially, the Texas Rules track the same format and layout of the ABA Model Rules, [84] yet there are many variations between these two sets of rules. [85] The Texas Rules serve as the disciplinary standards embracing "Texas law of professional discipline for lawyers." [86] Since 1990, the Texas Rules have gone through various amendments, the most recent being in 2005. [87] Additionally, the supreme court's Professional Ethics Committee [88] regularly issues advisory ethics opinions. As of October 2013, there have been 637 opinions issued, covering a wide array of professional responsibility topics. [89]

***456 C. Ethics 20/20 Commission Addressing Changes in Technology**

On September 20, 2010, the ABA's Commission on Ethics 20/20 Working Group on the Implications of New Technology (Working Group)[90] released a memorandum entitled, Issues Paper Concerning Lawyers' Use of Internet Based Client Development Tools.[91] The Working Group was charged with examining recent legal ethics issues emerging from technological advancements, specifically the Internet and Internet-related forums.[92] The purpose of the paper, which was addressed to various ABA entities, courts, bar associations, law schools, and attorneys, was to elicit feedback on the current remedies being considered by the Working Group prior to submission to the House of Delegates for review.[93]

The Working Group's evaluation discussed a myriad of issues including: (1) the guidance or standards needed for attorneys regarding their social networking sites, blogs and websites;[94] (2) the guidance needed for lawyers ***457** to avoid establishing inadvertent attorney-client relationships through the Internet;[95] and (3) the circumstances that could potentially trigger application of the Model Rules to attorney participation in blogs.[96] Following the submission of the Working Group's paper, which underwent extensive revision, the House of Delegates approved amendments to the ABA Model Rules on August 6, 2012, incorporating verbiage to resolve lingering uncertainties and confusion of the Rules' applicability to attorney use of technology.[97]

D. The Internet and Social Media's Effect on the Rules

The Model Rules, Texas Rules, and their numerous research committees are set up in a reactionary manner--meaning they assess changes in society and their impact on the applicability to both the Model Rules and Texas Rules. As a result, the rules tend to lag behind recent developments in the law and technological advancements. It is during this "lagging" period that practitioners should be particularly cautious and mindful of overstepping professional responsibility boundaries.

Take for instance the Ethics 20/20 Committee mentioned above, which issued its paper on lawyer use of technology as a means of client development.[98] That paper was issued eliciting feedback in 2010, ***458** addressing concerns that had surfaced up to that time, yet it was not adopted until August 6, 2012--some two years later.[99] Without a doubt, additional ethics issues materialized during that two-year period that were not contemplated in 2010, and thus would not be reflected in the most recent amendments.

This is precisely the problem lawyers find themselves in today--the very nature of the Internet is that of a living, breathing forum, evolving as users become more numerous and sophisticated. The ABA committees currently in place simply cannot keep up. Even the most current amendments do not go far enough in providing practical guidance for social media usage. Instead, attorneys are left with a still-and-ever-outdated set of rules, which made little substantive change from the previous rules. Until adequate rules are in place providing guidance on social media usage, a good rule of thumb that lawyers should employ is asking, "Would this action be ethical in the offline world?"[100] If the answer is no, then ask whether it is likely to be unethical in the online world as well.[101]

IV. Ethical Traps to Consider

A. The Inadvertent Attorney-Client Relationship

This ethics vulture continually preys on lawyers using social media as a method of communicating with prospective clients. At first blush, it seems rather simple to tell when an attorney-client relationship has been established, but reviewing state bar ethics opinions quickly dispels that notion.[102] The initial step in making a determination begins by ***459** understanding that, it is the reasonable expectations of the prospective client that trigger the creation of the relationship, not the expectations of the lawyer.[103] Perhaps surprisingly, this standard allows formation of an attorney-client relationship without an engagement

letter.[104] This reasonable expectation standard can be dangerous when applied to social networking sites-- and sites such as LawZam--because an interactive dialogue exchanged between lawyer and layperson concerning legal issues invites a reasonable expectation by the layperson to understand that he was ***460** consulting the lawyer in a professional capacity.[105] A related sub-issue arising from this standard is clarifying the blurry distinction between providing legal information and offering legal advice.[106]

While there is no bright line delineating when an attorney-client relationship begins, most state bars suggest that not only lawyers should exercise caution online, but if they decide to offer responses to legal inquiries, responses should be general communications that do not contain fact-specific circumstances.[107] As an additional measure, numerous authorities recommend when providing general legal information attorneys employ clear disclaimers[108] regarding the content of the information they are providing.[109] Disclaimers should state that no attorney-client ***461** relationship is formed by the disclosure of information.[110] These disclaimers may help shield attorneys from forming inadvertent attorney-client relationships.[111]

Rule 1.18 of the ABA Model Rules of Professional Responsibility makes clear that an attorney-client relationship arises when a prospective client consults with an attorney about potentially forming a relationship.[112] Under that rule, an attorney-client relationship results when a potential client submits information in response to an invitation from a website, blog or similar medium.[113] Through a series of hypotheticals, the ABA sets out its formal opinion on the issue of lawyer websites, requiring either a consultation or communication under Rule 1.18.[114] However, the ABA Rules are clear that information unilaterally communicated to a lawyer, ***462** where the lawyer lacks a reasonable expectation of discussing legal issues, does not implicate the rule regarding the creation of attorney-client relationship.[115]

Applying the plain language and meaning of Model Rule 1.18 to the LawZam model implicates the formation of an attorney-client relationship the moment a potential client visits the website and types his legal question.[116] As a result, there is a very low threshold to overcome before a person can claim an attorney-client relationship via the Internet.[117] Therefore, attorneys should exercise caution before responding to an individual's legal inquiry, and also take pause to consider the effect their response may carry, crafting their answers accordingly.

B. Conflicts Checks

Conflicts of interest issues may arise at any point in the legal representation process--during interviews, throughout representation, and even post-representation.[118] In the context of social media communications, conflicts problems commonly arise in a myriad of categories: (1) providing legal advice to an individual adverse to a current client--this is the typical conflict of interest commonly thought of by attorneys;[119] (2) issue conflicts formed by an inconsistency between a legal ***463** position provided by the attorney--potentially on a blog or message board--and a position taken by the attorney or his law partner on behalf of another client;[120] and (3) revealing confidential information obtained from a prospective client in the scope of determining whether to undertake legal representation.[121] Conflicts checking is critical, but the anonymity of the Internet severely frustrates the attorney's ability to properly comply with such an obligation.[122]

In August 2010, the American Bar Association issued a Formal Ethics Opinion acknowledging the growing use of attorney websites as a means of communicating with the public.[123] The opinion cautions attorneys to limit what they provide to website visitors, making sure all content is informational, not advice, and is general rather than specific in nature.[124] ***464** While lawyers can maintain an electronic presence without necessarily violating ethics rules, they still have a duty to obtain sufficient information from prospective clients to perform conflicts checks before giving legal advice.[125] The forum of the

communication does not change the standard imposed on the attorney; therefore, conflicts checks should occur just as if the client came to his office for an in-person meeting. [126]

In an ethics opinion offered by the New York State Bar Association, in which an attorney sought approval to answer legal questions in chat rooms, the committee warned that a violation of ethics rules would result if the attorney provided legal advice and thereby established an attorney-client relationship without undergoing the requisite conflicts check as required by the rules. [127] The Supreme Court of Ohio issued a similar opinion discussing ethical guidelines for online legal representation. [128] In providing its advice to attorneys about whether they may engage in online ***465** legal representation, the board reinforced that all representation must first be free from any conflict of interest. [129] The court opined that where legal representation may occur through the Internet via email questions and answers, there must be an online intake form that allows the law firm to perform a conflicts check prior to even reviewing the legal question. [130]

Every firm, small or large, should operate a conflicts checking system for prescreening clients. [131] This system should be used for Internet communications and video consultations between lawyers and the public, especially for those sites attempting to match attorneys with prospective clients where the potential risk for a conflicts issue is apparent. [132] In the scenario where an attorney engages in preliminary communications with a potential client to determine the possibility of representation, and during the scope of that communication a conflict of interest is revealed, the attorney is obligated to decline any representation and refrain from providing any legal advice. [133] For blogs and other non-real-time communications, disclaimers may assist the attorney in avoiding issue-based conflicts problems by putting labels on online content, designating it as an opinion of the author and not a reflection of the law firm or its clients. [134] Alternatively, firms may avoid disqualification by requiring ***466** visitors of their blog or website to affirmatively consent to terms of use before posting or otherwise submitting information through the blog or website. [135]

C. Negligent Misrepresentation

Negligence is a claim lawyers know all too well. [136] Every law school graduate is familiar with tort claims for breach of duty or standard of care, but seldom do attorneys, particularly recent graduates, equate negligence with their own actions. [137] However when such claims do arise, a claim of negligent misrepresentation against an attorney serves as a reminder to other practitioners that they are not unassailable in the eyes of the law but, instead, are subject to liability when providing bad advice or breaching client-owed duties. [138] In the more informal and relaxed setting of the online world, additional risks materialize for the attorney who does not adhere to the same degree of caution as in the offline world. [139] While electronic forums seem informal when compared with the four walls of an office, the standard of care owed to these users--potentially millions of ***467** people--should be more stringent rather than less. One way in which negligence claims creep into the social media spectrum is when attorneys, in response to some Facebook post or law blog, provide quick, off-the-cuff, unresearched answers to the public on a particular legal issue. [140] Take, for example, an individual with a legal problem who goes on the Internet, comes across a legal matchmaking website, and decides to use the service. He presents his legal dilemma through the live video consultation feature found on the website. Because the attorney--who, judging by the fact that he is utilizing this service himself--may already be anxious for business, has this limited window to impress the potential client, he may provide an answer without thoroughly weighing all implications. If the client adheres to the advice and is then in an even worse position, he may bring a claim against the attorney for providing bad legal advice. [141]

Importantly, ABA Model Rule 1.1, entitled "Competency," reiterates that attorneys should provide competent representation to all clients. [142] As part of the commentary of Rule 1.1, the ABA stresses that attorneys have a duty to maintain competency [143] throughout the representation of a client. [144] Attorneys are subject to negligence or misconduct claims if they provide legal advice without undergoing the requisite research to ensure it is sound. [145] Competency, for purposes of the rule, includes

being familiar and knowledgeable on recent changes in the law and attending continuing legal education programs, as well as understanding and respecting the *468 benefits and risks of using relevant technology, i.e., social media. [146]

Using the LawZam backdrop, some critics have suggested that there may be additional dangers from websites that employ graduates "fresh out of law school." [147] This is potentially problematic when there is no requirement that lawyers have experience in a particular field or even experience practicing law. [148] Thomas Mason, partner at Zuckerman Spaeder, acknowledged, "If the lawyers don't know what they're talking about, it's a problem for everybody." [149] In light of recent periods of economic distress, translating into fewer available jobs in the job market, more graduates are using the Internet as a way to meet clients and instantly start practicing. [150] While jumping into practice without experience does not violate any ethics rules in and of itself, [151] attorneys may be exposed to a host of problems absent some regulation or filtering system, which ideally would assign attorneys to legal issues based on fields of law in which they are knowledgeable, along with some vetting system, ensuring competency and experience rather than smooth talk and flash.

D. Solicitation and False and Misleading Statements

Soliciting potential clients runs afoul of professional responsibility rules enacted by both federal and state [152] authorities. [153] Under Model Rule *469 7.3, [154] if a lawyer's motive is monetary benefit, the lawyer shall not solicit [155] professional employment, either "in-person, [through] live telephone or real-time electronic contact." [156] The sense of immediacy and confrontation drive the need for such solicitation rules. [157] The rule's commentary explicates that because there are alternative, and perhaps better, means of communicating to those in need of legal assistance, there is justification for prohibiting solicitation. [158] Recent debate concerns whether social media communications should fall under the "real-time conversation" umbrella or if they should be considered individual solicitations at all because they are directed to the public-at-large. [159]

When applied in context to an online forum, solicitation occurs more frequently in chat rooms, chat services, and through email communications. [160] However, with their speed-dating model, websites like LawZam, who operate by providing "brief real-time consultations," *470 may qualify as solicitations because of the "real-time" communication designation. [161] But the problem goes slightly deeper still. Assume that an individual goes to a legal-services related website like LawZam, and engages in a brief initial consultation with a lawyer. Now consider that on the other end of the communication is an attorney hungry for work. The attorney has only a few minutes to demonstrate his knowledge and skill on the subject matter in hopes of being retained and representing the person with their claim. Essentially, what may be happening is that the lawyer transforms into a smooth-talking, used car salesman, [162] trying to get business by persuading the individual not only of the lawyer's knowledge and expertise, but also exaggerating the potential client's need for representation in the first place. [163] A similar scenario is possible through the use of blogs or other social media platforms so long as the exchanges occur through a "real-time" feature. [164]

The above example--brings to light a similar problem that typically coexists with solicitation--making false or misleading statements. [165] Such statements alone will carry disciplinary action. [166] Model Rule 7.1 discusses communications regarding lawyer services. [167] The rule holds that lawyers should not provide false or misleading information to the public about the lawyer's services. [168] Insofar as a lawyer misstates his expertise, promises more than he can deliver, uses puffery to gain business, or overstates a layperson's need for representation, he or she would come within the scope of a Rule 7.1 violation. [169] In the above example, this scenario could easily come into play when the attorney is aggressively *471 attempting to get business in a short amount of time (i.e., inflating one's level of expertise by using excessive legalese and stating the prospective client has a winning case). [170] Because the typical prospective client's understanding of the legal process is uninformed, he or she is more willing to accept the word of his or her potential attorney than professional advice in almost any other field. [171] As

our society becomes more tech-savvy, additional revisions to the Model Rules will be necessary to decide how the solicitation rules will adequately address videoconferencing websites and similarly situated blogs.

E. Unauthorized Practice of Law

Perhaps one of the most readily recognizable ethics issues plaguing the online legal community involves the unauthorized practice of law. [172] While the allure of the Internet and maintaining an online presence carries immediate, worldwide exposure with relatively low attendant costs, [173] it *472 simultaneously creates additional risks for attorneys who provide legal advice in one jurisdiction to an individual in another jurisdiction. [174] This situation is easy to imagine. Take for example an attorney who manages a legal blog or a Facebook page; a stranger visits the site and posts a question to the attorney, and the attorney receives the message and provides legal advice. Now, if the attorney and the stranger both reside in Texas, there is likely no unauthorized practice of law issue. [175] However, if the attorney is in Texas and the stranger is in Ohio, for instance, there will likely be an ethics violation for practicing law in a jurisdiction without a license. [176]

It is important to understand that the nature of the Internet distorts this issue for attorneys because blogging and comment posting is frequently done anonymously or through usernames, making it difficult to ascertain the source of the content or where the commentator is located. [177] In the *473 oft-cited case, Office of Disciplinary Counsel v. Palmer, [178] David Palmer, an executive director maintaining the website amoralethics.com, was accused of the unauthorized practice of law. [179] His website contained disclaimers that he was not an attorney but suggested he would provide advice on how to deal with legal problems. [180] Because the Supreme Court found the information posted by Palmer to be of a general nature and not individualized, he did not engage in the unauthorized practice of law. [181] The court, however, was quick to underscore that had Palmer actually given legal advice in response to a specific question posed by a visitor of his site, he would have engaged in practicing law without a license. [182]

ABA Model Rule 5.5 states: "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." [183] The rule further states that a lawyer not authorized to practice law in a given jurisdiction may not establish an office or other "systematic and continuous presence in [that] jurisdiction . . . or hold out to the public or otherwise represent that [he] is admitted to practice law." [184] The inclusion of this language suggests that *474 blogging or any interactive social media presence may run afoul of the unauthorized practice of law regulations. [185] A blog, website, or even a Facebook page, does not exist solely in the jurisdiction where it was created. In the eyes of the law, that website does not exist in one place at all, but rather, in every location where it is accessed. So, potentially, a website without the proper disclaimer could create jurisdictional problems for an attorney without a single conversation, electronically or otherwise, with a layperson from another jurisdiction who accesses a website and acts on the advice posted there. The rule does indicate, however, a limited number of exceptions to the general rule that prohibits practicing law in a jurisdiction other than where the attorney is licensed. [186]

For websites offering live video consultation between attorneys and clients, multijurisdictional practice-of-law dangers are ever-present. [187] To avoid being exposed to such ethics violations, attorneys should sufficiently pre-screen individuals before offering any legal advice to ensure they are not reaching into jurisdictions in which they are not licensed. [188] If an individual seeking legal advice contacts an attorney outside his jurisdiction, the attorney should refrain from offering any legal advice and should direct the individual to contact an attorney within his jurisdiction. Additionally, lawyers should employ disclaimers clearly setting forth the attorney's certifications and jurisdictional license restrictions so that individuals are aware of where the attorney can and cannot practice. [189]

***475 V. Approaches for Avoiding Liability**

For the prudent advocate, ignoring social media cannot be the answer. Doing so could have potentially devastating effects on one's practice in the present and, most certainly, in the future.[190] As society becomes more technologically savvy and dependent, maintaining a social media presence will be necessary to stay competitive in the legal marketplace.[191] Therefore, practitioners must learn how to utilize this free tool to their benefit, while respecting the boundaries of professionalism. To avoid ethics liability, three overarching approaches should be considered in assessing and managing social media risks in the professional arena: regulation-based, website-based, and attorney-based solutions. While any solution-based approach should, on its own, assist lawyers in avoiding liability, applying a hybrid approach will better shield a practitioner from the ire of their state bar and, potentially, from the kiss of death--license revocation.

The regulation-based remedy could include the creation of an oversight body to supervise social media issues and continuously draft guidelines for review and consideration by the ABA's ethics committee, which evolve along with social media.[192] This approach, essentially an ***476** acknowledgment that there is a definable lag between Internet-based content issues and implementation of laws or regulations addressing them, seeks to attack new issues as they arise, before they can cause serious damage.[193] Although it is impossible to entirely eliminate the lag between Internet activity and ethics standards, finding ways to rein in this lag would provide meaningful aid to the legal community by removing at least some of the current uncertainty.[194]

In order to properly empower the regulation-based solution, continuing legal education (CLE) requirements should expand to include a yearly obligation solely focused on social media and other technological education.[195] Providing attorneys with the expectations of their state bar concerning social media usage helps, not hinders, legal professionals.[196] Therefore, requiring this CLE serves two main purposes: explaining to practitioners the best methods for exploiting social media as the business-generating tool it can and should be, as well as properly defining the boundaries of professional responsibility for attorneys who are so inclined. Until this social-media CLE is required by the various states, or recommended by the ABA, responsible practitioners should, on their own, consider attending one of the numerous annual seminars discussing ethics and social media issues.[197]

***477** The website-based solution requires the use of clear and bold disclaimers throughout websites and blogs, renouncing any possible implication that an attorney-client relationship has been formed, and making visitors patently aware that general information on a website is not legal advice.[198] Although disclaimers alone are no guarantee that a visitor will not claim that legal advice was given or that an attorney-client relationship was formed, such disclaimers are a significant first step in shielding an attorney from these attacks or even rebutting such claims.[199] Of course, accompanying such disclaimers should be an attorney's designation of states in which he or she can lawfully practice, because the attorney's first priority, after all, is securing new business.[200]

Similarly, the website-based solution calls for attorneys to post terms-of-use in an open and obvious location on blogs and websites, and for requiring visitors to affirmatively consent to such terms before providing access, in an effort to aid attorneys in avoiding conflict of interest problems.[201] Such disclaimers, while protecting the attorney from liability, have the potential to achieve the ancillary goal of educating the public on the nature of online legal aid. As with all disclaimers, they should appear prominently on the website, in language and type that is readily identifiable and easily understandable to laypersons. This should be a relatively simple solution, given that most experienced practitioners are already familiar with the fact that disclaimers go a long way in limiting exposure to liability and resulting grievances.[202]

Of course, attorneys themselves can, and should, be part of the solution. By striving to achieve higher self-imposed standards, we will not only ***478** become better attorneys but our profession will be all the better for it. This will require a clear definition of the scope and boundaries of employment with clients--online and off--and require attorneys to consider the permanency

of words before posting them to the Internet for the world to see. Prudent attorneys should periodically review the rules of professional responsibility to ensure they are towing the line, and as necessary, familiarize themselves with new and changing rules in the realm of professional responsibility, as well as any legal developments in the area of social media-- whether the ABA requires new CLEs or not.[203]

Additionally, attorneys must be more proactive in eliminating the ambiguities that find their way into the rules and take advantage of the present ability to pose questions to state bar ethics committees and panels.[204] If concern about a particular behavior or action arises, state bar committees urge attorneys to make use of this forum for guidance and clarification rather than engage in behavior that potentially violates ambiguous or convoluted rules.[205] If nothing else, the sheer size of the client pool on the Internet seems enticing, but a law license--so difficult to earn and impossible to recover once lost--is not worth jeopardizing for an easy score. As American lawyers have always known, the easy way is rarely the best, and is never the safest.

VI. Conclusion

Social media entered our homes, lives, and society like a tornado; it came quickly, without much notice, and completely changed the way we live and do business. It is relatively new, but it is clearly the future.[206] Just as there are risks in any activity, sport or adventure, so too are there risks in interacting through social media.[207] It would be shortsighted not ***479** to embrace social media for the tool that it can be, both privately and professionally. However, if social media content is not given the requisite consideration and care before it is published to the world, it can be a piercing dagger to an attorney's career and license.[208]

Practitioners should not wait for the ABA or local state bars to take remedial measures that address ethics rules' applicability to social media. Rather, practitioners should interpret and apply the current rules themselves as best possible.[209] If all else fails, the prudent practitioner should ask the following question before making a post on the Internet: would this statement carry liability in an offline setting?[210]

Footnotes

a1 My sincere gratitude to my wonderful father, Fred Thomas, for his unwavering encouragement and support not only on this piece, but throughout law school. Dad, thanks for your understanding during my Christmas holiday absence spent writing late into the night. To my family and friends, who know who they are, the candid advice and critique greatly enhanced this Comment. Finally, I must recognize the Volume 45 of the Journal for its commitment to excellence in editing and publication, without which this piece would not be possible.

1 See Eileen Libby, www.warning.law: Websites May Trigger Unforeseen Ethics Obligations to Prospective Clients, A.B.A. J., Jan 2011, at 22, 22 ("[L] awyer websites have replaced business cards and Yellow Pages advertising.").

2 See, e.g., LawZam, https://www.lawzam.com (last visited Oct. 28, 2013) (representing an example of a website where prospective clients may speak and video chat with attorneys).

3 See J.T. Westermeier, Ethics and the Internet, 17 Geo. J. Legal Ethics 267, 270 (2004) (reasoning that because websites are available to anyone with Internet access, they serve as storefronts for lawyers with a much larger audience).

4 See, e.g., Merri A. Baldwin, What's a Little Tweet Among "Friends": Ethical and Liability Risks Posed by Lawyers' Use of Social Media, 37 A.L.I. A.B.A. Continuing Legal Educ. 443, 448-51 (2011) (highlighting various ethical and liability concerns such as disclosure of client confidences, inadvertent attorney-client relationship, improper solicitation, violation of attorney advertising rules, and judicial integrity); Steven C. Bennett, Ethics of Lawyer Social Networking, 73 Alb. L. Rev. 113, 115-16 (2009) (noting that social media sites have garnered significant media attention and concern, and those concerns are "multiplied when legal professionals use social networking tools"); Michael E. Lackey Jr. & Joseph P. Minta, Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging, 28 Touro L. Rev. 149, 149 (2012) (acknowledging issues related

to social media that arise from attorney usage and suggesting that additional questions arise when social media comes into the courthouse and courtroom); Merri A. Baldwin, Ethical and Liability Risks Posed by Lawyers' Use of Social Media, Am. Bar. Ass'n (July 28, 2011), http:// apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html (recommending that attorneys recognize the implications stemming from their online usage in order to effectively protect clients and their confidences).

5 See, e.g., Michael E. Lackey Jr. & Joseph P. Minta, Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging, 28 Touro L. Rev. 149, 153 (2012) (declaring that law firms are using social media and discovering how it fits into their marketing model); J.T. Westermeier, Ethics and the Internet, 17 Geo. J. Legal Ethics 267, 272 (2004) (acknowledging that numerous bar ethics committees receive questions regarding attorney webpage usage for obtaining clients); Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, Wis. Law., May 2012, available at http:// www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx? volume=85&issue=5&articleid=2416 (stressing the pressures felt by attorneys to brand their firms and stay connected to clients).

6 See generally Craig Estlinbaum, Essay, Social Networking and Judicial Ethics, 2 St. Mary's J. Legal Mal. & Ethics 2 (2012) (discussing social media related problems faced by judges today); Zachary C. Zurek, Comment, The Limited Power of the Bar to Protect Its Monopoly, 3 St. Mary's J. Legal Mal. & Ethics 242 (2013) (addressing the rise of online legal forums and the legal profession's battle against the unauthorized practice of law).

7 See J.T. Westermeier, Ethics and the Internet, 17 Geo. J. Legal Ethics 267, 269-70 (2004) (concluding that as more and more lawyers and law firms take to the web to promote themselves and their practice, the number of complex ethical questions rise).

8 See id. at 271 (discussing why more lawyers are turning to the Internet to promote their practice). Specifically, the allure of instant access and communication, coupled with the competiveness of the legal market and its relatively low attendant expense has garnered the attention of not only lawyers, but also bar ethics committees. Id. at 272.

9 Merri A. Baldwin, Ethical and Liability Risks Posed by Lawyers' Use of Social Media, Am. Bar Ass'n (July 28, 2011), http:// apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html.

10 See, e.g., Steven Seidenberg, Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous, A.B.A. J., Feb. 2011, at 49, 50 (illustrating the story of Sean W. Conway, a defense attorney, who never anticipated he would be facing ethics charges resulting from what he considered an ordinary blog post, but later was determined by the Florida Bar Association to have been in violation of five ethics rules).

11 Specifically, this Comment addresses inadvertent attorney-client relationships, unauthorized practice of law, conflicts of interest, solicitation, and negligence--all commonly found in the LawZam Model. This Comment does not address issues relating to judges' Facebook conduct, evidentiary, admissibility and authentication issues, confidentiality issues, and advertising rules.

12 LawZam, https://www.lawzam.com (last visited Oct. 28, 2013).

13 See Leigh Jones, Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet, Nat'l L.J. (Aug. 20, 2012) (content available through LexisNexis) (describing the purpose and general functions and benefits of LawZam.com).

14 See Match.com, http://www.match.com/help/aboutus.aspx?lid=4 (last visited Oct. 28, 2013) ("Our mission is simple: to help singles find the kind of relationship they're looking for.").

15 LawZam Creates a Lawyer District to Shop Online for Legal Services, Lawyerist.com, http://lawyerist.com/lawzam-creates-a-lawyer-district-to-shop-online-for-legal-services-sponsored-post/ (last visited Oct. 28, 2013).

16 Id.

17 Id.

18 See, e.g., Merri A. Baldwin, Ethical and Liability Risks Posed by Lawyers' Use of Social Media, Am. Bar Ass'n (July 28, 2011), http:// apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html (mentioning other crowd sourcing sites similar to the LawZam model, including LawPivot, which allow prospective clients to post questions to a number of member attorneys to the service and the lawyers respond back to the prospective client); Catherine J. Lanctot, Attorney-Client

Relationships in Cyberspace: The Peril and the Promise, 49 Duke L.J. 147, 154-55 (1999) (providing examples of other websites purporting to offer legal advice, some for a fee and others for free).

19 See Angelina Perez, Campaign to Teach Student Lesson of Internet Permanency, KDFA News Channel 10, http:// www.newschannel10.com/story/14197907/campaign-to-teach-students-lesson-of-internet-permanency (last visited Oct. 28, 2013) (campaigning the message of Amarillo ISD--hoping to teach students what they put out on the Internet remains there forever).

20 See Eileen Libby, Conflicts Check, Please, A.B.A. J., Jan. 1, 2010, at 24, available at http://www.abajournal.com/magazine/article/ conflicts_check_ please/ (outlining the steps typically involved in performing a conflicts check); see also Michael E. Lackey Jr. & Joseph P. Minta, Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging, 28 Touro L. Rev. 149, 163 (2012) (examining how conflicts of interest problems arise in large part due to the anonymity aspect of the Internet); Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, Wis. Law., May 2012, available at http:// www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx? volume=85&issue=5&articleid=2416 (listing risks associated with social media usage and suggesting that "[t]here are many times when social media is not the best forum to use").

21 See, e.g., Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, LLP, 105 S.W.3d 244, 259 (Tex. App.--Houston [14th Dist.] 2003, pet. denied) (holding that defendant attorneys did not have a conflict of interest and, therefore, did not breach their fiduciary duty to Tanox in reaching a settlement).

22 See Model Rules of Prof'l Conduct R. 1.7 cmt. 3 (determining whether a conflict of interest exists means that a lawyer should apply reasonable measures, consistent with the size and type of law firm, to decide the parties and issues involved); Steven C. Bennett, Ethics of Lawyer Social Networking, 73 Alb. L. Rev. 113, 124-25 (2009) (recognizing that conflicts issues can arise in a variety of scenarios, from the imposition of a conflict of one lawyer to another in the same law firm, failing to perform a name check within the firm's database, or taking a definitive legal position on a website and representing a client with the opposite legal position); Abigail S. Crouse & Michael C. Flom, Social Media for Lawyers, Bench & B. Minn. (Nov. 10, 2010), http:// mnbenchbar.com/2010/11/social-media-for-lawyers/ (advancing three different ways conflicts of interest issues arise from social media usage).

23 See, e.g., S.C. Bar Ethics Advisory Comm., Formal Op. 12-03 (2012), available at 2012 WL 1142185 (cautioning "lawyers to treat online communications with potential clients just as [you] would a live meeting, specifically regarding conflict checking").

24 There is a distinction between advice and opinion. Lawyers should be careful when providing any information to people via the Internet because what they might construe as opinion is likely to be received as legal advice, regardless of whether it was intended as opinion only. See Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, Wis. Law., May 2012, available at http:// www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx? volume=85&issue=5&articleid=2416 ("There is a huge difference between providing legal information and giving legal advice.").

25 See id. (emphasizing that not taking the time to verify the advice provided to clients may result in a claim of negligence or misconduct).

26 See Martindale-Hubbell, http://careers.martindale.com/c/job.cfm? site_id=7302&jb=10707224 (last visited Sept. 13, 2012) (on file with the St. Mary's Law Journal) (advertising that there is no minimum legal experience required for LawZam other than being in good standing and receiving a law degree from an ABA accredited university).

27 See Leigh Jones, Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet, Nat'l L.J. (Aug. 20, 2012) (content available through LexisNexis) ("LawZam wants to be thought of as speed-dating for the legal world.").

28 See J.T. Westermeier, Ethics and the Internet, 17 Geo. J. Legal Ethics 267, 288 (2004) (stating that lawyers are prohibited from communicating in ways that create unjustified, false, or misleading expectations).

29 See Off. of Disciplinary Couns. v. Palmer, 761 N.E.2d 716, 723 (Ohio Bd. Unauth. Prac. 2001) (finding that the attorney did not engage in the unauthorized practice of law when he offered general advice on his website, amoralethics.com); see also Model Rules of Prof'l Conduct R. 5.5 (2012) ("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.").

30 Steven Seidenberg, Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's also Dangerous, A.B.A. J., Feb. 2011, at 49, 50; see also Steven C. Bennett, Ethics of Lawyer Social Networking, 73 Alb. L. Rev. 113, 118-19 (2009) (reiterating that lawyers have a duty to stay apprised of new professional responsibility pronouncements and should frequently check with the ABA and their local bar for developments); Michael E. Lackey Jr. & Joseph P. Minta, Lawyers and Social Media: The Legal Ethics of Tweeting,

Facebooking and Blogging, 28 Touro L. Rev. 149, 149 (2012) (suggesting that the Internet provides an incomplete map for lawyers attempting to find their way through the social media arena due to the rapid change of legal doctrines, the frequent and expansive growth of technological developments, and a set of professional rules written before the Internet era).

31 See Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, Wis. Law., May 2012, available at http:// www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx? volume=85&issue=5&articleid=2416 (listing the following benefits and burdens of social media: staying current, inexpensive marketing, opportunity to demonstrate competency in technology, immediacy, mobility; and the flip side-- losing control over content, blurring lines, establishing unrealistic expectations, false and misleading statements concerning lawyer's ability and services).

32 Debra L. Bruce, Social Media 101 for Lawyers, 73 Tex. B.J., Mar. 2010, at 186.

33 Id.

34 February 4, 2004 marked the launch of Facebook. Sarah McGrath, A Timeline of Famous Historical Events in February, Suite101 Blog (Feb. 10, 2011), http://suite101.com/article/a-timeline-of-famous-historical-events-in-february-a346026. In eight years time, Facebook became the largest social networking website, with over one billion subscribers per month. Number of Active Users at Facebook Over the Years, Boston.com (Oct. 4, 2012), http:// www.boston.com/business/technology/2012/10/04/number-active-users-facebook-over-the-years/4MqAmvMGrDFH7EXDE97uYI/story.html (announcing that the active number of users per month has reached one billion as of October 4, 2012).

35 See, e.g., JDSupra, http://www.jdsupra.com (last visited Oct. 28, 2013) (exemplifying an online repository for legal documents, forms, and articles that help attorneys market their research, writing, and firms); LawLink, http://www.lawlink.com (last visited Oct. 28, 2013) (illustrating a social network aimed at the legal profession); Legal Onramp, http:// legalonramp.com (last visited Oct. 28, 2013) ("Legal OnRamp is a Collaboration system for in-house counsel and invited outside lawyers and third party service providers."); see also Debra L. Bruce, Social Media 101 for Lawyers, 73 Tex. B.J., Mar. 2010, at 186 (providing a list of various social media platforms widely used in the legal profession).

36 LawZam, https://www.lawzam.com (last visited Oct. 28, 2013).

37 See id. (follow "About Us" hyperlink) (describing itself as a social networking platform that effectively functions as a venue for communication).

38 Id.

39 Id.

40 Id.

41 See id. (addressing "How it Works" with a short video clip found on the right hand side of the website).

42 Although LawZam claims that no attorney-client relationship is established by the video consultation itself, that is no guarantee that one has not formed. See Ethics Traps to Consider, Inadvertent Attorney-Client Relationship discussed infra.

43 LawZam® Releases Mobile App for Legal Video Consultations on iPhone and iPad, PRWeb (Mar. 20 2013), http:// www.prweb.com/releases/2013/3/prweb10546948.htm.

44 Steven Seidenberg, Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's also Dangerous, A.B.A. J., Feb. 2011, at 49, 51.

45 It is worth noting that other online legal platforms, purporting to offer various forms of legal assistance, have recently come under fire for alleged ethics violations. For example, LegalZoom is currently the subject of a class action lawsuit involving claims concerning the unauthorized practice of law in Missouri. Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1057-58 (W.D. Mo. 2011); see also Zachary C. Zurek, Comment, The Limited Power of the Bar to Protect Its Monopoly, 3 St. Mary's J. Legal Mal. & Ethics 242, 266-80 (2013) (examining issues with the unauthorized practice of law arising out of certain legal websites); Debra Cassens Weiss, Suit Claims LegalZoom's Document Prep Is Unauthorized Practice, A.B.A. J., Feb. 19, 2010, available at http://www.abajournal.com/news/article/suit_claims_legalzooms_document_prep_is_ unauthorized_practice (discussing the pending litigation involving LegalZoom). More than a year since its inception, it still remains to be seen whether LawZam and other similar websites providing a communication

platform for consumers and practitioners will face similar litigious action of their own, with suits like Janson v. LegalZoom as the precedent.

46 See Marshall Brain, How Blogs Work?, How Stuff Works.com, http:// computer.howstuffworks.com/internet/social-networking/information/blog.htm (last visited Oct. 28, 2013) (explaining that a blog is a single page of entries, mimicking a stream-of-consciousness, written by a single author and made available to the public).

47 See Debra L. Bruce, Social Media 101 for Lawyers, 73 Tex. B.J., Mar. 2010, at 186 (writing that a blog is essentially an "online journal that discusses opinions or reflections on various topics and usually provides a mechanism for readers to comment").

48 Marshall Brain, How Blogs Work?, How Stuff Works.com, http:// computer.howstuffworks.com/internet/social-networking/information/blog.htm (last visited Oct. 28, 2013).

49 Debra L. Bruce, Social Media 101 for Lawyers, 73 Tex. B.J., Mar. 2010, at 186 (observing that a distinguishing characteristic of blogs is that they invite the public to post commentary); Marshall Brain, How Blogs Work?, How Stuff Works.com, http:// computer.howstuffworks.com/internet/social-networking/information/blog.htm (last visited Oct. 28, 2013) (recognizing that when bloggers see something they like on other sites, they comment on it).

50 For an example of a typical legal blog, see Wall St. J. L. Blog, http://blogs.wsj.com/law/ (last visited Oct. 28, 2013) (allowing visitors to read a full post, comment, recommend the posting via Facebook or Twitter).

51 See generally Dave Davies, Why Blog: The Benefits of Business Blogging for Visitors & Links, Search Engine Watch (Mar. 14, 2013), http:// searchenginewatch.com/article/2067370/Why-Blog-The-Benefits-of-Business-Blogging-for-Visitors-Links (analyzing the benefits of blogging in terms of attracting visitors and providing useful information); Ken Makovsky, Why Should Companies Blog?, Forbes (May 14, 2012, 4:32 PM), http:// www.forbes.com/sites/kenmakovsky/2012/05/14/why-should-companies-blog/ (suggesting reasons why companies should blog); Nicole Beachum, Blogging is More Important Today than Ever Before, Social Media Today (Apr. 6, 2013), http://socialmediatoday.com/nicolebeachum/1338806/blogging-more-important-today-ever (expressing why blogging is of such importance "[i]n today's internet-based society").

52 Magdalena Georgieva, An Introduction to Business Blogging, Hubspot.com, available at http://cdn1.hubspot.com/hub/53/introduction_to_ business_blogging.pdf (last visited Oct. 28, 2013).

53 Steven Seidenberg, Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's also Dangerous, A.B.A. J., Feb. 2011, at 49, 51.

54 Id.

55 See, e.g., Justanswer, http://www.justanswer.com (last visited Oct. 28, 2013) (providing legal answers to submitted questions for a fee); Lawdingo, https://www.lawdingo.com (last visited Oct. 28, 2013) (offering in-person and online legal advice and other services); Lawguru, http://www.lawguru.com (last visited Oct. 28, 2013) (allowing its users to ask legal questions, view recent questions and answers from other website visitors and providing legal forms for use); Lawpivot, https://www.lawpivot.com (last visited Oct. 28, 2013) (delivering online legal advice to consumers).

56 See generally Justanswer, http://www.justanswer.com (last visited Oct. 28, 2013) (identifying a list of "General Questions" asked by users followed by answers from presumably qualified individuals); Lawdingo, https:// www.lawdingo.com (last visited Oct. 28, 2013) (prompting users to type in their legal issue or browse a list of attorneys in order to have their problem personally addressed); Lawpivot, https://www.lawpivot.com (last visited Oct. 28, 2013) (providing users with "Public legal Q&A" as a free resource for their benefit).

57 Justanswer, http://www.justanswer.com (last visited Oct. 28, 2013); Lawdingo, https://www.lawdingo.com (last visited Oct. 28, 2013); Lawpivot, https://www.lawpivot.com (last visited Oct. 28, 2013); LawZam, https:// www.lawzam.com (last visited Oct. 28, 2013).

58 See generally Ctr. for Prof'l Resp., A.B.A., A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at v (2006) (providing a complete explanation of legislative history and formulation of the ABA's Model Rules of Professional Responsibility).

59 Those rules were last amended in 1963 and were a compilation of the following: Alabama Bar Association's Code of Ethics implemented in 1887, a collection of legal ethics lectures given by Judge George Sharswood from the University of Pennsylvania School of Law, and fifty resolutions extracted from David Hoffman's A Course of Legal Study. Henry S. Drinker, Legal Ethics 23-24 (1953); George Sharswood, Legal Ethics (5th ed. 1884) (non-paginated introductory memorial); see also Model Rules of Prof'l Conduct Preface (2002) (tracing the evolution of the Rules of Professional Conduct in the legal profession); Susan R. Martyn & Lawrence J. Fox, Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility 19 (2008) (explaining that these writings taken together inspired the formulation of the Canons of Professional Ethics).

60 Code of Prof'l Ethics (1908), available at http:// www.americanbar.org/content/dam/aba/migrated/cpr/1908_code.authcheckdam.pdf; accord Susan R. Martyn & Lawrence J. Fox, Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility 19 (2008) (describing the structure of the canons and how they were perceived by legal professionals).

61 Model Rules of Prof'l Conduct Preface (2002); Susan R. Martyn & Lawrence J. Fox, Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility 19 (2008).

62 See Model Code of Prof'l Responsibility Preface (1983) (emphasizing that there were four major revisions from the Canons to the Model Code); see also Susan R. Martyn & Lawrence J. Fox, Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility 19 (2008) (highlighting the similarities and difference between the Model Code and the Canons). Those revisions include: (1) amending certain laws governing attorney conduct that were either partially addressed or completely excluded from the Canons; (2) supplying certain codes with needed editorial revision; (3) implementing provisions subjecting individuals violating rules with practical sanctions; and (4) modernizing the rules to adequately address societal urbanization and the evolution of the legal system. Model Code of Prof'l Responsibility Preface (1983).

63 Susan R. Martyn & Lawrence J. Fox, Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility 19 (2008).

64 The commission determined a "piecemeal amendment of the ABA Model Code of Professional Responsibility would not sufficiently clarify the profession's ethical responsibilities in light of changed conditions." Ctr. for Prof'l Resp., A.B.A., A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at v (2006). Therefore, the commission began preparing numerous working drafts, each containing extensive and significant modifications to the Model Code. Id. The large dissemination of working drafts coupled with vast amounts of open hearing testimony allowed the commission to receive comments from a host of individuals and committees, including but not limited to "state and local bar associations, sections and committees of the ABA, and other interested parties." Id. The commission's chair, Robert J. Kutak, noted, "the overriding objective of the Commission...[[was] to develop professional standards that are comprehensive, consistent, constitutional and, most important, congruent with other law." Id.

65 Model Rules of Prof'l Conduct Preface (2013); Ctr. for Prof'l Resp., A.B.A., A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at v (2006).

66 The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983. Susan R. Martyn & Lawrence J. Fox, Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility 19 (2008). The new rules drastically changed the older provisions of the Model Code by adding extensive provisions and restructuring the format with black letter law followed by commentary. Id. The evolution of these rules stem from a gradual process of extending both "legal and moral concepts found in other bodies of law to lawyer behavior." Id.

67 California is the only state that has not adopted the Model Rules. State Adoption of Model Rules, A.B.A., http:// www.americanbar.org/groups/professional_responsibility/publications/model_ rules_of_professional_conduct/ alpha_list_state_adopting_model_rules.html (last visited Oct. 28, 2013). Texas adopted the Rules on June 20, 1989. Id.

68 Susan R. Martyn & Lawrence J. Fox, Traversing the Ethical Minefield: Problems, Law, and Professional Responsibility 19 (2008).

69 The ABA adopted the Commission's recommendations in 2002, which are reflected in the current Rules. Id.

70 See Margaret Colgate Love, ABA 2000 Ethics Commission: Final Report-Summary of Recommendations, Ga. St. Univ. Coll. Law, http:// law.gsu.edu/ccunningham/PR/ABA-Ethics2000Summary.htm (last visited Oct. 28, 2013) (discussing that the Ethics Commission came into being to perform a thorough analysis of the current rules in light of apparent shortcomings found in some rules and to resolve disparities existing in the rules from jurisdiction to jurisdiction). Additionally, the Restatement of Law Governing

Lawyers, then nearing completion, had also underscored the need for a comprehensive rule review, thereby creating national uniformity to the Ethics Commission. Id.

71 See generally Model Rules of Prof'l Conduct Preface (2013) (outlining the ABA Model Rules' transformation from their original Canon format and stressing the ABA's goal in pursuing standards of professional competence and conduct applicable to all jurisdictions).

72 See Most Recent Changes to the Model Rules, Ctr. for Prof'l Resp., A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Oct. 28, 2013) (indicating by month and year when certain revisions to the model rules occurred).

73 See Canons, Tex. Ethics Rep., http:// www.law.uh.edu/libraries/ethics/canons/ (last visited Oct. 28, 2013) (recognizing the forty-three Texas canons). See generally Cullen Smith, The Texas Canons of Ethics Revisited, 18 Baylor L. Rev. 183 (1966) (reviewing of the history of the Texas Canons of Ethics).

74 Id. at 183.

75 Charles F. Herring, Jr., Texas Legal Malpractice & Lawyer Discipline 3-4 (11th ed. 2012).

76 Robert P. Schuwerk & John F. Sutton, Jr., A Guide to the Texas Disciplinary Rules of Professional Conduct, 27A Hous. L. Rev. 1, 1 (1990).

77 Id.

78 Id. The Texas Code of Professional Responsibility was adopted in 1971. Charles F. Herring, Jr., Texas Legal Malpractice & Lawyer Discipline 3-4 (11th ed. 2012).

79 After extensive revisions, a final proposed draft of the Texas Disciplinary Rules was submitted to the Board of Directors of the Texas State Bar in 1987. Robert P. Schuwerk & John F. Sutton, Jr., A Guide to the Texas Disciplinary Rules of Professional Conduct, 27A Hous. L. Rev. 1, 2-3 (1990). Following its submission, the rules underwent additional scrutiny and revision from bar sections, lawyers and committee review. Id.; see also Barbara Hanson Nellermoe & Fidel Rodriguez, Jr., Professional Responsibility and the Litigator: A Comprehensive Guide to Texas Disciplinary Rules 3.01 Through 4.04, 28 St. Mary's L. J. 443, 447 (1997) (citing David J. Beck, Legal Malpractice in Texas, 43A Baylor L. Rev. 1, 8 n. 43, 22 n. 67, 147-48 (1991)) (following the repeal of the Texas Code of Professional Responsibility, all canons, including disciplinary rules and ethical considerations were replaced).

80 Charles F. Herring, Jr., Texas Legal Malpractice & Lawyer Discipline 3 (11th ed. 2012). On May 22, 1989, Justice Eugene A. Cook, Associate Justice of the Supreme Court of Texas and "father of professionalism," requested "authorization from the entire Supreme Court to form a Supreme Court Advisory Committee on Professionalism, whose members will be those who have expressed 'an interest in restoring professionalism and civility to the practice of law.'" Texas Lawyer's Creed Timeline, Tex. Ctr. for Legal Ethics, http:// www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/Texas-Lawyer's-Creed-Timeline.aspx (last visited Oct. 28, 2013); History of the Texas Lawyer's Creed, Tex. Ctr. for Legal Ethics, http:// www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/History-of--the-Texas-Lawyer-s-Creed.aspx (last visited Oct. 28, 2013). The advisory committee held meetings to draft and revise a professionalism statement for use by Texas lawyers. Texas Lawyer's Creed Timeline, Tex. Ctr. for Legal Ethics, http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/Texas-Lawyer's-Creed-Timeline.aspx (last visited Oct. 28, 2013). It was well received by lawyers, law schools, and the press. History of the Texas Lawyer's Creed, Tex. Ctr. for Legal Ethics, http:// www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/History-of--the-Texas-Lawyer-s-Creed.aspx (last visited Oct. 28, 2013).

81 History of the Texas Lawyer's Creed, Tex. Ctr. for Legal Ethics, http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/History-of--the-Texas-Lawyer-s-Creed.aspx (last visited Oct. 28, 2013). Copies of papers relating to the Creed's drafting process are held by the Texas Supreme Court Historical Society. Id. For some of those documents are available via the Texas Legal Ethics website, see Texas Lawyer's Creed Timeline, Tex. Ctr. for Legal Ethics, http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Lawyer-s-Creed/Downloads.aspx (last visited Oct. 28, 2013).

82 See Robert P. Schuwerk & John F. Sutton, Jr., A Guide to the Texas Disciplinary Rules of Professional Conduct, 27A Hous. L. Rev. 1, 5 (1990) (noting the inclusion of the word "disciplinary" into the title of the Texas Rules, which was notably absent from the Model Rules, perhaps reiterating that the violation of the Texas rules subjects one to official reprimand).

83 Id. at 3 n. 12 (citing Texas' New Disciplinary Rules Become Effective Jan. 1, 1990, 52 Tex. B.J. 1023 (1989)) ("[The P]roposed Texas Rules were approved by 84.14% of those voting in referendum conducted from May 19-June 19, 1989.").

84 The Texas Rules contain an introduction consisting of preamble, scope, and terminology sections which are followed by a laundry list of articles grouped according to relationship or professional obligation. Tex. Disciplinary Rules Prof'l Conduct (2005), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app A (West 2005) (Tex. State Bar R. art. X, §9).

85 See Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct, A.B.A. (2013), available at http://www.americanbar.org/content/dam/aba/administrative/professional_ responsibility/ state_advertising_and_solicitation_rules_differences_ update.authcheckdam.pdf (detailing the differences between state and ABA rules regarding confidentiality, advertising, and solicitation).

86 Robert P. Schuwerk & John F. Sutton, Jr., A Guide to the Texas Disciplinary Rules of Professional Conduct, 27A Hous. L. Rev. 1, 5 (1990); see State v. Malone, 692 S.W.2d 888, 896 (Tex. App.--Beaumont 1985, writ ref'd n.r.e.) (acknowledging that the disciplinary rules carry the same effect as statutes), rev'd on other grounds, 720 S.W.2d 842 (Tex. App.--Beaumont 1986, no writ); see also Tex. Disciplinary Rules Prof'l Conduct preamble P 10 (2005) ("The Texas Disciplinary Rules of Professional Conduct are rules of reason ... [they] define proper conduct for purposes of professional discipline ... [and] are imperatives, cast in the terms shall or shall not.").

87 See Charles F. Herring, Jr., Texas Legal Malpractice & Lawyer Discipline 3 (11th ed. 2012) (discussing a Texas State Bar referendum vote in November 2004 and the amendments that followed in 2005).

88 Listing of Texas Supreme Court Committees, Tex. B., http:// www.texasbar.com/AM/Template.cfm?Section=Ethics_Resources (select "For Lawyers" hyperlink; then select "Resources Guide" hyperlink; then select "Ethics Resources" hyperlink) (last visited Oct. 28, 2013).

89 See generally Index of Ethics Opinions, Tex. Ethics Rep., http:// www.law.uh.edu/libraries/ethics/opinions/ethicssubjectindexb.html (last visited Oct. 28, 2013) (listing the various ethics opinions available upon request from the Texas Bar website).

90 "The Commission was created in 2009 to perform a thorough review of the ABA Model Rules of Professional Conduct and the system of lawyer regulation in the context of advances in technology and global legal practice developments." Committees & Commissions, A.B.A., http:// www.americanbar.org/groups/professional_responsibility/committees_ commissions.html (last visited Oct. 28, 2013); see also Memorandum from the ABA Commission on Ethics 20/20 on Client Confidentiality and Lawyers' Use of Tech., Ctr. for Prof'l Resp., A.B.A., 1, 1 (Sept. 20, 2010), available at http:// www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_ 2020/clientconfidentiality_issuespaper.authcheckdam.pdf (explaining the Working Group's research in the technology sector).

91 Memorandum from the ABA Commission on Ethics 20/20 on Client Confidentiality and Lawyers' Use of Tech., Ctr. for Prof'l Resp., A.B.A. 1, 1 (Sept. 20, 2010), available at http:// www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_ 2020/ clientconfidentiality_issuespaper.authcheckdam.pdf.

92 See generally id. (specifying the four particular online methods that the Working Group focused on with respect to identifying recent ethical issues: (1) social and professional networking sites; (2) blogging; (3) pay advertising sites and (4) attorney websites).

93 The commission went through various reports and draft proposals over a two-year period. ABA Commission on Ethics 20/20 Work Product, A.B.A., http:// www.americanbar.org/groups/professional_responsibility/aba_commission_on_ ethics_20_20/ work_product.html (last visited Oct. 28, 2013). On February 21, 2012 the commission submitted its final revised draft proposal on Technology and Client Development, which went through additional modifications before becoming adopted in August 6, 2012. Id.

94 The commission considered a number of different ways for providing guidance to attorneys, including but not limited to: a policy statement to the House of Delegates; a white paper suggesting that lawyer social media use should be considered an extension of advertising; and proposed amendments to Model Rules, Article 7, either to the rules themselves or within the commentary. See Memorandum from the ABA Commission on Ethics 20/20 on Client Confidentiality and Lawyers' Use of Internet Based Client Development Tools, Ctr. for Prof'l Resp., A.B.A. 1, 3 (Sept. 20, 2010), available at http:// www.americanbar.org/content/dam/aba/

migrated/2011_build/ethics_ 2020/clientdevelopment_issuespaper.authcheckdam.pdf ("The Commission seeks to determine what guidance it should offer to lawyers regarding their use of social and professional networking sites, especially when lawyers use those sites for both personal and professional purposes.").

95 Entertaining a number of proposals for furnishing meaningful guidance to practitioners, the commission considered the following options: a policy statement to the House of Delegates; a white paper acknowledging that attorney use of social media be categorized as advertising; or consider modification to Model Rule 1.18, either to the rule itself or in the commentary. Id.

96 Id.

97 A number of changes were made to the Model Rules. Significant to this Comment, changes were made to the following: Model Rule 1.18 (Duties to Prospective Clients), Model Rule 7.1 (Communications Concerning a Lawyer's Services), Model Rule 7.3 (Direct Contact with Prospective Clients), Model Rule 5.5 (Unauthorized Practice of Law), Model Rule 1.1 (Competence), and Model Rule 1.4 (Communication). 105A Report to House of Delegates, Commission on Ethics 20/20, A.B.A. 1, 1 (Aug. 2012), available at http:// www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf (last visited Oct. 28, 2013) (discussing the changes approved by the House of Delegates to Model Rules 1.1 and 1.4 as of August 6, 2012); 105B Report to House of Delegates, Commission on Ethics, A.B.A. 1, 1 (Aug. 2012), available at http:// www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b.authcheckdam.pdf. (last visited Oct. 28, 2013) (outlining the changes by the House of Delegates to Model Rules: 1.18, 7.1, 7.3, and 5.5).

98 Memorandum from the ABA Commission on Ethics 20/20 on Client Confidentiality and Lawyers' Use of Internet Based Client Development Tools, Ctr. for Prof'l Resp., A.B.A. 1, 3 (Sept. 20, 2010), available at http:// www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_ 2020/clientdevelopment_issuespaper.authcheckdam.pdf.

99 Id.

100 John G. Browning, The Lawyer's Guide To Social Networking: Understanding Social Media's Impact On The Law 163 (Eddie Fournier, ed. Thomas Reuters/Aspatore 2010) (suggesting that if you would not engage in certain actions offline, then you should not perform them online).

101 Id. (stating that if certain behavior would be unethical offline, it is likely unethical on the Internet as well).

102 Compare ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457, (2010) (cautioning lawyers to consider some of the ethical obligations that arise from content and features found on lawyer sites and stating that lawyers who respond to inquiries should contemplate whether Model Rule 1.18 applies), and Ohio Informal Op. 99-9, (Ohio Sup. Ct. Dec. 2 1999), available at 1999 WL 1244454, at *2 (concluding it is proper for an attorney to post an online intake form on an Internet site allowing visitors to email legal questions and receive responses, but reminding attorneys that response to specific questions "carries all the traditional duties owed by a lawyer to a client"), and S.C. Bar Ethics Advisory Comm., Formal Op. 12-03, (2012), available at 2012 WL 1142185, at *5 (rendering an advisory that lawyers' participation in sites such as www.justanswer.com, where lawyers sign up with a web service, answer questions posed by people, and receive compensation from the website, is improper because the site invites specific questions about legal issues and elicits specific legal advice, and small, conspicuous statements attempting to disclaim any formation of an attorney-client relationship are not sufficient), and S.C. Bar Ethics Advisory Comm., Formal Op. 94-27, (2007) (expressing that attorney online presence for the purpose of giving general legal discussions through the Internet is permissible, but that such information must not be characterized as advice or be considered representation of a client), and N.Y. St. Bar Comm. on Prof'l Ethics, Op. 899 (Dec. 21, 2011) (debating whether a lawyer may answer legal questions in chat rooms and social networking sites and noting that such activities may establish an attorney-client relationship implicating violations of certain Model Rules), with Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 2003-164 (2003) (commenting that no attorney-client relationship is established when an individual asks a specific question to an attorney on a radio call-in show or similar format because the caller does not have a reasonable belief that such a relationship is formed, either explicitly or implicitly), and Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 2005-168 (2005) (accepting that because of disclaimer statement, no attorney-client relationship was formed when a wife asked a question through a website because she was interested in filing for divorce, stated that she liked website, and needed a good lawyer to obtain a reasonable property settlement, retain secrecy of her own affair, and maintain conservatorship of her child).

103 See Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1316-17 (7th Cir. 1978) (holding that an attorney-client relationship exists when a lay person submits confidential information to a lawyer with the reasonable belief that the lawyer was

acting in professional capacity), rev'd on other grounds, 588 F.2d 221 (7th Cir. 1978); Steven C. Bennett, Ethics of Lawyer Social Networking, 73 Alb. L. Rev. 113, 120 (2009) (citing Restatement (third) of law governing lawyers §14 (2000)) ("An attorney-client relationship arises when a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person,... and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services."); Abigail S. Crouse & Michael C. Flom, Social Media for Lawyers, Bench & B. Minn. (Nov. 10, 2010), http:// mnbenchbar.com/2010/11/social-media-for-lawyers/ (claiming that an attorney-client relationship can be established under a tort theory if an individual seeks and receives legal advice and under a contract theory if the circumstances and behavior between the parties shows an agreement to perform services); Gabriel Miller, Social Responsibility, Trial, Jan. 2011, at 20, 24 (discussing that whether an attorney-client relationship has been established depends on the reasonable expectations of the potential client).

104 See Westinghouse, 580 F.2d at 1316-17 (explaining that an attorney-client relationship can be implied by behavior of the parties); Togstad v. Veselt, Otto, Miller & Keefe, 291 N.W.2d 686, 693 (Minn. 1980) (determining under both contract and tort theory, that an attorney-client relationship existed for the purpose of a malpractice claim by a client against an attorney with whom she met for one hour to a discuss possible lawsuit, but was informed she did not have a case and was not referred to another attorney).

105 Merri A. Baldwin, Ethical and Liability Risks Posed by Lawyers' Use of Social Media, Am. Bar. Ass'n (July 28, 2011), http:// apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html (illustrating that the more specific the inquiry is from the questioner and the more specific the attorney's response, the more likely a relationship has been formed).

106 See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) (emphasizing that there is no bright line indicator to determine when legal information becomes legal advice and using the context and content of information to help differentiate between the two); see also Ariz. St. Bar, Formal Op. 97-04 (1997) (recommending that lawyers avoid offering specific answers to legal questions posed by individuals over the Internet unless their inquiry is so general that no fact-specific information is needed); D.C. Bar Legal Ethics Comm., Formal Op. 316 (2002) ("Providing legal advice...involves offering recommendations tailored to unique facts of a particular person's circumstances .... [L]awyers wishing to avoid formation of attorney-client relationships through ... Internet communications should limit themselves to providing legal information."); J.T. Westermeier, Ethics and the Internet, 17 Geo. J. Legal Ethics 267, 301 (2004) (echoing that attorneys should exercise extreme caution and ensure they only provide general legal information, not legal advice).

107 See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457, (2010) (indicating that a lawyer who answers hypothetical questions will not typically be characterized as offering legal advice and further recommending that consistent with previous ABA opinions, lawyers only provide general information, while cautioning the reader that it should not be taken as a substitute for actual legal advice); Merri A. Baldwin, Ethical and Liability Risks Posed by Lawyers' Use of Social Media, Am. Bar. Ass'n (July 28, 2011), http:// apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html (suggesting that specific questions and specific answers are more likely to constitute an attorney-client relationship).

108 This is an example of a disclaimer: "Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations." Michelle Sherman, Navigating Social Media and Legal Ethics, JDSupra.com (Apr. 24, 2012), http:// www.jdsupra.com/legalnews/navigating-social-media-and-legal-ethics-80349/.

109 See Eileen Libby, www.warning.law: Websites May Trigger Unforeseen Ethics Obligations to Prospective Clients, A.B.A. J., Jan. 2011, at 22, 23 (2011) (describing how a number of state bar opinions have analyzed online communications and determined that lawyers should employ disclaimers on their websites or social networking sites to avoid confidentiality and inadvertent attorney-client relationship issues). But see Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 2005-168 (2005) (opining that a lawyer may request individuals to provide information to the lawyer through any electronic means, including the lawyer's website, blog or email—with no attached duty of confidentiality if the lawyer has a clear disclaimer that he will not consider the material as confidential).

110 Michael E. Lackey Jr. & Joseph P. Minta, Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging, 28 Touro L. Rev. 149, 164 (2012) (recommending that all social media postings utilize clear and conspicuous statements disclaiming the potential formation of a relationship); Abigail S. Crouse & Michael C. Flom, Social Media for Lawyers, Bench & B. Minn. (Nov. 10, 2010), http://mnbenchbar.com/2010/11/social-media-for-lawyers/ (suggesting that in order to avoid liability attorneys maintain disclaimers on their web content expressly stating that no attorney-client relationship has been formed); see also Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 2003-164 (2003) (emphasizing that lawyers and law firms should pre-screen comments

before they are posted on blogs and edit accordingly in order to avoid potential issues); Eileen Libby, www.warning.law: Websites May Trigger Unforeseen Ethics Obligations to Prospective Clients, A.B.A. J., Jan. 2011, at 22, 23 (2011) (writing on the power of disclaimers and suggesting that disclaimers be used to prevent liability).

111 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010). But see Cal. St. Bar, Formal Op. 2004-165 (finding that a written disclaimer alone is not sufficient to prevent formation of an attorney-client relationship).

112 Model Rule 1.18(a) Duties to Prospective Client states: "A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." Model Rules of Prof'l Conduct R. 1.18(a) (2013); see also Merri A. Baldwin, Ethical and Liability Risks Posed by Lawyers' Use of Social Media, Am. Bar Ass'n (July 28, 2011), http:// apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html (warning that the rules relating to potential clients apply to lawyers regardless of whether they are on Facebook or at a cocktail party).

113 See Model Rules of Prof'l Conduct R. 1.18 cmt. (2013) (discussing the protection of a prospective client based on initial discussions); see also Va. St. Bar Standing Comm. on Legal Ethics, Legal Ethics, Formal Op. 1842 (2008), available at http://www.vacle.org/opinions/1842.htm (noting that a website that invites individuals to post information and receive a response essentially welcomes the formation of an attorney-client relationship).

114 The 2013 Model Rule 1.18(a) replaced the word "discusses" with "consults" in describing what type of exchange between a person and lawyer qualifies for possible attorney-client consideration. Compare Model Rules of Prof'l Conduct R. 1.18(a) (2013) ("A person who consults with a lawyer ...."), with id. R. 1.18(a) (2012) ("A person who discusses with a lawyer ....").

115 Id. R. 1.18 cmt. 2 (2013) ("[A] consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response."). Lawyers need to provide specific warnings that indicate their response to an online question does not constitute legal advice. Id.

116 See id. R. 1.18 (interpreting the rule which states that an attorney-client relationship can be formed upon submitting questions through the website by a potential client requesting legal assistance); see also LawZam, https://www.lawzam.com (last visited Oct. 28, 2012) (visiting the website reveals a comment box titled, "Ask a Lawyer" with a prompt to type your legal question).

117 But see N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 923, §25 (May 18, 2012), available at http://www.nysba.org/AM/Template.cfm? Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=66826 (holding that an individual who communicates with an attorney for the sole purpose of defrauding him and not obtaining legal services does not fall within the attorney-client relationship umbrella).

118 Charles F. Herring, Jr., Texas Legal Malpractice & Lawyer Discipline 351-52 (11th ed. 2012).

119 Model Rule 1.7 states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Model Rules of Prof'l Conduct R. 1.7(a) (2013). The rule continues by outlining what constitutes "a concurrent conflict of interest" and lists as the first scenario where "the representation of one client will be directly adverse to another client." Id. R. 1.7(a)(1). Rule 1.7 also considers it to be a conflict of interest if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Id. R. 1.7(a)(2).

120 Model Rule 1.10, "Imputation of Conflicts of Interest," states, "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [the rules] ...." Id.; see also Debra Cassens Weiss, Akin Gump Chair Hits Partner's Personal Blog Post on 'Ugly' Indian Prayer, A.B.A. J., Jan. 19, 2011, available at http://www.abajournal.com/news/article/akin_gump_chair_hits_ partners_personal_blog_post_on_ugly_indian_prayer/ (writing about comments made on a blog post by an Akin Gump partner which the firm found to be insensitive; thereby, compelling the firm to issue a statement acknowledging that it had no affiliation with the website, that the website does not represent the views of the firm or its clients, and that the firm would be actively reviewing its social media policies in light of the incident).

121 This scenario potentially implicates Model Rule 1.7(a)(2) through the "materially limited" verbiage that gives rise to a conflict of interest between a current client and a prospective client, and Model Rule 1.18(b) which discusses duties owed to a prospective client and includes holding client confidences learned during the course of determining whether representation is possible. Model Rules

of Prof'l Conduct R. 1.7(a)(2), 1.18(b) (2013); see also Michael E. Lackey Jr. & Joseph P. Minta, Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging, 28 Touro L. Rev. 149, 163 (2012) (citing situations in which a conflict of issue may arise, including conflicts resulting from taking a position on an issue that is adverse to a client); Abigail S. Crouse & Michael C. Flom, Social Media for Lawyers, Bench & B. Minn. (Nov. 10, 2010), http://mnbenchbar.com/2010/11/social-media-for-lawyers/ (delineating the three most common scenarios in which conflicts issues arise during the course of the attorney-client relationship).

122 See Catherine J. Lanctot, Attorney-Client Relationships in Cyberspace: The Peril and the Promise, 49 Duke L.J. 147, 156 (1999) (explaining that the possibility an attorney could create a conflict of interest simply by answering legal questions from someone with adverse interests from a present client is especially concerning given the Internet's anonymous nature); Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, 85 Wis. Law. 30, 31 (2012), available at http:// www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/ CM/ContentDisplay.cfm&contentid=110896 (describing potential problems that arise from lawyers using social media and suggesting that one particular problem lies in providing legal advice without first checking for possible conflicts).

123 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010).

124 The rationale for such advice flows from the fact that communicating through the Internet makes it difficult, if not impossible, to pre-screen for conflicts of interest issues. Ariz. St. Bar Comm. Rules of Prof'l Conduct, Formal Op. 97-04 (1997), available at http:// www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=480.

125 See S.C. Bar Ethics Advisory Comm., Formal Op. 94-27 (1994), available at http:// www.scbar.org/MemberResources/ EthicsAdvisoryOpinions/OpinionView/ArticleId/507/Ethics-Advisory-Opinion-94-27.aspx (reaffirming that an attorney must be able to identify his client and perform a conflicts check prior to providing legal advice). Of course, attorneys may use remedial measures to resolve conflicts issues, including waiver. Model Rule 1.7 lists the exceptions for which an attorney may proceed with representing a client even when a conflict of interest is found. See Model Rules of Prof'l Conduct R. 1.7(b)(1-4) (2013) (noting that an attorney may continue representing a client if the attorney believes he can still offer competent representation to each client, representation is not otherwise a violation of the law, representation does not concern claims "by one client against another" in the same proceeding or arising from the same action, and informed consent is given in writing); see also Charles F. Herring, Jr., Texas Legal Malpractice & Lawyer Discipline 351-52 (11th ed. 2012) (reiterating that "[b]efore undertaking any representation of a client, a lawyer must determine whether such representation would create a conflict of interest or a potential conflict of interest. If so, the next step is to determine whether remedial measures are possible to solve the conflict.").

126 See, e.g., Sup. Ct. of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 99-9 (Dec. 2, 1999), available at http:// search.supremecourt.ohio.gov/search?q=99-9&site=Advisory_ Opinions&btnG=Search&client=default_frontend&proxystylesheet=default_ frontend&output=xml_no_dtd&Submit1=Go&ulang=en&sort=date%3AD%C3AL% 3Ad1&entqr=3&entqrm=0&oe=UTF-8&ie=UTF-8&ud=1 (reminding attorneys that the same duties apply regardless of where the communication occurs).

127 N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 899 (Dec. 21, 2011), available at http://www.nysba.org/AM/Template.cfm? Section=Ethics_ Opinions&template=/CM/ContentDisplay.cfm&ContentID=60961.

128 The opinion considers whether online legal representation of potential clients through question and answer format is permissible without violating ethics rules. Sup. Ct. of Ohio Bd. of Comm'rs on Grievances and Discipline, Formal Op. 99-9 (Dec. 2, 1999), available at http:// search.supremecourt.ohio.gov/search?q=99-9&site=Advisory_ Opinions&btnG=Search&client=default_frontend&proxystylesheet=default_ frontend&output=xml_no_dtd&Submit1=Go&ulang=en&sort=date%3AD%C3AL% 3Ad1&entqr=3&entqrm=0&oe=UTF-8&ie=UTF-8&ud=1. Specifically, that questioner wonders whether it is acceptable to post an online intake form on his law firm's website that allows visitors to post questions and receive emailed responses from members of the firm. Id.

129 Id. at 2-3. The board explained further that "[just as] an attorney checks for conflicts when a client calls or comes to his office seeking legal services, an attorney must check for conflicts when a client e-mails seeking legal advice." Id.

130 Id.

131 See Charles F. Herring, Jr., Texas Legal Malpractice & Lawyer Discipline 353 (11th ed. 2012) (stating that all firms should prescreen clients for conflicts before rendering services, offering legal advice, or accepting engagement).

132 Because sites such as LawZam are set up for offering legal services, running conflicts checks is all the more critical, especially if it is found that these online platforms, as a result of their structure and objectives, create an attorney-client relationship the moment a communication is exchanged. Remembering that the moment an attorney-client relationship attaches, so do all the duties and professional responsibilities of the attorney to the client, including the duty to avoid conflicts of interest. See generally Model Rules of Prof'l Conduct R. 1.18 cmt. 4 (2013) (suggesting that an attorney should limit the information received during the initial consultation, but if the information reveals a conflict, the lawyer should inform the potential client and may also decline representation).

133 Even if the attorney is unable to represent the client, the communications may still be confidential and subject to ABA Model Rule 1.18, entitled "Duties to Prospective Clients." See Model Rules of Prof'l Conduct R. 1.18(b) (2013) (stating that a lawyer may not reveal client confidences learned from a prospective client in the course of determining possible representation); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 90-358 (1990) (holding that an attorney must protect information received from a would-be client seeking to employ the lawyer even when no services were actually performed because representation was otherwise declined).

134 See Steven C. Bennett, Ethics of Lawyer Social Networking, 73 Alb. L. Rev. 113, 126 (2009) (supporting the idea that law firms require individual publications to be accompanied with a disclaimer that the opinion represents the author only and should not be attributed to the law firm or its clients).

135 See Mass. Bar Ass'n Comm'n on Prof'l Ethics, Formal Op. 07-01 (2007), available at http://www.massbar.org/publications/ethics-opinions/2000-2009/2007/opinion-07-01 (opining that lawyers and their firms may avoid disqualification by posting a "terms of use" on their website and having potential clients affirmatively indicate their assent to the terms prior to using any email link found on the company's website).

136 See generally Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.").

137 But see Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 113 (Tex. 2004) (discussing a malpractice suit made by a securities firm against its attorneys for negligence in allegedly mishandling its bankruptcy claims); Grider v. Mike O'Brien, PC, 260 S.W.3d 49, 53-54 (Tex. App.-- Houston [1st Dist.] 2008, pet. denied) (involving a lawsuit initiated by Grider against her attorneys for negligent representation in her appeal in a medical malpractice suit and claiming the law firm was negligent for the following reasons: misstating the due date for filing her notice of appeal, advising her not to appeal an adverse judgment, failing to give timely notice that her motion for new trial had been denied, failing to notify her that the law firm would not handle the appeal, and failing to competently advocate Grider's claims).

138 See Abigail S. Crouse & Michael C. Flom, Social Media for Lawyers, Bench & B. Minn. (Nov. 10, 2010), http://mnbenchbar.com/2010/11/social-media-for-lawyers/ (noting that an attorney who "acts negligently or in breach of contract" may be subject to a malpractice claim, and recommending attorneys use caution before offering legal advice through social networking sites because of such risks).

139 See John G. Browning, The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law 163 (Eddie Fournier, ed., Thomson Reuters/Aspatore 2010) ("[T]he safest way to avoid any ethical problems associated with social networking activities is to regard one's statements and communications ... as subject to the same ethical prohibitions as if the same words were expressed in a more traditional medium.").

140 See Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, 85 Wis. Law. 30, 31-32 (2012), available at http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx? volume=85&issue=5&articleid=2416 (underscoring the risks associated with social media from making snap decisions).

141 Additionally, the website could face a claim of negligent recommendation for inadequately screening attorneys it promotes through the website. Leigh Jones, Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet, Nat'l L.J. (Aug. 20, 2012) (content available through LexisNexis).

142 The Rules indicate that competent representation includes "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rules of Prof'l Conduct R. 1.1 (2013).

143 "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation." Id. R. 1.1 cmt. 5.

144 Id. R. 1.1 cmt. 8.

145 See Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, 85 Wis. Law. 30, 32 (2012), available at http:// www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx? volume=85&issue=5&articleid=2416 (highlighting the additional risks posed by social media include negligence and even misconduct when attorneys fail to take the time to ensure the advice they are providing the public is not only accurate but also current).

146 See Model Rules of Prof'l Conduct R. 1.1 cmt. 8 (2013) (discussing the requirements for maintaining competence throughout the course of representation).

147 See Leigh Jones, Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet, Nat'l L.J. (Aug. 20, 2012) (content available through LexisNexis) (reporting that nearly 20% of attorneys providing services through LawZam graduated after 2008, prompting legal ethics experts to raise concerns about potential legal issues).

148 See id. (indicating that the website allows lawyers to jump into the job market and instantly gain clientele); see also Martindale-Hubbell, http://careers.martindale.com/c/job.cfm?site_id=7302&jb=10707224 (last visited Sept. 13, 2012) (on file with the St. Mary's Law Journal) (advertising a job opening for attorneys at LawZam that requires a degree from an ABA accredited school, membership of a state bar, and good standing but lists no minimum experience requirement).

149 Leigh Jones, Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet, Nat'l L.J. (Aug. 20, 2012) (content available through LexisNexis).

150 Id.

151 After all, we have to start somewhere.

152 The Texas Rules are similar to the ABA Model Rules with respect to solicitation. Only minor differences are present in the Texas version, which include additional commentary explaining non-profit organization exemption and forms of electronic communications that may be considered face-to-face solicitations. See Tex. Comm. on Prof'l Ethics, Formal Op. 561 (2005), available at http://www.legalethicstexas.com/getattachment/8b9e6585-6275-478b-a33846525d4ce291/Opinion-561.aspx (claiming that a Texas lawyer may not participate in an Internet lawyer-client matching service where potential clients post their legal problems, which are then forwarded to attorneys who registered to be able to respond online).

153 Model Rules of Prof'l Conduct R. 7.3 (2013); Tex. Disciplinary Rules Prof'l Conduct R. 7.03 (2005).

154 As part of the new 2012 amendments, Rule 7.3 originally titled "Direct Contact with Prospective Clients" has been modified to "Solicitation of Clients." Model Rules of Prof'l Conduct R. 7.3 (2013).

155 According to rule 7.3, comment 1, "solicitation" is defined as a "targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services." Id. R. 7.3 cmt. 1. Comment 2 goes further by acknowledging that there is a real potential for abuse if a "direct in-person, live telephone or real-time electronic communication" occurs with someone seeking legal services. Id. R. 7.3 cmt. 2.

156 Id. R. 7.3(a); see also N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 918 (April, 2012), available at http://www.nysba.org/AM/Template.cfm? Section=Home&ContentID=65710&Template=/CM/ContentDisplay.cfm (holding that a lawyer may post a video on his website for educating laypersons about a legal subject without violating solicitation rules so long as the video does not go beyond its intended educational framework). The Rules' list, of course, includes exceptions regarding categories of persons contacted by a lawyer who do not come within the rule. Those persons include: other lawyers, family members, or those with a "close personal, or prior professional relationship." Model Rules of Prof'l Conduct R. 7.3(a) (2013).

157 Id. R. 7.3 cmt. 2; Gabriel Miller, Social Responsibility, Trial, Jan. 2011, at 24-25.

158 Model Rules of Prof'l Conduct R. 7.3 cmt. 3 (2013); see also Ariz. St. Bar Comm. Rules of Prof'l Conduct, Formal Op. 99-06 (1999) ("Arizona lawyers ethically may not participate in an Internet service that sends legal questions from individuals to attorneys based upon the subject matter of the question.").

159 Model Rules of Prof'l Conduct R. 7.3(a) (2013); see also Steven C. Bennett, Ethics of Lawyer Social Networking, 73 Alb. L. Rev. 113, 132 (2009) (citing Joel Michael Schwarz, Practicing Law over the Internet: Sometimes Practice Doesn't Make Perfect, 14 Harv. J.L. & Tech. 657, 669 (2001)) (recommending a "sliding scale" standard for concluding when a website is considered a solicitation and suggesting that "merely hosting a passive website" does not rise to the level of soliciting).

160 See St. Bar Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166 (2004) (indicating attorney communication with a potential client in a chat room is a violation of the solicitation rules); see also Anderson v. Ky. Bar Ass'n, 262 S.W.3d 636, 638-39 (Ky. 2008) (holding that an attorney posting a website offering legal services following a fatal airplane crash warranted punishment for violating the rules of professional conduct).

161 See LawZam, https://www.lawzam.com (last visited Oct. 28, 2013) (noting that communications occur through real-time videoconferencing).

162 As a future member of a profession that is often derided as smooth talking and impersonal, I mean no disrespect to used-car salesmen the world over. This is just an acknowledgement of existing stereotypes.

163 See generally Model Rules of Prof'l Conduct R. 7.3 comments (2013) (expressing concern over the potential for abuse in face-to-face solicitations).

164 See generally id. R. 7.3(b) (acknowledging the apparent danger of solicitation occurring in "real-time" communications between lawyers and potential clients).

165 Id. R. 7.1; see also Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, 85 Wis. Law. 30, 31 (2012), available at http:// www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416 (admitting that one potential risk of social media usage is making false or misleading statements about an attorney's services).

166 See Model Rules of Prof'l Conduct R. 7.1 (2013) (violating the Model Rules subjects an attorney to possible disciplinary action or grievance).

167 "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Id.

168 Id.

169 See J.T. Westermeier, Ethics and the Internet, 17 Geo. J. Legal Ethics 267, 288 (2004).

170 But see S.C. Bar Ethics Advisory, Formal Op. 11-05 (2011), available at http:// scbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/1012/Ethics-Advisory-Opinion-11-05.aspx (holding that an attorney seeking to use "daily deal" websites like Groupon are okay so long as they are still in compliance with Rules 7.1 and 7.2 requiring that attorneys refrain from giving any false or misleading information about the lawyer's services in an attempt to receive financial gain).

171 See 24 Tips: Getting the Most Out of Your Lawyer, Cent. Va. Legal Aid Soc'y, http://www.cvlas.org/resource-24tips.html (last visited Oct. 28, 2013) (advising people to listen to their lawyers because they know the legal system and how the law applies to the facts).

172 See Steven C. Bennett, Ethics of Lawyer Social Networking, 73 Alb. L. Rev. 113, 128 (2009) (explaining that maintaining a social media presence or legal blog may expose attorneys to unauthorized practice of law issues across jurisdictions); Michael E. Lackey Jr. & Joseph P. Minta, Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging, 28 Touro L. Rev. 149, 161 (2012) (suggesting that the interactive nature of social media comment posting coupled with its broad reach creates the justifiable risk of unauthorized practice of law); J.T. Westermeier, Ethics and the Internet, 17 Geo. J. Legal Ethics 267, 284 (2004) (acknowledging that with the advent of the Internet the number of unauthorized practice of law issues has significantly risen); Zachary C. Zurek, Comment, The Limited Power of the Bar to Protect Its Monopoly, 3 St. Mary's J. Legal Mal. & Ethics 242, 250-77 (2013) (listing Certified Public Accountants, certain administrative agents, and those involved with online legal document preparation as possible individuals engaging in the unauthorized practice of law); Abigail S. Crouse & Michael C. Flom, Social Media for Lawyers,

Bench & B. Minn. (Nov. 10, 2010), http://mnbenchbar.com/2010/11/social-media-for-lawyers/ (highlighting that social media does not have any physical borders which makes it easy for lawyers to succumb to ethics violations); Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, 85 Wis. Law. 30, 32 (2012), available at http:// www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx? volume=85&issue=5&articleid=2416 (warning lawyers that content uploaded on the web is viewable anywhere in the world and cautioning lawyers not to engage in practice outside their jurisdiction).

173 See, e.g., Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, 85 Wis. Law. 30, 30 (2012), available at http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx? volume=85&issue=5&articleid=2416 (reporting that one of the main benefits of using social media is that it provides a cost-effective way of reaching large audiences all over the world).

174 See Model Rules of Prof'l Conduct R. 5.5 (2013) (discussing that a lawyer may only practice law in jurisdictions in which the lawyer is licensed and otherwise authorized to practice); see also Catherine J. Lanctot, Attorney-Client Relationships in Cyberspace: The Peril and the Promise, 49 Duke L.J. 147, 156 (1999) ("Lawyers answering questions about the law in jurisdictions in which they are not licensed to practice may violate restrictions against the unauthorized practice of law.").

175 Although with respect to social media issues, there could, however, be other ethical problems arising from the exchange of communication, including but not limited to: solicitation, making false or misleading statements, advertising violations, conflicts checking problems, confidentiality concerns, and competency issues. See, e.g., Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, 85 Wis. Law. 30, 30 (2012), available at http:// www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx? volume=85&issue=5&articleid=2416 (asserting that potential risks of using social media are making misleading comments that violate advertising rules).

176 Unless, of course, the attorney is also licensed to practice in the state of Ohio. See In re Discipline of Lerner, 197 P.3d 1067, 1069 (Nev. 2008) (asserting that whether the unauthorized practice of law has occurred is determined on a case-by-case basis and requires the "exercise of judgment in applying general legal knowledge to a client's specific problem," and holding that an attorney licensed to practice law in Arizona but maintaining an extensive practice in Nevada constituted a violation of the unauthorized practice of law for which a public reprimand was proper); Office of Disciplinary Counsel v. Palmer, 761 N.E.2d 716, 720 (Ohio Bd. of Comm'rs on the Unauthorized Practice of Law 2001) (finding that an executive director who created a legal blog offering his opinion and offering to help people with their legal issues did not engage in the unauthorized practice of law because he did not actually provide specific legal advice to visitors of the website). See generally Model Rules of Prof'l Conduct R. 5.5 cmt. 1 (2013) (outlining the parameters for multijurisdictional practice of law for attorneys, specifically addressing that a lawyer may practice in multiple jurisdictions so long as he has been admitted to practice in those jurisdictions).

177 See Michael E. Lackey Jr. & Joseph P. Minta, Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging, 28 Touro L. Rev. 149, 163 (2012) (proposing that it is difficult for practitioners to know their audience when communicating over the Internet because anonymity and pseudonymity are quite common in the online world).

178 Office of Disciplinary Counsel v. Palmer, 761 N.E.2d 716 (Ohio Bd. of Comm'rs on the Unauthorized Practice of Law 2001).

179 See id. at 718 (suggesting that Palmer committed multiple unauthorized practice of law violations). Specifically, Palmer was accused on three grounds: (1) allegedly providing free legal advice through his website, amoralethics.com; (2) affixing the letters J.D. after his name on his letterhead and representing that he was offering free legal advice; and (3) filing a brief in 1988 with the Ohio Court of Appeals. Id.

180 Id. There were several disclaimers on the website which indicated that some legal matters should be resolved without the need of an attorney and its associated costs. Id. at 718-19. The disclaimer also stated that Palmer was not an attorney and listed his employment history in the legal field. Id. It further invited people to submit brief summaries of legal issues for review and advice by Palmer, and he would provide a response unless he felt the individual required attorney services, in which case he would provide attorney names to the individual. Id.

181 See id. at 720 ("The publication of general legal advice on Palmer's [website], good or bad, is not of itself the unauthorized practice of law.").

182 See id. ("If Palmer actually gave legal advice in specific response to a question from one of his readers, he would have engaged in the unauthorized practice of law.").

183 Model Rules of Prof'l Conduct R. 5.5(a) (2013). The Model Rules are much more extensive than the Texas Rules when addressing the unauthorized practice of law. Compare id. R. 5.5 (detailing the circumstances in which a lawyers actions constitute the unauthorized practice of law, and setting forth general exceptions to the rule for practicing in other jurisdictions without running afoul of Rule 5.5), with Tex. Disciplinary Rules Prof'l Conduct R. 5.05 ("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.").

184 See Model Rules of Prof'l Conduct R. 5.5 cmt. 4 (2013) (explaining that "presence" does not require the lawyer to be physically present in order to qualify under the systematic and continuous presence test).

185 See Steven C. Bennett, Ethics of Lawyer Social Networking, 73 Alb. L. Rev. 113, 127 (2009) (suggesting that a lawyer may be exposed to violations of the unauthorized practice of law because he may not "establish an office or other systematic or continuous presence" in a jurisdiction in which he is not licensed to practice).

186 See Model Rules of Prof'l Conduct R. 5.5(c) (dictating the limited circumstances in which an attorney may provide legal services on a temporary basis, including: when the lawyer obtains local counsel and local counsel is actively involved in the matter; when a lawyer's services are related to an arbitration or mediation and stem from a proceeding within the attorney's jurisdiction and do not require a pro hac vice admission; or a proceeding related to or concerning a pending proceeding where the attorney is assisting another attorney authorized to practice in that jurisdiction and is admitted pro hac vice).

187 See Leigh Jones, Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet, Nat'l L.J. (Aug. 20, 2012) (content available through LexisNexis) (emphasizing that LawZam operates by hosting initial online video consultations between attorneys and visitors to the website).

188 See generally Model Rules of Prof'l Conduct R. 5.5 (setting forth the guidelines attorneys should follow in order to avoid disciplinary action).

189 See S.C. Bar Ethics Advisory Comm., Formal Op. 94-27 (1994), available at http:// www.scbar.org/MemberResources/ EthicsAdvisoryOpinions/OpinionView/ArticleId/507/Ethics-Advisory-Opinion-94-27.aspx (involving a situation where an attorney sought to participate in general legal discussions via electronic media and the committee noted that such practice of law via electronic means may violate rules of professional conduct absent a clear notice of geographical limitations on the lawyer's ability to practice in only those jurisdictions for which he is licensed). This would include a disclaimer that the attorney is only licensed to practice in states X, Y, and Z. See Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, 85 Wis. Law. 30, 32 (2012), available at http:// www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=85&issue=5&articleid=2416 (recommending that attorneys include on their webpages the jurisdictions in which they are licensed to practice law, so that visitors understand where the attorney can and cannot practice).

190 See Merri A. Baldwin, Ethical and Liability Risks Posed by Lawyers' Use of Social Media, Am. Bar Ass'n (July 28, 2011), http:// apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html (referencing the staggering numbers of both young and seasoned lawyers using social media as a means of generating business while acknowledging that those numbers are likely to increase over time).

191 See Robert Ambrogi, ABA Survey Shows Growth in Lawyers' Social Media Use, LawSites (Aug. 16, 2012), http:// www.lawsitesblog.com/2012/08/aba-survey-shows-growth-in-lawyers-social-media-use.html (providing some of the highlights from the 2012 ABA's Legal Technology Report, including that 39.1% of practitioners claim to have retained a client directly or indirectly from blogging activities, 11.2% acknowledge the use of Twitter for professional purposes, and an astonishing 95% of lawyers admit to using LinkedIn, Facebook, or other social networking sites for career development, networking, investigation, client development, and education purposes).

192 See, e.g., Memorandum from the ABA Comm'n on Ethics 20/20 on Client Confidentiality and Lawyers' Use of Technology, Am. Bar Ass'n 1, 3 (Sept. 20, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_ build/ethics_2020/ clientconfidentiality_issuespaper.authcheckdam.pdf (suggesting that committees could be established to research changes in technology and propose new guidelines or issue a paper for consideration by the ABA's House of Delegates). Until such body is formed, attorneys are permitted to submit questions, comments, or concerns to the ABA for consideration. See ABA Commission on Ethics 20/20 Comments, Am. Bar Ass'n, http:// www.americanbar.org/groups/professional_responsibility/aba_commission_on_

ethics_20_20/comments.html (last visited Oct. 28, 2013) (maintaining an extensive comments page with a table of contents for all current topics available for comment by the Ethics 20/20 Commission and including an email link feature for ease of submitting material to the ABA).

193 See John G. Browning, The Lawyer's Guide To Social Networking: Understanding Social Media's Impact On The Law 205-06 (Eddie Forunier, ed., Thomas Reuters/Aspatore 2010) (noting that the Internet is growing and changing at a pace so fast that the law is unable to stay current and applicable with new developments in technology).

194 But see Steven Seidenberg, Seduced: For Lawyers, the Appeal of Social Media Is Obvious, It's Also Dangerous, A.B.A. J., Feb. 2011, at 49, 53 (according to Stephen Gillers, legal ethics professor of New York University Law School and member of the ABA's Ethics 20/20 Commission, the current rules are at a high enough level that they do not require further clarification to be applicable and effective with new technology).

195 Currently, Texas requires fifteen credit hours of CLE per year, three of which must be devoted to legal ethics or professional responsibility, or divided between both. Tex. State Bar R. art. XII, §6, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2005).

196 See Steven Seidenberg, Seduced: For Lawyers, the Appeal of Social Media Is Obvious, It's Also Dangerous, A.B.A. J., Feb. 2011, at 49, 53 (quoting David Hricik, law professor at Mercer University School of Law and former chair of the ABA Section of Intellectual Property Law's Committee on Professional Responsibility, calling for bar associations to provide meaningful guidelines on acceptable uses of social media because of the number of attorneys using them that do not know the boundaries).

197 For a listing of social media geared CLE available for purchase and download offered through the ABA, see ABA Web Store, http:// apps.americanbar.org/abastore/index.cfm?fm=Product.Search&cid=84&layout=& tid=5&type=pte&section=cle&sort=d (last visited Oct. 28, 2013). Additionally, state and local bar websites are a great resource for information on upcoming CLE seminars and conferences.

198 See Eileen Libby, www.warning.law: Websites May Trigger Unforeseen Ethics Obligations to Prospective Clients, A.B.A. J., Jan. 2011, at 22, 23 (highlighting that a number of state bar opinions have tackled online communications and determined that lawyers should employ disclaimers on their social networking sites to avoid confidentiality and inadvertent attorney-client relationship issues).

199 See Ethics Traps to Consider, Inadvertent Attorney-Client Relationship discussed supra.

200 See Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, 85 Wis. Law. 30, 32 (2012), available at http:// www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx? volume=85&issue=5&articleid=2416 (recommending that an appropriate step in avoiding unauthorized practice allegations is to employ a clear disclaimer on online content stating the jurisdictions in which the attorney is licensed to practice).

201 See Mass. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 07-01 (2007) (reporting that legal professionals may avoid disqualification by posting a "terms of use" on their website to which clients must affirmatively assent before using the website's email link).

202 Eileen Libby, www.warning.law: Websites May Trigger Unforeseen Ethics Obligations to Prospective Clients, A.B.A. J., Jan. 2011, at 22, 23.

203 Although currently there are only a handful of ethics opinions concerning social media, more are certain to come.

204 See Steven Seidenberg, Seduced: For Lawyers, the Appeal of Social Media Is Obvious, It's Also Dangerous, A.B.A. J., Feb. 2011, at 49, 50 (recognizing the presence of ambiguities in the rules when applied to the online setting and how those ambiguities are already costing attorneys).

205 For information about submitting questions or comments to the ABA ethics committee see ABA Commission on Ethics 20/20 Comments, Am. Bar Ass'n, http://www.americanbar.org/groups/professional_responsibility/aba_commission_ on_ethics_20_20/ comments.html (last visited Oct. 28, 2013).

206 See Carolyn Elefant & Nicole Black, Social Media for Lawyers: The Next Frontier 6-7 (American Bar Association 2010) (providing statistics on the number of users utilizing various social media outlets and suggesting that we have yet to see social media's full impact on that way our society interacts with one another).

207 See Abigail S. Crouse & Michael C. Flom, Social Media for Lawyers, Bench & B. Minn. (Nov. 10, 2010), http://mnbenchbar.com/2010/11/social-media-for-lawyers/ (outlining different risks for attorneys associated with social media usage); Thomas J. Watson, Managing Risk: Lawyers and Social Media: What Could Possibly Go Wrong?, 85 Wis. Law. 30, 31 (2012), available at http:// www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx? volume=85&issue=5&articleid=2416 (addressing certain risks present when attorneys engage in social media usage in a professional capacity).

208 See, e.g., Complaint at 1, In re Kristine Ann Peshek, No. 6201779 (Ill. Att'y Registration & Disciplinary Comm'n Aug. 25, 2009), available at https://www.iardc.org/09CH0089CM.html (outlining disciplinary charges brought against an Illinois public defense attorney for publishing client confidences over the Internet through her blog "The Bardd (sic) Before the Bar - Irreverent (sic) Adventures in Life, Law, and Indigent Defense").

209 Merri A. Baldwin, Ethical and Liability Risks Posed by Lawyers' Use of Social Media, Am. Bar Ass'n (July 28, 2011), http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html.

210 See John G. Browning, The Lawyer's Guide To Social Networking: Understanding Social Media's Impact On The Law 163 (Eddie Fournier, ed. Thomas Reuters/Aspatore 2010) (suggesting that if you would not engage in such actions at your neighborhood bar, cocktail party, golf course or in a written letter, then you should not say them on Facebook, Twitter, blog or other electronic medium). For those attorneys and firms using social media, it may also be wise to invest in a social media insurance policy. See Kendall Kelly Hayden, Social Media Users: R U Insurable?, 74 Tex. B.J., Jan. 2011, at 96 (reporting that as a result of social media, insurers offer specific policies covering Internet-based business activity).

4 STMJLME 440

End of Document

103 Cornell L. Rev. 879

Cornell Law Review
May, 2018

Article
Cheryl B. Preston [dl]

LAWYERS' ABUSE OF TECHNOLOGY

*881 INTRODUCTION

Lawyers are highly educated and, allegedly, of higher than average intelligence, but sometimes individual lawyers demonstrate colossal errors in judgment, especially when insufficiently trained in the new and emerging risks involved with the technological age. For instance, although the internet is a necessary tool for attorneys [1] and is now a prominent feature in the everyday lives of all actors in the legal system, [2] this technology poses particularized and often unanticipated risks of professional and ethical abuse--risks that are extraordinary both in quantity and intensity. [3] As Harvard's Director of the Center for the Legal Profession warned: We are "only at the forefront of seeing the kind of changes that technology is likely to bring to legal practice," and these changes will "have a profound effect on how we think about regulating lawyers." [4] Unfortunately, the American Bar Association (ABA) missed an opportunity it ***882** had with its own Ethics 20/20 Commission [5] to address meaningful changes in the practice of law wrought by technology. [6] However, the opportunities for unethical and unprofessional behavior in the use of electronic communications and storage cannot be ignored. This Article assesses the risks of technology abuse and proposes a scheme for addressing the professional and ethical problems that have and will continue to accompany the shift to digital lawyering.

Part I of this Article sets the stage for how to effect change within the existing regulatory scheme to address technoblunders in the legal field. It differentiates various modes of managing and punishing lawyers and briefly explains the role of the First Amendment in regulation of the bar. Part II demonstrates why technologies pose inherent, increased, and intensified risks for incivility, unprofessionalism, and unethical behavior. While the core principles of honesty, respect of others, and confidentiality that are the basis of the Model Rules of Professional Conduct [7] (Model Rules or Rule) and civility standards adopted by individual state, local, and court bar associations do not change with the use of technology, the gaps and ambiguities in the Model Rules and the civility standards make them ineffectual in addressing technology. Lawyers need to be informed, trained, and warned about specific risks to avoid in an area where the risks are new and any error in judgment can be unusually extensive and severe. In addition, the newness of the technology and the widespread use of email, Facebook, LinkedIn, Twitter, Yelp, Angie's List, AVVO, Lawyers.com, various platforms for blogs and chatrooms, and other sites warrant efforts to provide more advance guidance alerting of risks and defining safe practices than is necessary with long recognized practice hazards that law students are taught to avoid. Public realization that lawyers are incompetent to use technology, are spying or otherwise deceiving others to get electronic information, or cannot be trusted to keep confidential information and defense strategy private undermines the entire profession.

***883** Part III provides specific ways that attorneys can and do use technology unprofessionally and unethically and suggests specific changes to address these issues. Part III is organized in the numerical order of the provision of the Model Rules most relevant to particular harms. Although ordered in accordance with the Model Rules, the same concerns arise with published professionalism standards. The recommendations are targeted not exclusively to changes in the Model Rules. Recognizing the

institutional and political difficulty of effecting any changes in the Model Rules and the urgency of addressing technology risks, I recommend that changes be made, first, in the various bar associations' professionalism standards, and then through the process of adopting Model Rules. Because drafting consistent and clear professionalism standards can be daunting, I suggest specific language for each of the concerns. The related twin problems of educating lawyers and making certain that regulations are enforced are beyond the scope of this Article. [8]

I MECHANISMS FOR ADDRESSING TECHNOLOGY ABUSES

Attorney conduct is subject to regulation as a condition to licensure, membership in bar associations, and admittance to practice before particular courts. Like participants in other endeavors, such as securities traders and sports competitors, lawyers are subject to rules. The directives and guidelines for conduct in the profession come in various forms.

In spite of these various rules, the profession has made almost no effort to explicate for future guidance how technology may pose particular risks to civility, professionalism, and ethics and how the risks should be addressed. One lawyer stated it this way: "All the rules that the legal profession relies on to instruct lawyer behavior were forged before the emergence of twenty-first century technology. The rule book for this young century has not been written yet." [9]

One major issue in regulating lawyers is the need to control their willful and intentional violations of ethical and professional standards. Many willful violations are covered in the Model Rules. But that level of regulation is insufficient. As the technoblunders explicated in this Article demonstrate, at least some attorneys are just negligent in their use of technology and ***884** others do not seem to consciously register the misrepresentations inherent in their use of new discovery searches and other methods. In many cases the lawyer should have realized that such conduct was inappropriate and foreseen the harmful consequences. Other technoblunders are a result of insufficient recognition of new risks.

A. Model Rules of Professional Conduct

The primary mechanism for lawyer regulation is the Rules of Professional Conduct promulgated in model form by the ABA and adopted, typically with few variations, by the various state bar associations. [10] I refer generally to all state versions as Model Rules, unless a variation in a particular state context is noted. The Rules define with some precision the point at which disciplinary action will be taken. [11] But the level of conduct in the Model Rules is set to a low goal--minimal ethics. Even then, continuing and escalating instances of misbehavior demonstrate that the Model Rules are insufficient to regulate attorney conduct. [12]

The ABA has mechanisms to evaluate where the Model Rules need changes and to propose draft language. [13] Unfortunately, ***885** the ABA Commission 20/20, specifically tasked to address advances in technology, made its contribution submerged into the comment for Model Rule 1.1. [14] The Comment offers only the following vague and insubstantial advice: "[A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." [15] In terms of other forms of direction, the ABA has only begun to scratch the surface with an opinion letter on social media, but it is directed only at judges. [16] Commentators widely criticized the failure to realistically address technology; for instance, one quipped, "The Deafening Silence of the ABA Model Rules." [17]

Even in an ideal world, the process of the ABA adopting changes to the Model Rules and urging each bar association to adopt the changes, is political, cumbersome, and lengthy. [18] A level of care to involve all constituencies and changes that are the result of long term thoughtfulness may be necessary for crafting a uniform set of rules that lead directly to enforceable punishments, [19] but the ABA has used these procedures to ***886** avoid taking action. Expecting timely revisions of the Model Rules to further

address technology is at best a long-term goal. In fact, Professor Dzienkowski argues that "the structure of the ABA is such that few, if any, fundamental reforms have any chance of adoption by the ABA House of Delegates."[20]

B. Professionalism and Civility Standards or Creeds

In an attempt to address the lapses of the Model Rules,[21] many states and courts adopted express statements of acceptable and unacceptable behavior norms.[22] Taking on many different names, these statements of professionalism were originally envisioned to serve an aspirational purpose, clarifying and in some instances going beyond the Model Rules. These published best practices are denominated as professionalism and civility standards, creeds, pillars, codes, etc.[23] I use these common titles interchangeably. The stated expectations in creeds generally aim higher than the minimums delineated in the Model Rules and are designed "to encourage dedication to professionalism and civility."[24] Today, many jurisdictions *887 have taken steps towards making professionalism creeds enforceable.[25]

In professionalism standards, an ideal place to address new and changing issues, there is virtually no treatment of technology abuses.[26] The first two states to hint at the issue in professionalism standards are Utah and Florida.[27] The preamble to Utah Standards of Professionalism and Civility now states:

> Lawyers should educate themselves on the potential impact of using digital communications and social media, including the possibility that communications intended to be private may be republished or misused. Lawyers should understand that digital communications in some circumstances may have a widespread and lasting impact on their clients, themselves, other lawyers, and the judicial system.[28]

The Florida Expectations of Professionalism was amended in 2015 to include:

> 2.5 A lawyer's communications in connection with the practice of law, including communications on social media, must not disparage another's character or competence or be used to inappropriately influence or contact others. (See R. Regulating Fla. Bar 4-8.4(d)).
>
> 2.6 A lawyer should use formal letters or e-mails for legal correspondence and should not use text messages to correspond with a client or opposing counsel unless mutually agreed.[29]

*888 To avoid negligent and accidental abuses, lawyers must be educated in, and then reminded of, the ethical and professional risks.[30] Professionalism creeds, even if not directly enforced, can form a basis for educating and mentoring lawyers with respect to advances in technology.[31] They may be the most appropriate medium for addressing technology issues in the short run until the ABA or another regulator can provide a firmer solution.

C. Ethics Opinions and Court Opinions

Another method of regulating attorney conduct is through the issuance of ethics opinions, which address a question submitted about a specific issue or behavior. In addition, bar associations can issue individualized, ad hoc responses to members of the bar who ask specific questions about the interpretation of the Model Rules. Although some formal opinions include

excellent discussion of the risks and expectations, only a very few have addressed technology.[32] The best effort emerged in November 2016 from the District of Columbia Bar Association.[33] But formal opinions are, in practice, of limited use in disseminating widespread standards and guiding future conduct.[34] Few lawyers think to consult ethics opinions on new questions of technology use. Fewer take the time to search through ethics opinions unless they understand they are taking a considerable risk.

In addition to ethics opinions, in a few jurisdictions, technology abuses by lawyers have resulted in published opinions by the disciplinary body or the courts.[35] These are useful in ***889** training lawyers in this area but tend to involve only the most egregious cases with the most extreme facts. The few precedents on proper technology use are not available in each jurisdiction and are not uniform or consistent in coverage or result.

D. Best Approach for an Immediate Need

Although changes to the Model Rules to account for technology are necessary, the professionalism creeds offer a mechanism that can be more responsive and flexible in the meantime. The potential of stated standards in creeds to address ongoing developments in practice such as the advent of technology is enormous, but most creeds are not currently effective. The use of creeds in this function will require focused attention and significant redrafting.[36] Unfortunately, as presently written, almost all of the professionalism creeds are inconsistent, erratic in coverage, and poorly worded. Even the best of creeds are also largely impotent. Including references to common technology related abuses would be an important improvement, but bar associations should also consider using this opportunity for change to undertake a general revision of the wording of their creed and consider options to give them ***890** teeth. The survey in *Incentivizing Lawyers to Play Nice: A National Survey of Civility Standards and Options for Enforcement* offers a comparison of the subjects that these creeds handle and commentary on the problems in which some of them wallow.[37] With this information available, each bar association has some comparables to assist them in being more inclusive in the subjects they address and in improving wording. The ideal would be carefully worded sets of standards that are fairly uniform across the nation.

A related issue is how to make revised creeds more effective in sending the message. Some bar associations are already treating creeds as enforceable in various ways, and others are active in making such creeds effective starting points for lawyer education and guidance.[38] For example, some states are incorporating the creeds into their Attorneys' Oaths; other jurisdictions have implemented programs for referring offenders to investigation boards.[39] Some courts have gone so far as to issue serious sanctions for uncivil conduct violating professionalism creeds.[40] Because of poor drafting and little enforcement, most codes of professionalism have failed.[41]

Despite their flaws, professionalism standards offer the best vehicle within the current regulatory framework for meeting the urgent need to address the issue of technology and social media until we can treat these issues more formally in the Model Rules.

E. Speech and Other Legal Implications of Lawyer Regulation

Finally, a note on the speech implications of regulating professionalism and civility is in order. A robust and thorough discussion of the historical and current treatment of the intersection between attorneys and free speech is well beyond the scope of this Article. This issue has been addressed in detail in a plethora of books and articles.[42] I include here only a short ***891** summary of the status of speech and lawyer regulation law in hopes of exposing the implausibility of successful First Amendment challenges to the proposed professionalism creeds or Model Rules.

It is well accepted that licensed members of bar associations are subject to speech restrictions that would not apply to lay persons.[43] These restrictions go well beyond what can be said in court filings, at hearings, and other official contexts and

cover speech technically outside of legal system processes.[44] Although these restrictions are not without strain, "important state interests compete with attorneys' First Amendment rights and justify greater restrictions on lawyers' speech rights."[45] The Model Rules and local rules of states and courts often restrict and penalize attorneys for what they say. These restrictions generally fall into two broad categories: restrictions on commercial speech[46] and restrictions on speech that affects the administration of justice.[47] In deciding whether a restriction is constitutionally permissible, the court weighs "the State's interest in the regulation of a specialized profession ***892** against a lawyer's First Amendment interest in the kind of speech that [is] at issue."[48]

Where the restriction is supported by a compelling governmental interest, it will be upheld as constitutional.[49] In general, the state's interest in regulating commercial speech is less compelling than the interest in regulating attorney speech that affects the administration of justice.[50] It follows, then, that rules restricting attorney commercial speech are sometimes invalidated when challenged on First Amendment grounds, whereas rules implicating the administration of justice and the image of the profession--such as the majority of the professionalism creeds herein discussed--are generally upheld as constitutional.[51] Attorneys knowingly and willingly enter into a highly regulated profession, implicitly waiving the right to unrestrained expression.[52] They should expect to be subjected to some speech restrictions by virtue of being "officers of the court," capable of influencing the administration of justice.[53]

In conclusion, regulation of attorney conduct is generally allowed even when it involves speech. Many provisions of the Model Rules address restrictions on speech.[54] The suggestions in this Article for clarifying and modifying creeds of professionalism in the short term, and the Model Rules in the long term, are well within the exceptions for regulating lawyers.

*893 II WHY TECHNOLOGY ABUSES WARRANT IMMEDIATE AND TARGETED COVERAGE

Technology use imposes both unique and heightened risks to lawyers, clients, and the legal system. As compared to the type of conduct that was originally targeted in the Model Rules and professionalism creeds, the features of electronic communications make more likely unethical and unprofessional behavior and, when it occurs, more damage to individuals and the legal system.[55] The interests and values that animate the Model Rules and creeds are the same whether on or offline. But the ways the harm is inflicted are subtler and outside of the awareness of many attorneys, even those who are not naïve or inexperienced technologically. Thus, a tantrum online is much more likely to be exposed and disseminated than oral conversations or a sheet of paper. The digital era represents some fundamental behavioral and attitudinal changes. For instance:

> With social media, the world is literally just a few mouse clicks away from a company's most confidential information, raising growing concerns about a company's own employees disclosing confidential information via social media. Exacerbating this is the fear that social media has desensitized people to the fact of disclosure of formerly private information because so much of it is done voluntarily--and so *easily*. When taken with the tendency of social media users--especially younger ones--to blur the line between social life online and work, crucial proprietary information can be out the door almost before the employee knows it. The concept of information--*any* information--being private is almost obsolete to many people. If they have access to it, what's so bad about others having it?[56]

Thus, Part II reviews various non-exclusive reasons why technology warrants specific attention in the regulation of the profession.

A. Lack of Anonymity and Privacy

The internet creates an unwarranted illusion of anonymity and privacy. Although an expert in encryption, Tor, and antitrace ***894** relays can hide the source and content of some messages, the average internet user cannot expect privacy or anonymity unless no one is trying to find or unmask a post. Any savvy computer user can trace the source IP address for a post and the identifying MAC number of the originating computer. In addition, many lawyers are still extremely sloppy about creating secure and uncommon passwords and then keeping the passwords private.[57] Leaving a confidential letter or an ill-advised note on one's desk or within easy access of a determined snooper is unwise. Stepping away from a computer that is logged into a user's account runs the risk of exposing what is on the screen and anything else a search of the computer or a look at browsing history might reveal. Social media is particularly risky. Recently, in *hiQ Labs, Inc. v. LinkedIn*, a district court expressed skepticism about an argument that LinkedIn's users expect privacy, noting that LinkedIn's privacy policy is illusory. "LinkedIn ... trumpets its own product in a way that seems to afford little deference to the very privacy concerns it professes to be protecting in this case. ... LinkedIn's own actions do not appear to have zealously safeguarded those privacy interests."[58]

Federal laws cover the intentional interception of electronic transmissions and hacking or exceeding access authorization.[59] Additionally, unauthorized access to electronic information is covered in some states by the common law trespass to chattels.[60] However, these laws have not prevented wide scale violations by people unaware of the law, the risk of being ***895** caught, and the seriousness of the implications. Furthermore, in most cases, even when a perpetrator is caught, the harm has already been done. Once an embarrassing or unethical communication has been made public, arguing that access to internet posts was obtained illegally or that the material on a computer was stored by someone else is not an effective response.[61] As in the case of *Yath v. Fairview Clinics*, once the information about plaintiff's sexually transmitted disease and her new lover had travelled through her husband's family and onto Myspace.com, it was little comfort that the information had been obtained illegally by an employee of a medical clinic.[62]

Moreover, the law does not prevent the reproduction and distribution of information by a third-party who did not participate in the illegal access. In *Bartnicki v. Vopper*, an activist allegedly found a tape of a private cell phone conversation in his mailbox, which he then sent to the press.[63] Because it could not be proved that the recipient of the tape was a party to the illegal acquisition of the conversation, the wiretap statutes did not apply and thus spreading this information was legal.[64]

B. Rights Waivers

Increasingly, internet users are waiving what rights to privacy and protection they have. Websites often assert a "terms of use" policy, "end user license agreement," or the like in clickwrap or even browsewrap form.[65] These wrap contracts may give the website owners or operators a license to use customer postings and photographs for their own purposes and to sell or sublicense these to others.[66] If so, the author and original ***896** copyright owner of the post cannot force the site, or the assignees and sublicensees, to take it down.[67] Some websites offer processes that allow users to erase personal information themselves; however, this is not a guarantee of privacy and creates no legal obligation for the service provider.[68]

Many employers have access by contract. Courts have upheld the right of employers to access the content of internet transmissions and stored computer content originating from, received on, or saved on company owned machines.[69] The same applies to employer owned internet access accounts and mobile devices.[70] Some employers disclose their right to such access and require employees to consent in an internet use policy or employee handbook. Others do not, but courts have generally found that an employee cannot have a reasonable expectation of privacy in such content.[71]

C. Misplaced Trust

Many communicants on the internet share an unfounded belief that their message will be seen only by the intended recipients. Recently, the adultery-based dating website Ashley Madison suffered a serious hack that exposed the names and email addresses of the site's users, which information went *897 viral.[72] As with prior, well publicized disclosures, these hackers will inspire copycats.[73] Any promise that digital information will be hermetically sealed in a mayonnaise jar is tenuous. Although secrets have always spread, in years past, fewer people had the technology to rapidly share secrets. Moreover, passed-on oral information was recognized to become increasingly less reliable with each subsequent retelling, while exact copies of a writing or a tape are hard to refute.

Even if no one intercepts an online conversation or circumvents privacy settings, the content of group posts is only as trustworthy as the others who have authorized access. Friends, family members, coworkers, and others may not understand that another's posts made in a "private" group should not be copied and sent to outsiders.[74] This often happens without the slightest intent to criticize or harm the author, but some later recipient may have other ideas. One Myspace user posted a journal entry that was later submitted to a local newspaper.[75] The court reached the obvious holding on the law: users of social media have no reasonable expectation of privacy.[76] In a Fourth Amendment context, one court observed: "While [the user] undoubtedly believed that his Facebook profile would not be shared with law enforcement, he had no justifiable expectation that his 'friends' would keep his profile private."[77]

The ABA's formal opinion on social media issued to judges states what every lawyer should be taught:

> Judges must assume that comments posted to [a social media site] will not remain within the circle of the judge's connections. Comments, images, or profile information ... may be electronically transmitted without the judge's knowledge or permission to ... unintended recipients.[78]

*898 In addition, an array of observers may be present in a chatroom without disclosing their presence or their real identity. Interested third parties may convince another member of the group to disclose his or her password, and access the computer of a co-worker or family member while it is logged into a chat room, blog, or social media site. In its opinion regarding proper technology use for judges, the ABA correctly observed a truth applicable to all technology users:

> In contrast to fluid, face-to-face conversation that usually remains among the participants, messages, videos, or photographs posted to [social media] may be disseminated to thousands of people without the consent or knowledge of the original poster.[79]

D. Ubiquity and Diffusion

Internet use has become pervasive in all ages and groups, including lawyers.[80] Every person can be a publisher on a national and global scale with a few keystrokes and a click. Each person's associates, friends, and relatives (including prior acquaintances entirely ignored for the last forty years), are now sending numerous messages that seem to warrant a quick reply. The ease and speed of electronic communications means writers give less thought to what they write (or tweet) back.[81] Conversations in which two like-minded people whispered casually at the watering hole after work are now taking place online and can, in painful detail, be displayed in writing and out of context for the world to see. Unprofessional and hotheaded comments in emails are prone to being found, copied, reposted, and forwarded to the person berated in a way that face-to-face comments between

two people would not. The risk that maladroit messages will be forwarded to a judge, opposing counsel, *899 client, juror or other target is vastly magnified online. Thus, electronic communications are more lethal than prior modes of discussion.

E. Verifiability

The accuracy of a report of others' statements using electronic communication can be easily verified, whereas oral interactions cannot. It is difficult to "spin" the meaning when the exact words used are on display. The experience of Federal District Judge Richard Cebull serves as a prime example.[82] After he forwarded a racially charged email to some "old buddies," the exact content of that email was forwarded in a chain to unintended recipients.[83] Judge Cebull lamented, "It was not intended by me in any way to become public."[84] Unfortunately for the judge, his name was attached to contents circulated beyond his reach.

F. Permanence and Aggregation

The internet's memory cannot be controlled by the original poster.[85] A computer drive or disk can keep innumerable messages without bothering with space, filing cabinets, or document clerks. And unlike oral or print communication, digital information is easily searchable by names and other terms. A tidbit of a client confidence in a tweet can be connected to other bits of digital information to reveal information lawyers believe was never told to anyone. Internet service providers often cache copies of "deleted" data forever.[86] Material thought to have been destroyed can resurface at a later date.[87] In contrast to the European Union,[88] the United States does not require *900 internet service providers to delete electronic information, unless the content is illegal and the provider is under notice.[89]

G. Instantaneity and Informality

The instantaneity of online communications permits, if not encourages, severely pococurante messages. Because of the ease and informality of online communication, people say things online that they would not say in a letter or face-to-face.[90] Social norms that encourage people to self-regulate-- for example, shunning or reprimands from neighbors, family, and coworkers--are largely lost online.[91] Internet use seems to override any sense of inhibition or caution, perhaps because *901 users wrongly harbor an illusion that their communication will never reach beyond the intended recipient. In addition, digital natives are carrying on more and more conversations electronically that historically were not in writing. Given the immediacy of texting coupled with clumsy, tired thumbs, an electronic reply may be more easily misspelled, misstated, and misaimed.

Language in electronic messages is typically more casual and filled with hyperbole and tasteless attempts at humor. Research by social scientists reveals that we tend to be vastly overconfident in our ability to clearly communicate by email.[92] Comments that might be in an offhand aside to the person in the next seat in a meeting can, and frequently do, implicate flaws in clients, other lawyers, judges, jurors, and the legal system, and project messages that erode public trust in the legal system. When made electronically, such comments can be preserved, verified, and disseminated in writing to a wide audience.

Employees who would not confront a boss in the hall seem willing to say what they think online. An employee shared that she and another employee had been fired on Facebook.[93] A third worker commented on the post, stating that "[the boss] did both of y'all wrong."[94] Word got back to the boss,[95] who disapproved of what could be read as disloyalty. The third worker then posted: "[S]omeone did not like what I had to say even though it's MY fb, MY post/comment. I can say what I please. don't like whatcha see? then scoot."[96] Ultimately, the person who had to "scoot" was the third worker, who was fired and initially denied unemployment benefits.[97]

The sender may choose the wrong emoji. I once included a face with big tears to convey sadness and the recipient had to *902 tell me that this emoji conveys laughing so hard that one is crying. The message, thus, was inappropriate. Many electronic devices autocorrect words that appear (to it) to be misspelled. The text is replaced with what may be a commonsense choice but is inaccurate, sometimes after the writer has moved down several lines. My daughter announced the birth of her baby named Hugh. A friend's voice text came across as "Congrats on BBQ." This is a trivial error; others might be significant. Following an interview with a Salt Lake City firm, one applicant wrote to praise the firm for its "nurturing" of new associates and instead praised their "neutering" of new associates. [98]

Often, the author of a post believes that catchy comments will be seen as a harmless jest. However, for defamation purposes, that assumption cannot be relied upon. At least one judge has ruled that comments made on Twitter should be taken just as seriously as comments in other, more formal settings. [99] After Courtney Love tweeted that her former lawyer was "bought off," the lawyer brought a libel suit. [100] Counsel for Courtney Love argued that the tweet was just the hyperbole often found on the internet. The court ruled that Love made the comments with "a widely used internet vehicle for communicating personal views," [101] and will be held to the words she used. [102] This is only the decision of a single district judge, but the analysis is convincing and other courts may be willing to take online messages literally. [103]

*903 H. Lack of Context

Internet interactions can be taken easily out of context. [104] Ask Sarah Palin about seeing Russia [105] and Michelle Obama about being proud of her country. [106] It is much easier to copy and paste word snippets that, without context, carry a different meaning than the speaker or poster intended. The casualness and back and forth of an email chain means that writers may be more terse and improvident than in other settings. Without the entire chain, a statement in one email could carry an entirely different meaning.

Internet posts consist only of bare words and an occasional emoji, without the body language usually present in face-to-face conversations and without the tonal distinctions of oral conversations. [107] The impediments in accurately conveying a message electronically are so acute that some have called for punctuation that indicates mood (such as one to denote sarcasm). [108] Facebook even started experimenting with a "satire" tag to help users avoid getting duped by popular satiric news stories. [109]

The speed and the ease with which an electronic communication can be sent means that an errant click on "reply all" could send one's snotty commentary on a post to the entire listserv. Other potential pitfalls lie in the ability to copy and paste a long list of recipients' emails without reentering or rereading each. A prior message may have been used to reply. The parties believe the new interchange includes only two people, not realizing that the "reply" went to everyone on the list. Just recently, one of my research assistants accidentally sent a "kissy face" image and a personal message to his landlord; it *904 was intended for his wife. No harm done, but it is easy to imagine more damaging images and messages. The old-fashioned process of printing duplicates and typing out the addresses on envelopes, by contrast, makes this kind of unintentional over-distribution so much less likely in non-digital contexts.

In a provoking example, after oral arguments for a case involving the State Bar of Nebraska, the former bar president sent an email to the attorneys who had argued for the bar. [110] He also cc'd the bar's Executive Council, which unfortunately included the Chief Justice as the Supreme Court Liaison. [111] The email congratulated the attorneys for dealing with "ill conceived [sic] and uninformed questions" from the bench. [112] Because the Chief Justice had seen the email, he felt it necessary to reveal it to the other members of the court, as an ex-parte communication. [113] This whole embarrassment was facilitated by the ease of including groups in the recipient field of an email without separately inputting names. Clearly, the internet presents a host of new issues that make ethical and professional faux pas more likely and spread their harm more widely.

III PROPOSED CHANGES TO ADDRESS TECHNOLOGY ABUSE IN THE LAW

Stopping uncivil and unprofessional behavior by lawyers is the focus of many of the Model Rules and the clear intent of professionalism standards. Most printed court and bar association standards include a generalized and overarching statement, such as this one: "[L]awyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner." [114] The sentiment is noble, but it does little to incentivize change and less to identify when the line is crossed.

In this Part, I discuss how technology use frequently runs afoul of various principles of ethical and professional behavior. ***905** I organize this discussion in the numerical order of the individual Model Rule that is most closely associated with a particular type of abuse. I do not mean to suggest that the problems must now be addressed in terms of the Model Rules. Although enforcement actions could currently take the form of violations of the Model Rules, my main concern is preventing abuses in the future. Thus, I suggest that each bar association and court explain these issues in the official statements of expectations or professionalism creeds that they enact. At some point, hopefully, the Model Rules will be reexamined to consider express inclusion of these ethical and professional problems in the text of the Model Rules. I order the discussion in accordance with the format of the Model Rules only for convenience. I begin with issues related to the content of Model Rule 1.1. However, the most important discussion falls at the end in the coverage of Rule 8.

A. Rule 1.1: Competence

Model Rule 1.1 requires "competent representation." [115] The ABA Commission 20/20 took a small step toward acknowledging the importance of technology in the practice when they added a comment to Rule 1.1 stating that "a lawyer should keep abreast ... of the benefits and risks associated with relevant technology." [116] Many states have adopted this provision, [117] including Alabama, Arizona, Connecticut, Delaware, Kansas, New Mexico, New York, Pennsylvania, and Utah. [118] Commendably, Florida went beyond the suggested language of Model Rule 1.1 and not only adopted the language of the Rule, but also took a concrete step toward making sure that Model Rule 1.1 is followed by requiring Florida lawyers to "take at least three hours of CLE in an approved technology program as part of the 33 total hours of CLE they must take over a three-year period." [119]

***906** Admonitions of competency are being considered or adopted in various states in a variety of alternative forms. [120] Many courts now encourage or require lawyers to conduct discovery in digital formats. A California ethics opinion states that if an attorney lacks the required competence for proper ediscovery, she should "(1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation." [121] A few bar association creeds mention use of technology in discovery and transfer of documents. [122]

As technology becomes more and more pervasive, ignorance of beneficial uses of technology is increasingly unacceptable, and can result in very real consequences for lawyers and their clients. Many have opined that not using technology during legal research may constitute a lack of diligence because online legal research provides the most up-to-date picture of the law. [123] Further, online fact discovery is likely to reveal important additional information to help build a client's case or assess a client's risk. Failing to use technology to streamline practice and save wasted time could lead to fees a court might find unreasonable. [124]

Although most discussion of technology uses and abuses centers on litigators, transactional lawyers are not immune from technoblunders. The recent District of Columbia Bar association ethics opinion warns that lawyers entrusted with fulfilling due diligence for cases involving securities, pending sales ***907** and purchases, and regulatory compliance must thoroughly review all social media postings and the situation may "require advice about whether social media postings or use violate statutory or rule-based limits on public statement or marketing." [125] It references limitations on such public statements and guidelines from federal, state, and local agencies. [126] It explicitly notes the Security and Exchange Commission's recent action

relating to the risk that social media may be a communication about an initial public offering, [127] and that "[i]nadequately disclosed interactive Internet downloads may constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act." [128] The Model Rules do not address the risks for transactional lawyers, and neither do the professionalism standards of any state. This specificity is novel to the D.C. Bar Ethics Opinion 371. The ABA goes so far to change the Model Rules to require lawyers to be competent in electronic communications but offers no guidance for transactional lawyers.

Not just disuse, but mistakes in understanding how technology works can have serious consequences. In Wisconsin for example, a lawsuit was recently dismissed because of an email that allegedly landed in a lawyer's junk mail folder. [129] The plaintiff and his lawyer Timothy Davis did not appear at a deposition on June 6th because "the email notice went to the lawyer's junk email folder." [130] Apparently no one in the office saw a mailed notice. Assuming the lawyer in this case is telling the truth, this example is a warning about relying on the delivery of electronic notices and neglecting careful handling of hard copy mail. In addition, Davis alleges that the lawyers for the opposition ***908** did not receive discovery documents he sent because their system could not receive email files larger than ten megabytes. [131] Lawyers must be on the alert for sending documents in smaller batches or emailing opposing counsel to be sure that files were received before assuming they were.

Although a lack of a technological savvy may not always result in consequences as drastic as having a case dismissed or missing discovery deadlines, it will never do the client any favors. One way to approach this issue would be to amend the requirements for continuing education to require some credits for classes on properly using technology in the practice of law. In the last year promising materials are starting to be available for even the smallest bar association to use in providing at least initial education to members. [132]

Unfortunately, much of the education on social media available to lawyers is promotional. That means it is teaching about how to promote yourself and your practice and it is given by commercial interests that are happy to assist you by selling use of their platforms. For instance, Kevin O'Keefe, CEO of LexBlog, introduces his various presentations with this: [133]

> The key for lawyers is learning how to turn the digital dials by using social networks and media effectively. Learning here comes from trial and error.
>
> Adapting to the cultures each social media present is like traveling to a foreign country. You get comfortable over time and keep the faux pas to a minimum as you start. [134]

But encouraging lawyers to dive in and hope to overcome mistakes over time is the wrong message. Lawyers should be ***909** taught how to avoid "faux pas" as well as ethical and professional violations first.

While waiting for the Model Rules to be more explicit, bar associations should consider professionalism standards that encourage the use of electronic discovery and recommend online factual research. Moreover, technological competency requires recognizing the risks of online social media and electronic communications. No lawyer is competent to practice law in this century without becoming aware of the risks of electronic communications and social media as described in Part II. A general statement in a professionalism creed could include the following language, but as the following subparts illustrate, various issues require more detailed individual coverage:

> Lawyers should educate themselves on the merits of e-discovery and online research, as well as the obligations of researching social media in the course of due diligence. Further, lawyers should be aware of potential negative consequences of using digital communications and social media, including the possibility that communications

intended to be private may be republished or misused. Lawyers should understand that digital communications in some circumstances may have a widespread and lasting impact on their clients, themselves, other lawyers, and the judicial system.

B. Model Rule 1.6(a) and (c): Confidentiality of Information

Model Rule 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client," except under limited circumstances. [135] Of course, attorneys have been on notice about the importance of confidentiality for a century. However, attorneys may not recognize the ways that electronic communications, research, and storage lures a conscientious attorney into inadvertent violations.

What lawyers should be required to know is that, with more options of storing and transmitting client information, inadvertent disclosure of client information is much more likely in the cyberworld. [136] Protection of important digital data is often handled too casually by attorneys. The frequency of on- ***910** line posts, texts, tweets, and other forms of social media correspondingly increase the risk of exposing confidential information. Also, the ease and instantaneity of the medium encourages sloppy and thoughtless disclosures. Something about the internet leads people to overshare, to unduly trust those they imagine are watching, and to fail to use caution or even proofread. [137] Lawyers must be aware that, in addition to their own electronic devices, access to confidential information may occur from third parties' devices when they receive or generate messages to the lawyer.

Lawyers fail to consider the various kinds of technoblunders that give rise to ethical and professional risks. This section reviews common categories of confidentiality breaches arising with the use of technology.

1. *Oversharing*

Attorneys have been known to complain about their day's work or regale others with tales of competence and success in particular cases or transactions. Some of these communications provide enough information to lead a recipient to figure out exactly what client and what transaction was involved, even if the lawyer did not mention specific names or obvious facts. Historically, these kinds of sloppy and "accidental" disclosures took place in closed groups during oral conversations, making it less likely for those disclosures to spread and be made available to others who might want to harm the client. In writing online, such disclosures can easily be spread and become exceedingly dangerous both to the client and to the integrity of the legal system.

An outrageous example of oversharing involves an assistant public defender in Illinois who posted sensitive client information on her blog, referring to clients by their first names and even revealing information relating to a client's drug use. [138] A less outrageous, but still problematic, example involved posting that "the client just lied to me about a crucial ***911** fact - I hate it when they do that." [139] Such a post could "reveal confidences because the post has a date and a time, and a reader might well be able to identify which client [she was] meeting with." [140]

A thoughtful District of Columbia ethics opinion states that "[w]hile lawyers may ethically write about their cases on social media, lawyers must take care not to disclose confidential or secret client information in social media posts" and that it is always necessary to obtain consent from the client before posting any details of their case online. [141]

Even if an attorney is reasonably certain that disclosures of case or client details will not be prohibited by the rules of his or her jurisdiction, it is always best to err on the side of caution in obtaining consent from the client. [142] Added complications arise where a lawyer posts on social media about a client, and then posts personal opinions on seemingly unrelated political or social topics that ultimately are adverse to the potential interests of the client. [143]

2. *Reviews, Ranking, and Feedback*

Another hotspot for disclosure mistakes arises with the trend of using the internet for feedback. A significant feature of the internet is a lawyer's ability to invite comments and ratings and clients' ability to gripe online. Lawyers have revealed confidential client information while responding to negative feedback on rating sites. One lawyer responded to a negative rating with this: "I dislike it very much when my clients lose, but I cannot invent positive facts for clients when they are not there. I feel badly for him, but his own actions in beating up a female co-worker are what caused the consequences he is now so upset about." [144] A lawyer may in self-defense spill out a justification that reveals too much about the case. When it happens ***912** in writing on a publicly accessible and easily duplicated and preserved medium, the harm is vastly enlarged.

In a culture where a company's online presence is just as, if not more, important than its physical presence, a bad review online can have a substantial impact. One lawyer in Utah decided that the best way to deal with a negative online review that stated he was the "[w]orst ever," among other things, was to sue the person who posted the review for "defamation, intentional infliction of emotional distress, and intentional interference with prospective economic relations." [145] The district court dismissed all of the claims and was upheld by the appellate court, holding that the online review was merely an opinion and thus did not rise to the level of a tort. [146] The publicity from the suit brought far more attention to the negative review and did nothing to make this lawyer more appealing to future clients. As one blogger who covered the opinion said, "Spoiler alert: suing the client is not the correct answer." [147] Someone should have given this bit of advice to Alisa Levin, a lawyer who filed a defamation lawsuit against a former client for calling her a "legal predator" and a "con artist" in a Yelp review. [148]

In responding to reviews of any nature, lawyers must be careful not to reveal client confidences. The District of Columbia, for example, permits lawyers to reveal client confidences only when responding to "'specific' allegations by the client concerning the lawyer's representation of the client." [149] D.C. rules also "specifically exclude[ ] general criticisms of an attorney from the kinds of allegations to which an attorney may respond using information otherwise protected ...." [150] The New York State Bar takes an even stricter stance and holds ***913** that, "[a] lawyer may not disclose confidential client information solely to respond to a former client's criticism of the lawyer posted on a [lawyer-rating website]." [151]

3. *Internet Provider Disclosures*

Other risks arise with social media websites. Lawyers' three most commonly used social media networking sites are Facebook, Twitter, and especially LinkedIn. [152] The ABA 2016 Tech report found that ninety-nine percent of large firms, ninety-seven percent of mid-size firms, ninety-four percent of small firms, and ninety-three percent of solo firms have a LinkedIn profile. [153] LinkedIn offers users the option to import contact information from an existing email account; doing this may "publicize details about clients, witnesses, consultants, and vendors." [154] Caution is warranted in such instances and confidentiality issues may arise because use of social media websites often involves access to address books, and

> allows the social media site to suggest potential connections with people the lawyer may know who are already members of the social network, to send requests or other invitations to have these contacts connect with the lawyer on that social network, or to invite non-members of the social network to join it and connect with the lawyer. [155]

This can be a huge technoblunder because:

> [I]n many instances, the people contained in a lawyer's address book or contact list are a blend of personal and professional contacts. Contact lists frequently include clients, opposing counsel, judges and others whom it may

> be impermissible, inappropriate or potentially embarrassing to have as a connection on a social networking site. The connection services provided by many social networks can be a good *914 marketing and networking tool, but for attorneys, these connection services could potentially identify clients or divulge other information that a lawyer might not want an adversary or a member of the judiciary to see or information that the lawyer is obligated to protect from disclosure. Accordingly, great caution should be exercised whenever a social networking site requests permission to access e-mail contacts or to send e-mail to the people in the lawyer's address book or contact list and care should be taken to avoid inadvertently agreeing to allow a third-party service access to a lawyer's address book or contacts. [156]

4. *Unsecured Access*

A major, but often unappreciated, risk arises from the prevalence of unsecured internet connections. Lawyers and clients may send and receive digital communications on unsecured internet access services at a restaurant, park, airport, and other public locations. Some still have home wireless routers that do not require passwords. Someone on the street can access an inadequately protected internet access point, even from outside a building or home, and monitor communications. [157] If a party other than the lawyer, such as a spouse, child, or untrained staff member, uses a computer, phone, or email account, communications and stored information are not secure.

In a recent case, an employee working with the lawyers for an insurance company made a grave mistake involving unsecured access. In *Harleysville Insurance Co. v. Holding Funeral Home, Inc.*, [158] the district court with odd analysis overruled the magistrate judge's opinion stating that the insurance company waived any attorney-client privilege in, or work-product protection of, their "Claims File." [159] However, the magistrate's reasoning is compelling. The magistrate observed that the insurance company knowingly uploaded the Claims File to a cloud storage and file sharing service operated by Box, Inc. [160] Although the purpose of putting the Claims File on Box was to share it with outside counsel, the folder was available to *915 anyone with access to the internet because it was not password protected. [161] In addition, an email to opposing counsel included the link to the Box folder, which included the Claims File. [162] The insurance company later sent a thumb drive to opposing counsel in response to discovery requests. [163] The thumb drive also contained the full Claims File. [164] At this point opposing counsel alerted the insurance company's counsel of a perceived mistake involving the thumb drive, but believed the online availability of documents through the provided link was intentional. [165] In the magistrate's opinion, this was the "cyber world equivalent of leaving its claims file on a bench in the public square and telling [opposing] counsel where they could find it." [166] The magistrate imposed a monetary sanction for failure to alert the insurance company that the file was available using the provided link, but refused to disqualify opposing counsel or take any further action. [167]

The district court found, on the other hand, that the Claims File had been inadvertently disclosed. [168] In a particularly generous move, the district court held that the insurance company took reasonable measures to protect the Claims File, [169] notwithstanding the double disclosure. First it found that the Box cloud storage folder "was not searchable through Google or any other search engine, nor was it searchable on the Box, Inc. website. Therefore, a person would need to enter the specific URL of the 'sharing' link, which consisted of 32 randomly-generated alphanumeric characters." [170] Unfortunately, the link was knowingly given to opposing counsel.

The insurance company claimed it voluntarily provided opposing counsel with the link for the purpose of making available a video of the relevant fire. [171] The district court excused the employee of the insurance company for putting the Claims File in

the same Box folder with the video. [172] The court noted that it was the employee's first time using Box, he lacked a technical *916 background, and he believed he had utilized the security features. [173]

Then the court looked at whether the insurance company waited too long to rectify the error. [174] The court determined that the insurance company's delay in rectifying their error resulted from its ignorance, not its negligence.

> It was perfectly reasonable--and, indeed, accurate--for Harleysville's counsel to expect that no one could access the Box Folder unless he was given that specific URL. The fact that [opposing] counsel could access the Box Folder via a 32-character, randomly-generated "sharing" link in an email sent by Harleysville did not, and should not have, put Harleysville's counsel on notice that anyone with an Internet connection could do the same. [175]

The court also found that the disclosure to just one party, and not multiple parties, meant the disclosure was not extensive and concluded that no waiver occurred. [176]

I find it very difficult to interpret as reasonable lawyers' use of cloud storage files unprotected by password. The distinctive URL is no protection, even if the link was not disclosed. An experienced hacker can search the cloud without using Google. How can sharing the link not put lawyers on notice that the material in the folder accessed by that link has been made available to the recipient of the link? Actual realization of the consequences of an error is not required. In addition, employees and agents of lawyers are not typically excused because they are inexperienced in handling confidential material. [177] Most people do not have a technical background. In any event, outside of this court, lawyers cannot justify a breach of confidentiality by having client information handled by inadequately trained employees.

5. *Terminated Devices*

Another common problem involves lawyers, clients, and firm employees who exchange or sell devices, or return company owned equipment. A departing employee may return a device with digital information still on it, even if the employee tried to erase it. If the employee did not remove passwords or *917 did not log out of accounts, privileged attorney-client messages could appear on the device now in the possession of another owner or former employer. One employee sued a former employer when he found out that his old company-issued iPhone, which he had returned to his former employer, was still linked to his Apple account. [178] The text messages he received on his new phone were automatically sent to the phone that was now in his former employer's possession. [179] This case did not involve a lawyer, but a lawyer or litigant could easily make the same mistake. In addition, devices may have been programmed to remember passwords or otherwise contain cookies that store and apply all kinds of information automatically, giving the new owner access to a host of personal data containing confidential information.

The Florida Bar, the leader in addressing technology, issued an ethics opinion on the proper ways to handle hard drives from discarded computer equipment to protect confidential client information. [180] The Florida Bar addressed the obligations of lawyers regarding information stored on hard drives in hopes of preventing the leak of confidential information. In the ethics opinion, the Bar stated that "hard drives from high speed scanners and other like computer equipment" may retain records of scanned documents that can be accessed after the equipment is discarded. [181] "[L]awyer[s] must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition." [182] Other bar associations need to incorporate similar warnings. [183]

6. *Ransomware*

An increasingly common risk involves third parties who hack in and freeze lawyer's computer systems and demand a ***918** ransom be paid to unlock the system. [184] Although the payment of the ransom does not itself raise ethical concerns, firms that are unable to pay the ransom risk the "or else" threat, which is that the hackers will release the information into the public or permanently delete it. A public release results in a breach of confidentiality and permanent inability to access firm files that dramatically affects a lawyer's ability to competently represent a client. Loss of records entrusted to a lawyer raises a plethora of common law and statutory claims from affected clients. [185] The incidence of ransomware attacks is rising. [186] John Simek, the vice president at Sensei Enterprises Inc. said that

> [w]hen it comes to ransomware ... attacks are growing and that many firms end up having to pay the ransom because they didn't have systems in place to recover the stolen data. "Our own clients are beginning to wake up to the fact that these types of attacks can happen anytime." [187]

In Rhode Island, the law firm Moses Afonso Ryan allegedly lost $700,000 in billings from a ransomware virus that infected the firm's computer network. [188] The virus was unwittingly introduced to the firm's network because a lawyer clicked on an infected email attachment which downloaded the virus and encrypted the law firm's network for three months until the ransom of $25,000 was paid to release the network. [189] The law ***919** firm had an insurance policy through Sentinel, which paid the maximum $20,000 as provided under the policy for virus coverage, but the policy would only cover "lost business income when there is physical loss or damage to property at the business premises." [190] Moses Afonso Ryan filed a claim against Sentinel for the $700,000 in lost billings because of the virus. [191] Cases like these demonstrate how lawyers need to guard themselves against the risks of not only their unethical behavior, where purposeful or not, but also against the behavior of others who could use technology to extort money from a law firm or compromise confidential client data.

7. *Employer Access*

A serious and not uncommon example of confidentiality breach involves the attorney who communicates with a client who is at work. Recently in California, a lawyer permitted a client who was involved in litigation with her employer to discuss the case, facts, and strategy from her workplace using her employer's equipment. [192] A company policy had warned that an email account "was to be used only for company business, that e-mails were not private, and that the company would randomly and periodically monitor its technology resources to ensure compliance with the policy." [193] The employee had been given the company's handbook and signed that she had read its terms. [194] Like the rest of us, she did not think twice about it again and fell into the common illusion that emails are private. Of course, the court determined that the emails were not private, and therefore, they were not protected by attorney-client privilege. [195] The employer could use against her any content it found.

The emerging view is that employees, like this client, have no reasonable expectation of privacy when using employer equipment or systems. [196] And even if there were a reasonable expectation of privacy, many companies require the employee to enter into an agreement regarding the terms of using the ***920** employer's equipment or internet access. [197] If an employee's email address or IP address includes words or numbers relating to the employer, a reasonable employee should realize that the employer may have rights to access and use electronic communications.

8. *Lawyers' Employees' Access*

A member of a lawyer's staff who has terminated employment at a firm or other business may retain passwords that allow continued access to company email and electronically stored information. If a dispute arises, or just out of curiosity, the former employee may seek to access digital information.[198] In a recent criminal complaint, Michael Potere, a former associate at Dentons' Los Angeles office, was charged with extortion.[199] Potere allegedly threatened to reveal sensitive firm documents that he had obtained by using the email password of a partner at Dentons.[200] The email password was given to Potere when he worked on a case together with the partner in 2015.[201] Potere, upset about not being able to continue working at Dentons until the fall where he would start a political science degree program, "demand[ed] that the law firm pay him $210,000 and give him a piece of artwork to ensure the documents remained secret."[202] This is a prime example of why lawyers must frequently change passwords, especially when employees are terminated.

In addition, lawyers should be warned about the frequent cases involving current employees allowing others to use their online identities or passwords that link and allow access to lawyer information. One attorney in West Virginia repeatedly *921 accessed the emails of his wife and seven of his wife's co-workers at her law firm because he thought she was engaging in an extramarital affair.[203] There is no evidence in this case that the outside attorney was looking for client information, but if the fear had been that the wife was having an affair with a client, sensitive information on the client's legal matters may have been exposed. Spouses of employees may have legal access to passwords or share computers with cookies permitting access to private sites. Lawyers and firms need to be much more vigilant in policing employee access to client information.

Some kinds of employees and agents have access to computer systems or equipment for repair or maintenance purposes. Something available on the computer may tempt such a person to copy or use the information or disclose it to others. Or, as happened to the Utah Bar Association in March 2018, someone in the office may stick a full frontal photo of naked breasts at the end of an email sent to all active attorneys asking them to sign up for the bar convention.[204] Anyone in the office may access a lawyer's computer and any open internet sites while the lawyer is out to lunch, in a conference, in the bathroom, etc. Of course, before the digital era, co-workers and maintenance staff could always have looked at papers on the desk or opened files and drawers. However, papers on a desk do not include a record of the user's search history or networks of stored information. Digital information can be searched by keyword easily and quickly. It can be printed, forwarded to another account, or saved on a flash drive. Moreover, someone with access to a lawyer's email account or blog may post information in the name of the lawyer or send out requests for information that may result in breaches to confidentiality.

*922 9. *Information Storage*

Storing information in a cloud creates a risk of disclosing confidential client information.[205] In addition to large, sophisticated firms, the 2016 ABA Legal Technology Report found that forty-six percent of two-to-nine attorney firms and forty-two percent of solo practice attorneys use the cloud.[206] Outsider hacking of firm computer systems to obtain information on clients, potential stock offerings, and political dirt is a serious risk brought on with the use of technology.

A startling report released on June 27, 2017, by LogicForce, a cybersecurity firm, detailed just how "woefully unprepared" law firms are against cyber threats.[207] The report used data compiled from surveys and found that "77 percent of responding firms did not have cyber insurance, 95 percent of responding firms were noncompliant with their own cyber policies, 100 percent were noncompliant with a client's policies, and 53 percent of responding firms do not have a data breach incident response plan."[208] The report notes that, because of most law firms' dreadful state of unpreparedness, "It is truly not a question of if, but when, an incident will occur."[209] The risks go beyond a failure to keep client information private, and include the loss of the attorney/client privilege, loss of work product claims in discovery, and loss of trade secret protection. In addition, information exposed may be a violation of various securities laws and confidentiality agreements with third parties.[210] Exposing client information opens up an attorney to a variety of common law and statutory claims. This section discusses various information storage related technoblunders and their consequences.

Of critical concern is cloud storage. Much has been written elsewhere on the benefits and risks of attorneys using the ***923** cloud and this is not the place for a thorough exploration of all the implications. However, the risks are sufficiently substantial that mention of methods to protect stored information in professionalism creeds warrants discussion. Even with ordinary precautions, electronic storage of large amounts of data is risky and history has amply shown that such data can be hacked,[211] or worse, can be accidentally downloaded on another user's device.[212] In relation to trade secrets, Professor Sharon Sandeen has gone so far as to say, "The mere fact that you're storing on the cloud, in my opinion, is a strong argument that you've waived your trade secrecy."[213]

The ABA now "recognizes a ... world where law enforcement discusses hacking and data loss in terms of 'when,' and not 'if,'"[214] and offers an insurance policy to cover cyber-incidents, including network extortion.[215] A press release noted:

> In recent years, the legal profession has become a popular target for hackers. Despite vigilance and increased awareness by law firms and individual lawyers, cyber-related risks have escalated based on the sensitivity and nefarious uses of that data. Last year, for example, the Manhattan U.S. attorney's office unsealed indictments against three Chinese men who are accused of using stolen law firm employee credentials to access troves of internal emails at two law firms. The men, according to prosecutors, used details they obtained from partners' emails about pending deals to make more than $4 million in illegal stock trades.[216]

One study estimated that eighty percent of the 100 largest law firms have had a malicious computer breach during a one- ***924** year period.[217] Some of these may include ordinary phishing scams, but an occasional employee falls for the ploy and reveals confidential information.[218] Some have been major breaches with serious confidentiality implications and may result in class action lawsuits against the firms.[219]

Another risk of storing large amounts of data in the cloud is access to the information by the service provider. Recently, Google introduced a free service called Optical Character Recognition (OCR) that extracts information from documents and images stored in your drive to make your files more searchable.[220] Google uses information to trigger advertising and sells user data to others. Some commentators suggest that "lawyers should avoid using free email or cloud storage services like Gmail and Dropbox. The free versions allow Google and Dropbox to scan everything sent to the service, which compromises client confidentiality."[221] While Google may use client information for advertising, a potentially greater risk is that Google Drive may be hacked.

10. *Reasonable Efforts to Protect*

Following the 2012 amendments, Model Rule 1.6(c) provides: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[222] At least nineteen state and local ethics opinions have ***925** addressed the question of cloud-based information storage, and all have decided that it is ethically permissible to use cloud storage services, but only if attorneys use "reasonable care."[223] The problems with this advice is that lawyers may not be alert to the risks and will not seek out advice from ethics opinions and, more importantly, there are no concrete standards for "reasonable care." Each opinion notes different specific obligations of attorneys to shield against confidentiality concerns.[224] One thing is clear: the failure to take any precautions certainly is a violation of the duty of confidentiality. And failure to respond appropriately once a system is hacked is another risk, as Yahoo!'s top lawyer can attest.[225] In addition, lawyers need to be reminded of the obvious professional duty to report data breaches to clients, who are the real victims of these kinds of attacks.

When the ABA amended Model Rule 1.6, rather than clarifying a position reconciling or directing the suggestions in various bar associations' statements on cloud computing and rather than giving lawyers a clear standard for what is "reasonable," it chose to give vague and limited guidance in the Comment to Rule 1.6: [226]

> [A] lawyer [must] act competently to safeguard information relating to the representation of a client against unauthorized access ... and against inadvertent or unauthorized disclosure .... When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. [227]

Lawyers' views of "reasonable" depends on their awareness of the risks, which is still doubtful, and their awareness of the easily available security options.

Unfortunately, the Comment begins by ignoring the facts of modern practice and lulling lawyers into believing that "[t]his duty, however, does not require that the lawyer use special ***926** security measures if the method of communication affords a reasonable expectation of privacy." [228] The Comment admits that "[s]pecial circumstances, however, warrant special precautions," and offers a list of extremely vague factors. [229] First is the "sensitivity of the information." [230] What information about a lawyer's representation of a client is not per se "sensitive," other than what can be reported in the newspaper, such as scheduling and published court orders, and friendly chitchat? The Comment also reminds lawyers that some information is "protected by law or by a confidentiality agreement." [231] The Model Rule 1.6 Comment does not educate or guide lawyers by identifying various laws that protect information. Moreover, all attorney-client information is protected by a "confidentiality agreement" imposed as a matter of common law, if not ethics rules.

Other factors include "the likelihood of disclosure if additional safeguards are not employed." [232] Like speeding, not everyone gets caught, but the risks of disclosure are broad and cannot be denied. Another factor is "the cost of employing additional safeguards [and] the difficulty of implementing the safeguards." [233] While technoneophytes likely think that investigating and implementing security measures is daunting, the 2017 ABA Opinion 477 acknowledges

> a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information ... using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/AntiSpyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software. Each of these measures is *routinely accessible and reasonably affordable or free.* [234]

Why not *require* the use of measures that, at any given time, are "routinely accessible and reasonably affordable or free" or at least provide a list of the kinds of simple, low cost measures that are available in the Comment Rule 1.6? At a minimum, the ABA Model Rules should address the use of unsecured ***927** networks and public Wi-Fi and the risk of unsuspectingly downloading viruses.

The last factor found in the Rule 1.6 Comment for determining the level of security necessary is "the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)." [235] The Comment thus offers an easy excuse, without acknowledging that almost none of the routinely available security measures make anything "excessively difficult to use." Moreover, ample examples in this Article

and elsewhere show that some lawyers believe that avoiding unsecured networks, restricting posts on social media, occasionally changing passwords, and avoiding cell phones for sensitive communications is just too difficult. Some lawyers may think that giving up the convenience of discussing client matters with a colleague in a crowded elevator or at a bar makes practice excessively difficult, but that has never been an excuse.

In an attempt to add some specificity to the woefully inadequate Comment to Rule 1.6, the ABA recently issued ABA Formal Opinion 477. It adds various tips about obvious risks and is a starting point for training lawyers, even though it offers no more concrete standards than the Comment to Rule 1.6. Opinion 477 mentions the well-known fact that a "client [may use] computers or other devices subject to the access or control of a third party," and it reminds lawyers of their duties to supervise staff and nonlawyers to whom work is delegated.[236]

Finally, in addition to other "may"s and "should"s, Opinion 477 suggests one specific "better practice" of marking communications "privileged and confidential."[237] Such disclaimers are usually at the bottom and not noticeable until the message has been read in full. In addition, those with a financial or strategic stake in the legal matter are unlikely to immediately delete it, even if they had not already read the contents.

Opinion 477 lists in a footnote various lawsuits involving the breach of confidentiality by electronic communications,[238] ***928** but nothing in the Opinion sets a standard stronger than "reasonable," but undefined, steps to avoid these or other risks.[239]

A specific step that should be required as a reasonable effort to protect against technoblunders is a requirement for lawyers to become aware of the policies of online platforms and services and then avoid those whose policies allow the provider wide powers to access information and relieve the provider from liability for giving information to others or other mishandling of information. The District of Columbia Bar recently addressed an issue few if any lawyers have grasped.[240] "It is critically important that lawyers review the policies of the social media sites that they frequent, particularly policies related to data collection. Privacy settings on social media are not the equivalent of a guarantee of confidentiality."[241] Lawyers, as with all other internet users, will resist taking the time to find the providers' terms on their webpages, reading the lengthy statement, and understanding how the policies relate to risks.[242] Even if the policies were initially read, lawyers do not keep up on the regularly changing terms even if they have notice of the changes. Bar associations might provide the service of reviewing the policies of popular social media sites and advising lawyers of the specific risks. Certainly professionalism standards in each jurisdiction should specifically alert lawyers ***929** to the risks created by common online provider contracts and advise against using platforms with certain terms or a history of disclosures.

Although using two-step passwords and encryption is a better practice, a minimum step that should be required is strengthening and protecting passwords. Risks abound. For instance, the Heartbleed bug, which allowed third parties to potentially view encrypted data, affected many sites that could contain sensitive information, such as Yahoo!, Google, Box, and Dropbox, as well as other sites that cater specifically to lawyers.[243] One commentator opined that, at a minimum, ethics required lawyers to change their passwords regularly.[244]

Requiring particular methods of security runs the risk of becoming outdated, but the Model Rules or state professionalism standards can require the use of at least one of a variety of methods subject to advances in the field. Without federal legislation, the bar can adopt standards for ethical behavior that draw on the specifics in The Sarbanes Oxley Act (SOX),[245] Federal Information Security Management Act (FISMA),[246] Family Educational Rights and Privacy Act (FERPA),[247] Gramm Leach Bliley Act (GLBA),[248] or Payment Card Industry Data Security Standard (PCI-DSS).[249]

Bar association standards can, at a minimum, advise lawyers who are not technologically sophisticated and not employing existing security measures to get professional advice on securing communications and cloud storage from an information

systems expert. If a disclosure or breach occurs, a lawyer's failure to have reasonable security measures in place should be an ethics violation subject to bar disciplinary action. Bar associations could also require continuing legal education hours in the subject of communications and information security.

*930 Language setting forth the most minimum of standards that can be added to bar association standards is as follows:

> Lawyers should be alert to the increased risk of interception of, and unauthorized access to, digital communications and information storage, including the risks of unauthorized access, unintended disclosure of details that can be aggregated, and oversharing of personal information or activities that might allude in any way to clients and cases. Lawyers should carefully screen any information posted to social media sites. Lawyers should use frequently changed and robust passwords, two-factor authentication, or encryption. Unless technologically sophisticated or advised by a security expert, lawyers should not store client information on the cloud. Lawyers should not use unsecured internet access points or routers to discuss client business. Lawyers should consider cyber liability insurance.
>
> Lawyers are responsible for failures to protect information from improper use by employees, agents, and repair service technicians who have access to electronic devices on which client information may be stored. Lawyers should discuss with, and obtain consent from, clients regarding the use of electronic communications in various circumstances. Lawyers should request that clients store and discuss case details only on reasonably secure devices and provide clear advice about the risks of client use of social media.

C. Rule 1.7(b) and (c): Conflicts of Interest

Rule 1.7(b)(4) prohibits representing a client with respect to a matter if "[t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's own financial, business, property, or personal interests," unless the conflict is resolved in accordance with Rule 1.7(c).[250] Posts on social media may take a position that is contrary to the interests of a current or potential client. The District of Columbia Bar warns about such inadvertent creations of conflicts and notes that even "the acquisition of uninvited information through social media sites ... could create actual or perceived conflicts of interest for the lawyer or the lawyer's firm."[251] Lawyers and firms often post legal updates where they may opine on the merits of new legislation or a recent case. Others run opinionated blogs as a way of attracting clients or garnering social and peer acceptance for *931 positions taken by existing major clients. These practices must be carefully monitored.

Professionalism standards adopted by bar associations should include:

> Lawyer or firm postings on social media, as well as third party comments (invited or uninvited) may create subject matter conflicts even if a future client is not adverse to a prior client.

D. Rule 3: Obstruction and Extrajudicial Statements

1. *Rule 3.4(a): Obstruction and Spoliation of Evidence*

Model Rule 3.4(a) creates the duty not to "obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, [or] counsel or assist another person to do [so]."[252] Copies of electronic communications should be preserved in the client's file. The District of Columbia Ethics Opinion 370 adds a further

twist: "Social media sites may not permanently retain messages or other communications; therefore care should be taken to preserve these communications outside of the social media site, in order to ensure that the communications are maintained as part of the client file."[253] In addition to keeping their own records, lawyers must warn clients of the consequences resulting from spoliation of evidence,[254] including an adverse inference at trial, assessment of costs and fees, disciplinary action, default judgment, as well as tort and criminal liability.[255] A good reference is Professor Browne-Barbour's citation of several cases, ethics opinions, and commentators that discuss spoliation.[256]

***932** In addition, District of Columbia Ethics Opinion 371 warns that the law, which varies among jurisdictions, may prevent advising a client to "modify their social media presence once litigation or regulatory proceedings are anticipated."[257] Lawyers must consult obstruction statutes, spoliation law, procedural rules for criminal and regulatory investigations, and rules for civil cases before taking down or advising clients to take down social media posts.[258] The time to advise clients about the risk that information in social media will come back to haunt them is before it is posted.

2. *Rule 3.6: Extrajudicial Statements by Non-Prosecutors*

Model Rule 3.6 provides: "A lawyer ... shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[259] The Rule expressly details the limited kinds of information that can and cannot be revealed. Being in front of a television camera or talking to a reporter would put most lawyers on alert to carefully monitor information disclosed. However, in this generation, every lawyer can actually *be* the press. At any time, including while sitting at the counsel table, a lawyer may, with a few thumb strokes, broadcast a message to untold millions. Hopefully, it is unlikely a lawyer would actually intend to broadcast the information about the legal proceeding to inappropriate parties, but the belief that a tweet or text will be kept private is unfounded.

Already situations involving lawyer communications during judicial proceedings are coming to light. The harm is compounded if the lawyer is an employee of the government working for the court. For instance, a court research attorney tweeted during an attorney discipline proceeding what was her take on the merits of the case and the moral turpitude of the respondent Phil Kline:[260] "Why is Phil Klein [sic] smiling? ***933** There is nothing to smile about douchebag"; "ARE YOU FREAKING KIDDING ME. WHERE ARE THE VICTIMS? ALL THE PEOPLE WITH THE RECORDS WHO [sic] WERE STO-LEN"; "I predict that he will be disbarred for a period not less than 7 years"; and finally, "It's over ... sorry. I did like how the district court judges didn't speak the entire time. Thanks for kicking out the SC Phil [sic]! Good call!"[261] The bar association reprimanded the tweeting attorney, finding that her prediction was a misrepresentation of fact and law, implied that she had undue influence over the judges, disrespected a litigant, disrespected the judges, and prejudiced the administration of justice.[262] This consequence of a mere reprimand seems inadequate to address such a breach. This behavior throws the legal system in disrepute because of the implication that a party involved in the proceeding was subject to a general bias and not able to obtain a fair outcome.

A new standard can remind lawyers that their online communications during a proceeding are inappropriate.

> Communication via social media platforms by lawyers and court personnel constitutes "public communication." Lawyers must avoid extrajudicial statements via social media platforms that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

3. *Rule 3.8: Extrajudicial Statements by Prosecutors*

Rule 3.8 provides, "The prosecutor in a criminal case shall ... refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused ...."[263] There are already reported cases involving prosecutor tweets made during a trial. One case was based on these tweets: "I have respect for attys who defend child rapists. Our system of justice demands it, but I couldn't do it. No way, no how," and "Jury now has David Polk case. I hope the victim gets justice, even though 20 years late."[264] The appellate court that considered the prosecutor's tweets did not decide whether they were improper since the real test is whether the trial was fair.[265] However, the judge mentioned ***934** that the timing and content of the messages increased the likelihood that a jury would be tainted.[266] Aside from tainting the jury, providing information to the public that predicts a result or suggests facts not elicited in the evidence is covered by the intent of Rule 3.8. The question arises of whether prosecutors can risk posting anything on the internet relevant to any cases.[267]

A new standard can remind prosecutors that online social media communications are public, and thus there is great risk of abuse when commenting about an ongoing case. A standard might look like this:

> Prosecutors should know that online social media posts are public extrajudicial comments. As such, prosecutors should ensure that their social media posts (i) do not have a substantial likelihood of heightening public condemnation of the accused and (ii) do not have a substantial likelihood of tainting a jury.

E. Rules 3.4, 4.1, 4.4, and 5.3: Abuse of the Research Process

Model Rule 3.4 requires parties to act in fairness during the discovery process.[268] This Rule originally addressed abusively large and detailed discovery requests intended to require excessive and unnecessary effort and expense of the other party.[269] This problem is vastly magnified with the ease of generating electronic requests and the vastly increased amounts of digitally stored data.

Something new and insufficiently addressed, however, are abuses involved with electronic fact research regarding opposing parties, opposing attorneys, judges, jurors, or witnesses. In a recent study, eighty-one percent of attorneys who responded used evidence from social media in their cases.[270] "Facebook was found to be the most popular source of evidence, with 66% of attorneys responding indicating that they had used evidence found on the site."[271] Some argue that a lawyer who does not ***935** take advantage of the vast new resources for discovery is guilty of malpractice.[272] One court recently held that it was not only acceptable, but good practice, for attorneys to bring their laptops to the courtroom and conduct searches while potential jurors are being questioned.[273] Because of the potential for online factual research, lawyers should warn their clients to post only truthful statements, encourage clients to avoid posting information that could be detrimental, and provide guidelines for taking down information.[274]

This vast body of potential evidence comes with the risk of various abuses. For example, some courts do not allow questions about political affiliations,[275] but this information is often available on social media web pages.[276] Some courts and commentators express concern that, when jurors know that lawyers use various means, especially online, to find information about jurors, some people would be discouraged from jury duty.[277] Other issues involving research are even more serious.

Finding and using information that is publicly available online is legitimate.[278] "Lawyers, just like everyone else, are ***936** freely permitted to search social media for information concerning a litigant and to view the information that is generally available to the public."[279] However, attempts to gain access to private social media accounts, blogs, and chat rooms are generally improper. This includes the actions of third parties at the direction of the lawyer.

Most lawyers are not experts in internet law nor do they carefully think through the implications of the Model Rules when applied to novel techniques. Lawyers should be warned about how easy and tempting overreaching is online and reminded that their behavior may be exposed even if lawyers believe they act anonymously. The implications of improper conduct affect the reputation of the lawyer personally and the legal system as a whole if their conduct is exposed.

The use of any kind of intentional deception to obtain advantage in the legal system should be strictly prohibited. A person who sees a communication not knowing it came from a lawyer or a person involved in a legal process cannot weigh the credibility of the information or recognize harmful strategic behavior. When doing research, lawyers must avoid making any communication with a judge or a person represented by counsel as covered by Model Rules 3.5(b) and 4.2. Ex parte communications of this sort, including "friending" in that context, are discussed further in subpart III.G.

1. *Friending*

Lawyers are tempted to send friend requests under their names but without disclosing the lawyers' interest in a case given that some people accept friend requests indiscriminately. Several state and local bar associations have addressed friending specifically. The San Diego Bar Association concluded that "friending" potential witnesses without disclosing the purpose of the request is unethical, even when using a true name.[280] Further, the Pennsylvania, New Hampshire, and Philadelphia Bar Associations have found that viewing the public portions of a Facebook profile is ethical, but requesting access to a private ***937** profile is inappropriate without using the lawyer's name and stating his or her purpose for the request.[281]

However, the New York City Bar Association reached a different conclusion.[282] If a real name appears on the friend request, it is not making a false statement.[283] "Consistent with the policy [in favor of informal discovery], we conclude that an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request,"[284] as long as it does not include any kind of misrepresentation. The opinion draws the following analogy:

> [I]f a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.
>
> In contrast, in the "virtual" world, the same stranger is more likely to be able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the foregoing information.[285]

Unlike the opinion's holding, this reasoning suggests that, because we are not as careful in granting friend requests as we are with opening our door even though the results could be similar, friending to garner evidence or private information is never proper.

Furthermore, regarding technology abuse in research, lawyers must be warned that directing someone else to do the research does not remove liability. Responsibility lies with the ***938** lawyer even if an agent, employee, or other third party takes the action. Rule 5.3(b)-(c)(1) states:

> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.[286]

For example, while representing defendants in a personal injury lawsuit, two attorneys directed a paralegal to gather information about the plaintiff using the internet.[287] The plaintiff's Facebook page was initially public, and the paralegal accessed it multiple times.[288] When the plaintiff's profile became private, the attorneys directed the paralegal to continue to monitor the plaintiff's social media activity by sending him a "friend request."[289] While the paralegal did not use a false identity, she also did not disclose that she worked for the law firm representing the defendants in the pending lawsuit.[290] When the attorneys sought to introduce the paralegal as a trial witness and introduce documents from the plaintiff's Facebook page, the plaintiff filed an ethical grievance complaint with the state ethics committee.[291] Although the New Jersey Supreme Court did not directly decide whether the attorneys committed an ethical violation by requesting their paralegal to "friend" an opposing party, it did hold that the Office of Attorney Ethics could prosecute the alleged misconduct.[292]

While clients are not under the same obligations as lawyers and their employees, lawyers are obligated to advise clients to avoid overreaching, illegal or fraudulent conduct when trying to communicate with a party represented by counsel.[293] Lawyers, ***939** however, are fully responsible for using information improperly obtained by a client. Recently, the Missouri Supreme Court indefinitely suspended a lawyer for using information in a divorce case that was obtained by his client after guessing his wife's email password.[294]

2. ***False Names and Identities***

Most opinions so far focus on deceptive friending. Several Model Rules touch on misrepresentations. Model Rule 4.1 provides: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."[295] Model Rule 4.4 provides: "[A] lawyer shall not use ... methods of obtaining evidence that violate the legal rights of such a person."[296] In addition, Model Rule 8.4 addresses fraud.[297] Using subterfuge for purposes of gathering information is addressed in a variety of formal opinions.[298] Even the New York City Bar Association held that using falsehoods to obtain evidence is unethical.[299] "[F]or example, an attorney may not claim to be an alumnus of a school that she did not attend in order to view a juror's personal webpage that is accessible only to members of a certain alumni network."[300]

In one example, a lawyer in a wrongful discharge action sought access using a false identity to the social media pages of a client's co-workers in hopes of finding others who would make disparaging comments about the employer.[301] One Pennsylvania county district attorney is currently facing disciplinary action for creating a fake Facebook page in an effort to gain information about defendants.[302]

***940** A particularly egregious case involves a forty-year-old former partner in a Bloomington, Illinois law firm.[303] He undertook an eleven month cyber harassment campaign of a lawyer who had been opposing counsel in a prior matter. He set up a fake online dating profile of her, posted a false review about her to a database of legal professionals, and registered her to receive information from other organizations, such as Obesity Action Coalition, Pig International, and Diabetic Living.[304]

Although a variety of similar deceptions likely occurred in cases before the internet, especially those involving private investigators, the simple and relatively costless methods of obtaining information online make this temptation significantly more powerful. In the real world, people do not generally give personal information to strangers indiscriminately, but people online are much less careful and lawyers should not abuse their misjudgment.

3. *Entrapping Disclosures*

Of even greater concern are attempts by a lawyer (or a lawyer's agent or client) to direct the conversation on blogs, chatrooms, and other social media sites for the purpose of inducing comments or information that otherwise may not have been posted. In 2013, a prosecutor created a fake Facebook profile and, via the chat feature on Facebook, pretended to be the ex-girlfriend of a defendant in a murder case to get two witnesses to change their story about the defendant's alibi. [305]

Another issue with available technology involves recording conversations without the consent of all the parties to the conversation. In most state and federal jurisdictions, it is not illegal to secretly record a conversation as long as at least one party to the conversation (the party recording) has consented. ***941** [306] Although lawyers were forbidden historically by the ABA from making such recordings without disclosure to other parties, the ABA reversed this position in a 2001 formal opinion. [307] It concluded that, although discouraged, secret recordings are not misconduct per se as long as it is not illegal to do so in a lawyer's respective jurisdiction. "A lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules." [308] The previous opinion was based upon "the principle that a lawyer 'should avoid even the appearance of impropriety.'" [309] The ABA withdrew its previous opinion because an "overwhelming majority of states permit recording by consent of only one party to the conversation" and there may be legitimate reasons for making a record to avoid fraud. [310]

Although the ABA changed its position, it continues to advise against recording exchanges with clients without their knowledge, and outright forbids any representation that a conversation is not being recorded when in actuality it is. [311] With the ABA, most state bar associations discourage secret recordings and remind lawyers that the totality of circumstances surrounding the recording may suggest the lawyer has engaged in dishonesty, fraud, deceit, or misrepresentation in violation of Model Rule 8.4(c). [312]

Sometimes lawyers, or even judges, show undue enthusiasm for recording devices. For instance, in New Mexico, the Attorney General has charged Magistrate Court Judge Connie Johnston in connection with recording telephone conversations involving multiple people, within secure, nonpublic areas ***942** of the courthouse without the participants' consent. [313] In Kansas City, a federal prosecutor lost her job at the U.S. Attorney's office because she had listened to recordings of private conversations between a Leavenworth inmate and his lawyer provided by a private prison company. [314] Lawyers must recognize that covert recordings bring many hazards.

4. *Hacking*

Some lawyers have superior technological skills. Bar associations should take the lead in warning them that gaining unauthorized access to another's electronic communications and computers is not merely an ethical issue but is also illegal. In addition to prohibiting intentional interception during an electronic transmission without a court order, [315] the Stored Communications Act makes it illegal to access electronic communications in an inbox, outbox or otherwise stored without authorization from the owner (or to intentionally exceed authorized access) and thereby obtain, alter, or prevent authorized access to a wire or electronic communication. [316]

The Computer Fraud and Abuse Act[317] makes unauthorized access to another's computer for an improper purpose a crime. Subsection 1030(a)(2)(C) is surprisingly broad and, by its terms, makes it a crime to exceed authorized access of a computer connected to the internet *without* any culpable intent. Although some courts are unlikely to interpret minor violations as a crime,[318] lawyers should stay well within the law when doing research on the case facts, parties, judges, or jurors.

The following is possible language addressing this concern for use in professionalism standards:

> Lawyers can and should search social media in the formal and informal discovery processes. However, lawyers should not seek to gain access to a private social media account by ***943** use of misleading statements or false names nor should they direct others under their control to do so. Even "friending" the subjects of their inquiries without a clear disclosure of the lawyers' identity and purpose can be misleading. Lawyers who comment online should avoid using potentially deceptive methods, such as false identities, to mislead others as to the source of online statements

F. Rule 3.4(b): Coaching Witnesses

Another issue made critical because of electronic communications is sending messages to other participants during a proceeding. It seems to not fit well in any of the Model Rules. The closest is Rule 3.4(b), which prohibits assisting a witness to testify falsely.[319] Some professionalism creeds forbid lawyers from coaching witnesses or obstructing a deposition. Such language,[320] including direct reference to tweets and electronic chats during testimony, should be added to all creeds. When the Model Rules were written, improper coaching was hard to define and limited to discussion during preparation time or breaks, and rambling objections.[321] It would have been impossible for a lawyer to coach a witness in specific terms in real time.

Today, witnesses and lawyers can hold cell phones under a table and discreetly text a witness in a deposition or in trial, especially in video depositions. Technically, the Model Rules only address assisting false testimony; leading a witness to give responses that the witness did not come up with on his or her own is false and certainly misleading testimony.[322] For example, a lawyer in Michigan and his client in California exchanged five text messages while the client was being deposed via videoconference.[323] The only reason the exchange came to light is because the lawyer accidentally sent a text meant for his client to opposing counsel in New Jersey.[324]

***944** Hopefully, the Model Rules will be amended to provide more specific coverage about inappropriate digital communication during testimony, but in the meantime, this temptation must be addressed in bar association standards. One option is to provide:

> During depositions and testimony, lawyers should not obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. This includes using technology to send any communication to, or receive any from, a witness, lawyer, or other participant. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in full sight of a judge.

G. Rules 3.5 and 4.2: Ex Parte Communications

Model Rules 3.5(a) and (b) prohibit ex parte communication with "a judge, juror, prospective juror or other official by means prohibited by law" and "with such a person during the proceeding unless authorized to do so by law or court order."[325] Model

Rule 4.2 prohibits communicating directly with anyone represented by counsel.[326] Recently, a district attorney was subject to disciplinary proceedings for texting with judges about pending cases without informing defense counsel and failing, during a subsequent investigation, to correct the judge's assertion that he had not exchanged texts with her, even though he had sent her eighty-nine texts over a period of six months.[327] Would a prosecutor and a judge have engaged in formal written communication without informing other parties? That seems less likely, but given the ease and ubiquity of digital communications, lawyers may fail to register the significance of texts although the ethical result is the same.

Not all improper electronic communications are so obvious as emails. Some lawyers may intentionally use electronic means to send "hints" and "thoughts" to persons covered by these Rules. Because of the increased risks and subtleties of electronic messaging, intentional and unintentional communication by social media must be directly confronted, defined, ***945** and prohibited rather than relying on lawyers to register how such behavior might fit under Model Rules 3.5 and 4.2.

Recognizing the ease with which a lawyer can communicate with a juror online, the New York City Bar Association has urged lawyers to use extreme caution when researching jurors in the course of a trial.[328] Its formal opinion warned, "[R]esearching jurors mid-trial is not without risk. For instance, while an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial."[329] Several professionalism creeds include language addressing the prohibition on ex parte communications, but none implicate the heretofore impossible ways that a simple online click could constitute a communication.[330] An affirmative attempt to engage in ex parte communications about a case through use of social media is clearly inappropriate, even if the facts and identities are veiled.

The ways in which messages can be communicated electronically are so varied, I discuss several of them specifically.

1. *Friending*

The subject of friending for purposes of research on parties, jurors, and witnesses is discussed in detail above in subpart III.E. In addition to the problems described in that subpart, using the various techniques of social media associations also risks violating the rules governing ex parte communications.

Sending a connection/access invitation (such as a "friend request" on Facebook) is widely regarded as a communication, even though it is simply a click of the mouse and no words are exchanged. The ABA's Formal Opinion 466 states that, for purposes of Model Rule 3.5, a lawyer may review a juror's or potential juror's public postings but should not send a request for access to private sites, directly or indirectly.[331] This applies to lawyers and to anyone acting on their behalf.[332] The ABA offers an analogy for explanation:

> ***946** This would be the type of ex parte communication prohibited by Model Rule 3.5(b). This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past.[333]

A New Hampshire Bar formal opinion reminds us that attempting to communicate, no matter how subtly, with a witness in the same matter involving a lawyer's client is also an improper ex parte communication that implicates Model Rule 4.2.[334]

2. *Follower Notifications*

Some sites, such as LinkedIn, send a notification to users when a third party views their profile.[335] This is relevant when a lawyer is researching a juror, represented party, or judge. Ethics opinions are split on whether this constitutes a communication.[336] In a formal opinion, the ABA states that since the automatic notification is generated by the website, it "is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street."[337] The lawyer's actions may seem invasive, discourage jury service, and suggest a threat. The New York City Bar Association adopted a broad definition of the ***947** word "communicate" and concluded that automatic notifications are a communication because "at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated."[338] Of course, researching opposing parties, the assigned judge, and a lawyer's own clients is good practice.[339] But attorneys must be cautious about the implications of any notice generated by the attorney that is conveyed to a third party.[340]

One way to determine whether an online action should count as a prohibited "communication" is if the notification can be construed as an intentional effort to send a "message," no matter how subtle.[341] If this is the pertinent distinction, passively viewing a profile that automatically generates a notification is not a communication, but actively requesting a friend status is. Not all commentators make this distinction. But lawyers deserve better guidance on what is appropriate.

3. *Public Posts Intended as Messages*

Even if there is no communication targeted at a specific party, juror, judge, or witness, putting information out on the internet still may lead to a communication that raises ethical issues. A unique opportunity for public concern arises with lawyers' online ability to communicate overt and covert messages through online postings that are likely to reach parties interested in a case. In some circumstances, tweeting falls into the prohibition against public communications by a prosecutor,[342] discussed above in subpart III.D, as well as the prohibition on ex parte communications. In one example, a prosecutor tweeted updates before, during, and after a trial.[343] On appeal, the defense argued that the verdict should be overturned because the prosecutor's tweets prejudiced the jury.[344] ***948** The appellate court did not find prejudice but voiced concerns that such actions could taint the jury:

> [E]xtraneous statements on Twitter or other forms of social media, particularly during the time frame of the trial, can taint the jury and result in reversal of the verdict. We are especially troubled by the timing of [the prosecutor]'s Twitter posts, because broadcasting such statements immediately before and during trial greatly magnifies the risk that a jury will be tainted by undue extrajudicial influences.[345]

This example serves to show that a lawyer making indirect communications may fail to assess the likelihood that online communications will spread beyond their intended recipients.

Currently, much of a lawyer's correspondence is digital.[346] As discussed above in Part II, one risk of digital information is accidently forwarding an email, or "replying all," without realizing a judge, court official, witness, or party is on the recipient list. Recall the example of a seasoned attorney who accidently sent an email with negative comments about the court to the chief judge.[347] The judge treated the email as an improper ex parte communication.[348]

A more subtle violation would be posting a copy of correspondence, or a summary of it, on a blog or social media site. The digitized image or text can easily be viewed by, or shown to, judges or members of the judge's staff. As we discuss below, many lawyers and judges have connected on social media websites. Even if the judge is not likely to see the post, the lawyer may know that a friend or family member of the judge may see the post and pass it on. Traditionally, this kind of indirect communication

would have required much more effort. A lawyer would have to start a rumor or give a copy to someone she believes will pass it on. Online, transmitting such information to anyone and everyone is fast, simple, and can include exact language. Many lawyers seriously underestimate how online posts and emails can be spread to potentially wide audiences. On the other hand, some lawyers may be fully aware of these patterns and intend to send a message to the judge through indirect means.

***949** For example, after the Supreme Court's decision in *Kennedy v. Louisiana*,[349] a legal blogger found an error in the Court's opinion.[350] An attorney saw the blog post and mentioned it to his wife, a *New York Times* reporter, who then wrote a front-page story about the Court's mistake.[351] This eventually led to the court issuing an amended opinion, even though the outcome of the case was the same.[352] Although in this instance the blogger was an attorney that was not representing either party in the case, it is not far-fetched to imagine a scenario where counsel for one of the parties posts something online about an ongoing case in hopes that the content gets back to the court. In high-profile Supreme Court litigation, this possibility is not too remote. SCOTUSblog, a popular Supreme Court blog, was accessed "over a hundred" times in one day from an IP address registered to the Court.[353] This suggests that members of the Court or their staff are receiving the information included on the blog. Clearly, "the line between talking *about* the Court and talking *to* the Court" becomes blurred at times.[354]

A standard can warn of the risks of ex parte communications:

> Lawyers should be aware that communicating using digital mediums increases the risk of ex parte communications by inadvertently or intentionally sending a message or a copy of a correspondence to a judge or judicial staff through an indirect route online.
>
> When conducting informal fact research online, lawyers should not do anything that might be interpreted as sending a message or ex parte communication to judges, jurors, identified witnesses, or represented parties. This includes a request to connect, "friending," and other nonverbal actions that send a message to the recipient. It is always permissible to view publicly available information online. Since any online post has a potential of reaching unintended recipients, once a jury has been selected, ***950** lawyers should avoid posts, tweets, and social media messages with content relevant to the case.

H. Rule 5.5: Unauthorized Practice of Law

Model Rule 5.5(a) includes: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction ...."[355] Comment 4 adds, "Presence may be systematic and continuous even if the lawyer is not present [in the jurisdiction]."[356] A looming risk that accompanies the wonder of a webpage presence is the unauthorized practice of law. Related risks are misleading information about a lawyer's services, discussed in subpart III.I, and violation of advertising regulations, discussed in subpart III.J. This subpart focuses on when a web presence constitutes practice in jurisdictions where the lawyer is not licensed. While the treatment of unauthorized practice is clear under the Model Rules, what virtual activities constitute the practice of law is enormously confusing. Lawyers need clear guidelines.

Any offer of legal advice online raises the risk of unauthorized practice.[357] Webpages and online form services may constitute the practice of law in certain circumstances. Although this problem may seem obvious to some lawyers, other lawyers who set up webpages with legal information as a public service or as an inducement to attract clients seem to forget that a webpage reaches potentially every jurisdiction in the world. This issue becomes significantly more troubling when either the lawyer intends to attract non-residents or, when that is not the intent, the webpage is interactive and the host should have realized that an

out-of-jurisdiction visitor to the website would rely on the posted information. For example, an appellate court in Indiana stated that attorneys consent "to the establishment of an attorney-client relationship if there is proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it."[358]

This hypothetical situation demonstrates the problem of giving advice online. When an Idaho resident felt his rights had been violated by the police, he turned to the internet for an ***951** answer regarding how long he would have to bring a lawsuit in his jurisdiction.[359] The answer was provided by a lawyer in Wyoming who told the Idahoan that he had one year to bring suit, which would have been accurate if the man lived in Wyoming instead of Idaho.[360] However, when the man tried to bring his suit nine months later, he unpleasantly found out that the online advice he received was inaccurate for his jurisdiction, and that in Idaho he only had 180 days to bring his claim.[361]

The lawyer in this hypothetical could and should have been more careful to identify the jurisdiction of the person to whom he or she was giving legal advice, rather than assume that the person was in the Wyoming jurisdiction. Furthermore, the lawyer in the hypothetical may not have even realized that a lawyer-client relationship can arise regardless of the residence of the questioner. If a lawyer's statement regarding the statute of limitations had not been given in response to a question, it may still have created problems. Lawyers who give specific statements of law on a webpage may be inducing reliance and thus creating an attorney-client relationship and, if it is online and the applicable jurisdiction is not specified, the advice could be false and be malpractice.

This caution describes well the risks of creating a lawyer and client relationship online:

> Lawyers should be cautious not to create an unintended attorney-client cyber relationship. Having a conversation via social media and offering legal advice in that manner is one way that this could happen. To the extent that social media involves two-way communication, the possibility exists that a lawyer might unintentionally form an attorney-client relationship through social media. Lawyers accordingly should avoid creating an impression that they are providing legal services with their social media when they do not intend to do so. Although lawyers may give legal information to members of the public, such information can be transformed into legal advice if the lawyer applies analysis of the law to the particular facts of an individual's situation.
>
> Having a conversation on social media might accidentally trap an attorney into being deemed to have provided legal advice to someone he did not think was his client. If an ***952** individual reasonably believes that a lawyer has undertaken representation, the lawyer can be liable for negligence in providing the legal service and be subject to disciplinary action.[362]

Model Rule 8.5(b)(2) offers a safe harbor to mitigate the scope of the risk: "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."[363] The D.C. ethics opinion however is quick to note that this model rule has not been adopted in every state, thus the caution for lawyers to do their due diligence in familiarizing themselves with surrounding jurisdictions' rules.[364]

To address this issue, the ABA Commission 20/20 proposed the following amendment to the Model Rules 5.5 Comments:

> For example, a lawyer may direct electronic or other forms of communications to potential clients in this jurisdiction and consequently establish a substantial practice representing clients in this jurisdiction, but without

> a physical presence here. At some point, such a virtual presence in this jurisdiction may become systematic and continuous within the meaning of Rule 5.5(b)(1).[365]

Unfortunately, this language was not adopted, apparently because of the fear that it would "chill cross-border practice."[366] This risk is serious even if the ABA chooses not to warn lawyers about it.

The problem is that webpages with legal advice are sprouting like mushrooms and attorneys are left without warning of the risks of creating a virtual presence in all the jurisdictions serviced by a webpage. Because practitioners with virtual offices can offer complete legal services, the foundational question arises of why licenses are required for having a physical office in a state.[367] The ABA and bar associations cannot continue to ignore these issues.

***953** Cases finding the unauthorized practice of law in an online context have already arisen. A California court acknowledged these issues when it held that "an out-of-state lawyer's use of [electronic communications] could constitute unauthorized practice of law."[368] Other courts have also addressed virtual practice problems. A recent example is *In re Brandes*, where a New York appeals court held that a disbarred lawyer who provided service over the internet involving legal advice and contracting to draft briefs was engaged in unauthorized practice of law.[369] The Supreme Court of Nebraska held that an operator of a website selling presentations on eviction law engaged in the unauthorized practice of law.[370] Although the website operator in this case was not a lawyer, a licensed attorney offering similar services online could be deemed practicing in each jurisdiction where customers reside. A bankruptcy court in Montana ruled that the operator of an internet website through which debtors were advised of available exemptions and the site solicited information from debtors was engaged in the unauthorized practice of law.[371] In an unpublished opinion, the North Carolina Superior Court found that statements on a website included with a lien filing service constituted providing legal advice.[372]

In another example, the principal office of Low Cost Paralegal Services was in Texas, but its services were offered online to takers from other states.[373] The Rhode Island Unauthorized Practice of Law Committee found that the operators of the webpage were engaging in the unauthorized practice of law, a finding affirmed by the Rhode Island Supreme Court.[374] The court further recommended that its order be turned over to the attorney generals of Rhode Island and Texas, the North Carolina State Bar Association, and the federal agency with jurisdiction over internet-based fraud.[375]

***954** The most notable case involved the legal forms offered by LegalZoom.com, Inc.[376] After various law suits and appeals, a district court in Missouri held that the legal document preparation service on its website constituted the unauthorized practice of law.[377] Some of the cases were settled and others were dismissed based on the settlement.[378] In any event, lawyers with an online presence must carefully study which statements made and services offered constitute providing legal services and thus give rise to unauthorized practice claims in states where a lawyer is unlicensed.

The language of some state ethics rules can be interpreted to address virtual offices, but the results are inconsistent.[379] For instance, Colorado allows lawyers from other jurisdictions to practice Colorado law, as long as they do not have a "domicile" or "a place for the regular practice of law" in the state.[380] In Virginia, out-of-state lawyers can have an office in Virginia without a Virginia license as long as they do not practice Virginia law.[381] This language seems to suggest that a virtual office may create the "systematic and continuous presence" for the practice of Virginia law even without any physical presence.[382] These regulatory positions were not written to specifically cover online legal services and are inadequate to give lawyers sufficient notice on the extent to which an online presence is considered the practice of law within a state.

Other unauthorized practice-of-law issues arise when software designed to assist in legal matters is offered for sale online. Of course, nonlawyers who make these forms available or who use them may be engaged in unauthorized practice.[383] *955 The users of legal forms generated by software are also at risk.[384] Some commentators suggest all these problems can be avoided with a disclosure.[385] A disclosure may be sufficient to warn a nonlawyer that general statements of the status of the law or the existence of a variety of legal options does not create an attorney-client relationship and such generalized statements should not be relied upon. It is far more difficult to argue that the offering of a form with specific legal language for specific purposes can be protected by a disclaimer. Action that contradicts the terms of the disclaimer invalidates the disclaimer. In addition, if the operator of such a website responds to a question or request from a nonlawyer, the disclaimer provides no protection. It is not the potential client's job to self-screen based on a disclosure. Another option might be screening questions by asking the poster's residence, but if the webpage itself contains advice without further interaction, screening is not a viable option.

The bigger problem, for purposes of this Article, is not nonlawyer programmers or users. It is the involvement of lawyers in drafting the forms, assisting in the creation of the software, and making a profit on the sale of the forms. They risk the creation of an attorney-client relationship in every state, since the webpage will be available to all, and can be sued for malpractice. Again, disclaimers are a good idea to aid in the prevention *956 of inappropriate attorney-client relationships.[386] Disclaimers must be conspicuous, easily understood, properly placed, and not misleading.[387] A D.C. Bar ethics opinion puts disclaimers in context when it "reiterate[s] 'that even the use of a disclaimer may not prevent the formation of an attorney-client relationship if the parties' subsequent conduct is inconsistent with the disclaimer.'"[388]

A professionalism creed should include the following:

> Lawyers must recognize that a web presence is open to residents of other jurisdictions. Attorneys making specific statements of the law applicable to certain facts or answering questions online may create an attorney-client relationship. A lawyer giving legal advice or selling software to generate legal forms online must be licensed in all applicable states or undertake measures to screen potential clients' residences. Lawyers must always ascertain the location of people with whom they electronically communicate before giving any legal advice via any electronic medium.

I. Rule 7.1: Misleading Information about a Lawyer's Services

Model Rule 7.1 states: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."[389] This restriction is related to, and overlaps some with, Rules 7.2 and 7.3, discussed in the next subpart, which directly addresses lawyer advertising, as well as Model Rule 8.4(e), discussed in subpart III.L, which addresses improper implications of influence.

Lawyers have historically used various mechanisms to mislead others about the nature or quality of their services. The internet has introduced ample additional cheap and easy opportunities for lawyers to make misleading assertions about themselves in a context that may or may not qualify as advertising. A New Jersey lawyer posted excerpts from court opinions that complimented his work.[390] After a judge asked that *957 his comment be taken down, the judge referred the matter to the New Jersey Committee on Attorney Advertising.[391] The Committee subsequently issued a guideline forbidding the use of "a quotation or excerpt from a court opinion (oral or written) about the attorney's abilities or legal services," commenting that such statements are misleading.[392] Such conduct could also fall under Model Rule 8.4(e) by suggesting that this lawyer can exercise improper influence over the quoted judge.

A recent D.C. Bar ethics opinion cautions lawyers to be careful in their social media posts regarding results of cases and information on clients "because [internet-based publications such as social media] have the capacity to mislead by creating the unjustified expectation that similar results can be obtained for others." [393]

One of the predominant features of the internet is the myriad of ways to collect and display rankings, reviews, and other kinds of feedback. Many businesses and professionals, including lawyers, have hired companies that specialize in writing and posting fake online reviews of their services. [394] Fake reviews can be positive reviews that put one's own services or firm in a good light, or they can be negative reviews intended to undercut other lawyers or retaliate against a judge.

Another infamous example involves a review posted by the CEO of a Fortune 500 company, Whole Foods Market. [395] He used a fictional identity for eight years on message boards to praise his brand and disparage competitors. [396] Lawyers with enough ego may well try the same scheme. For example, one small San Diego firm found itself embroiled in a suit with Yelp after allegedly soliciting fake reviews. [397] Another concern is ***958** lawyers who pay real clients to write positive reviews for them on Google or other websites. Failing to state that the reviewers are paid or receive other forms of compensation is itself misleading. Pressuring ongoing clients to write positive reviews may be perceived as a condition of continued representation, and such reviews are not voluntary and thus their content is misleading.

As discussed in the next subpart, each jurisdiction may have slightly different rules about lawyer advertising that implicate testimonials. Some states do not allow testimonials or online reviews at all, which can cause problems for lawyers who use LinkedIn. [398] Texas Disciplinary Rule of Professional Conduct 7.02(4) "prohibits comparisons to other lawyers' services, unless substantiated by verifiable objective data." [399] A client writing a review on a lawyer's page that says a particular lawyer is "the best trial lawyer in town" would be a violation of the rules because it is a prohibited comparison. [400]

One unusual twist arose in a recent case involving a California lawyer who posted on her webpage photoshopped pictures of herself and various important politicians and celebrities including Barack Obama, Arnold Schwarzenegger, and Ellen DeGeneres. [401] The disciplinary body treated these photos as a method of making herself seem more important and connected than she really is. [402] Similarly, such photos could suggest that she has improper influence with powerful government actors and may be willing to use that influence on behalf of a client. [403]

Standards could include a provision that looks like this:

> Lawyers should be wary of quoting out of content excerpts from court opinions that mention the quality or nature of a lawyer's services since such statements may ***959** be misleading. Further, lawyers may not pay for online reviews or pressure clients to write reviews during an ongoing representation. Lawyers may never misrepresent their identities or write reviews of their own services online as such conduct is clearly misleading. Finally, lawyers should never use technology to misrepresent their legal services, their influence in the community, or their reputation.

J. Rules 7.2 and 7.3: Restrictions on and Requirements of Advertising

Rules 7.2 and 7.3 on advertising and solicitation of clients have been amended to refer to "electronic communication" along with other written and recorded communication. [404] Rule 7.3 refers to "real-time electronic contact" along with in-person and telephone contact. [405] Although lawyers may advertise through any kind of medium, Rule 7.2 provides in pertinent part that,

"Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content."[406] Lawyers wanting to garner clients will most likely display their name. Whereas office letterhead typically displays an address, social media posts or other forms of electronic communications are less likely to display an office address. Presumably, a URL or Twitter moniker is not enough.

The most obvious problem with the advertisement regulations arises with online communications that the lawyer does not recognize are "advertisements." The D.C. Bar warns that "any social media presence, even a personal page, could be considered advertising or marketing ...."[407]

The California Bar issued a formal opinion stating under what circumstances an attorney's postings on social media websites would be subject to professional responsibility rules and standards governing attorney advertising.[408] For example, in some states, creating a LinkedIn profile with testimonials is ***960** a violation of advertising rules.[409] Similarly, talking about case results on Twitter out of context may be deemed as soliciting clients.[410] Webpages and blogs, like newsletters, largely consisting of "mundane advice" but including information on the lawyer's practice areas and contact information are advertisements.[411]

An interesting issue was raised by a firm that gave out free t-shirts with the firm logo and offered entry in a drawing for a prize to anyone who posted a picture on Facebook of themselves wearing the firm's t-shirt.[412] The ABA Commission determined that such a promotion pushed the lines of advertising and might violate existing ethics rules.[413] One enterprising firm posted advertisements for their law services on the bulletin boards of thousands of online news groups.[414] People in 140 different countries, some of which had laws prohibiting advertising by lawyers, viewed the advertisement.[415] What seemed like an enterprising idea was not carefully considered.

For intentional advertising, lawyers should make certain that their social media advertisements comply with all applicable state rules.[416] Some states may require keeping a copy of all social media posts for three years,[417] or giving the name and office address of the responsible lawyer or firm in the post itself.[418] In Connecticut, "even a simple LinkedIn invitation to another user that links to a lawyer's personal page describing his practice may be an advertisement subject to regulation."[419] ***961** A New York ethics opinion forbids law firms from listing their services under the "specialties" section of LinkedIn, because under New York ethics rules, lawyers, but not law firms, can be certified as specialists.[420] The D.C. Bar warns that lawyers should familiarize themselves with the ethical rules for social media and online resources not just in D.C., but also in the surrounding jurisdictions because some jurisdictions, such as Maryland and Virginia, have rules that allow for the discipline of lawyers that are not even admitted in their jurisdictions.[421]

A standards provision might look like this:

> At a minimum, lawyers need to ensure that intentional advertisements comply with local laws and rules. Lawyers should be aware that the advent of digital advertising allows them to advertise beyond state lines. As such, lawyers should be prepared to comply with regulations in other states to which they may be subject.

K. Rule 8.2: Disparaging Judicial and Legal Officials

Rule 8.2 provides:

> 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.[422]

A famous example illustrating the need for this rule involves a lawyer speaking on a talk show--although the same communication could just as easily have been made online. The lawyer "declare[d] war" on three court of appeals judges calling them "jackass[es]" and compared them to Adolf Hitler and other Nazis.[423] Another lawyer on his blog called a particular judge an "evil, unfair witch," who "is clearly unfit for her ***962** position and knows not what it means to be a neutral arbiter."[424] These are obvious violations.

Aside from a lack of civility, such comments erode public confidence in the legal system and profession. First, most readers may well believe that at least some toned-down version of the allegations is factual. Second, many readers could perceive the legal system as an ugly joke rather than a serious place to resolve disputes. Although lawyers are free to criticize judicial opinions in public, such criticisms should be professional and not personal. In recent years, the climate of public discourse has so coarsened that public criticism of judges' competency and neutrality has taken center stage.[425]

Language in a bar association's standards might look like this:

Lawyers may openly criticize judicial opinions. However, such criticisms should always be professional and never a personal attack on the person or the competence and bias of the judge. Such criticisms damage the credibility of the lawyer and bring the profession into disrepute. If the behavior of a judge is subject to dispute, lawyers should refer the matter to the appropriate regulating authority and avoid public disclosure.

L. Rule 8.4: Maintaining the Integrity of the Profession

1. *Rule 8.4(c): Fraud and Deception*

Rule 8.4(c) offers a general statement advising lawyers to avoid dishonesty in all its forms. It states: "It is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation ...."[426] As discussed elsewhere, many types of technoblunders involve misleading others. The remainder of Rule 8.4 addresses additional specifics.

***963** 2. *Rule 8.4(e): Improper Implication of Influence*

Rule 8.4(e) provides: "It is professional misconduct for a lawyer to ... 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 ...."[427] This rule is directed to lawyers, but on occasion, judges lure lawyers into violations because they are not careful about their own behavior. This subpart focuses on lawyer-judge interactions that may give the impression that the lawyer has undue influence on the judge or that the judge is biased. It discusses judges' friending and other social media relationships involving judges.[428] Judicial conduct and technology has received attention from the ABA.[429]

Issues relating to lawyers' friending in the course of factual research are discussed in subpart III.E. Friending as a form of ex parte communications is discussed in subpart III.G. Issues relating to advertising and friending are discussed in subpart III.J.

A lawyer who is friends with or following a judge may use that fact to create the appearance of improper communications or relationships suggesting judicial bias.[430] Such relationships may create an impression that the judges favor such attorneys or that the attorneys "are in a special position to influence the judge."[431] Such is why a Florida judge was disqualified in a criminal case when it was discovered that the judge was Facebook friends with the prosecutor.[432] However, in a recent ***964** case, a Florida district court refused to disqualify a judge who was Facebook friends with a lawyer representing a party and a witness in the case, although it noted the earlier case in Florida reaching a different conclusion.[433] The court stated that Facebook friending does not necessarily signify a close relationship.[434]

Attitudes differ on judges and friending.[435] Most official ethics opinions that address the issue do not condemn friending as *per se* improper.[436] However, in a few states, ethics opinions state that lawyer-judge friending is prohibited.[437] Whether or not judges should be allowed to friend lawyers, the mere presence of an online friendship can produce a variety of ethical problems.[438] A Staten Island judge was transferred because he friended lawyers on Facebook, and the lawyers complained. ***965** [439] A Florida judge was removed from a divorce case because she friended one of the parties.[440] The litigant did not accept the friend request, and she feared that this offended and biased the judge against her.[441]

In another example, a trial judge who sent a friend request to one the parties in a divorce case was disqualified because sending the request placed the party in the position of accepting the invitation and engaging in improper ex parte communications or facing the reasonable fear that rejecting the request would offend the judge.[442] Although these cases involve judges, who are subject to separate ethical rules, the rationales used in these cases may apply equally to a lawyer who accepts a friend request or who sends them to other lawyers or parties in the litigation.

Aside from friending, social media posts or other forms of electronic advertising may run afoul of Model Rule 8.4(e) because lawyers post pictures of themselves with judges or quote or restate praise given to them by a judge.[443] One case that reached the Federal Circuit involved a lawyer from a big firm who circulated a praise-filled email received from a former chief judge.[444] After the lawyer-recipient forwarded the email widely in connection with soliciting business,[445] the lawyer was publicly reprimanded, and the judge resigned. The court held:

> While the dissemination of complimentary comments by a judge contained in a public document would not itself constitute a violation of Model Rule 8.4(e), we conclude respondent's actions violated the rule. First, the email both explicitly describes and implies a special relationship between respondent and then-Chief Judge Rader. The text of the email describes a close friendship between the two.[446]

The lawyer may have had time to think in the process of retyping the words into an advertisement and mailing copies. But the ease of forwarding an email was too tempting.

***966** A professionalism standard could include this language:

> Lawyers should be very circumspect in requesting other lawyers and judges to indicate relationships on social media that may suggest any improper influence or potential lack of objectivity in resolving legal disputes even if the relationship was initiated by the judge.

3. *Rule 8.4(d) and Rule 8.4(g): Conduct Prejudicial to the Administration of Justice*

Rule 8.4(d) is the catchall many judges and disciplinary councils use to punish a lawyer for bad behavior that is difficult to fit under one of the more specific Model Rules. It provides: "It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice ...."[447] The Model Rules include a general statement requiring respectfulness in Rule 8.4(g), but the issue of civil discourse justifies more targeted attention.

a. *Rude, Crude, and Inhumane Descriptions of Participants in the Legal System*

Lawyers are sometimes crude and brutal in traditional written communications such as letters. This kind of language is often expressly covered by stated professional standards. The temptation to use disrespectful and vulgar language seems to be heightened in the fast and informal context of electronic communications. Even though mediums such as email invite offhanded and uncensored explosions and vitriol, hopefully lawyers can recognize that incivility in any communication to opposing counsel is subject to professionalism constraints. Examples abound. For instance, a lawyer in Ohio sent e-mails to the opposing party's older brother, insulting and demeaning the entire family's gene pool and calling the opposing party, a pro se litigant, an "'anencephalic cretin' with a 'single operating brain cell' whose 'brain-dead ravings' and 'anal rantings' were characteristic of the 'lunatic fringe.'"[448]

What may be less obvious are communications not intended to be seen by anyone other than those working on the case, or maybe family and friends. It has become increasingly easy and tempting for lawyers to criticize anyone--even their own clients--online, not realizing the implications of the online medium. In one instance, Steve Regan, an attorney at the ***967** Pittsburgh office of Reed Smith, a big law firm, wrote on the Twitter feed of SCOTUSblog, which he mistakenly believed was the blog of the Supreme Court, "Don't screw up this like ACA [Affordable Care Act aka Obamacare]."[449] After SCOTUSblog tweeted back "Intelligent life?," Regan replied, "Go [expletive] yourself and die."[450] His firm eventually stated "the posting of offensive commentary or language on social media is inappropriate and inconsistent with Reed Smith's social media policy. We are addressing this matter internally."[451] In the heat of a tweet, people do not stop to think about how it will read in national news.

Even if the lawyer making the communication does not use names, context is frequently more than sufficient to reveal the targeted party. For example, an Illinois attorney lost her job when she posted in her blog about a judge referred to as "Judge Clueless."[452] She "thinly veiled the identities of clients and confidential details of a case, including statements like, 'This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother ....'"[453] While she might have recognized the lack of professionalism in this language in a written letter, she did not expect her online comment to become as public as it was. Even communications intended for the private use of coworkers and family can be easily saved and then forwarded.

As discussed in Part II, online comments are likely to be read by more people than intended. The person who is criticized in an electronic communication is more likely to find out about the criticism than if the lawyer had expressed the criticism in a private conversation. Beyond the personal offense suffered by the victim, the injured party may experience damage to commercial, professional, social, and personal relationships stemming from any number of third parties who may harbor negative opinions about the victim.

Furthermore, electronic communications are forever. Even if something is "deleted," the email or post can be preserved by ***968** anyone who saw it before it was "deleted," and the electronic memory of the transmission can be easily saved in a variety of ways.[454] In May 2017, the ABA issued Opinion 477 that noted, "In the electronic world, 'delete' usually does not mean information is permanently deleted, and 'deleted' data may be subject to recovery. Therefore, a lawyer should consider whether certain data should *ever* be stored in an unencrypted environment, or electronically transmitted at all."[455] But no further guidance, standards, or advice is given.

Unfortunately, electronic mediums lend themselves to thoughtless outbursts.[456] Worse, lawyers may believe they are posting anonymously, give sway to their coarser natures,[457] and then discover that their identity can be traced[458] and their content never disappears.

A possible civility standard to address these issues might state:

> Lawyers should be respectful to all participants in the legal system and avoid vulgarity, personal insults, name calling, and other uncivil language. A lawyer should be cautious of memorializing in written electronic communications comments that are unprofessional and patently offensive regarding any person involved in a litigation or negotiation.

b. ***Disrespecting Opposing Counsel, Opposing Clients, and Others***

Some states have adopted standards explicitly relating to communications to opposing counsel, in addition to a general ***969** statement requiring lawyers to treat all others with dignity.[459] Specifically, some standards forbid: imputing improper motives to an adversary without a factual basis; embarrassing or personally criticizing another attorney; attributing a position not taken to an adversary; and impugning an adversary's character, intelligence, or morals.[460] Online, lawyers sometimes make disrespectful statements about other lawyers and participants in the legal system in communications directed to third parties. Nonetheless, the target often discovers the communications directed to others. Even if undiscovered by the target, such postings can poison the well for judges, jurors, and the public who are exposed to the post.

In one example, the lawyer may have believed his email to opposing counsel seemed innocuous or even humorous at the time, but the Missouri Supreme Court found it to be a violation of Model Rule 8.4(d).[461] After a contested hearing, the lawyer sent the following email: "Rumor has it that you are quite the gossip regarding our little spat in court. Be careful what you say. I'm not someone you really want to make a lifelong enemy of, even though you are off to a pretty good start."[462]

While the target of the criticism may deserve reprimand, the lawyer involved in a particular case should not be making judgment in an effort to intimidate, harass, or demean others involved in the suit. In a heated and pending domestic dispute, the mother's attorney sent an email directed to the father's attorney reciting details of his daughter's drug dealing in a dangerous neighborhood and suggesting the father should take more seriously his daughter's behavior.[463] The recipient's wife (who, coincidentally, was also an attorney) read the email and ***970** reported the sending attorney for discipline.[464] The Supreme Court of South Carolina issued a private letter of caution[465] and dismissed the sending attorney's claim that the bar's civility oath was an unconstitutional limit on his First Amendment rights.[466] Litigants do have a First Amendment right to be tacky, but lawyers cannot similarly conduct themselves in this way under the professionalism and civility constraints of the profession. Allowing egregious incivility to persist under the banner of freedom of speech would be a disservice to the profession. The South Carolina Supreme Court put it this way:

> The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally in the manner in which [the sending attorney] attacked [the receiving attorney]. Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client.[467]

Lawyers are asked to report to the relevant bar association misconduct of other lawyers, and doing so through the established system is an appropriate way to seek improvement in the legal profession.[468] However, a malicious online attack on an individual lawyer or firm is inappropriate. A judge or bar association, at least, can request and receive evidence and may refuse to take any action against the allegedly misbehaving attorney if there is not enough evidence to prove liability. The public, however, cannot request or receive evidence and may not be as careful about refraining from punishing a lawyer for unsubstantiated claims. Members of the public may choose not to go to a certain lawyer or firm based on malicious information they found online about that lawyer or firm, and thus the attacked firm or lawyer can lose clientele, even if the attack was unsubstantiated or completely false.

Last year, a lawyer sued the former spouse of a divorce client because he wrote a negative review of the lawyer on Google Plus.[469] The review said the lawyer worked for an "exceptionally unethical law firm ...."[470] The former spouse was ***971** not a lawyer, but such comments could be posted by lawyers who falsely believe they are acting with anonymity. The perception that lawyers are lacking in moral and competency qualities by attacking, insulting, or demeaning others online erodes the public's faith in the legal system.

c. ***Creation, Use, and Storage of Improper Electronic Content***

In addition to sex discrimination implications, some behaviors involving sexually explicit materials bring the profession into disrepute, and often, these behaviors involve the internet. For instance, one would imagine that lawyers recognize that using electronic communications to request sexual services as pay is inappropriate, but not everyone gets the message.[471] One lawyer persistently pressured in a series of emails a third-year law student who had worked for him for only a few weeks to provide sexual favors as a condition of keeping her job.[472]

One East Texas chief judge deleted his social media information and resigned rather than give up his records or produce his phone in an investigation of sexting allegations.[473] He claims he gave his phone to "charity."[474] While serving in his official capacity as vice chairman of the State Commission for Judicial Conduct, he sent sexually explicit messages to a woman who responded to his friend request.[475] She employed a private investigator to pursue the matter.[476] The investigator found and turned over photos and more than a thousand sexually ***972** explicit messages, many of which were verified by a local television station.[477]

Another issue implicating Model Rule 8.4 involves using the internet to access or store illegal or even unregulated sexually explicit content. Disciplinary actions have been brought against judges, district attorneys, and other governmental lawyers for excessive use of pornography on government-owned computers, using government-provided internet access, or on government time. In *In re Disciplinary Proceedings Against Beatse*, pornography was found on an assistant district attorney's state-provided computer.[478] An investigation ensued which found that he had been spending massive amounts of time looking at pornography.[479] He had originally lied and said that it was his son who had been looking at the pornography on his computer.[480] He also sent a number of sexual email messages to various people, including two government employees, one of whom was a court reporter.[481] Some of the emails described looking at and touching the breasts of government employees.[482] He admitted to having lied about the emails and the pornography, and he was publicly reprimanded.[483]

Some judges have been disciplined for sexually harassing or sexting staff or attorneys, even if the sexual exchanges were voluntary. In 2014, a justice on the Pennsylvania Supreme Court was ousted after sending pornographic emails to contacts in the Attorney General's office.[484] In another case, the court approved a stipulation for the retirement and public reprimand of a judge who was accused--along with failing to disclose a juror written communication and engaging in inappropriate conduct towards two female attorneys--of habitually viewing pornographic images on his courthouse computer.[485] The court pointed out that this caused numerous viruses to infect his computer, that personnel were exposed to ***973** the pornography when

coming to repair the computer, and that the judge ignored requests to stop issued because his actions were threatening to infect the entire courthouse computer system with unwanted computer viruses.[486]

4. *Rule 8.4(g): Discrimination and Prejudice*

Model Rule 8.4(g) forbids a private attorney to make public comments that are racist, sexist, or that express negative group stereotypes.[487] Although few current statements of professionalism expressly warn about such bias, all bar associations should include a charge against comments that further racial, sexist, or other biases. Lesley M. Coggiola, disciplinary counsel for the South Carolina Supreme Court, reported that she has seen lawyer posts online that are degrading to various classes of people, and argues that the lawyers behind such posts should be sanctioned for "bringing the profession into disrepute."[488] She noted that one of her ongoing cases involved a lawyer's blog that she described as "vile."[489] The blog is "insulting everybody from Hispanics to women to 'midgets.'"[490] According to Coggiola, "technology is cited most often as the foundation for boorish behavior."[491] The serious issues they have had, she explains, "[a]re all related to social media."[492]

Various examples abound. A lawyer at a large law firm was unveiled as having posted misogynistic lyrics online.[493] Although the poster likely believed he or she was anonymous or speaking to a close and trusted group, the posting was exposed and the poster was fired.[494] But the consequences do not stop there. Those who associated those lyrics with a lawyer and those who read about it in the press retain an association of such attitudes with lawyers.[495]

***974** While online comments on message boards, social media, and emails may not immediately be seen as "public comment," the ease of spreading such comments to unintended readers and even the press argues for more explicit regulation. Such statements are detrimental to the perception of the profession and legal system. For example, underrepresented groups might be discouraged from using the legal system to resolve disputes, fearing that the biases of lawyers and judges make it unlikely they will receive fair treatment. Members of the maligned group may believe that their treatment in prior cases was unfair, and thus, they are justified in disobeying court orders or not paying judgments.

While bias reflects poorly on all of the profession, the problem is even worse if a judge or other public official is the source of the electronic communication. Judge Cebull, a federal judge, forwarded a seemingly racist email about President Obama to some of his close friends.[496] After the email came to light, a commission investigating its impropriety uncovered many more emails laced with "disdain for African Americans, Latinos, women and various religious faiths."[497] Highlighting the problem in this case, the panel observed, "The racist and political [email language] reflects negatively on Judge Cebull and on the judiciary and undermines the public trust and confidence in the judiciary."[498]

Professionalism standards could state:

> Lawyers should not express through electronic or other media sources bigotry, prejudice, or disdain for any class of people. Such behavior brings the legal profession into disrepute and weakens the confidence of the public in the fairness and efficacy of the judiciary.

CONCLUSION

As the recent ABA's Commission 20/20's failures amply illustrate, the ABA cannot be expected to address the risks of technology within any reasonable time. Moreover, the Model Rules acknowledge that they do not "exhaust the moral and ethical considerations that should inform a lawyer, ... [they] ***975** simply provide a framework for the ethical practice of law."[499]

Increasing pressure on the ABA to shore up the Model Rules is essential. In the meantime, however, bar associations must take action now.[500] One option is formal ethics opinions that lawyers can research by jurisdiction, if the lawyer is alert enough to ask questions. A better option is a statement of best practices standards adopted by state, local, and practice group bar associations. Professionalism creeds address a more expansive range of behavior, but most are aspirational, meaning violators are not subject to formal discipline affecting their standing to practice law. New professionalism creeds must be adopted, integrated into lawyer education, and subject to enforcement. The legal profession, and the society it serves, deserves a clearer statement of moral ground in technology use.

Professor Chaffee suggests that aspirational standards can be implemented "with broad moral language and a high moral tone to engage with the emotions and intuitions of those practicing law and to play upon the intuitions and emotions of those interacting with lawyers to make them believe that they are being treated fairly."[501] The importance of ensuring those who interact with lawyers believe they are being treated fairly is largely underestimated by the legal community. If the Model Rules and professionalism standards fall short of society's expectations because attorney behavior seems "intuitively wrong or elicits negative emotions," the legitimacy of the profession is threatened.[502] The lack of stated moral standards relating to an issue as important as technology and social media abuses "creates an incentive for those outside of the legal profession to begin to interfere with the self-regulation of the profession, which may have negative consequences if it is done in an unsophisticated way."[503]

As outrageous examples of attorney abuses of technology continue to make headlines, the public may form the opinion that attorney conduct is not sufficiently regulated and urge ***976** lawmakers to impose external regulation on the profession.[504] Rules backed by legislation will undoubtedly be more difficult to change and less attuned to realities of the practice than the Model Rules. The profession itself can no longer ignore lawyer abuses of technology.

Footnotes

d1 Edwin M. Thomas Professor of Law, Emerita, J. Reuben Clark Law School, Brigham Young University. I thank the staff of the BYU law school library for tremendous support and the faculty for reviews and comments. I also thank Austin R. Martineau for his in-depth work on the original draft, and Matthew J. Sorensen, Brandon Stone, and Andrew Hoffman.

1 Sofia S. Lingos, *Solo and Small Firm*, A.B.A. TECHREPORT, 2016, at 1, 8 https://www.americanbar.org/groups/law_practice/publications/techreport/2016/solo_small_firm.html [https://perma.cc/E4HK-TQ64] ("It is undeniable that technology plays an ever increasing role in our profession and that gaining and maintaining an aptitude early on is necessary."); *see also* 4 AM. BAR ASS'N, LEGAL TECHNOLOGY SURVEY REPORT: WEB AND COMMUNICATION TECHNOLOGY xxxi (2013) (reporting that lawyers increasingly rely on email, text messaging, web conferencing, and social networking to communicate with clients and others); Robert Ambrogi, *This Week in Legal Tech: Ethics and Technology Competence*, ABOVE THE L. (July 11, 2016, 3:02 PM), http://abovethelaw.com/2016/07/this-week-in-legal-tech-ethics-and-technology-competence/ [https://perma.cc/KVG6-CZTE] (discussing how a firm that is not up-to-date with advances in technology not only faces a competitive disadvantage, but also risks ethical rebuke).

2 *See*RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 107 (rev. ed. 2010) ("[I]f you are not [connected to the network and accessible to your client], there is every chance ... that your competitors will be. The astute lawyer of tomorrow, even if grudgingly, will want to have more or less full-time presence, day and night, on the network, to ensure that any queries from clients will be addressed by their firm rather than by another."); Aaron Street, *Mobile Technology*, A.B.A. TECHREPORT, 2016, at 1, 2 https://www.americanbar.org/groups/law_practice/publications/techreport/2016/mobile.html [https://perma.cc/5M7X-APLW] (last visited Aug. 10, 2017) ("In total, 77% [of survey respondents] say they use the internet for working away from the office. Presumably, these *2016 Survey* respondents assumed 'use the internet' was somehow different than accessing email, because 99% check email while out of the office (89% regularly do).").

3 Drew T. Simshaw, *Ethical Implications of Electronic Communication and Storage of Client Information*, 59 RES GESTAE, Dec. 2015, at 9. *See also* Lingos, *supra* note 1, at 2 ("Technological incompetence is not merely a disadvantage, it may be an actual ethical violation.").

4 David. B. Wilkins, *Some Realism About Legal Realism for Lawyers: Assessing the Role of Context in Legal Ethics*, *in*LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 25, 34-35 (Leslie C. Levin & Lynn Mather eds., 2012).

5 *ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers,*MEDIA.AMERICANBAR.ORG (Aug. 4, 2009), https://americanbarassociation.wordpress.com/2009/08/04/aba-president-carolyn-b-lamm-creates-ethics-commission-to-address-technology-and-global-practice-challenges-facing-u-s-lawyers/ [https://perma.cc/Y72D-VVEQ] (announcing the creation of the Ethics 20/20 Commission).

6 *See infra* notes 9-10.

7 MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2013).

8 For a discussion of these issues, see Cheryl B. Preston, Professionalism in the Trump Era (unpublished manuscript) (on file with author).

9 Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 264 (2011).

10 All states have based their ethics rules on the Model Rules, except California, where the Model Rules "may be considered as a collateral source." Diane Karpman, *ABA Model Rules Reflect Technology, Globalization*, CAL. ST. B.J. (Sept. 2012), http://www.calbarjournal.com/September2012/EthicsByte.aspx [https://perma.cc/PUJ7-QCD4]. In other states, the Model Rules are "considered highly influential guidance when states update their own idiosyncratic Rules of Professional Conduct." *Id.*

11 Cheryl B. Preston & Hilary Lawrence, *Incentivizing Lawyers to Play Nice: A National Survey of Civility Standards and Options for Enforcement*, 48 U. MICH. J.L. REFORM 701, 710-11 (2015).

12 *See* John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 70-71 (2013) (citing, e.g., Joan C. Rogers, *Ethics 20/20 Commission Airs Proposals on Conflicts-Checking, Choice of Rules Pacts*, BLOOMBERG BNA (Sept. 14, 2011), http://www.bna.com/ethics-2020-commission-n12884903471, [https://perma.cc/CH4Q-WLKD] for its discussion of an interview with Anthony E. Davis, Esq. about the limited scope of the Ethics 20/20 Commission's recommendations and its discussion of the ABA's inability to effectively revise the Model Rules to keep current with the realities of modern practice and the debilitating politics within the ABA).

13 The ABA commenced a review of the Model Rules in 1997 when it established the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") to consider necessary changes based on developments since the Model Rules were adopted in 1983. For a more detailed description of how changes to the Model Rules can be initiated and adopted, and the history of such amendments, see Dzienkowski, *supra* note 12, at 87-88. The product of the 20/20 Commission was thoughtfully criticized by Professor Dzienkowski. *Id.* at 71 ("Most observers viewed Ethics 20/20 as a major opportunity to examine and consider changes that recently have taken place in the legal professions of the United States and other countries. The resulting work product, however, has disappointed many scholars and lawyers because the results do not match the promises.").

14 MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2013) ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.").

15 *Id.*

16 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) [hereinafter ABA Formal Op. 462] (discussing judge's use of electronic social networking media).

17 Saleel V. Sabnis, *Attorney Ethics in the Age of Social Media*, A.B.A. (June 8, 2016,) http://apps.americanbar.org/litigation/committees/professional/articles/spring2016-0616-attorney-ethics-age-social-media.html [https://perma.cc/T4GQ-6S6P]. He continued, saying:

When the ABA amended the Model Rules of Professional Conduct in 2013, there was no specific mention of social media other than a not-so-subtle reminder that an attorney must stay abreast of changes in technology. The ABA's silence was incongruous with the everyday demands placed on litigators to harvest information on social media.
Id.

18 *See, e.g.*, Lorelei Laird, *Discrimination and Harassment Will Be Legal Ethics Violations Under ABA Model Rule*, A.B.A. J. (Aug. 8, 2016, 6:36 PM CDT), http://www.abajournal.com/news/article/house_of_delegates_strongly_agrees_to_rule_making_discrimination_and_harass [https://perma.cc/L7DR-KJSL] (discussing how difficult it is to amend the Model Rules).

19 Albeit in a different context, one author's argument that we should not address advances in technology by changing the Rules is convincing. In arguing that the rules of civil procedure should not be amended to take into consideration advances in technology, the author states, "'a change devised now might be irrelevant, and might even be harmful, four years from now.'" Steven S. Gensler, *Special Rules for Social Media Discovery?*, 65 ARK. L. REV. 7, 36 (2012) (quoting Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253, 280 (2001)).

20 Dzienkowski, *supra* note 12, at 92.

21 *See id.* at 73 (noting that codes of civility "were largely viewed as a solution to the failures of the ABA Model Codes").

22 *See* A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 302 (1998) (citing 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § AP4:107, at 1269-70 (2d ed. 1994 & Supp. 1997)) ("Many civility or conduct codes were formulated in the 1980s and 1990s."). The number of creeds seems to have fluctuated over the years from 100 in 1995 to 150 in 2005. Marvin E. Aspen, *A Response to the Civility Naysayers*, 28 STETSON L. REV. 253, 253 n.2 (1998). *See also* Allen K. Harris, *Increasing Ethics, Professionalism and Civility: Key to Preserving the American Common Law and Adversarial Systems*, 2005 PROF. LAW 91, 112 ("More than 150 state, county and city bar associations have adopted professionalism codes to encourage enhanced professional behavior and support increased judicial control of incivility and other unprofessional behavior."). Today there are about 125 such creeds that various organizations and jurisdictions in the United States have adopted. This decline may reflect consolidation, for instance, where lower courts exchange individual creeds for those of the state or circuit. The ABA has compiled an extensive, but not exhaustive nor current, list of the professionalism creeds adopted in various jurisdictions around the United States. *Professionalism Codes*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html [https://perma.cc/K9E9-V3CB] (last updated Mar. 2017).

23 For a list of extant creeds and how they are styled, see Preston & Lawrence, *supra* note 11, app. A.

24 *Id.* at 707.

25 *Id.*

26 *Id.* at tbl.9. Only three creeds from that survey mention technology in any form, and they address it only in terms of transmitting material. *Id.* The most comprehensive treatment of technology is from the Denver Bar Association:
1. We will use data-transmission technologies only as an efficient means of communication and not as a means of obtaining an unfair advantage. The use of such technologies does not require receiving counsel to discontinue other matters to respond.
2. We will honor reasonable requests to retransmit materials or to provide hard copies.
DENVER BAR ASS'N, PRINCIPLES OF PROFESSIONALISM (May 2007), http://www.denbar.org/portals/dba/repository/professionalism.pdf [https://perma.cc/JFN8-3RLP].

27 No professionalism statements included other uses of technology as of 2014. *See* Preston & Lawrence, *supra* note 11, at 714 n.75.

28 UTAH STANDARDS OF PROFESSIONALISM & CIVILITY pmbl. (2014).

29 FLA. BAR, PROFESSIONAL EXPECTATIONS 2 (2015), https://www.floridabar.org/wp-content/uploads/2017/04/professionalism-expectations.pdf [https://perma.cc/R3KJ-DZ7T]; *see also*FLA. BAR, OATH OF ADMISSION TO THE FLORIDA BAR (2017), https://www.floridabar.org/wp-content/uploads/2017/04/oath-of-admission-to-the-florida-barada.pdf [https://perma.cc/

TGQ4-464W] ("To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.").

30 *See*MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR. ASS'N 2013) (asserting that lawyers must be subject to the profession's rules of conduct as well as their "personal conscience *and* the approbation of professional peers" (emphasis added)).

31 Preston & Lawrence, *supra* note 11, at 724.

32 *See, e.g.*, N. Y. C. Bar Comm. on Ethics & Prof'l Responsibility, Formal Op. 2012-2 (2012); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014); Pa. Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 2014-300 (2014).

33 *See* D.C. Bar Ass'n, Ethics Op. 370 (2016); D.C. Bar Ass'n, Ethics Op. 371 (2016).

34 *See* Preston & Lawrence, *supra* note 11, at 724 (noting that formal opinions are usually not binding but persuasive).

35 *See, e.g.*, *In re* Reines, 771 F.3d 1326 (Fed. Cir. 2014) (reprimanding the lawyer for his misconduct in disseminating an email from a then-judge to clients); *In re* Eisenstein, 485 S.W.3d 759, 761 (Mo. 2016) (en banc) (holding that the lawyer violated several disciplinary rules by not immediately disclosing that he received the opposing party's emails including direct examination questions); Missouri v. Polk, 415 S.W.3d 692, 695 (Mo. App. E.D. 2013) (holding that Defendant could not show substantial prejudice stemming from the prosecutor's Twitter comments about the case to justify reversal); *In re* Anonymous Member of S.C. Bar, 709 S.E.2d 633 (S.C. 2011) (holding that lawyer engaged in conduct "prejudicial to the administration of justice" by sending an inflammatory and insulting email about a party to opposing counsel); *In re* Disciplinary Proceedings Against Beatse, 722 N.W.2d 385, 386-90 (Wis. 2006) (holding that attorney's lies about source and viewing of pornographic images on State computer and sending and receiving of sexually explicit emails violated Rules of Professional Conduct); *In re* Tsamis, No. 2013PR00095 (Ill. Att'y Registration and Disciplinary Comm'n Jan. 15, 2014), http://www.iardc.org/HB_RB_Disp_Html.asp?id=11221 [https://perma.cc/E8RU-W64D]; *In re* Herr, Kan. Sup. Ct. Order 2012 SC 94 (Kan. Jan. 13, 2014), http://www.kscourts.org/pdf/Herr-Admonition-Final-Report.pdf [https://perma.cc/FAY8-LV3C].

36 *See, e.g.*, Preston & Lawrence, *supra* note 11, at 723.
The provision that appears most frequently in [various state creeds] is the vague charge to "treat others in a courteous and dignified manner" or to "act in a civil manner," which forty-five of the forty-seven creeds included. This general objective is not very helpful without being further refined and defined within the creed .... Also common are provisions urging honesty (without specific definition or elaboration) and provisions against knowingly deceiving or misrepresenting fact or law. Because Model Rules 3.3, 4.1, and 7.1 cover misrepresentation, restating the honesty requirement in unenforceable creeds may suggest that honesty is aspirational, not essential. Such a creed would be more helpful if it articulated borderline cases where the honesty implications are less obviously addressed in the Model Rules.
Id.

37 *Id.* at 713-23.

38 *Id.* at 724.

39 *Id.* at 729-32.

40 *Id.* at 732-34.

41 *See* Dzienkowski, *supra* note 12, at 73.

42 *See, e.g.*, Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998); Terri R. Day, *Speak No Evil: Legal Ethics v. the First Amendment*, 32 J. LEGAL PROF. 161 (2008); Peter Margulies, *Advocacy as a Race to the Bottom: Rethinking Limits on Lawyers' Free Speech*, 43 U. MEM. L. REV. 319 (2012); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 569 (1998); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567 (2009); W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305 (2001); Sarah DeFrain, Note, Grievance Administrator v. Fieger*: The Tenuous Link Between Attorney Silence and Public Confidence in the Legal System*, 54 WAYNE L. REV. 1823, 1824 (2008).

43 *In re* Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring in the result) ("Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."); *see also* Sullivan, *supra* note 42, at 569.

44 *See, e.g.*, Grievance Adm'r v. Fieger, 719 N.W.2d 123, 142 (Mich. 2006) (punishing an attorney for undignified speech made on a radio broadcast); *In re* Anonymous Member of S.C. Bar, 709 S.E.2d 633 (S.C. 2011) (upholding reprimand of attorney for email communication made to opposing counsel outside of formal proceedings).

45 Day, *supra* note 42, at 162 (citations omitted); *see In re* Snyder, 472 U.S. 634, 644 (1985) ("'Membership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." (alterations in original) (quoting People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 489 (N.Y. 1928))); *Grievance Adm'r*, 719 N.W.2d at 142 (holding that coarse attorney speech "warrants no First Amendment protection when balanced against this state's compelling interest in maintaining public respect for the integrity of the legal process" (citing United States v. O'Brien, 391 U.S. 367, 377 (1968))).

46 *E.g.*, MODEL RULES OF PROF'L CONDUCT r. 7.1 (AM. BAR ASS'N 2013); SUPREME COURT OF OHIO COMM'N ON PROFESSIONALISM, PROFESSIONAL IDEALS FOR OHIO LAWYERS AND JUDGES (2013).

47 *E.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.6; WASHINGTON STATE BAR ASS'N, CREED OF PROFESSIONALISM (2001).

48 Gentile v. State Bar of Nev., 501 U.S. 1030, 1073 (1991).

49 *See* cases cited *supra* note 45 (describing what constitutes a compelling government interest).

50 *See* Kyle Lawrence Perkins, Note, *Attorney Advertising: The Marketing of Legal Services in the Twenty-First Century*, 35 GONZ. L. REV. 99 (2000).

51 *E.g.*, *In re* Snyder, 472 U.S. 634 (1985) (reversing an attorney's suspension for heated criticism of the judiciary's administration of the Criminal Justice Act); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985) (nullifying a state ban on the use of pictures in legal advertisements); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (striking Arizona's flat ban on attorney advertising of legal services, but leaving open other options to regulate advertising attorneys); *cf.* cases cited in *supra* note 45 (upholding restrictions on attorney speech); *see also* Mattei Radu, *The Difficult Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Rights of Criminal Defendants, and Society's Right to the Fair Administration of Justice*, 29 CAMPBELL L. REV. 497 (2007) (arguing that Rule 3.6 strikes an appropriate balance between an attorney's right to free speech and the state's valid interest in the proper administration of justice).

52 *See* DeFrain, *supra* note 42, at 1824 (citing another source).

53 *Id.* at 1844.

54 *See*MODEL RULES OF PROF'L CONDUCT r. 1.6, 7.1 (AM. BAR ASS'N 2013).

55 *See, e.g.*, Catherine J. Lanctot, *Becoming A Competent 21st Century Legal Ethics Professor: Everything You Always Wanted to Know About Technology (But Were Afraid to Ask)*, 2015 PROF. LAW. 75, 91-95 (citing State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2010-179 (2010)).

56 Michael C. Smith, *Social Media Update*, 58 ADVOC. (TEXAS) 1, 4 (2012).

57 Using the same password for all password-protected services you use means that when someone obtains your password for one of these sites, they will have access to all of them. Using words from the dictionary for a password means a brute force dictionary attack by hackers will crack your password. Using long strings of letters and symbols and numbers means that passwords will be difficult to remember. Many sites now require the use of numbers and characters in passwords.
It is time to start using a password manager .... A password that is short and simple enough for you to remember is too short and simple to be secure.
Jim Calloway, *Client Confidentiality, Personal Privacy and Digital Security*, 87 OKLA. BAR J. 2579, 2579 (2016). For examples of password problems involving lawyers, see *infra* notes 150-153, 184, 193, 194.

58 hiQ Labs, Inc. v. LinkedIn Corp., Case No. 17-cv-03301-EMC, 2017 WL 3473663, at *3, *4 (N.D. Cal. Aug. 14, 2017); *see also* Venkat Balasubramani, *LinkedIn Enjoined From Blocking Scraper*-hiQ v. LinkedIn, TECH. & MARKETING L. BLOG, (Aug. 15, 2017), http://blog.ericgoldman.org/archives/2017/08/linkedin-enjoined-from-blocking-scraper-hiq-v-linkedin.htm [https://perma.cc/4HMC-A7DZ].

59 *See, e.g.*, 18 U.S.C. § 2703 (2018).

60 *See, e.g.*, Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004).

61 Ask Sarah Palin and Judge Kozinsky of the Ninth Circuit. *See* Erin Fuchs, *9th Cir. Chief Judge Escapes Porn Download Case*, LAW360 (Oct. 28, 2009, 3:04 PM), https://www.law360.com/articles/130925/9th-circ-chief-judge-escapes-porn-download-case [https://perma.cc/YQ33-AHQZ]; Erik Wemple, *Fox News Drops Sarah Palin*, WASH. POST (June 24, 2015), https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/06/24/fox-news-drops-sarah-palin/?utm_term=.d5c1777ad58d [https://perma.cc/23LP-9ZPX].

62 *See*Yath v. Fairview Clinics, N.P., 767 N.W.2d 34, 38-40 (Minn. Ct. App. 2009). The plaintiff's personal information was released online prior to the determination that the information was obtained illegally. The response could not remedy the damage done. *Id.*

63 Bartnicki v. Vopper, 532 U.S. 514, 519 (2001).

64 *Id.*

65 Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. PUB. L. 1, 19-22 (2011).

66 For example, Facebook's terms of service provide that "you grant us a nonexclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook." *Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/legal/terms [https://perma.cc/673P-K27L] (revised as of Jan. 30, 2015).

67 *See* Venkat Balasubramani, *Xcentric Ventures Chips Away at Small Justice's Copyright Workaround to Section 230*, TECH. & MARKETING L. BLOG (Apr. 5, 2014), http://blog.ericgoldman.org/archives/2014/04/xcentric-ventures-chips-away-at-small-justices-copyright-workaround-to-section-230.htm [https://perma.cc/MNQ5-PXDT] (saying that even though a lawyer gained copyright to the contents of a website post, that website had a right to keep the post online because of the license granted in the terms of service).

68 *See Statement of Rights and Responsibilities*, *supra* note 66 ("When you delete [intellectual property] content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others).").

69 *See* Kara R. Williams, *Protecting What You Thought Was Yours: Expanding Employee Privacy to Protect the Attorney-Client Privilege from Employer Computer Monitoring*, 69 OHIO ST. L.J. 347, 357 (2008).

70 *See, e.g.*, Smyth v. Pillsbury Co., 914 F. Supp. 97, 101 (E.D. Pa. 1996) (holding as early as 1996 that there is no "reasonable expectation of privacy in email communications voluntarily made by an employee to his supervisor over the company e-mail system notwithstanding any assurances that such communications would not be intercepted by management.")

71 *Id.*

72 Jeff Yang, *Ashley Madison Hack: Privacy Becomes Extinct*, CNN (Aug. 27, 2015, 7:50 AM), http://www.cnn.com/2015/08/27/opinions/yang-ashley-madison-hack/ [https://perma.cc/WVM3-BFVH].

73 *Id.*

74 ABA Formal Op. 462, *supra* note 16, at 1 ("Judges must assume that comments posted to [a social media site] will not remain within the circle of the judge's connections. Comments, images, or profile information ... may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients.").

75 Moreno v. Hanford Sentinel, Inc., 172 Cal. App. 4th 1125, 1130 (2009).

76 *Id.* at 1130.

77 United States v. Meregildo, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012) (citations omitted).

78 ABA Formal Op. 462, *supra* note 16, at 1.

79 *Id.* at 2.

80 *See* Allison Shields, *Blogging and Social Media*, A.B.A. Techreport, 2016, at 1, 2 https://www.americanbar.org/groups/law_practice/publications/techreport/2016/social_media_blogging.html [https://perma.cc/DFY5-Z4ZA] (last visited Aug 11, 2017) (reporting that "76% of respondents report that they individually use or maintain a presence in one or more social networks for professional purposes. This number has also remained relatively steady since 2013.
Not surprisingly, the group most likely to report individually using or maintaining a presence in a social network is respondents under the age of 40, at 88%, followed by those between the ages of 40-49 at 85%, then 50-59 years old at 81%, and 64% of those 60+ years old, again all remaining reasonably consistent from 2013 to the present." (emphases omitted)).

81 Given the nature of some of President Trump's tweets, hopefully they were not thoroughly thought through. Leslie Currie, *Trump's 8 Worst Tweets of 2018 (So Far)*, STUDY BREAKS (Jan. 9, 2018), https://studybreaks.com/culture/trump-tweets-worst-2018/ [https://perma.cc/X47B-9PUW].

82 Kim Murphy, *Montana Judge Admits Sending Racist Email About Obama*, L.A. TIMES (Feb. 29, 2012), http://articles.latimes.com/2012/feb/29/news/lamontana-judge-admits-sending-racist-email-about-obama-20120229 [https://perma.cc/5XPX-NU45].

83 *Id.*

84 *Id.*

85 *See* Jeffrey Rosen, *The End of Forgetting*, N.Y. TIMES MAG., July 25, 2010, at 30, 33.

86 *What Is Browser Caching and ISP Caching?*, GEEK HOST, https://geek-host.ca/supp/knowledgebase.php?action=displayarticle&id=90 [https://perma.cc/EY5E-73SR].

87 ABA Formal Op. 462, *supra* note 16, at 2 ("Such data [posted to social media] have long, perhaps permanent, digital lives such that statements may be recovered, circulated or printed years after being sent.").

88 *See, e.g.*, Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2014 E.C.R. 317 (ruling that a person may request to have third-party websites containing information about them removed from search engine result lists); Charles Arthur, *Explaining the 'Right to be Forgotten' - The Newest Cultural Shibboleth*, GUARDIAN (May 14, 2014, 1:42 PM), http://www.theguardian.com/technology/2014/may/14/explainer-right-to-be-forgotten-the-newest-cultural-shibboleth [https://perma.cc/V3QY-8F2D] (discussing the *Google Spain* result and analyzing the European "right to be forgotten"); Julia Fioretti, *France Fines Google over 'Right to Be Forgotten,'* REUTERS (Mar. 24, 2016), http://www.reuters.com/article/us-google-france-privacy-idUSKCN0WQ1WX [https://perma.cc/ATG8-SWTT] (demonstrating France's enforcing the European Court of Justice's ruling in *Google Spain*); Lance Ulanoff, *EU Wants a 'Right to Be Forgotten,' But the Internet Never Forgets*, MASHABLE (May 13, 2014), http://mashable.com/2014/05/13/eu-google-rulingop-ed/#wImNGubLpqqW [https://perma.cc/B8ZS-WYNS] (arguing that the ruling in *Google Spain* represents a misunderstanding of the nature of the internet).

89 *See* David Wolpe, *Drunk Mistakes Posted on Facebook Are Forever*, TIME (Apr. 28, 2015), http://time.com/3838345/drunk-social-media-permanence/ [https://perma.cc/9VJ3-6E4R].

90 *See* Elizabeth Bernstein, *Why We Are So Rude Online*, WALL ST. J., Oct. 2, 2012, at D1, D4.

91 Anonymity removes many of the social controls that may have deterred offenders in the pre-Internet era. Anonymity also reduces accountability and accuracy. ... While one may argue that anonymously authored postings are not as credible as identified postings, the mere existence or prevalence of online gossip or online insults may have a negative effect even where such information is refuted

or discredited. One study showed that repeated exposure to information made people believe the information was true, even where the information was identified as false. The "illusion of truth" appears to come from increased familiarity with the claim and decreased recollection of the original context in which the information was received.
Nancy S. Kim, *Web Site Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993, 1009 (footnotes omitted).
Significant work has been done on the power to control behavior generated by the social expectations of members of communities and even strangers who share expectations and whose shock or disapproval is enough to discourage unacceptable behavior. *See generally*ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 230 (1991) (discussing inter alia the role of gossip and hero worship in adjusting behavior); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 976-77 (1995) (analyzing the coercive effects of language); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 916 (1996) (describing ways in which norms and roles incentivize and disincentivize conduct). For many online posts, anonymity is assured unless someone is motivated enough to expend time and money in uncovering the source. *See* Kim, *supra*, at 1010-11.

92 See various studies discussed in Kristen E. Murray, *You Know What I Meant: The Science Behind Email and Intent*, 14 J. AM. LEGAL WRITING DIRECTORS 119, 120-25 (2017).

93 Venkat Balasubramani, *Employee Kvetching About Job on Facebook Still Entitled to Unemployment Benefits*, TECH. & MARKETING L. BLOG (Jan 2, 2016), http://blog.ericgoldman.org/archives/2016/01/employee-kvetching-about-job-on-facebook-still-entitled-to-unemployment-benefits.htm [https://perma.cc/66WK-2L5W].

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* She was first denied unemployment benefits and consequently sued the company. The court held that Martinez (the third worker) was entitled to benefits. *Id.*

98 Message on file with author. It is probably true that neutering new associates would result in higher billable hours.

99 Martha Neil, *Courtney Love Testifies at First US 'Twibel' Trial, Sued by Her Ex-lawyer over Critical Tweet*, A.B.A. J. (Jan. 16, 2014, 3:25 PM), http://www.abajournal.com/news/article/courtney_love_takes_stand_in_former_attorneys_libel_lawsuit_over_critical/ [http://perma.cc/4NVF-UVQC].

100 Bill Hetherman, *Lawsuit Against Courtney Love Can Proceed, Judge Rules*, L.A. DAILY NEWS (Dec. 20, 2013, 6:59 AM), http://www.dailynews.com/general-news/20131220/lawsuit-against-courtney-love-can-proceed-judge-rules [http://perma.cc/M6DH-R9PT].

101 *Id.*

102 *Id.*

103 Ellyn Angelotti, *How Courtney Love and U.S.'s First Twitter Libel Trial Could Impact Journalists*, POYNTER (Jan. 14, 2014, 8:00 AM), http://www.poynter.org/news/how-courtney-love-and-uss-first-twitter-libel-trial-could-impact-journalists/ [http://perma.cc/4R8K-XALB]. This article suggests that "this decision could be influential in future [Twitter-libel] cases" and urges publishers to "keep a close eye on how this court applies traditional defamation to Twitter." *Id.*; *see also* Lizzie Plaugic, *Ciara Hits Future with $15 Million Libel Suit over Tweets*, VERGE (Feb. 9, 2016, 12:40 PM), http://www.theverge.com/2016/2/9/10949564/ciara-future-lawsuit-slander-tweets-interviews [http://perma.cc/R4VP-BA3G] (discussing a lawsuit for libel and slander originating from statements made over Twitter).

104 ABA Formal Op. 462, *supra* note 16, at 2 ("[R]elations over the Internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly.").

105 Eoin O'Carroll, *Political Misquotes: The 10 Most Famous Things Never Actually Said*, CHRISTIAN SCI. MONITOR (June 3, 2011), https://www.csmonitor.com/USA/Politics/2011/0603/political-misquotes-the-10-most-famous-things-never-actually-said/i-can-see-russia-from-my-house!-sarah-palin [http://perma.cc/WK3A-6Y8D].

106 Cate Carrejo, *The Infamous Comment Michelle Obama Made in 2008 That Would Be Better Understood Today*, BUSTLE (Dec. 27, 2016), https://www.bustle.com/p/the-infamous-comment-michelle-obama-made-in-2008-that-would-be-better-understood-today-26371 [http://perma.cc/M34U-9BR9].

107 ABA Formal Op. 462, *supra* note 16, at 2.

108 *See* Erin McKean, *Yeah, Right*, BOS. SUNDAY GLOBE, Feb. 7, 2010, at C2.

109 Anu Passary, *Facebook Tests 'Satire' Tag to Avoid Confusion on News Feed*, TECH. TIMES (Aug. 17, 2014, 9:33 AM), http://www.techtimes.com/articles/13230/20140817/facebook-tests-satire-tag-to-avoid-confusion-on-news-feed.htm [http://perma.cc/S286-M9GT].

110 Joe Patrice, *This Is Why You Always Check the Address Field Before Sending an Email*, ABOVE L. (Oct. 7 2013, 3:42 PM), http://abovethelaw.com/2013/10/this-is-why-you-always-check-the-address-field-before-sending-an-email/ [perma.cc/6SR8-FHUL].

111 *Id.*

112 *Id.*

113 *Id.*

114 UTAH STANDARDS OF PROFESSIONALISM & CIVILITY r. 1 (2014). Around nineteen states have adopted a similar standard. Preston & Lawrence, *supra* note 11, at tbl.1.

115 MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2013).

116 *Id.* at cmt. 8.

117 *See* Ambrogi, *supra* note 1.

118 CPR POL'Y IMPLEMENTATION COMM., A.B.A., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, RULE 1.1: COMPETENCE at 1-5 (2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_1.authcheckdam.pdf [https://perma.cc/HCN4-QMJN].

119 Victor Li, *Florida Requires Lawyers to Include Tech in CLE Courses*, A.B.A. J. (Feb. 1, 2017 2:10 AM CST), http://www.abajournal.com/magazine/article/technology_training_cle/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly [http://perma.cc/R6Y3-BBF4].

120 *See* Ambrogi, *supra* note 1.

121 State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. Interim No. 11-0004 (2014).

122 *See, e.g.*, UTAH STANDARDS OF PROFESSIONALISM & CIVILITY, *supra* note 28, 14 cmt ("Lawyers should only use data-transmission technologies as an efficient means of communication and not to obtain a tactical advantage."); ASS'N BUS. TRIAL LAWYERS, LOS ANGELES CHPT., ETHICS, PROFESSIONALISM AND CIVILITY GUIDELINES 3-4 (2016) http://www.abtl.org/pdfs/la_civilityguidelines.pdf [http://perma.cc/QDJ8-55TW] (containing an entire section on electronic discovery); FLA. BAR, *supra* note 29, at 2.17 ("A lawyer must ensure that the use of electronic devices does not impair the attorney-client privilege or confidentiality.").

123 *See, e.g.*, Ellie Margolis, *Surfin' Safari--Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 92 (2007) ("Courts routinely emphasize the relative ease and quickness of Shepardizing, particularly with the use of Westlaw or Lexis, implying that failing to perform this simple task is a basic lack of diligence.").

124 Ivy B. Grey, *Not Competent in Basic Tech? You Could Be Overbilling Your Clients--and Be on Shaky Ethical Ground*, A.B.A. J.: LEGAL REBELS (May 15, 2017), http://www.abajournal.com/legalrebels/article/tech_competence_and_ethical_billing [http://perma.cc/X8BA-LBER] ("[F]ailing to become competent in technology would also lead to unreasonable fees. This may be more than a billing writeoff--it may constitute an ethical violation.").

125 D.C. Bar Ass'n, Ethics Op. 371, *supra* note 33, at 3.

126 *Id.*

127 *Id.* (first citing Complaint, *In re* Sears Holdings Mgmt. Corp., FTC No. 082, 3009, No. C-4264 (F.T.C. Aug. 31, 2009); and then citing Decision and Order, *In re* Sears Holdings Mgmt. Corp., FTC File No. 082, 3009, No. C-4264 (F.T.C. Aug. 31, 2009)).

128 *Id.* at 3 (citing Netflix, Inc., and Reed Hastings, Exchange Act Release No. 69279, 2013 WL 5138514, at 5 (Apr. 2, 2013) ("[I]ssuer communications through social media channels require careful Regulation FD analysis comparable to communications through more traditional channels[, and] the principles outlined in the 2008 Guidance ... apply with equal force to corporate disclosures made through social media channels.")).

129 Debra Cassens Weiss, *Lawyer Says He Missed Deposition Because Email Notice Went to His Junk Folder*, A.B.A. J. (July 5, 2017, 9:42 AM), http://www.abajournal.com/news/article/lawyer_says_he_missed_deposition_because_email_went_to_his_junk_mail_folder/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email [http://perma.cc/DS5Q-DBL6].

130 *Id.*

131 *Id.*

132 *See, e.g.*, Robert C. Nagle & Pamela Chandran, *Attorney Misconduct on Social Media: Recognizing the Danger and Avoiding Pitfalls*, A.B.A. J. LAB. & EMP. L. 427, 432-33 (2017) (advising lawyers on how to properly safeguard evidence on social media); SOCIAL MEDIA LAW BASICS (ON-DEMAND CLE) A.B.A., Jan. 18, 2017, https://shop.americanbar.org/ebus/store/productdetails.aspx?productId=263192541 [http://perma.cc/K2QT-9955] (presenting a webinar for lawyers about social media law).

133 Kevin O'Keefe, *Nuts and Bolts of Social Networking and Social Media*, LEX-BLOG (Nov. 2014), http://rlhb.wp.lexblogs.com/wp-content/uploads/sites/111/2014/11/Social-Media-Nuts-and-Bolts-by-Kevin-OKeefe.pdf [http://perma.cc/H84P-Y5NX]. This material and versions of it are promoted widely. The presentation O'Keefe gave to the Utah Bar Association is available at https://www.utahbar.org/wp-content/uploads/2016/12/Social-Media-Nuts-and-BoltsUtah-Bar-Association.pdf [http://perma.cc/BC6G-HHYY], and the slides are available at https://www.slideshare.net/kevinokeefe/utah-bar-association-nuts-and-bolts-of-social-media [https://perma.cc/SDU9-ZU4P].

134 *Id.*

135 MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2014).

136 *See* Anne Klinefelter, *When to Research is to Reveal: The Growing Threat to Attorney and Client Confidentiality from Online Tracking*, 16 VA. J.L. & TECH. 1, 8-9 (2011) (discussing the possibility that third parties can gain access to private information through online tracking); Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 155-56 (2012) ("The ease of sharing and publicizing information through social media, however, raises a danger that lawyers might fall afoul of this duty [of confidentiality].").

137 *See, e.g.*, Martha Neil, *Lawyer's Request for Reprimand over Her Own Web Comments Nixed by Top State Court*, A.B.A. J. (Mar. 20, 2013, 4:11 PM), http://www.abajournal.com/news/article/top_court_nixes_lawyers_request_for_reprimand_dismisses_case_due_to_lack/ [https://perma.cc/J7F6-REBC].

138 Robert J. Ambrogi, *Lawyer Faces Discipline over Blog Posts*, LAW.COM: LEGAL BLOG WATCH (Sept. 11, 2009, 3:10 PM), http://legalblogwatch.typepad.com/legal_blog_watch/2009/09/lawyer-faces-discipline-over-blog-posts.html [https://perma.cc/8QG4-CBN5].

139 Smith, *supra* note 56, at 7.

140 *Id.*

141 D.C. Bar Ass'n, Ethics Op. 370, *supra* note 33, at 3.

142 *See id.*

143 *See id.*

144 Debra Cassens Weiss, *Lawyer Accused of Revealing TMI in Response to Bad Avvo Review Is Reprimanded; Overdraft Also Cited*, A.B.A. J. (Jan. 21, 2014, 11:45 AM), http://www.abajournal.com/news/article/lawyer_who_revealed_tmi_in_response_to_bad_avvo_review_is_reprimanded [https://perma.cc/V9SX-NBJP]; *see also In re* Tsamis, No. 2013PR00095 (Ill. Att'y Registration & Disciplinary Comm'n Jan. 15, 2014), http://www.iardc.org/HB_RB_Disp_Html.asp?id=11221 [https://perma.cc/X2P5-F999] (joint stipulation and recommendation for a reprimand by the hearing board).

145 Spencer v. Glover, 397 P.3d 780, 783 (Utah Ct. App. 2017).

146 *Id.*

147 Eric Goldman, *How Should a Lawyer Respond to a Yelp Review Calling Him "Worst. Ever."?*-Spencer v. Glover, TECH. & MARKETING L. BLOG (Apr. 24, 2017), http://blog.ericgoldman.org/archives/2017/04/how-should-a-lawyer-respond-to-a-yelp-review-calling-him-worst-ever-spencer-v-glover.htm [https://perma.cc/7XQ4-7KMP].

148 Debra Cassens Weiss, *Chicago Solo Files $1.1M Defamation Suit Against Ex-Client for Alleged 'Legal Predator' Yelp Review*, A.B.A. J. (Mar. 14, 2018, 8:00 AM), http://www.abajournal.com/news/article/chicago_solo_files_1.1m_defamation_suit_against_ex_client_for_alleged_legal/?utm_source=maestro&utm_medium =email&utm_campaign=weekly_email [https://perma.cc/J3GY-J7PP]. In response, the former client republished the Yelp review, which, as a top review, drove Levin's name and the allegations to national fame. *Id.*

149 D.C. Bar Ass'n, Ethics Op. 370, *supra* note 33, at 3 (quoting MODEL RULES OF PROF. CONDUCT r. 1.6(e)(3) (AM. BAR ASS'N 2014)).

150 *Id.*

151 *Id.* (quoting N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Opinion 1032 (2014)).

152 *See* Stephen Fairley, *How Lawyers Are Using Social Media in 2017*, THE NAT'L L. REV. (June 20, 2017), https://www.natlawreview.com/article/how-lawyers-are-using-social-media-2017 [https://perma.cc/SED7-RV5Q].

153 Shields, *supra* note 80 ("In total, 78% of respondents report that their firms maintain a presence on LinkedIn. This represents a drop from previous years, when this number topped 90%. This could be due to a greater understanding on the part of respondents that a firm presence on LinkedIn (a law firm business page), may be different than firms requiring or encouraging their lawyers to complete their individual LinkedIn profiles, or it could mean that firms are not seeing the value of firm business pages on LinkedIn and prefer to focus more on *individual* lawyers [sic] profiles and networking to gain visibility for both the lawyers and the firm.").

154 Lackey & Minta, *supra* note 136, at 155.

155 D.C. Bar Ass'n, Ethics Op. 370, *supra* note 33, at 3.

156 *Id.*

157 Cheryl B. Preston, *WiFi in Utah: Legal and Social Issues*, 20 UTAH B.J. 29, at *31, Sept.-Oct. 2007.

158 Harleysville Inc. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617 (Oct. 2), *overruling in pertinent part*No. 1:15CV00057, 2017 WL 1041600 (W.D. Va. Feb. 9, 2017).

159 *Id.* at *5.

160 Harleysville Inc. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 1041600, at *3 (W.D. Va. Feb. 9, 2017).

161 *Id.* at *5.

162 *Id.* at *1.

163 *Id.* at *2.

164 *Id.*

165 *Id.*

166 *Id.* at *5.

167 *Id.* at *8.

168 Harleysville Inc. Co. v. Holding Funeral Home, Inc., No. 1:15CV00057, 2017 WL 4368617, at *5-6 (Oct. 2, 2017)

169 *Id.* at *7.

170 *Id.*

171 *Id.* at *6.

172 *Id.* at *7.

173 *Id.*

174 *Id.* at *8.

175 *Id.*

176 *Id.*

177 *See, e.g.*, Frances P. Kao, *No, a Paralegal Is* Not *a Lawyer*, A.B.A. BUS. L. TODAY, Jan.-Feb. 2007, at 11, 13-14 (discussing a lawyers' duty to ensure that a paralegal maintains confidentiality).

178 Venkat Balasubramani, *Employer Isn't Liable when Former Employee Linked His Apple Accounts to Its Devices*-Sunbelt v. Victor, TECH. & MARKETING L. BLOG (Sept. 18, 2014), http://blog.ericgoldman.org/archives/2014/09/employer-isnt-liable-when-former-employee-linked-his-apple-accounts-to-its-devices-sunbelt-v-victor.htm [https://perma.cc/H3BW-328V].

179 *Id.*

180 Prof'l Ethics of the Fla. Bar, Op. 10-2 (2010); *see also* Jake Schickel, *A Report from the Florida Bar Board of Governors Meeting*, FIN. NEWS & DAILY REC. (June 7, 2010), http://www.jaxdailyrecord.com/showstory.php?Story_id=531175 [http://perma.cc/2MGF-GHA7].

181 Schickel, *supra* note 180.

182 Fla. Bar., Op. 10-2, *supra* note 180.

183 *See* Zelda Gerard, *What After the Sony Hack? Examination of the Development of Cybersecurity Law in the United States and in France and Its Impact on Lawyers*, 32 ENT. & SPORTS LAW 28, Winter 2016, at 28, 32 (citing Florida and California as examples of states that have implemented such warnings).

184 *See* Vanessa S. Browne-Barbour, *"Why Can't We Be 'Friends'?": Ethical Concerns in the Use of Social Media*, 57 S. TEX. L. REV. 551, 568 (2016) (giving examples of firms that have been subject to such attacks).

185 *See* Vincent I. Polley, *Cybersecurity for Lawyers and Law Firms*, 53 JUDGES' J. 11, 11 (Fall 2014) ("In 2012, the American Bar Association updated the model ethics rules to require lawyers to keep abreast of the benefits and risks associated with new technology and to maintain basic competency in the use of computer technologies. A blizzard of ABA and state ethics opinions address lawyers' duties to protect confidential client information and to keep clients informed ....").

186 *See* Herb Weisbaum, *Ransomware: Now a Billion Dollar a Year Crime and Growing*, NBC NEWS (Jan. 9, 2017, 11:51 AM), https://www.nbcnews.com/tech/security/ransomware-now-billion-dollar-year-crime-growing-n704646 [https://perma.cc/QQ3M-QMTY] ("Ransomware payments for 2016 are expected to hit a billion dollars, according to the FBI. That compares to just $24 million paid in 2015. And it's expected to get even worse this year--with more victims and more money lost.")

187 Victor Li, *How Prepared Are Law Firms for Cyber Breaches? And How Often Are Firms Being Attacked?*, A.B.A. J. (June 29, 2017, 8:41 AM), http://www.abajournal.com/news/article/how_prepared_are_law_firms_for_cyber_breaches_and_how_often_are_they_being_ [https://perma.cc/8RM9-BEAE].

188 Debra Cassens Weiss, *Victimized by Ransomware, Law Firm Sues Insurer for $700K in Lost Billings*, A.B.A. J. (May 2, 2017 11:09 AM), http://www.abajournal.com/news/article/victimized_by_ransomware_law_firm_sues_insurer_for_700k_in_lost_billings/ [http://perma.cc/QA66-YQDG].

189 *Id.*

190 *Id.*

191 *Id.*

192 *See*Holmes v. Petrovich Dev. Co., 119 Cal. Rptr. 3d 878, 884-87 (Cal. Ct. App. 2011).

193 *Id.* at 896.

194 *Id.* at 883.

195 *Id.* at 895.

196 *See, e.g., id.*

197 *See, e.g.*, Kristin J. Hazelwood, *Technology and Client Communications: Preparing Law Students and New Lawyers to Make Choices that Comply with the Ethical Duties of Confidentiality, Competence, and Communication*, 83 MISS. L.J. 245, 270 (2014) (discussing cases in which plaintiff waived reasonable expectation of privacy because defendant had retained right to access in employee handbook).

198 *See, e.g.*, United States v. Morris, 928 F.2d 504, 505 (2d Cir. 1991) (describing how a Cornell researcher used his knowledge and access to security networks to infect them).

199 Complaint at 1, United States v. Potere, No. 2:17-cr-00446 (C.D. Cal. June 20, 2017).

200 Debra Cassens Weiss, *Former Dentons Associate Accused in Extortion Plot Involving Threat to Leak Documents to Legal Blog*, A.B.A. J. (June 28, 2017 9:47 AM), http://www.abajournal.com/news/article/ex_dentons_associate_is_accused_in_extortion_plot_involving_threat_to_leak [https://perma.cc/AHQ2-DDPL].

201 *Id.*

202 *Id.*

203 Lawyer Disciplinary Bd. v. Markins, 663 S.E.2d 614, 615-17, 622 (W. Va. 2008).

204 Christina Zhao, *Utah State Bar Emails Photo of Naked Breasts to Every Lawyer in the State*, NEWSWEEK (Mar. 6, 2018, 12:12 PM), http://www.newsweek.com/utah-state-bar-emails-photo-boobs-every-lawyer-state-832710 [https://perma.cc/XMY7-SUMR]; *see also* David Wells, *Utah Bar Commission Cites Human Error for Email Containing Nude Photo*, FOX 13 NEWS NOW (Mar. 9, 2018, 9:54 AM), http://fox13now.com/2018/03/09/utah-bar-commission-cites-human-error-for-pornographic-email/ [https://perma.cc/22NA-4L5U] (quoting email from John Baldwin, executive director of the Bar, to Utah lawyers. The Bar's response email said, "We have determined that a link to the inappropriate image was inadvertently added to the email as a result of human error. That error is being addressed as a personnel issue."). *Id.*

205 Martha Neil, *Potential Privilege Pitfalls Posed by Cloud Storage*, A.B.A. J. (Sept. 9, 2013, 1:55 PM), http://www.abajournal.com/news/article/online_doc_repositories [https://perma.cc/8VCE-XLBD].

206 Dennis Kennedy, *Cloud Computing*, A.B.A. TECHREPORT, 2016, at 1, 2, https://www.americanbar.org/content/dam/aba/publications/techreport/2016/cloud/cloud-computing.authcheckdam.pdf [https://perma.cc/L35Q-XQRL].

207 Victor Li, *How Prepared Are Law Firms for Cyber Breaches? And How Often Are Firms Being Attacked?*, A.B.A. J. (June 29, 2017, 8:41 AM), http://www.abajournal.com/news/article/how_prepared_are_law_firms_for_cyber_breaches_and_how_often_are_they_being_ [https://perma.cc/8RM9-BEAE].

208 *Id.*

209 *Id.*

210 *See* David G. Ries, *Safeguarding Confidential Data: Your Ethical and Legal Obligations*, 36 L. PRAC., July-Aug. 2010, at 49.

211 *See* Victor Li, *Tools for Lawyers Worried that NSA is Eavesdropping on Their Confidential Conversations*, A.B.A. J. (Mar. 30, 2014 12:44 PM), http://www.abajournal.com/news/article/tools_for_lawyers_worried_that_nsa_is_eavesdropping_on_their_confidential_c/ [https://perma.cc/PV7C-SGCE];.

212 Debra Cassens Weiss, *Verizon Worker Told Customer to Hire 'Big Shot Lawyer' over Nude Photo Migration, Suit Says*, A.B.A. J. (Feb. 15, 2018, 10:53 AM), http://www.abajournal.com/news/article/verizon_worker_told_customer_to_hire_big_shot_lawyer_over_his_nude_photo_mi [https://perma.cc/7TWM-AM3Y].

213 Neil, *supra* note 205.

214 ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R*, at 2 (revised May 22, 2017) [hereinafter ABA Formal Op. 477R*] (referencing THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS (2013)).

215 *ABA Begins Offering Cyber Liability Insurance to Lawyers, Law Firms of All Sizes*, A.B.A. (Feb. 27, 2017, 1:30 PM), https://www.americanbar.org/news/abanews/aba-news-archives/2017/02/aba_begins_offering.html. [https://perma.cc/857E-AC4Q]

216 *Id.*

217 Matthew Goldstein, *Law Firms Are Pressed on Security for Data*, N.Y. TIMES (Mar. 26, 2014, 7:00 PM), http://dealbook.nytimes.com/2014/03/26/law-firms-scrutinized-as-hacking-increases/?_php=true&_type=blogs&_php=true&_type=blogs&_php=true&_type=blogs&_php=true&_type=blogs&emc=edit_tnt_20140326&nlid=1166199&tntemail0=y&_r=3 [https://perma.cc/DBX3-RJEW]; *see also* Lisa Morgan, *Panama Papers Fallout: What If Your Lawyer Gets Hacked?*, INFO. WEEK (May 31, 2016, 9:06 AM), http://www.informationweek.com/strategic-cio/security-and-risk-strategy/panama-papers-fallout-what-if-your-lawyer-gets-hacked/a/d-id/1325545 [https://perma.cc/77JZ-BZGX] (identifying various firms suffering data breaches).

218 *See* Waqas Amir, *Google Docs Users Targeted with "Confidential Document" Phishing Scam*, HACKREAD (July 9, 2015, 4:51 AM), https://www.hackread.com/google-docs-phishing-scam/ [https://perma.cc/WWV9-UEBB].

219 Gabe Freeman, *Threats of Litigation After Data Breaches at Major Law Firms*, BLOOMBERG L.: BIG BUS. (Mar. 30, 2016), https://bol.bna.com/threats-of-litigation-after-data-breaches-at-major-law-firms/ [https://perma.cc/HV5P-R496] (reporting on data breaches at Weil, Gotshal & Manges, Cravath, Swaine & Moore, and other firms).

220 *Convert PDF and Photo Files to Text*, GOOGLE DRIVE HELP, https://support.google.com/drive/answer/176692?hl=EN [https://perma.cc/B2KC-LM6D].

221 Tsutomu Johnson, *Sorry I Lost Your Files: Cybersecurity Threats to Confidentiality*, 28 UTAH B. J., July-Aug. 2015, at 41, 43.

222 MODEL RULES OF PROF'L CONDUCT r. 1.6(c) (AM. BAR ASS'N 2013).

223 *Cloud Ethics Opinions Around the U.S.*, A.B.A., http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html#AZ [https://perma.cc/UY9L-TVEY].

224 *Id.*; *see also* Peter Geraghty and Susan Michmerhuizen, *Encryption Companion*, ABA (July 2015), http://www.americanbar.org/publications/youraba/2015/july-2015/encryption-conniption.html [https://perma.cc/MP9H-U57J].

225 Vindu Goel, *Yahoo's Top Lawyer Resigns and C.E.O. Marissa Mayer Loses Bonus in Wake of Hack*,N.Y. TIMES (Mar. 1, 2017), https://www.nytimes.com/2017/03/01/technology/yahoo-hack-lawyer-resigns-ceo-bonus.html?smid=pl-share&_r=0 [https://perma.cc/PW6K-MF8P].

226 MODEL RULES OF PROF'L CONDUCT r. 1.6 cmts. 18-19.

227 *Id.*

228 *Id.* at cmt. 19.

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.* at cmt. 18.

233 *Id.*

234 ABA Formal Op. 477R*, *supra* note 214, at 6 (emphasis added).

235 *See* Model Rule 1.6, *supra* note 222, at cmt. 18.

236 ABA Formal Op. 477R*, *supra* note 214, at 6.

237 *Id.* at 8.

238 *E.g.*, Bingham v. BayCare Health Sys., No: 8:14-cv-73-T-23JSS, 2016 WL 3917513 (M.D. Fla. July 20, 2016) (collecting cases on privilege waiver for privileged emails sent or received through an employer's email server); Mason v. ILS Tech., LLC, No. 3:04-CV-139-RJC-DCK, 2008 WL 731557 (W.D.N.C. Feb. 29, 2008); Holmes v. Petrovich Dev Co., LLC, 191 Cal. App. 4th 1047 (2011) (employee communications with lawyer over company owned computer not privileged); Scott v. Beth Israel Med. Center, Inc., 847 N.Y.S.2d 436 (Sup. Ct. 2007).

239 ABA Formal Op. 477R*, *supra* note 214.

240 D.C. Bar Ass'n, Ethics Op. 370 (2016).

241 *Id.* at 2.

242 *See*NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 1, 213 (2013) (citations omitted):
One study estimated that it would cost the average American Internet user 201 hours or the equivalent of $3,534 a year to read the privacy policies of each website that he or she visits, you would not have time to engage in productive work, recreational activities, or relationships. Modern life, in other words, would break down if we treated wrap contracts just like other contracts.
See also Cheryl B. Preston, *"Please Note: You Have Waived Everything": Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535, 553 (2015) (citations omitted):
In addition to time drain, a second reason not to read wrap contracts is that they are difficult, dense texts. Most readers cannot be expected to comprehend them even if they read every word. Wrap contracts are increasingly elaborate, monotonous, and written in ways that suggest the drafter intended to obfuscate the scariest parts by embedding them in excess verbiage and repetition. Remember, wrap contract drafters do not have to worry about printer or paper costs, mailing or storage costs, or the cautionary impact of presenting a long paper contract to a consumer in its obvious fullness. Key sections in wrap contracts are frequently presented in all capital letters, but that does not help.

243 Robert Ambrogi, *Which Legal Sites Did Heartbleed Affect?*, L. SITES (Apr. 14, 2014), http://www.lawsitesblog.com/2014/04/legal-sites-heartbleed-affect.html [https://perma.cc/SM7X-V5FB].

244 *See* Aaron Street, *Heartbleed: What Lawyers and Law Firms Need to Know*, LAWYERIST (Apr. 11, 2014), http://lawyerist.com/72733/heartbleed-lawyers-law-firms-need-to-know/ [https://perma.cc/X562-YUEH] (suggesting encrypting and backing up hard drives).

245 Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 15, 18, 28, and 29 U.S.C.).

246 44 U.S.C.A §§ 3145 et seq. (2012).

247 20 U.S.C. §§ 1232g et seq. (2012).

248 Pub. L. No. 106-102, 113 Stat. 1338 (1999) (adding to and amending various sections of Titles 12 and 15 U.S.C.)

249 *PCI Security*, PCI SEC. STANDARDS COUNCIL https://www.pcisecuritystandards.org/pci_security/ [https://perma.cc/8YU8-K94C].

250 D.C. RULES OF PROF'L CONDUCT r. 1.7 (D.C. BAR 2015).

251 D.C. Bar Ass'n, Ethics Op. 370, *supra* note 33, at 2 (2016).

252 MODEL RULES OF PROF'L CONDUCT r. 3.4(a) (AM. BAR ASS'N 2013).

253 The D.C. Bar Association also recommends that lawyer-client communications be made through a secure office email rather than social media. D.C. Bar Ass'n, Ethics Op. 370, *supra* note 33, at 2.

254 Browne-Barbour, *supra* note 184, at 575.

255 *Id.*

256 *Id.* at 575 n. 187 (citing Gatto v. United Airlines, Inc., No. 10-CV-1090-ES-SCM, 2013 WL 1285285, at *1 (D.N.J. Mar. 25, 2013); Patel v. Havana Bar, Rest. & Catering, No. 10-1383, 2011 WL 6029983, at *1 (E.D. Pa. Dec. 5, 2011); Lester v. Allied Concrete Co. (*Lester II*), Nos. CL08-150, CL09-223, 2011 WL 9688369, at *1 (Va. Cir. Ct. Oct. 21, 2011), *aff'd in part, rev'd in part*, 736 S.E.2d 699 (Va. 2013); Prof'l Ethics Comm. of the Fla. Bar, Proposed Advisory Op. 14-1 (2015); N.Y. Cty. Lawyers Ass'n Comm. on Prof'l Ethics, Ethics Op. 745, at 3 (2013); N.C. State Bar Ethics Comm., 2014 Formal Ethics Op. 5 (2014); Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2014-300, at 7 (2014); Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2014-5 (2014); John G. Browning, *A Clean Slate or a Trip to the Disciplinary Board? Ethical Considerations in Advising Clients to 'Clean Up' Their Social Media Profiles*, 48 CREIGHTON L. REV. 763, 763-64 (2015); John G. Browning & Al Harrison, *"What Is That Doing on Facebook?!": A Guide to Advising Clients to 'Clean Up' Their Social Media Profiles*, 53 HOUS. LAW., Jan./Feb. 2016, at 26, 27; John Levin, *Social Media--Advising Your Client*, 29 CBA REC., Jan. 2015, at 40, 40; Agnieszka McPeak, *Social Media Snooping and Its Ethical Bounds*, 46 ARIZ. ST. L.J. 845, 888-94 (2014)).

257 D.C. Bar Ass'n, Ethics Op. 371, *supra* note 33, at 3.

258 *Id.* (citing other sources).

259 MODEL RULES OF PROF'L CONDUCT r. 3.6 (AM. BAR ASS'N 2013).

260 *In re* Sarah Peterson Herr, 2012 SC 94, ¶ 34 (Kan. Jan. 13, 2014), http://www.kscourts.org/pdf/Herr-Admonition-Final-Report.pdf [https://perma.cc/8ZVX-LXXS].

261 *Id.* ¶ 15.

262 *Id.*

263 MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2013). In addition to the Rule, thirty states have adopted a standard encouraging honesty. Preston & Lawrence, *supra* note 11, at 717 tbl.3.

264 Missouri v. Polk, 415 S.W.3d 692, 695 (Mo. App. E.D. 2013).

265 *Id.* at 696.

266 *Id.*

267 *E.g.*, Emily Anne Vance, Note, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 FORDHAM L. REV. 367, 384-402 (2015).

268 MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 2013).

269 *Id.* at cmts.

270 Zoe Rosenthal, *"Sharing" with the Court: The Discoverability of Private Social Media Accounts in Civil Litigation*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 227, 229-30 (2014).

271 *Id.* at 230.

272 *See, e.g.*, Shannon Awsumb, *Social Networking Sites: The Next E-Discovery Frontier*, 66 BENCH & B. MINN., Nov. 2009, at 22, 26 ("[A]ttorneys should explore social networking sites as part of their formal and informal discovery efforts and case preparation. Just as it would be unthinkable nowadays to conduct discovery without considering what email evidence may be available, attorneys should give the same attention to social networking information to ensure that all smoking guns have been uncovered and addressed."); Andy Radhakant & Matthew Diskin, *How Social Media Are Transforming Litigation*, 39 LITIG., Spring 2013, at 17, 18-19.

273 *See*Carino v. Muenzen, No. L-0028-07, 2010 WL 3448071, at *10 (N.J. Super. Ct. App. Div. Aug. 30, 2010) ("That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of 'fairness' or maintaining 'a level playing field.'").

274 *See* N.Y. Cty. Law. Ass'n, Ethics Op. 745, at 4 (2013).

275 *See*Connors v. United States, 158 U.S. 408, 412-13 (1895); Thaddeus Hoffmeister, *Applying Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA L. REV. DISCOURSE 28, 34-35 (2011).

276 *See* Robert B. Gibson, *Researching Jurors on the Internet--Ethical Implications*, N.Y. ST. B. ASS'N J., Nov.-Dec. 2012, at 10, 12 ("Now, through the Internet, trial attorneys can obtain information about prospective jurors that would otherwise not be disclosed during *voir dire*, such as the juror's political beliefs and economic philosophies.").

277 *See, e.g.*, N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Op. 2012-02, at 9 (2012) ("[J]urors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online--albeit public--social lives.").

278 *See, e.g.*, Or. State Bar Legal Ethics Comm., Op. 2005-164, at 453 (2016) (finding that accessing an opposing party's public website does not violate the ethics rules and is conceptually no different from reading a magazine article or purchasing a book written by that adverse party).

279 John M. Flannery, *The Discoverability and Admissibility of Social Media in NY Civil Litigation*, *in*JOHN M. FLANNERY ET AL., NEW DEVELOPMENTS IN EVIDENTIARY LAW IN NEW YORK 7, 11 (2013).

280 San Diego Cty. Bar Legal Ethics Comm., Op. 2011-2 (2011).

281 N.H. Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05, at 3 ("There is a split of authority on this issue, but the Committee concludes that such conduct violates the New Hampshire Rules of Professional Conduct."); Pa. Bar Ass'n Legal Ethics Comm., Op. 2014-300, at 8-9 (2014); Phila. Bar Ass'n, Op. 2009-02, at 3 (2009) (finding that directing a third party to friend a witness using only truthful information "omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness"); *see also* Steven C. Bennett, *Ethical Limitations on Informal Discovery of Social Media Information*, 36 AM. J. TRIAL ADVOC. 473, 484 (2013) (discussing a Philadelphia bar opinion).

282 *See* N.Y.C. Bar Ass'n, Formal Op. 2010-02 (2010).

283 *Id.*

284 *Id.*

285 *Id.*

286 MODEL RULES OF PROF'L CONDUCT r. 5.3(b)-(c)(1) (AM. BAR ASS'N 2013).

287 Robertelli v. New Jersey Office of Atty. Ethics, 134 A.3d 963, 965 (N.J. 2016).

288 *Id.*

289 *Id.*

290 *Id.*

291 *Id.*

292 *Id.* at 975.

293 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461, at 5 (2011) (warning that lawyers must advise their clients that when communicating with other parties, they should not overreach or interfere with the other party's client-lawyer relationship).

294 *In re* Eisenstein, 485 S.W.3d 759, 761, 764 (Mo. 2016) (en banc). One judge wrote a dissenting opinion, joined by one other judge, arguing that the attorney's violation of various Model Rules warranted a suspension with no leave to apply for reinstatement for twelve months, rather than six months as in the majority. *Id.* at 764 (Fisher, J., dissenting).

295 MODEL RULES OF PROF'L CONDUCT r. 4.1(a) (AM. BAR ASS'N 2013).

296 *Id.* r. 4.4(a).

297 *Id.* r. 8.4.

298 *See, e.g.*, Or. Bar, Formal Op. 2013-189, at 581 (2013) ("Lawyer may not engage in subterfuge designed to shield Lawyer's identity from the person when making the request.").

299 N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Op. 2010-02 (2010).

300 *Id.* at 8.

301 John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 477-78 (2011).

302 Lori Falce, *Centre County DA's Fake Facebook Page Entered as Evidence in Case*, CENTRE DAILY TIMES (Jan. 26, 2017, 11:26 AM), http://www.centredaily.com/news/local/crime/article128875799.html [https://perma.cc/LVU9-5PEV].

303 *See* Jim Dey, *What Was Area Lawyer Thinking with Harassment Campaign?*, NEWS-GAZETTE, (Aug. 17, 2017, 6:00 AM), http://www.news-gazette.com/news/local/2017-08-17/jim-dey-what-was-area-lawyer-thinking-harassment-campaign.html [https://perma.cc/8U8Q-YS8P]; Stephanie Francis Ward, *Fired Lawyer Who Set Up Fake Match.com Profile of Female Attorney Cited by Disciplinary Board*, A.B.A. J. (Aug. 17, 2017, 7:00 AM), http://www.abajournal.com/news/article/fired_lawyer_who_set_up_fake_match.com_profile_of_female_attorney_cited_by [https://perma.cc/8EXF-RBX4].

304 *See* Dey, *supra* note 303; Ward, *supra* note 303.

305 *Aaron Brockler, Former Prosecutor, Fired for Posing as Accused Killer's Ex-Girlfriend on Facebook*, HUFFINGTON POST (June 7, 2013, 2:25 PM), http://www.huffingtonpost.com/2013/06/07/aaron-brockler-fired-facebook_n_3402625.html [https://perma.cc/BSG9-9PAL].

306 *See, e.g.*, 18 U.S.C. § 2511(2)(d) (2018) ("It shall not be unlawful under this chapter for a person to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception ...."); ARIZ. REV. STAT. ANN. § 13-3005 (2018); D.C. CODE § 23-542 (2018); N.Y. PENAL LAW § 250.00 (Consol. 2018).

307 ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001) (replacing ABA Formal Opinion 337 which in part stated that "with a possible exception for conduct by law enforcement officials, a lawyer ethically may not record any conversation by electronic means without the prior knowledge of all parties to the conversation").

308 *Id.* at 65.

309 *Id.* at 66.

310 *Id.* at 67.

311 *Id.* at 69-71.

312 *See, e.g.*, Sup. Ct. of Ohio Bd. of Comm'r on Grievances and Discipline, Informal Op. 2012-1 (2012); Utah State Bar Ass'n, Ethics Advisory Op. No. 96-04 (1997) (stating that it is not per se unethical to record conversations but describing circumstances where it would be).

313 Joshua Kellogg, *AG Files Charges Against Aztec Judge - Connie Johnston Facing 12 Counts of Interference with Communications*, FARMINGTON N.M. DAILY TIMES, July 29, 2017, at A2.

314 Debra Cassens Weiss, *Federal Prosecutor Admits She Listened to Recordings of Attorney-Client Conversations, Filing Says*, A.B.A. J. (June 29, 2017, 7:00 AM), http://www.abajournal.com/news/article/federal_prosecutor_admits_she_listened_to_recordings_of_attorney_client_con [https://perma.cc/7RUE-69WZ].

315 18 U.S.C. § 2511(1) (2018).

316 18 U.S.C. § 2701 (2018).

317 18 U.S.C. § 1030 (2018).

318 *See, e.g.*, United States v. Nosal, 676 F.3d 854, 863 (9th Cir. 2012) (en banc) (holding that the Computer Fraud and Abuse Act does not extend to "violations of a company or website's computer use restrictions").

319 MODEL RULES OF PROF'L CONDUCT r. 3.4(b) (AM. BAR ASS'N 2013).

320 *See*UTAH STANDARDS OF PROFESSIONALISM & CIVILITY r. 18 (2014). Six states have this standard. Preston & Lawrence, *supra* note 11, at 721 tbl.7.

321 *See* Tom Barber, *Restrictions on Lawyers Communicating with Witnesses During Testimony: Law, Lore, Opinions, and the Rule*, FLA. B.J., July/Aug. 2009, at 58, 60, https://www.floridabar.org/news/tfb-journal/?durl=/DIVCOM/JN/jnjournal01.nsf/Articles/F361C04FC87E0EF2852575D600654478 [https://perma.cc/44B5-TTAH].

322 *See* Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 3-4 (1995); Barber, *supra* note 321, at 58, 60.

323 Wei Ngai v. Old Navy, No. 07-5653 (KSH) (PS), 2009 U.S. Dist. LEXIS 67117, at *4 (D.N.J. July 31, 2009).

324 *Id.*

325 MODEL RULES OF PROF'L CONDUCT r. 3.5(a)-(b) (AM. BAR ASS'N 2017).

326 *Id.* r. 4.2.

327 Debra Cassens Weiss, *Penn State Frat Prosecutor Faces Ethics Hearing over Fake Facebook Page, Texts to Judges*, A.B.A. J. (Aug. 22, 2017, 7:00 AM), http://www.abajournal.com/news/article/penn_state_frat_prosecutor_faces_ethics_hearing_over_fake_facebook_page_all [https://perma.cc/8LMP-5E2J].

328 N.Y.C. Bar Ass'n. Comm. on Prof'l Ethics, Formal Op. 2012-02, at 9 (2012).

329 *Id.*

330 *See, e.g.*, UTAH STANDARDS OF PROFESSIONALISM & CIVILITY r. 11 (2014) ("[L]awyers shall avoid impermissible ex parte communications"). Fourteen states mention this in their standards, in addition to it being a violation of the Rules of Professional Conduct. Preston & Lawrence, *supra* note 11, at 720 tbl.6.

331 ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 32, at 4.

332 *Id.*

333 *Id.* (footnote omitted).

334 N.H. Bar Ass'n, Op. 2012-13/05, at 3 (2012) ("If the witness is represented by a lawyer with regard to the same matter in which the lawyer represents the client, the lawyer may not communicate with the witness except as provided in Rule 4.2.").

335 However, the individual attorney can adjust his or her settings on LinkedIn to tailor what the user sees about the lawyer. *See Who's Viewed Your Profile - Privacy Settings*, LINKEDIN, https://help.linkedin.com/app/answers/detail/a_id/47992/ft/eng [https://perma.cc/H2CW-L4YG] (last visited Sept. 3, 2015). There are three options:
Your name and headline (Recommended).
Anonymous profile characteristics such as industry and title.
You will be totally anonymous.
What Others See When You've Viewed Their Profile, LINKEDIN, http://www.linkedin.com (last visited Sept. 3, 2015).
If an attorney chooses one of the latter two options, however, the "Profile Stats" feature (which allows users to tell who has viewed their profile) will be disabled for the attorney's account. *Id.* Essentially, if attorneys do not want that notification to the third party to contain any information about them, then they have to be willing to disable the setting that allows them to see who has been viewing their profile. In the ABA Techreport 2016, "76% of respondents report that they individually use or maintain a presence in one or more social networks for professional purposes. This number has also remained relatively steady since 2013." Shields, *supra* note 80. Obviously, in a profession that is so dependent upon networking, disabling this feature on a personal account could be detrimental, and is therefore not a viable option.

336 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466, at 5 (2014).

337 *Id.*

338 N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, *supra* note 32, at 6.

339 *See* Eric P. Robinson, *Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online*, 36 AM. J. TRIAL ADVOC. 597, 637-38 (2013) (warning that attorneys should "be careful to ensure that their online research does not result in a communication"). Some have even opined that it is "bordering on malpractice" not to use the internet in jury selection. Carol J. Williams, *Jury Duty? May Want to Edit Online Profile; Trial Consultants Increasingly Use the Internet to Learn About Prospective Jurors*, L.A. TIMES, Sept. 29, 2008, at A6 (internal quotation omitted).

340 Robinson, *supra* note 339, at 637-38 (warning that attorneys should "be careful to ensure that their online research does not result in a communication").

341 *Id.* at 638 (recommending that the rules may "need to be more flexible regarding sites ... which automatically notify a user when someone looks at their profile, with no other action by the user viewing the information").

342 *See*MODEL RULES OF PROF'L CONDUCT r. 3.8(f) (AM. BAR ASS'N 2013).

343 *See*State v. Polk, 415 S.W.3d 692, 695 (Mo. Ct. App. 2013).

344 *Id.*

345 *Id.* at 695-96. Even though the court saw potential for harm with this behavior, it did not overturn the verdict because there was no evidence that the jury had been biased. *See id.* at 696.

346 LEGAL TECHNOLOGY SURVEY REPORT, *supra* note 1, at 62.

347 Patrice, *supra* note 110.

348 *Id.*

349 Kennedy v. Louisiana, 554 U.S. 407 (2008).

350 *See* Rachel C. Lee, Note, *Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 STAN. L. REV. 1535, 1537-38 (2009).

351 *See id.* at 1538.

352 *See id.* at 1539-40.

353 *Id.* at 1542 ("Of course, these visits could be from court personnel other than the Justices and their clerks, and some of the visits could be merely to peruse the court calendar or read coverage of a recently released decision. But a steady visitor to the site will be exposed to lists of cert petitions to watch, discussions of the filed briefs in various cases, and recaps of oral arguments, along with links to news stories or other blogs with similar material--all touching on the merits of pending litigation.").

354 *Id.* at 1541 (emphasis added).

355 MODEL RULES OF PROF'L CONDUCT r. 5.5(a) (AM. BAR ASS'N 2014).

356 *Id.* at cmt. 4.

357 Geraghty & Michmerhuizen, *supra* note 224, at 571-72.

358 Hacker v. Holland, 570 N.E.2d 951, 956 (Ind. Ct. App. 1991) (quoting Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977)) (internal quotation marks omitted).

359 This hypothetical is from Kristine M. Moriarty, Comment, *Law Practice and the Internet: The Ethical Implications that Arise from Multijurisdictional Online Legal Service*, 39 IDAHO L. REV. 431, 432-33 (2003).

360 *Id.*

361 *Id.*

362 Thomas Roe Frazer II, *Social Media: From Discovery to Marketing--A Primer for Lawyers*, 36 AM. J. TRIAL ADVOC. 539, 564-65 (2013) (citations omitted).

363 MODEL RULES OF PROF'L CONDUCT r. 8.5(b)(2) (AM. BAR ASS'N 2014).

364 D.C. Bar Ass'n, Ethics Op. 370, at 5 (2016).

365 Initial Resolution by ABA Comm'n on Ethics 20-20 on Model Rule 5.5(d)(3)/Continuous and Systematic Presence, at 2-3 (Sept. 7, 2011).

366 Comments from N.Y. State Bar Ass'n Comm. on Standards of Att'y Conduct on Ethics 20/20 Draft Reports Dated September 7, 2011, at 3 (Nov. 21, 2011).

367 *See* Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 413-14 (2013).

368 Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 128 (2009).

369 *See In re* Brandes, 65 N.E.3d 678, 679 (N.Y. 2016).

370 *See*State *ex rel.* Comm'n on Unauthorized Practice of Law v. Hansen, 834 N.W.2d 793, 798-99 (Neb. 2013).

371 *See In re* Bagley, 433 B.R. 325, 333, 335 (Bankr. D. Mont. 2010).

372 *See*N.C. State Bar v. Lienguard, Inc., No. 11 CVS 7288, 2014 WL 1365418, at *11-13 (N.C. Super. Ct. Apr. 4, 2014).

373 *See In re* Low Cost Paralegal Servs., 19 A.3d 1229, 1229-30 (R.I. 2011).

374 *Id.*

375 *Id.* at 1230.

376 For more discussion of the various law suits involving LegalZoom and similar webpages, see Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in The Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 583-85 (2014).

377 Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1064-65 (W.D. Mo. 2011).

378 Webster v. LegalZoom.com, Inc., B240129, 2014 WL 4908639 (Cal. Ct. App. Oct. 1, 2014). The North Carolina court granted full faith and credit to the *Webster* settlement to terminate the LegalZoom case in its jurisdiction. Bergenstock v. LegalZoom.com, Inc., No. 13 CVS 15686, 2015 WL 2345453, at *10 (N.C. Super. May 15, 2015).

379 *See* Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 1010-11 (2012).

380 COLO. R. CIV. P. 205.1(1).

381 VA. ST. BAR RULES OF PROF'L CONDUCT r. 5.5 cmt. 4 (2016).

382 Gillers, *supra* note 367, at 414 n.237.

383 An exception to the general rule exists in Texas. Texas took action to protect programmers of legal-use software, at least those who use conspicuous disclaimers, after a Texas court found software developers, whose program was sold to help with family law disputes, to be engaged in the unauthorized practice of law. Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956, 956 (5th Cir. 1999). Most states do not protect those who sell forms. Further, since a downloadable program can typically be obtained by residents of every state, even a Texas programmer is at risk in the forty-nine other states.

384 For example, an insurance agent used legal-based software to generate a fill-in-the-blank form which he then filled out to help his elderly neighbor make a will. Franklin v. Chavis, 640 S.E.2d 873, 875-76 (S.C. 2007). After the elderly neighbor's death, her family sued Chavis for "engag [ing] in the unauthorized practice of law." *Id.* at 875. The South Carolina Supreme Court found that Chavis had engaged in the unauthorized practice. *Id.* at 876. "Even the preparation of standard forms that require no creative drafting may constitute the practice of law if one acts as more than a mere scrivener." *Id.*; *see also* Mathew Rotenberg, Note, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709 (2012).

385 *See, e.g.*, Bennett, *supra* note 368, at 127 ("A lawyer may use disclaimers to reduce problems involving unauthorized practice of law ... [stating] the state (or states) in which the attorney is admitted. Attorneys may take the additional step of asking potential clients about their residence before answering any questions or sending any messages." (footnote omitted)); Jordana Hausman, *Who's Afraid of the Virtual Lawyers? The Role of Legal Ethics in the Growth and Regulation of Virtual Law Offices*, 25 GEO. J. LEGAL ETHICS 575, 587-89 (2012); Stephanie L. Kimbro, *The Law Office of the Near Future: Practical and Ethical Considerations for Virtual Practice*, 83 N.Y. ST. B.J. 28, 30-31 (2011).

386 *See* Bennett, *supra* note 368, at 123; Kimbro, *supra* note 385, at 31.

387 *See* Browne-Barbour, *supra* note 184, at 572 (citing ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457, at 1-5 (2010)).

388 D.C. Bar Ass'n, Ethics Op. 370, *supra* note 33, at 2.

389 MODEL RULES OF PROF'L CONDUCT r. 7.1 (AM. BAR ASS'N 2013).

390 David L. Hudson Jr., *Federal District Court Cautions Lawyers to Be Careful About Repeating Judges' Compliments*, A.B.A. J. (Oct 1, 2013, 2:20 AM), http://www.abajournal.com/magazine/article/federal_district_court_cautions_lawyers_to_be_careful_about_repeating_judge/ [https://perma.cc/9X8U-5VYE].

391 *Id.*

392 *Id.*

393 D.C. Bar Ass'n, Ethics Op. 370, at 3 (2016).

394 Dominic Rushe, *Fake Online Reviews Crackdown in New York Sees 19 Companies Fined*, GUARDIAN (Sept. 23, 2013, 2:42 PM), http://www.theguardian.com/world/2013/sep/23/new-york-fake-online-reviews-yoghurt?commentpage=1 [https://perma.cc/5HS7-CK8T].

395 *See Sockpuppet (Internet)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Sockpuppet_%28Internet%29 [https://perma.cc/3A65-5KX9].

396 *See id.*

397 Brian Focht, *Astroturfing: Fake Online Reviews Are Bad News for Law Firms!*, A.B.A. (Oct. 2013), http://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/2013/5_october/astroturfing.authcheckdam.pdf [https://perma.cc/U7J4-USDW]. Eventually, this case settled. Cyrus Farivar, *Yelp Settles Suit with Bankruptcy Lawyer over Allegations of Fake Reviews*, ARSTECHNICA (Oct. 2, 2015, 6:20 PM), https://arstechnica.com/tech-policy/2015/10/yelp-settles-lawsuit-with-bankruptcy-over-allegations-of-fake-reviews/ [http://perma.cc/UTU7-P2RW].

398 Smith, *supra* note 56, at 7.

399 *Id.*

400 *Id.*

401 Paul Vercammen, *California Attorney Facing Suspension for Fake Photos with Celebs*, CNN (Sept. 20, 2014, 1:10 AM), http://www.cnn.com/2014/09/19/us/california-lawyer-suspension-fake-celebrity-photos/index.html?c=US [https://perma.cc/K74N-WRRX].

402 *See id.*

403 *See*MODEL RULES OF PROF'L CONDUCT r. 8.4(e) (AM. BAR ASS'N 2013) ("It is professional misconduct for a lawyer to ... 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 ...."). A more interesting question involves the lawyer who has authentic pictures of herself with various famous and powerful people, including judges. And consider the lawyer who includes on her Facebook page a picture of her and the judge for whom she clerked in a friendly embrace.

404 *Id.* rr. 7.2, 7.3.

405 *Id.* r. 7.3.

406 *Id.* r. 7.2(c).

407 D.C. Bar Ass'n, Ethics Op. 370, *supra* note 33, at 1.

408 Calif. Bar Stand. Comm. on Prof'l Responsibility & Conduct, Formal Op. No. 2012-186, at 4-6 (2012) (listing, through hypotheticals, the circumstances when a lawyer's blog post falls within the ethics rules covering advertising and state fair advertising laws).

409 G.M. Filisko, *The Ethics of Online Advertising*, A.B.A. FOR L. STUDENTS (Mar. 3, 2013), http://abaforlawstudents.com/2013/03/03/ethics-online-advertising/ [https://perma.cc/6PCV-USV8].

410 *Id.*

411 *See* Debra Cassens Weiss, *A $4.2M Mistake? Lawyer Is Liable for Faxing 'Mundane Advice' to Accountants, 7th Circuit Says*, A.B.A. J. (Sept. 16, 2013, 10:30 AM), http://www.abajournal.com/news/article/a_4.2m_mistake_lawyer_is_liable_for_faxing_mundane_advice_to_accountants [https://perma.cc/HYB8-2442].

412 Lackey & Minta, *supra* note 136, at 160-61.

413 *Id.*

414 J. T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 291-92, 309 (2004).

415 *Id.* at 309.

416 Lackey & Minta, *supra* note 136, at 158.

417 *Id.* at 158 n.57 (citing Ariz. Comm. on Ethics & Prof'l Responsibility, Informal Op. 97-04 (1997)).

418 *Id.* at 159 n.59 (citing WASHINGTON RULES OF PROF'L CONDUCT r. 7.2(c) (2006)).

419 *Id.* at 158 n.58 (citing Martin Whittaker, *Internet Advertising Isn't Exempt from Rules, Speakers Make Clear in Separate Programs*, 24 LAW MANUAL ON PROF. CONDUCT 444, 444-45 (2008)); *see also* Mason Gordon & Alex Derstenfeld, *The LinkedIn Lawyers: The Impact of Article 145 of the Code of Professional Conduct of Lawyers on Social Media Use*, LEXOLOGY (July 19, 2016), http://www.lexology.com/library/detail.aspx?g=5b784395-91b3-4274-a964-a587dc34807e [https://perma.cc/G7BY-DWMC] (noting that multiple authors have argued that LinkedIn constitutes an advertising platform).

420 Debra Cassens Weiss, *Law Firms Can't Describe 'Specialties' on LinkedIn, New York Ethics Opinion Says*, A.B.A. J. (Aug. 16, 2013, 4:25 PM), http://www.abajournal.com/news/article/law_firms_cant_describe_specialties_on_linkedin_new_york_ethics_opinion_say [https://perma.cc/6GM9-FYLQ]; *accord* D.C. Bar Ass'n, Ethics Op. 370, *supra* note 33, at 5 (noting that although "jurisdictions, like New York, do not permit lawyers to identify themselves as 'specialists' unless they have been certified as such by an appropriate organization[,] [t]hey are ... permitted to detail their skills and experience").

421 D.C. Bar Ass'n, Ethics Op. 370, *supra* note 33, at 1.

422 MODEL RULES OF PROF'L CONDUCT r. 8.2(a) (AM. BAR ASS'N 2013).

423 Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129 (Mich. 2006).

424 Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous*, 97 A.B.A. J., Feb. 2011, at 49, 50; *see also* John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 12, 2009, at A1.

425 For a discussion about President Trump's disparagement of judges and Justice Antonin Scalia's biting and sometimes personal criticisms of his colleagues, as well as other social trends that lead to rude and uncivil language within the profession, see Cheryl B. Preston, Professionalism in the Trump Era, *supra* note 8.

426 MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2013).

427 *Id.* r. 8.4(e).

428 For detailed discussions of judges' social media behavior, see John G. Browning, *Why Can't We Be Friends? Judges' Use of Social Media*, 68 U. MIAMI L. REV. 487 (2014), and David Hricik, *Bringing a World of Light to Technology and Judicial Ethics*, 27 REGENT U. L. REV. 1 (2014).

429 *See* ABA Formal Op. 462, *supra* note 16, at 2 ("The judge should not form relationships with persons or organizations that may violate Rule 2.4(c) by conveying an impression that these persons or organizations are in a position to influence the judge.").

430 The ABA's Model Code of Judicial Conduct states that "[a] judge shall act ... in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2011).

431 Mass. Sup. Jud. Ct. Comm. Jud. Ethics, Opinion No. 2011-6, 2011 WL 7110317, at *3 (2011).

432 Domville v. State, 103 So. 3d 184, 185 (Fla. Dist. Ct. App. 2012); *see also*State v. Thomas, 376 P.3d 184, 198 (N.M. 2016) (cautioning against "friending" that can be misconstrued and "create an appearance of impropriety"); Debra Cassens Weiss, *Judge Reprimanded for Friending Lawyer and Googling Litigant*, A.B.A. J. (June 1, 2009, 12:20 PM), http://www.abajournal.com/news/article/judge_reprimanded_for_friending_lawyer_and_googling_litigant/ [https://perma.cc/8KSE-823J] (noting that a North Carolina judge was reprimanded for "disregard[ing] the principles of judicial conduct" by "friending" a lawyer in a pending case on Facebook, communicating about the case on Facebook, and independently gathering information).

433 Law Offices of Herssein & Herssein v. United Servs. Auto. Ass'n, 229 So. 3d 408 (Fla. Dist. Ct. App. 2017); *see also* Debra Cassens Weiss, *Judge Shouldn't Be Booted from Case Because of Facebook Friendship with Lawyer, Appeals Court Rules*, A.B.A. J. (Aug. 25, 2017, 8:00 AM), http://www.abajournal.com/news/article/judge_shouldnt_be_booted_from_case_because_of_facebook_friendship_with_lawy/ [https://perma.cc/LD43-XDAX].

434 Weiss, *supra* note 433.

435 *See*CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 10.05[6] (Lexis Nexis, 5th ed. 2013). *Compare* Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 297 (2011) ("[W]henever a judge permits [a social media] user to be a 'friend,' the judge risks violating this ethical standard because a potential consequence of [social media] 'friending' is that the [social media] user could use the [social media] 'friendship' with the judge to advance his or her personal or financial interest."), *with* Bill Haltom, *If You Are a Judge, You Better Get a Dog*, 46 TENN. B.J., Feb. 2010, at 36 (offering a humorous rebuttal to the notion that "friending" between judges and lawyers is unprofessional and damaging).

436 *See Social Media and the Courts*, NAT'L CTR. FOR STATE COURTS, http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/State-Links.aspx?cat=judicial%20Ethics%20Advisory%C20Opinions%C20on%C20Social%20Media [https://perma.cc/NJ25-X38H] (listing and summarizing various states' advisory opinions on judges and friending); *see, e.g.*, ABA Formal Op. 462, *supra* note 16 ("Because of the open and casual nature of [social media] communication, a judge will seldom have an affirmative duty to disclose [a social media] connection."). For another state's advisory opinion on this issue, see Ariz. Sup. Ct. Jud. Ethics Advisory Comm., Advisory Op. 14-01, at 14 (2014).

437 *Social Media and the Courts*, *supra* note 436 (indicating that Florida, Massachusetts, and Oklahoma opinions state that judges may not friend attorneys that may appear in their court; California, Kentucky, Maryland, New York, and Ohio opinions state that judges may friend attorneys that may appear in their court).

438 Jones, *supra* note 435, at 296-97.

439 Alex Ginsberg, *SI Judge Is Red 'Face'd*, N.Y. POST (Oct. 15, 2009, 4:00 AM), http://www.nypost.com/p/news/local/staten_island/si_judge_is_red_face_1TCZaxBoS2p5oOyES11jPN [https://perma.cc/385G-T8B4].

440 Stephanie Francis Ward, *Judge Removed from Divorce Case After Sending One Party a Facebook Friend Request*, A.B.A. J. (Jan. 29, 2014, 11:40 AM), http://www.abajournal.com/news/article/judge_removed_from_divorce_case_after_party_rebuffs_facebook_friend_request [https://perma.cc/VK63-GU43].

441 *Id.*

442 Chace v. Loisel, 170 So. 3d 802, 803-04 (Fla. Dist. Ct. App. 2014).

443 See, for example, *supra* text accompanying note 403.

444 *In re* Reines, 771 F.3d 1326 (Fed. Cir. 2014).

445 *Id.* at 1331.

446 *Id.* at 1330 (footnote omitted).

447 MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2013).

448 Butler Cty. Bar Ass'n v. Foster, 794 N.E.2d 26, 26 (Ohio 2003).

449 Staci Zaretsky, *A Biglaw Partner's Big Twitter Meltdown*, ABOVE L. (Oct 16, 2013, 12:58 PM), http://abovethelaw.com/2013/10/a-biglaw-partners-big-twitter-meltdown/ [https://perma.cc/79Q8-LU93].

450 *Id.*

451 *Reed Smith Partner in Sweary Twitter Rant*, ROLL ON FRIDAY (Oct. 18, 2013, 12:40 PM), http://www.rollonfriday.com/thenews/europenews/tabid/58/id/2980/fromtab/36/currentindex/3/default.aspx [https://perma.cc/U9U2-8YAK].

452 John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES (Sept. 12, 2009), http://www.nytimes.com/2009/09/13/us/13lawyers.html [https://perma.cc/T2JT-S2NL].

453 *Id.*

454 *See supra* notes 85-88 and accompanying text.

455 ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Opinion 477R, at 7 (revised May 22, 2017).

456 *See supra* notes 89-98 and accompanying text.

457 *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 382, 385 (1995) (Scalia, J., dissenting) (stating that "a person who is required to put his name to a document is much less likely to lie than one who can lie anonymously" and that anonymity "facilitates wrong by eliminating accountability"); DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 140 (2007) (concluding that "anonymous, people are often much nastier and more uncivil in their speech[ ] [because it] is easier to say harmful things about others when we don't have to take responsibility"); Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1642-43 (1995) (noting anonymous or pseudonymous postings "relieve[ ] their authors from responsibility for any harm that may ensue[ ] [and that] [t]his often encourages outrageous behavior without any opportunity for recourse to the law for redress of grievances").

458 *See supra* note 57 and accompanying text.

459 Twenty-two states have adopted at least one of these standards urging respect towards other attorneys. Preston & Lawrence *supra* note 11, at 718-19 tbls.4 & 5.

460 *Id.*

461 *In re* Eisenstein, 485 S.W.3d 759, 763 (Mo. 2016) (en banc).

462 *Id.* at 761.

463 *In re* Anonymous Member of S.C. Bar, 709 S.E.2d 633, 636 (S.C. 2011). The email text reads: "I have a client who is a drug dealer on [ ] Street down town [sic]. He informed me that your daughter, [redacted] was detained for buying cocaine and heroine [sic]. She is, or was, a teenager, right? This happened at night in a known high crime/drug area, where alos [sic] many shootings take place. Lucky for her and the two other teens, they weren't charged. Does this make you and [redacted] bad parents? This incident is far worse than the allegations your client is making. I just thought it was ironic. You claim that this case is so serious and complicated. There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near [ ] Street. Think about it. Am I right?"

464 *Id.*

465 *Id.* at 638.

466 *Id.* at 637-38.

467 *Id.* at 638.

468 MODEL RULES OF PROF'L CONDUCT r. 8.3 (AM. BAR ASS'N 2013).

469 Steve Miller, *Naperville Lawyer Sues Man over Negative Comments Online*, CBS CHI. (Sept. 19, 2013, 7:57 AM), http://chicago.cbslocal.com/2013/09/19/naperville-lawyer-sues-man-over-negative-comments-online/ [https://perma.cc/KF5G-868P].

470 *Id.*

471 *See* Amanda Griffin, *Texas Lawyer Accused of Sending Inappropriate Texts*, JD J. (Nov. 9, 2016), http://www.jdjournal.com/2016/11/09/texas-lawyer-accused-of-sending-inappropriate-texts/ [https://perma.cc/AST5-KW4H].

472 Jackie Borchardt, *Supreme Court Suspends Willoughby Lawyer For Sexually Explicit Texts Sent to Employee*, CLEVELAND.COM (June 12, 2014, 12:20 PM), http://www.cleveland.com/open/index.ssf/2014/06/supreme_court_suspends_willoug.html [https://perma.cc/3QA9-DSLG]; Staci Zaretsky, *Lawyer Sends Nasty Text Messages to 3L, Demands Sexual Favors*, ABOVE L. (June 18, 2014, 1:12 PM), https://abovethelaw.com/2014/06/lawyer-sends-nasty-text-messages-to-3l-demands-sexual-favors/ [https://perma.cc/YG8Q-FXJK].

473 *Smith County Judge Joel Baker Resigns*, TYLER MORNING TELEGRAPH (Sept. 23, 2016, 9:37 AM), http://www.tylerpaper.com/TP-Breaking/241295/smith-county-judge-joel-baker-resigns [https://perma.cc/TZ6G-5XBR].

474 *Id.*

475 *Judge Accused of Sexting While Sitting on Judicial Conduct Board*, KLTV 7 (Mar. 14, 2016, 8:34 PM), http://www.kltv.com/story/31467865/texas-judge-accused-of-sexting-while-sitting-on-judicial-conduct-board [https://perma.cc/4TCB-35L6].

476 *Id.*

477 *Id.*

478 *In re* Disciplinary Proceedings Against Beatse, 722 N.W.2d 385, 386-90 (Wis. 2006).

479 *See id.* (noting that the attorney had spent thirty-six hours browsing pornographic websites).

480 *Id.* at 387.

481 *Id.*

482 *Id.*

483 *Id.* at 388-89.

484 Angela Couloumbis, *Supreme Court Suspends McCaffery over Porn E-mails*, PHILA. INQUIRER (Oct. 21, 2014, 1:07 AM), http://www.philly.com/philly/news/politics/20141021_Supreme_Court_votes_to_suspend_McCaffery_over_e-mails.html [https://perma.cc/5YV7-CJEQ].

485 *In re* Downey, 937 So. 2d 643, 645-49 (Fla. 2006).

486 *Id.* at 645-46.

487 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2013).

488 G.M. Filisko, *You're Out of Order!: Dealing with the Costs of Incivility in the Legal Profession*, 99 A.B.A. J., Jan. 2013, at 35, 37; *see also* Christina Parajon Skinner, *The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short*, 63 S.C. L. REV. 241, 258 (2011) (noting a Texas judge's comments that lawyers were "on the verge of crossing ... ethical lines when they complain about clients and opposing counsel" in social media posts).

489 Filisko, *supra* note 488, at 37.

490 *Id.*

491 *Id.*

492 *Id.*

493 LORI ANDREWS, I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY 123 (2012).

494 *Id.*

495 *Cf.* Filisko, *supra* note 488, at 37 (discussing how unprofessional conduct can bring the legal profession into disrepute).

496 Murphy, *supra* note 82.

497 Saba Hamedy, *Montana Federal Judge Sent Hundreds of Biased Emails, Panel Finds*, L.A. TIMES (Jan. 18, 2014, 7:30 AM), http://www.latimes.com/nation/nationnow/la-na-nn-montana-judge-racist-emails-20140118,0,2624855.story#ixzz2rMe7otTi [https://perma.cc/2FX7-TBSV].

498 *Id.*

499 MODEL RULES OF PROF'L CONDUCT pmbl. & scope ¶ 16 (AM. BAR ASS'N 2013).

500 For a discussion of the role of law schools in the professionalism crisis and how they can take concrete steps to educate law students better, see Cheryl B. Preston, Professionalism in the Trump Era, *supra* note 8.

501 Eric C. Chaffee, *The Death and Rebirth of Codes of Legal Ethics: How Neuroscientific Evidence of Intuition and Emotion in Moral Decision Making Should Impact the Regulation of the Practice of Law*, 28 GEO. J. LEGAL ETHICS 323, 354 (2015).

502 *Id.* at 358.

503 *Id.*

504 Professor Chaffee recalls how this very thing happened with business conduct in the wake of the Enron scandal. *Id.* at 358-60. Frustrated American people successfully urged Congress to pass the Sarbanes-Oxley Act of 2002; there were many regulations in the Act that addressed attorney ethics, which were previously regulated by the American Bar Association. *Id.*

103 CNLLR 879

End of Document

HTML awyers, Inc.
THE LAW MARKETING CONSULTANCY

7 Murray Road
Moorestown, NJ 08057

Phone: (856) 234-4334
E-mail: micah@HTMLawyers.com

BIOGRAPHY

Micah U. Buchdahl is an attorney focused on assisting law firms with business development initiatives. He is the immediate past Chair of the American Bar Association's Standing Committee on Continuing Legal Education and a past chair of the ABA's Law Practice Division. Based in Moorestown, New Jersey, he is president of HTMLawyers, Inc., a law marketing consultancy.

Micah's career experiences shape his vision and ideas for law firm clients. He worked in the Philadelphia Municipal Court as a mediator and arbitrator. He served as associate corporate counsel with the Philadelphia Flyers and Spectacor, as well as director of NBA Photos, a marketing division of the National Basketball Association. Micah is well known for his ethics counsel as it pertains to law marketing, advertising issues and compliance. With HTMLawyers, founded in 2001, he has worked with law firms of all shapes and sizes on initiatives ranging from business development strategies to audits of existing marketing efforts.

Prior to law school, he worked in marketing and public relations functions within the National Hockey League and Major Indoor Soccer League. He also served as a journalist for The Baltimore Sun. Micah attended Temple University both as an undergraduate (B.A., journalism, magna cum laude, 1985) and later for Law School (J.D., class president, 1991). He is admitted to the Pennsylvania Bar.

In the legal community, Micah regularly teaches ethics courses on marketing and advertising for the Pennsylvania Bar Institute, the ABA and ALI among the CLE providers. He is the marketing columnist for Law Practice magazine, and associate editor of the ABA's Law Practice Today webzine. In addition, he currently serves on the ABA Law Practice Division's Ethics & Professionalism, Magazine Board of Editors, Fellows Outreach, Pro Bono & Public Service, and Strategy & Planning committees. Micah has also worked on diversity initiatives with law firms and associations for more than two decades, and regularly attends annual meetings of NAMWOLF, the National Association of Minority and Women Owned Law Firms.

In the community, Micah serves as the First Vice President of the Board of Trustees for Adath Emanu-El in Mount Laurel, New Jersey. He has served as a volunteer coach with the Moorestown Youth Baseball Federation and the Moorestown Youth Basketball Club. With his wife, Ivy, they contribute time and financial support to numerous charitable and educational endeavors (including Temple University, the University of Pennsylvania, Washington University in St. Louis and Moorestown Friends School). They are the proud parents of Lily and Benjamin. Micah's personal passions include bicycling and following the Philadelphia Phillies, Eagles, and Temple Owls. Micah and Ivy, self-proclaimed foodies, provide wining & dining advice to friends and family looking for the best restaurants in Philadelphia.

Micah can be reached at micah@HTMLawyers.com or by phone at 856-234-4334, and on Twitter at @mbuchdahl.