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1-1-2014

## The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law

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### Recommended Citation

Jan L. Jacobowitz and Danielle Singer, *The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law*, 68 U. Miami L. Rev. 445 (2014)  
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# The Social Media Frontier: Exploring a New Mandate for Competence in the Practice of Law

JAN L. JACOBOWITZ & DANIELLE SINGER\*

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## I. INTRODUCTION

[W]e contend that social media in this day and age cannot be ignored. It is now a critical part of presidential politics, it has been part of revolutions in the Middle East, and it is going to be an unavoidable part of high-profile legal cases, just as traditional media has been and continues to be. We feel it would be irresponsible to ignore the robust online conversation, and we feel equally as strong about establishing

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a professional, responsible, and ethical approach to new media.<sup>1</sup>

The O'Mara Law Group represented defendant George Zimmerman in the notorious Trayvon Martin case and established the website, "George Zimmerman Legal Case." The statement above appears on the website to explain the use of social media in the case. The website created controversy, and the prosecution attempted to have it deleted, but the judge permitted the website and held that "[t]here has not been an overriding pattern of prejudicial commentary that will overcome reasonable efforts to select a fair and impartial jury."<sup>2</sup>

Mark O'Mara conceded that the creation of the website was an unusual strategy, but he deemed it to be a necessary one to contend with the overwhelming amount of discussion about the case on social media—especially the damaging aspersions cast about his client, George Zimmerman, and the websites impersonating George Zimmerman. The use of social media was not confined to this website; it also invaded many aspects of the trial from jury selection to witness testimony on Skype and even an embarrassing picture posted on Instagram by one of the defense attorneys' daughters of her and her Dad eating ice cream with a caption, "We beat stupidity celebration cones," and the hashtag, "#dadkilledit."<sup>3</sup>

The Zimmerman trial highlighted the use of social media in the practice of law and, because of the tremendous media coverage of the trial, it facilitated a robust conversation on whether the legal profession's use of social media is the "new normal."<sup>4</sup> Actually, lawyers' use of social media predates the Zimmerman case, as evidenced by a growing body of case law, ethics opinions, and journal articles discussing the propriety of using social media in areas such as investigation, discovery, and jury selection.<sup>5</sup> In fact, there have been quite a few articles that offer guidance as to how to steer clear of the ethical pitfalls of social media.

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1. *Why Social Media for George Zimmerman?*, GEORGE ZIMMERMAN LEGAL CASE (Apr. 28, 2012), <http://www.gzlegalcase.com/index.php/8-press-releases/7-why-social-media-for-george-zimmerman>.

2. Lizette Alvarez, *Judge in Trayvon Martin Case Denies Request for Silence*, N.Y. TIMES, Oct. 30, 2012, at A16.

3. Evan S. Benn & Audra D.S. Burch, *Social Media, Technology Drove Zimmerman Trial*, MIAMI HERALD (July 14, 2013), [http://www.miamiherald.com/2013/07/14/3499936\\_p3/social-media-technology-drove.html](http://www.miamiherald.com/2013/07/14/3499936_p3/social-media-technology-drove.html).

4. *Id.*

5. See, e.g., *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 656 (N.Y. Sup. Ct. 2010); Phila. Bar Ass'n Prof'l Guidance Comm., Formal Op. 2009-02 (2009); JOHN G. BROWNING, THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW (Eddie Fournier ed., 2010) [hereinafter BROWNING, LAWYER'S GUIDE TO SOCIAL NETWORKING]; Hope A. Comisky & William M. Taylor, *Don't be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas—Discovery, Communications with Judges and Jurors, and Marketing*, 20 TEMP. POL. & CIV. RTS. L. REV. 297

Thus, some lawyers opt to avoid social media as a strategy for avoiding liability.<sup>6</sup> In other words, social media is often discussed as a slippery slope where only the adventurous among the legal profession are traveling. However, technology and social media are evolving so quickly that lawyers who elect not to participate in social media may be in for a rude awakening—an awakening that reveals that the understanding and use of social media is becoming a requisite component of competent legal practice and that the failure to consider social media in a case may subject a lawyer to a disciplinary proceeding or a malpractice claim.

This article will explore the contention that the use of social media and technology in the practice of law has become a required component of effective lawyering. There are many uses of innovative technology in the practice; however, the primary focus of this article is social media, which would not exist without the technology made possible by the advent of the Internet. Thus, the reference to social media and technology is meant to describe the interconnection between social media and the Internet and the fact that in order to use social media, one must be familiar with the technology that accesses social media on the Internet.

The article will first review the legal profession's historical relationship and occasional reluctance to embrace innovative technology and communication methods. Next, it will briefly explore the relationship of legal ethics to malpractice law. It will then discuss the history of the self-regulating nature of the legal profession and the professional code of conduct that governs lawyers. Then, the article will highlight some of the legal ethics rules that support the theory that social media is a requisite addition to legal practice. Finally, it will discuss historical and current aspects of malpractice law and conclude that the *failure to employ social media* may result in the ineffective representation of clients, disciplinary complaints, or malpractice claims.

## II. THE LEGAL PROFESSION AND EVOLVING COMMUNICATION TECHNOLOGY

The legal profession has historically taken a cautious approach to

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(2011); Michael Downey, *12 Tips for Reducing Online Dangers and Liabilities*, 36 ABA LAW PRACT., July–Aug. 2010, at 26, available at [http://www.americanbar.org/publications/law\\_practice\\_home/law\\_practice\\_archive/lpm\\_magazine\\_articles\\_v36\\_is4\\_pg26.html](http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v36_is4_pg26.html); Nicole Hyland, *The Legal Ethics of Social Networking*, MLRC MEDIA LAW LETTER PT. 1 May 2013, at 51, available at <http://www.jdsupra.com/legalnews/the-legal-ethics-of-social-networking-85909/>.

6. See BROWNING, LAWYER'S GUIDE TO SOCIAL NETWORKING, *supra* note 5, at 15; Niki Black & Carolyn Elefant, *Social Media: What It Is and Why It Matters*, ABA LAW PRACT. TODAY (Jan. 2010), <http://apps.americanbar.org/lpm/lpt/articles/ftr01102.shtml>; Brian Dalton, *This 'Social Media' Thing Might Not Be a Fad, Law Firms Acknowledge*, ABOVE THE LAW (Aug. 6, 2013), <http://abovethelaw.com/2013/08/this-social-media-thing-might-not-be-a-fad-law-firms-acknowledge/>.

technology that establishes new communication channels. Although the Internet and social media are relatively new, necessarily intertwined, and therefore, somewhat different in character from earlier communication technology, a look back at innovations such as the telephone, telefax, and email—as well as the legal profession’s analysis of the ethical considerations relating to each invention—provides valuable insight. As communication technology has evolved since the advent of the telephone, so too has the legal profession’s standard for competence and communication in the practice of law.

### A. *The Telephone*

On March 7, 1876, Alexander Graham Bell received his patent on the telephone, and within twenty-five years, there were 1.5 million telephones throughout the United States.<sup>7</sup> Telephones provided the opportunity for people throughout the country to communicate considerably faster with one another; yet, this opportunity created concern in the legal profession.<sup>8</sup> In fact, Alexander Graham Bell’s prospective father-in-law, a Boston attorney, viewed the telephone as “only a toy.”<sup>9</sup> Another well-known lawyer of the time and the managing partner of what would later become Cravath, Swaine & Moore, Clarence Seward, strove to keep new technological devices like the telephone and typewriter out of the office because he believed that they were “destroying the simplicity of American life.”<sup>10</sup> Seward was so displeased with the telephone that he refused to answer the telephone, which was located in the separate “telephone closet,” for years.<sup>11</sup>

The prominent law firm of Sullivan and Cromwell did not install a telephone in its office until nearly a decade after the invention became available.<sup>12</sup> The law firm maintained the telephone in a separate office and instructed its clerks not to use the telephone unless it rang.<sup>13</sup> John Foster Dulles recounted that when he joined Sullivan and Cromwell in New York in 1911, many of the attorneys believed that the only proper form of communication was through the use of letters delivered by

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7. Catherine J. Lancot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 162 n.34 (1999).

8. See Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 Nw. U. L. REV. 1827, 1855 (2008) (“The telephone could conquer distance in a way that not even the telegraph could match.”).

9. Lancot, *supra* note 7, at 163.

10. *Id.* at 165 (quoting 1 ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS, 1819–1906*, 448 (1946)); see Marcus, *supra* note 8, at 1857 (noting that use of the telephone “probably changed visiting practices moderately during the first half of [the twentieth] century”).

11. Lancot, *supra* note 7, at 165 n.46.

12. *Id.* at 164.

13. *Id.*

hand.<sup>14</sup>

Despite the existence of many “technophobes” like Seward during this time, telephones infiltrated law firm offices by the turn of the twentieth century. The telephone dramatically transformed the legal profession, assisting law firms, like Cravath, Swaine & Moore, to grow exponentially and serve a wider range of corporate clients.<sup>15</sup> Lawyers were able to communicate more efficiently with their clients, and today, the thought of operating a law firm without a telecommunication system is unimaginable. Of course, as cordless telephones and cellular telephones became available, these devices also became integrated into the practice of law.

Etiquette aside, one of the primary concerns among lawyers about the use of any type of telephone technology is the potential for interception and the breach of client confidentiality. According to the ABA, lawyers have a reasonable expectation of privacy in using landline telephones to communicate with their clients; however, it is unclear whether a lawyer has that same reasonable expectation in regards to using a cellular or cordless telephone.<sup>16</sup> Although landline conversations are not absolutely secure—as a telephone line may be tapped or the phone company may commit a technical error—“using a telephone is considered to be consistent with the duty to take reasonable precautions to maintain confidentiality.”<sup>17</sup>

State bar associations have reached differing conclusions on the reasonable expectation of privacy as it relates to use of a cellular or cordless telephone.<sup>18</sup> The ABA elected not to attempt to resolve the disparity among the states when it issued Formal Opinion 99-413. Instead, the ABA Opinion focused upon the risk of interception of a cellular or cordless telephone conversation as compared to an email that is transmitted via a land-based telephone line.<sup>19</sup> The ABA Committee explained that the radio signals used by cordless and cellular telephones add to the risk of interception.<sup>20</sup> Thus, the risk of a breach is greater with the use of

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14. *Id.*

15. *Id.* at 165.

16. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999).

17. *Id.*

18. *Compare* State Bar of Ariz., Formal Ethics Op. 95-11 (1995), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=463> (finding that a lawyer can use a cellular telephone to communicate with his or her client but must take adequate precautions to avoid revealing client confidences) with Mass. Bar Assoc., Formal Ethics Op. 94-5 (1994), available at <http://www.massbar.org/publications/ethics-opinions/1990-1999/1994/opinion-no-94-5> (finding that a lawyer cannot discuss confidential matters with a client on a cellular telephone without client informed consent if there is any “nontrivial risk” that the confidential information may be overheard).

19. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999).

20. *Id.*

a cordless or cellular telephone than with the use of a landline telephone or an email message.<sup>21</sup> While there are risks inherent in using landline, cellular, and cordless telephones, these devices have obviously become incorporated into the practice of law with attention paid to precautionary measures available to secure client confidentiality.<sup>22</sup>

### B. *The Telefax*

Alexander Bain patented the original telefax (“fax”) machine in England in 1843.<sup>23</sup> His machine had two pens that were attached to pendulums that passed over chemically treated paper and left marks when an electrical charge was sent through the telegraph wire.<sup>24</sup> The fax machine was further developed throughout the late nineteenth and twentieth centuries, but it was not widely used in the American workplace until the 1980s when the machines were smaller, faster, and, overall, more efficient.<sup>25</sup> For example, in 1970, an estimated fifty thousand fax machines were in use throughout the United States, but in the late 1980s the number of fax machines topped four million.<sup>26</sup>

Attorneys began using the fax machine to submit documents to the court to more efficiently deal with filing deadlines.<sup>27</sup> The fax machine alleviated the pressures of traffic and parking when attempting to file just before the deadline and became a wonderful addition to the practice of law.<sup>28</sup>

However, today, the early fax machine technology has been deemed obsolete technology by some who believe its use should be discontinued in the practice of law.<sup>29</sup> Many attorneys prefer the efficiency of email rather than the use of a fax machine to transmit pleadings and

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21. *Id.*

22. Cellular telephones have also given rise to the use of texting, which in turn has impacted not only the attorney-client relationship and confidentiality but also has raised discovery issues. *See, e.g., Big Voices Media, LLC v. Wendler*, No. 3:12-cv-242-J-99MMH-JBT, 2012 WL 6021443, at \*3 (M.D. Fla. Dec. 4, 2012) (broad production of text messages not warranted because request was not narrowly tailored; however, a discovery request for a specific text message or text messages from a specific person or specific time period would likely be appropriate); *Mancuso v. Fla. Metro. Univ., Inc.*, No. 09-61984-CIV, 2011 WL 310726, at \*3 (S.D. Fla. 2011) (holding that text messages are only discoverable when they are relevant to the claims or defenses of the case).

23. *Fax History*, FAXPIPE, <http://www.faxpipe.com/fax-history.html> (last visited May 19, 2013).

24. *Id.*

25. *Id.*

26. *Id.*

27. Linda Deutsch, *Fax Machines Give Lawyers a New Suit Tool*, L.A. TIMES (Oct. 22, 1990), [http://articles.latimes.com/1990-10-22/business/fi-2452\\_1\\_printing-fax-machines](http://articles.latimes.com/1990-10-22/business/fi-2452_1_printing-fax-machines).

28. *Id.*

29. *See Philip Thomas, Is the Fax Machine Still Relevant to a Law Firm?*, MS LITIGATION REVIEW & COMMENTARY (July 31, 2012), <http://www.mslitigationreview.com/2012/07/articles/>

documents for trial.<sup>30</sup> Email is not necessarily a viable alternative, however, when an opposing counsel continues to use a fax machine. Fortunately, virtual fax now provides an alternative to the slow, antiquated traditional fax machine.<sup>31</sup> Virtual fax allows attorneys to send faxes as emails and receive faxes as email attachments.<sup>32</sup> This new technology serves as a helpful way for attorneys to quickly send and receive messages, as well as keep a better record of documents, without wasting too much extra paper or toner.

Courts tend to presume that attorneys have a reasonable expectation of privacy in the use of fax machines, and the ABA is in accord. However, the ABA has also noted that attorneys need to be aware that there are some significant risks in the use of a fax machine.<sup>33</sup> For example, a fax may inadvertently be sent to the wrong person simply by mixing up one number in dialing a fax number.<sup>34</sup> Thus, client confidentiality remains a concern, and the fax sender must remain attentive to the process.

### C. *Email*

Tracing the history of email requires a closer look at the history of the Internet. In 1969, the Department of Defense undertook a project entitled the Advanced Research Projects Agency Network (“Arpanet”).<sup>35</sup> Eventually, additional networks became connected to Arpanet and this “network of networks” quickly gained recognition as the “Internet.”<sup>36</sup> By the middle of the 1980s, there were only about one thousand “hosts” on the Internet.<sup>37</sup> However, Internet “browser” software was developed in 1990, which “led to the exponential growth of the Internet.”<sup>38</sup> Between 1990 and 1995, the number of networks grew to over 44,000 in 160 countries.<sup>39</sup> “Host” computers have also

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general-1/is-the-fax-machine-still-relevant-to-a-law-firm/ (posing the question on his blog whether lawyers still need fax machines).

30. John Cord, *How I Learned to Love the Fax Machine*, THE DAILY RECORD, GENERATION J.D. (Jan. 23, 2012), <http://thedailyrecord.com/generationjd/2012/01/23/how-i-learned-to-love-the-fax-machine/>.

31. *Id.*

32. *Id.*

33. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999).

34. *Id.*

35. David Hricik, *Lawyers Worry Too Much About Transmitting Client Confidences by Internet E-mail*, 11 GEO. J. LEGAL ETHICS 459, 462 (1998).

36. *Id.*

37. *Id.*

38. *Id.* at 462–63.

39. *Id.* at 463.



grown exponentially.<sup>40</sup> There were thirteen million host computers as of July 1996.<sup>41</sup> Host computers are particularly relevant to this discussion because each one has a “unique Internet ‘address’ for sending and receiving the e-mail from computers networked to that host.”<sup>42</sup>

Email has served as an inexpensive form of communication that is “exceptionally fast and easily accessible to almost all individuals throughout the world.”<sup>43</sup> It has proved to be very convenient because it allows an attorney to send documents to numerous parties to a case at the same time—within seconds—and it also allows for files and messages to be forwarded.<sup>44</sup> However, with this convenient, fast new form of communication came concerns about whether an attorney sacrifices client confidentiality when he or she discusses a sensitive matter over email.<sup>45</sup>

The ABA has determined that attorneys and clients maintain a reasonable expectation of privacy in most email communications; however, they must understand the dangers inherent in using this form of communication and take precautions to avoid disclosure.<sup>46</sup>

40. *Id.* (noting that these “computers are gateways to the Internet for individual computers networked to that host”).

41. *Id.*

42. *Id.*

43. Ernest Sasso, *E-mail and Client Confidentiality*, LAW OFFICES OF ERNEST SASSO, <http://www.ernestsasso.com/cm/Articles/Articles3.html> (last visited May 20, 2013); see also Tana M. Materi, *Email Confidentiality*, CARNEY BADLEY SPELLMAN (May 2002), <http://www.carneylaw.com/resources/getProfile.asp?publicationID=31> (discussing email as perfect for the business world because it is a “quick, cheap, and easy means of communication”).

44. Sasso, *supra* note 43.

45. Materi, *supra* note 43 (“[A]ttorneys and their clients worry that sending sensitive correspondence via email may waive privilege claims or disclose client confidences.”).

46. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 99-413 (1999); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-459 (2011). The Committee, in its 1999 opinion, examined four different kinds of email and the implications and dangers of each in turn:

The first type of email the ABA analyzed was direct email, which involves attorneys directly emailing their clients by “programming their computer’s modem to dial their client’s [modem].” *Id.* The process by which this email is sent is quite similar to the sending of a fax, both of which are transmitted via land-based telephone lines. This transmission is much more difficult to hack, however, when compared to a traditional telephone call because the email message travels in digital form. The Committee agreed with a number of state bar ethics opinions, as well as two federal courts, in determining that there is a reasonable expectation of privacy in this type of email communication based at least in part on the difficulty of intercepting these messages.

The second type of email the ABA examined was “private system” e-mail, which includes “typical internal corporate e-mail systems.” *Id.* The only worrisome distinction between this form of email and direct email is that there is a higher risk of misdirection in a private system. However, this misdirection would occur within a law firm or within a private system in which all still owe the duty of confidentiality to the client. Therefore, the Committee found that an attorney using

In 2011, the ABA reexamined email communications and affirmed its earlier finding of a reasonable expectation of privacy in this form of communication, but the ABA also expanded upon its earlier opinion by stating that an attorney must warn the client about this form of communication when there is a significant risk of interception by a third party.<sup>47</sup> Some of the situations where this “significant risk of interception” may arise include when an employee uses an employer’s computer to contact his attorney or when a client logs on to a public or borrowed computer to contact his or her attorney.<sup>48</sup> The ABA Model Rule of Professional Conduct 1.6 requires a lawyer to maintain client confidentiality and “to refrain from revealing ‘information relating to the representation of a client unless the client gives informed consent.’”<sup>49</sup> The Committee concluded that based upon this duty, a lawyer should usually advise his or her client to avoid using an employer’s computer or network to send emails to the lawyer because of the assumption that the employer has a policy that allows it to view emails sent through its network.<sup>50</sup>

In 2010, The California State Bar evaluated email communication via Wi-Fi, noting the growing frequency of attorney-client communication that is occurring when one person or both people are working on a

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this form of email communication also maintains a reasonable expectation of privacy.

The third type of email discussed by the ABA was online service providers (“OSPs”), which typically offer users a password-protected email system. The OSP is used by other individuals and is open to other members of the public who pay fees. Therefore, a misdirected email may land in the hands of someone who owes no duty of confidentiality to the client; however, this chance of misdirection is no different than that inherent in using a fax machine. The second danger in using OSP email is that the security is mainly dependent upon the measures taken by the OSP and not any measures taken by an individual user. However, the possibility of intercepting an OSP message is lessened by the use of protected passwords and encryption. Additionally OSP administrators are limited in their ability to examine emails on their systems by federal law. The Committee determined that these protections were sufficient to find that a lawyer has a reasonable expectation of privacy in utilizing this form of email.

Finally, the Committee studied the use of Internet email, which typically is transmitted using land-based telephone lines and numerous intermediate computers. The intermediate computers are made up of Internet service providers (“ISPs”), which are owned by third parties and allow for the possibility of copying messages passing through that network. ISPs have the same rights and restrictions on inspection as OSPs and, although hackers may be able to intercept a message sent through ISPs, this is a crime and is not seen as a reason to lessen the lawyer’s reasonable expectation of privacy in Internet email. The Committee concluded by stating that this form of email communication is also permissible in accordance with the Model Rules. *Id.*

47. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 11-459 (2011).

48. *Id.*

49. *Id.* (quoting MODEL RULES OF PROF’L CONDUCT 1.6(a) (1983)).

50. *Id.*

laptop from a coffee shop or airport.<sup>51</sup> The California advisory opinion reinforces an attorney's obligation to be attentive to available security features and to consider the sensitivity of client information. The opinion acknowledges the lightning speed at which technology is changing and concludes,

An attorney's duties of confidentiality and competence require the attorney to take appropriate steps to ensure that his or her use of technology in conjunction with a client's representation does not subject confidential client information to an undue risk of unauthorized disclosure. Because of the evolving nature of technology and differences in security features that are available, the attorney must ensure the steps are sufficient for each form of technology being used and must continue to monitor the efficacy of such steps.<sup>52</sup>

Thus, the legal profession has evaluated innovations in communication technology from the nineteenth century telephone to the twenty-first century laptop to determine the appropriate manner of use of technology in the practice of law. Ultimately, as communication technology has advanced, so too have the lawyers who have modified their practices to remain competent and effective, connect with their clients on current technology, and maintain a competitive edge in the marketplace.

#### D. *Social Media*

Social media, also referred to as social networking, is defined as, any type of social interaction using technology (primarily the Internet, but also including modern smartphone and PDA innovations) with some combination of words, photos, video and/or audio . . . The concept is a relatively simple one: just as with a network of roads that enables you to see that Dallas is connected via highways to St. Louis, which in turn is connected with yet another city, a network of people exists as well. While on a personal level, you may know a friend who in turn knows a friend who works in an industry and knows of a job for you, this type of connection isn't widely known. Social networking sites help you see connections that you otherwise wouldn't see . . . You can see who your friends know, who your friend's friends know and so on.<sup>53</sup>

Social media allows an individual to join a network and connect with people all across that network. Social media is one of fastest growing communication vehicles in the world. In fact, the cultural impact of prior

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51. State Bar of Cal. Comm. on Prof'l Responsibility and Conduct, Formal Op. 2010-179 (2010), available at <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=wmqECiHp7h4%3D&tabid=837>.

52. *Id.*

53. BROWNING, LAWYER'S GUIDE TO SOCIAL NETWORKING, *supra* note 5, at 17-18.

telecommunication innovations pales in comparison to the sea change brought about by social media as millions of people instantaneously connect and routinely share the details of their daily lives. In fact, Facebook, one of the most popular social networking sites, recently reported that it has 1.15 billion users—including 198 million people in the United States and Canada who are actively participating on a monthly basis.<sup>54</sup> When Facebook recently added video-sharing capacity to Instagram, Facebook's image-sharing service, five million videos were uploaded in the first twenty-four hours.<sup>55</sup> Facebook's growth is perhaps all the more remarkable given that it was founded in 2004 for college students and was not available to the public until 2006.<sup>56</sup>

Attorneys have not been immune to the social media phenomenon. An increasing number of attorneys belong to social networks and are posting about both their personal and professional lives in a number of different forums.<sup>57</sup> According to the 2012 ABA Legal Technology Survey Report, fifty-five percent of law firms surveyed have Facebook accounts, and thirty-eight percent of lawyers have their own page on Facebook.<sup>58</sup> Some of the other major social networking options for lawyers include Twitter, LinkedIn, and blog websites. Thirteen percent of law firms indicated that they have a presence on Twitter, a service that allows users to share images and messages of up to 140 characters.<sup>59</sup> Twitter use by firms has increased from seven percent in 2011 and five percent in 2010.<sup>60</sup> Eleven percent of attorneys said they have their own Twitter account, which is also an increase from the six percent mark in 2011.<sup>61</sup> LinkedIn, a professional networking service, is popular among firms and individual lawyers, with eighty-eight percent of firms and ninety-five percent of the individual lawyers surveyed indicating that they have accounts.<sup>62</sup> Finally, the survey "not surprisingly" shows that the number of lawyers writing blogs has also increased.<sup>63</sup> Twenty-two

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54. *Facebook Reports Second Quarter 2013 Results*, FACEBOOK (July 24, 2013), <http://investor.fb.com/releasedetail.cfm?ReleaseID=780093>.

55. *Id.*

56. BROWNING, *LAWYER'S GUIDE TO SOCIAL NETWORKING*, *supra* note 5, at 18.

57. Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 214 (2008); Dalton, *supra* note 6.

58. Robert Ambrogi, *ABA Survey Shows Growth in Lawyers' Social Media Use*, LAW SITES BLOG (Aug. 16, 2012), <http://www.lawsitesblog.com/2012/08/aba-survey-shows-growth-in-lawyers-social-media-use.html> (ABA sent questionnaires to 12,500 ABA-member lawyers in private practice and 823 completed the questionnaires).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

percent of firms and nine percent of lawyers have blogs.<sup>64</sup> Nearly forty percent of attorneys said their blogs even generated new business for them.<sup>65</sup>

In fact, social media is “permanently altering the way that potential clients . . . evaluate their need for legal services and select the lawyer best-suited to serve those needs.”<sup>66</sup> Lawyers must provide the online information that clients are seeking in order to establish meaningful connections with those clients.<sup>67</sup> The legal community’s online presence has required bar associations to reconsider their attorney advertising regulations as the current rules were created before the age of the Internet and social media.<sup>68</sup>

However, while many lawyers and law firms have an Internet presence for marketing purposes and must adhere to the advertising rules, the area in which social media is arguably having a more radical impact is in the actual practice of law. In other words, if there are over 198 million Facebook users in the United States and Canada who are posting their thoughts, feelings, pictures and more,<sup>69</sup> then isn’t it likely that, in many litigious disputes, some of the participants have social network pages?

In fact, social media has become the proverbial treasure trove of evidence for those who know where and how to search. And just as with other types of innovative technology, the ABA,<sup>70</sup> the state bar associa-

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64. *Id.* This is an increase from fifteen percent of firms with blogs in 2011 and fourteen percent in 2010. The amount of individual attorneys with blogs has increased from five percent in both 2011 and 2010. *Id.*

65. *Id.*

66. Black & Elephant, *supra* note 6 (“Social media gives lawyers the tools to provide potential clients with the kind of in-depth information that they’ve come to expect online prior to making any kind of decision requiring a significant commitment of resources.”).

67. *Id.* (describing how “the interactive nature of social media helps lawyers build deeper and more meaningful connections online, which eventually translate into offline business and friendship”).

68. *See, e.g.*, Jan L. Jacobowitz & Gayland O. Hethcoat II, *Endless Pursuit: Capturing Technology at the Intersection of the First Amendment and Attorney Advertising*, 17 J. TECH. L. & POL’Y 63, 64–65, 80 (2012).

69. *Quarterly Earnings Slides Q2 2013*, FACEBOOK, <http://investor.fb.com/results.cfm> (last visited Nov. 6, 2013).

70. *See, e.g.*, ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 462 (2013) (finding that, subject to the Judicial Canons, judges may participate in social media and the existence of a social media friend does not necessarily mean that the judge is inappropriately biased).

tions,<sup>71</sup> and the courts<sup>72</sup> are analyzing the permissible use of social media in the practice of law. However, unlike the telephone or email, social media is not a linear exchange that may be analyzed in a single opinion or two. Many variations of social media and optional individual privacy settings exist, such that there is no simple answer to the question of whether a lawyer may generally use social media to investigate a case, serve a complaint, conduct discovery, impeach a witness, select jurors, or support a recusal motion.<sup>73</sup>

Thus, the ABA and various state bar associations have begun to issue ethics advisory opinions, and the body of case law continues to grow on the use of social media.<sup>74</sup> Additionally, bar journal articles, blog websites, and law review articles that have been published in the past few years often offer tips or highlight ethical landmines to avoid if a lawyer *chooses* to use social media.<sup>75</sup> However, it appears that social media has become so pervasive that its use may no longer be a *choice*, but rather a *mandate*.<sup>76</sup>

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71. See, e.g., Fla. Judicial Ethics Advisory Comm., Formal Op. 2009-20 (2009), available at <http://www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/2009/2009-20.html> (stating that judges cannot be “friends” on social media sites with lawyers who appear before them); Phila. Bar Ass’n Prof’l Guidance Comm., Formal Op. 2009-02 (2009), available at [http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf) (discussing whether, under the Rules of Professional Conduct, an attorney may ask a third person to contact a witness via Facebook and MySpace to obtain information from that witness for use in litigation); San Diego Cnty. Bar Ass’n, Formal Op. 2011-2 (2011), available at <https://www.sdcba.org/index.cfm?pg=LEC2011-2> (discussing whether an attorney violated his ethical obligations by sending a “friending” request to employees of a client’s former company whom the client is suing in a wrongful discharge action); S.C. Advisory Comm. on Standards of Judicial Conduct, Formal Op. 17-2009 (2009), available at <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo+17-2009> (concluding that a judge may participate in social media but cannot discuss matters related to the judge’s position); Tenn. Judicial Ethics Comm., Advisory Op. No. 12-01 (2012), available at [http://www.tncourts.gov/sites/default/files/docs/advisory\\_opinion\\_12-01.pdf](http://www.tncourts.gov/sites/default/files/docs/advisory_opinion_12-01.pdf) (concluding that judges may use social media sites, but they must be cautious).

72. See, e.g., *FTC v. PCCARE247 Inc.*, No. 1:12-cv-07189-PAE, 2013 WL 841037, at \*12 (S.D.N.Y. Mar. 7, 2013) (holding that lawyers representing the FTC could serve legal documents on defendants in India via Facebook); *Domville v. State*, 103 So. 3d 184, 185 (Fla. 4th DCA 2012) (discussing whether a criminal defendant can disqualify a judge when the judge and the prosecutor assigned to the case are Facebook “friends” on the grounds that the relationship causes the criminal defendant “to believe that the judge could not ‘be fair and impartial’”).

73. See *supra* note 71. See also BROWNING, *LAWYER’S GUIDE TO SOCIAL NETWORKING*, *supra* note 5, at 29, 41, 123, 169, 173 (offering examples of being served through social media, conducting discovery using social media, judges exercising recusal due to the judges’ social media activity, and using social media for jury selection).

74. See *supra* note 71.

75. See generally Comisky & Taylor, *supra* note 5 (analyzing the role of a lawyer’s ethical responsibilities in using social media); Downey, *supra* note 5 (offering tips for minimizing online liabilities); Hyland, *supra* note 5 (offering practical tips on how to avoid trouble while using social media).

76. See John G. Browning, *Keep Your “Friends” Close and Your Enemies Closer: Walking*

Consider the following hypotheticals mirroring current reality that John G. Browning offers in his article *Digging for the Digital Dirt*:

Imagine encountering the following scenario during the litigation following an industrial accident: just as an expert witness is explaining how all required safety protocols and procedures were diligently followed, opposing counsel confronts him with postings from YouTube videos shot by some of the defendant company's own employees showing how they cut corners. Or perhaps the defendant driver in a devastating accident denies that he was in a hurry and not paying attention, only to be confronted with his own tweets about being behind schedule. For plaintiff's counsel, consider the sinking feeling when your client, a grieving widow who has just finished testifying about the void left by the loss of her husband, is impeached with salacious photos and postings from her boyfriend's MySpace page—all of which are dated months before the accident in which her husband was killed. And of course, there is nothing quite like the look on the face of a "severely and permanently injured" plaintiff who has spun his tale of woe for the jury about barely being able to walk and who now has to explain the photos from his Facebook page depicting his completion of a recent 10k run or a mountain climb in the Pacific Northwest.<sup>77</sup>

Or if hypotheticals fail to persuade, consider the reality of *Lester v. Allied Concrete Co.*,<sup>78</sup> a wrongful death action in which defense counsel

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*the Ethical Tightrope in the Use of Social Media*, 3 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 204, 211 (2013). Browning states that "[a]n understanding of social networking sites, such as Facebook, is pivotal to accomplishing lawyerly tasks in the digital age . . . the sheer pervasiveness of social media in our modern society, coupled with its relative ease of use, demonstrates that a lawyer who ignores social media will fail to provide competent representation."

77. John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 465 (2011) [hereinafter Browning, *Digging for the Digital Dirt*].

78. *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013); see *Lester v. Allied Concrete Co.*, Nos. CL08-150, CL09-223, Final Order (Va. Cir. Ct. Oct. 21, 2011). See also *Perrone v. Rose City HMA, LLC*, No. CI-11-14933 (Pa. Ct. Com. Pl. May 3, 2013) in which the court ordered the parties to hire a neutral forensic computer expert to view the plaintiffs' Facebook pages to determine whether she had to produce them. Katerina Milenkovski, a writer for the ABA Litigation News, described the *Perrone* case as follows:

[P]laintiff Grace Perrone claimed to have suffered severe, life-altering, and disabling injuries as a result of a fall at the Lancaster Regional Medical Center (LRMC). Perrone alleged that her injuries made it impossible for her to go for walks, garden, bicycle, or even to knit or sew.

During settlement discussions, the defendants had produced photographs of Perrone from her Facebook page depicting her shoveling snow, climbing up a snow bank, and riding a sled downhill on her stomach, face first, tumbling, and laughing—all activities inconsistent with her alleged injuries. Perrone's Facebook page indicated that the photos were posted on February 6 and 13, 2010, a few weeks after the alleged injuries at the LRMC and coincident to two significant snowfalls in the area.

requested a copy of Mr. Lester's Facebook account in a discovery request that included a picture of Mr. Lester from his Facebook account.<sup>79</sup> Mr. Lester survived after a concrete truck collided with his car, but his wife perished in the crash.<sup>80</sup> The picture portrayed Mr. Lester, with beer in hand, donning a t-shirt with the message, "I ♥ hot moms."<sup>81</sup>

The question of how problematic that picture might have become at trial was lost in the social media "strategy" that ensued. Mr. Lester's counsel, a former president of his state bar association—and perhaps a social media neophyte—instructed his paralegal to have Mr. Lester "'clean up' his Facebook account" and explained that he did not want to see "blow-ups of [those types of pictures] at trial."<sup>82</sup> Mr. Lester complied, eventually deleted his Facebook account, and signed interrogatories, at his attorney's direction, stating that as of the date of the signature, Mr. Lester did not have a Facebook account.<sup>83</sup>

Before the trial and in response to the objections from Allied Concrete, Mr. Lester and his attorney reactivated the Facebook account.<sup>84</sup> Apparently upon reactivation, Mr. Lester took it upon himself to delete sixteen pictures without informing his counsel.<sup>85</sup>

What transpired next demonstrates the axiom that one may win the battle but lose the war. Mr. Lester's attorney won a multi-million dollar verdict, but post-trial hearings on the defendant's motion for sanctions and attorney's fees based upon the Facebook debacle resulted in a court order requiring Mr. Lester's counsel to pay \$542,000.00 in attorney's fees and a court referral to the state bar, which recently concluded its proceedings with an agreed upon five-year suspension.<sup>86</sup>

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Katerina Milenkovski, "Private" Postings Nevertheless Discoverable, ABA LITIGATION NEWS (Aug. 2, 2013), [http://apps.americanbar.org/litigation/litigationnews/top\\_stories/080213-private-posts-discoverable.html](http://apps.americanbar.org/litigation/litigationnews/top_stories/080213-private-posts-discoverable.html).

79. *Allied Concrete Co.*, 736 S.E.2d at 702.

80. *Id.* at 701.

81. *Id.* at 702.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Mr. Lester was also ordered to pay \$180,000.00, and the case was referred by the court to the state attorney's office for consideration of perjury charges. *Lester v. Allied Concrete Co.*, Nos. CL08-150, CL09-223, 2011 WL 9688369, at ¶ 107 (Va. Cir. Ct. Oct. 21, 2011). Lester's counsel has resigned from his law firm and has agreed to a five-year suspension of his law license. *In re Matthew B. Murray*, Nos. 11-070-088405, 11-070-088422 (July 17, 2013). It is interesting to note that this order indicates that Murray's client, Lester, sent a friend request to opposing counsel and thereby set the stage for all that followed. Lester's actions reinforce the proposition that it is mandatory to discuss social media use with a client. See also *Matthew B. Murray Resigns from the Allen Law Firm*, ALLEN ALLEN ALLEN & ALLEN, <http://www.allenandallen.com/matthew-b-murray-resigns.html> (last visited Aug. 7, 2013); Peter Vieth, *Murray Agrees to 5-Year Bar*



Lawyers can no longer ignore social media—it is here to stay. The proverbial train has left the station, and those lawyers who remain behind are likely to find themselves not only behind the learning curve and subject to humiliation, but also with heightened exposure to court sanctions, disciplinary action, and malpractice claims.

### III. LEGAL ETHICS AND MALPRACTICE LAW

We feel it would be irresponsible to ignore the robust online conversation, and we feel equally as strong about establishing a professional, responsible, and ethical approach to new media.<sup>87</sup>

Revisiting the second part of the opening quotation, the question then becomes, what are the considerations for establishing a “professional, responsible, and ethical approach to new media”? Stated another way, what are the considerations that compel the conclusion that a social media assessment is a requisite component of a case evaluation?

Perhaps the place to begin is where lawyers find general guidance: the legal ethics rules and malpractice law. Of course, the legal ethics rules provide the baseline for appropriate conduct throughout the practice of law and malpractice law enlightens a lawyer as to how to limit liability exposure that generally arises under a tort theory. In other words, the ABA Model Rules of Professional Conduct, the various state professional codes, and ethics advisory opinions should be consulted before acting. On the other hand, while liability exposure may be an underlying ever-present calculation, a lawyer generally does not actively engage in analyzing the elements of a malpractice claim before acting in a case, unless he is unfortunately defending a claim. Nonetheless, both legal ethics and malpractice merit a closer look in the context of social media and the law.

Legal ethics rules establish the regulations by which lawyers are to conduct the practice of law. As will be discussed at greater length below, since 1908, the ABA has established national guidelines from which most states have adopted their own codes of professional conduct. A violation of these rules may result in prosecution by the state bar with possible repercussions ranging from reprimand to disbarment.

Malpractice law has its roots in English common law and has been present in the United States since at least the eighteenth century.<sup>88</sup> A

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*Suspension in Wake of Sanctions Payment*, VA LAWYERS WEEKLY (July 29, 2013), <http://valawyersweekly.com/2013/07/29/murray-agrees-to-5-year-bar-suspension-in-wake-of-sanctions-payment/>.

87. *Why Social Media for George Zimmerman?*, *supra* note 1.

88. 1 RONALD E. MALLEN & JEFFREY M. SMITH WITH ALLISON D. RHODES, *LEGAL MALPRACTICE* § 1:5, at 13 (2013 ed.).

malpractice claim generally arises under a tort theory, and it is a private action brought by a client against his attorney for negligence in handling the client's case.<sup>89</sup> Although various states have defined the requirements differently, generally, a client alleging malpractice must establish a viable attorney-client relationship, the attorney's neglect of a reasonable duty, and prove that the attorney's negligence was the proximate cause of the client's damages.<sup>90</sup> In evaluating whether an attorney has breached a reasonable duty, there is a presumption that an attorney is required to use the degree of "care, skill, and diligence which is commonly possessed and exercised by attorneys practicing in the same jurisdiction."<sup>91</sup>

A malpractice case often turns on the definition of the appropriate standard for the duty of care in the case, and this is where malpractice law and legal ethics may intersect. While the courts generally do not consider a violation of the ethics rules as tantamount to malpractice, ethics rules are sometimes used as one component in establishing the appropriate standard of care applicable when evaluating whether an attorney has breached his duty to a client.<sup>92</sup> Thus, in the context of social media and the law, it is wise to be mindful of which ethics rules may give rise to a duty to employ social media in a case and whether in some cases that ethical duty may also be evidence of the requisite standard of care element in a legal malpractice case.

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89. 7A C.J.S. *Attorney & Client* § 301 (2004 & Supp. 2013).

90. *Id.*

91. *Id.* (citing *Sanjines v. Ortwein & Assocs, P.C.*, 984 S.W.2d 907 (Tenn. 1998)).

92. *See, e.g.*, *Greenwald v. Eisinger, Brown, Lewis & Frankel, P.A.*, No. 3D12-1181, 2013 WL 3455600, at \*2 (Fla. 3d DCA July 10, 2013) ("We previously have observed that 'a [v]iolation of the Code of Professional Responsibility does not prove negligence per se, . . . but it may be used as some evidence of negligence.'" (quoting *Oberon Invs., N.V. v. Angel, Cohen & Rogovin*, 492 So. 2d 1113, 1114 n.2 (Fla. 3d DCA 1986), *rev'd on other grounds*, 512 So. 2d 192 (Fla. 1987))); *Pressley v. Farley*, 579 So. 2d 160, 161 (Fla. 1st DCA 1991) (holding that "[a] violation of the Rules of Professional Conduct does not create a legal duty on the part of the lawyer nor constitute negligence per se, although it may be used as some evidence of negligence"); *Jett Hanna, Social Media, Lawyer Liability and Ethics*, ASS'N OF CERTIFIED E-DISCOVERY SPECIALISTS, <http://www.aceds.org/wp-content/uploads/2013/04/Jett-Hanna-Social-Media-Lawyer-Liability-and-Ethics-Paper.pdf> (last visited Sept. 8, 2013); *SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION* 31 (Thomson/West 2008) ("A majority of courts permit discussion of such a violation at trial as *some* evidence of the common law duty of care. These courts generally rule that the expert must address his or her testimony to the breach of a legal duty of care and not simply to breach of disciplinary rule. Other courts have held that ethical standards conclusively establish the duty of care and that any violation is negligence *per se*. A minority find that violation of an ethical rule establishes a rebuttable presumption of legal malpractice. And, finally, a few courts hold that ethical standards are inadmissible in a legal malpractice action.") (emphasis in original) (internal citations omitted).

## IV. LEGAL ETHICS RULES AND SOCIAL MEDIA

A. *History of the Ethics Rules*

For over a century, the ABA has provided guidance in legal ethics and professional responsibility by promulgating professional standards that serve as a model of regulatory authority governing the legal profession.<sup>93</sup> The ABA has adapted its regulations over time to accommodate the expanding influence of technology on the practice of law. The original Canons of Professional Ethics were adopted by the ABA on August 27, 1908.<sup>94</sup> The Canons provided “ethical standards: (i) to judge who should be permitted to become and remain lawyers; (ii) to educate young or inexperienced lawyers; and (iii) to elicit and strengthen lawyers’ resolve to conduct themselves in accordance with the highest ethical standards.”<sup>95</sup>

Five years after it adopted the first Canons, the ABA established the Standing Committee on Professional Ethics with the goal of staying current on the professional ethics activities in state and local bar associations.<sup>96</sup> The Committee’s name was changed in 1919, and it was then divided into two committees: the Committee on Professional Grievances, which had the authority to investigate professional misconduct charges, and the Committee on Professional Ethics, which had the authority to issue opinions on proper professional and judicial behavior.<sup>97</sup> The Committee on Professional Grievances was discontinued in 1971.<sup>98</sup> The Committee on Professional Ethics was renamed the Committee on Ethics and Professional Responsibility and has since maintained its name and mission.<sup>99</sup>

In 1964, a Special Committee on Evaluation of Ethical Standards created the Model Code of Professional Responsibility.<sup>100</sup> The Code was adopted by the ABA House of Delegates on August 12, 1969, and many state and federal jurisdictions followed in the adoption.<sup>101</sup> In 1977, the ABA created the Commission on Evaluation of Professional Standards to comprehensively study and evaluate the ethical issues and similar problems within the legal profession.<sup>102</sup> The Commission presented a

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93. MODEL RULES OF PROF’L CONDUCT Preface (pre-2002).

94. *Id.*

95. James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2400 (2003).

96. MODEL RULES OF PROF’L CONDUCT Preface (pre-2002).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

Discussion Draft of the Model Rules of Professional Conduct in 1980.<sup>103</sup> Public hearings were then held throughout the country, which allowed for people to provide their opinions on the draft.<sup>104</sup> A year after the public hearings were conducted, the Commission analyzed all of the comments and integrated those into another draft.<sup>105</sup> After a six-year study and drafting process, the Commission released the Model Rules of Professional Conduct.<sup>106</sup> The Model Rules of Professional Conduct “serve as a national framework for implementation of standards of professional conduct.”<sup>107</sup> The Model Rules were adopted on August 2, 1983 by the House of Delegates, and since then, nineteen amendments have been made.<sup>108</sup> At the time of adoption in 1983, “more than two-thirds of the jurisdictions had adopted new professional standards based on these Model Rules.”<sup>109</sup>

Since the adoption of the Model Rules, the ABA has created three commissions to study and propose changes to the rules. The first commission created by the ABA was the Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) in 1997 “to comprehensively review the Model Rules and propose amendments as deemed appropriate.”<sup>110</sup> In August 2001, the Commission submitted a report to the ABA House of Delegates, which discussed the goal of the Commission to provide uniformity based on the “growing disparity in state ethics codes” and to address the effect of technological developments on the practice of law.<sup>111</sup> On February 5, 2002, a number of the Ethics 2000 Commission’s proposed amendments were adopted by the House of Delegates.<sup>112</sup>

In 2000, the ABA created the Commission on Multijurisdictional Practice “to research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law.”<sup>113</sup> This Commission submitted proposed amendments to Rules 5.5 and 8.5

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103. Robert W. Meserve, *Chair's Introduction to MODEL RULES OF PROF'L CONDUCT* (pre-2002), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preface/chair\\_introduction.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preface/chair_introduction.html).

104. *Id.*

105. *Id.*

106. MODEL RULES OF PROF'L CONDUCT Preface (pre-2002).

107. Meserve, *supra* note 103.

108. MODEL RULES OF PROF'L CONDUCT Preface (2012).

109. MODEL RULES OF PROF'L CONDUCT Preface (pre-2002).

110. MODEL RULES OF PROF'L CONDUCT Preface (2012).

111. ABA Ethics 2000 Comm'n, *Report to the House of Delegates*, ABA, available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_hod\\_082001.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_hod_082001.authcheckdam.pdf) (last visited Sept. 8, 2013) [hereinafter ABA 2000 Report].

112. MODEL RULES OF PROF'L CONDUCT Preface (2012).

113. *Id.*

that were adopted by the House of Delegates on August 12, 2002.<sup>114</sup> Finally, in 2009, the ABA created the Commission on Ethics 20/20 to evaluate the Model Rules in light of the effect of advancing technology and the globalization of the practice of law.<sup>115</sup> The Commission recently submitted proposed amendments to the House of Delegates—some of which were adopted in August 2012—including the heavily discussed amendment to Comment 8 of Model Rule 1.1, addressing attorneys' duty to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."<sup>116</sup>

The commissions created by the ABA have been influential in ensuring that the Model Rules reflect the ever-evolving practice of law.<sup>117</sup> Additionally, the Standing Committee on Ethics and Professional Responsibility continues to issue opinions on the Model Rules and provide ethical guidance to the legal profession as it faces new challenges each day due to the role of rapidly advancing technology in our

114. *Id.*

115. ABA COMMISSION ON ETHICS 20/20, *Report to the House of Delegates*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html) (last visited May 27, 2013) [hereinafter ABA 20/20 Report].

116. *Id.*; see MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2012).

117. Prior to the 2012 adoption of the ABA comment, a number of states had begun to address various technology concerns in the context of competence. In 2010, The State Bar of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion 2010-179, in which it described lawyers' duty to evaluate the technology that they use in representing their clients in order to be competent and ensure confidentiality. State Bar of Cal. of Prof'l Responsibility & Conduct, Formal Op. 2010-179 (2010), available at <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=wmqECiHp7h4%3D&tabid=837>. The Committee stated that because technology is constantly evolving and is playing a larger role in all of our lives, "attorneys are faced with an ongoing responsibility of evaluating the level of security of technology that has increasingly become an indispensable tool in the practice of law." *Id.* The attorneys' duty of competence requires attorneys to take "appropriate steps" to ensure that clients' confidences do not become revealed and that no privileges or protections are waived. *Id.* The Committee ultimately set out six considerations for attorneys when dealing with technology in representing their clients: (a) "The attorney's ability to assess the level of security afforded by the technology"; (b) "[l]egal ramifications to third parties of intercepting, accessing or exceeding authorized use of another person's electronic information"; (c) "[t]he degree of sensitivity of the information" ("[t]he greater the sensitivity of the information, the less risk an attorney should take with technology"); (d) "[p]ossible impact on the client of an inadvertent disclosure of privileged or confidential information or work product, including possible waiver of the privileges"; (e) "[t]he urgency of the situation"; (f) "[c]lient instructions and circumstances." *Id.* Florida has also addressed the growing effect of technology on the practice of law. Fla. Prof'l Ethics Comm., Formal Op. 10-2 (2010), available at <http://www.floridabar.org/tfb/TFBETOpin.nsf/SMTGT/ETHICS,%20OPINION%2010-2>. The Florida Bar Board of Governors asked the Professional Ethics Committee to opine on attorneys' ethical obligations in regard to using and storing information on hard drives and equipment such as printers, cellular telephones, facsimile machines, and scanners. *Id.* The Committee declared that "the lawyer has a duty to keep abreast of changes in technology" when utilizing these storage devices in the representation of their clients. *Id.* Further, the duty extends from the time the lawyer obtains the device, through the life of the device, and until the lawyer disposes of the device, including the time subsequent to when the lawyer relinquishes control of the device. *Id.*

society.<sup>118</sup>

### B. *The Model Rules and a Duty to Incorporate Social Media and Technology*

The Model Rules, the state codes of professional conduct, and the developing body of ethics opinions, which interpret the rules in the context of social media, reinforce the proposition that the use of technology and social media is becoming a requirement in the practice of the law. The first few rules discussed below support the use of social media as a fundamental component of the practice of law, and the remaining rules that are discussed demonstrate the guidelines that have been propounded to establish appropriate, ethical conduct on social media. Finally, a few rules are considered that indicate the increasing presence of lawyers in the world of social media.

#### 1. COMPETENCE AND DILIGENCE

The duties of competence and diligence are ones that have undoubtedly been impacted by the growth of technology and the availability of social media on the Internet.<sup>119</sup> There are some lawyers employing social media to provide their clients with effective representation,<sup>120</sup> and there are other lawyers who are not investigating social networking sites, thereby facing a growing risk of missing crucial evidence, locating key witnesses, and exposing potential biases and improprieties.<sup>121</sup>

Model Rule 1.1 states that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>122</sup> Model Rule 1.3 provides that “[a] lawyer shall act

118. *Id.*

119. Lawyers are now often expected to utilize online resources for a variety of tasks, including to diligently investigate a party being served and to select juries. Browning, *Digging for the Digital Dirt*, *supra* note 77, at 470.

120. “[I]f the use of social media tools continues to increase as predicted, it may be possible that, soon, a basic awareness of social media will be necessary for the competent practice of law.” Additionally, “[i]f the diligent attorney must be zealous in pursuing a matter on his client’s behalf, it seems possible that more than familiarity may be required—actual use of social media may be necessary.” Margaret M. DiBianca, *Ethical Risks Arising from Lawyers’ Use of (and Refusal to Use) Social Media*, 12 DEL. L. REV. 179, 183 (2011).

121. Social media sites can be “invaluable sources of information,” especially for family lawyers and personal injury lawyers. Michael E. Lackey Jr., *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 173 (2012). You can find evidence of infidelity, bad tempers, bad behavior, and exaggeration or lying about injuries sustained. *Id.* at 173–74. Attorneys no longer need to hire investigators to find this information. *Id.* at 174.

122. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2006).

with reasonable diligence and promptness in representing a client.”<sup>123</sup>

In August 2012, the ABA House of Delegates amended the comments to Model Rule 1.1 to state that “[t]o 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.”<sup>124</sup> The ABA Commission on Ethics 20/20 clarified that this amendment was not intended to create additional obligations for lawyers; rather, it was meant to serve as a reminder that to remain competent, lawyers should keep up to date on technology.<sup>125</sup>

However, regardless of the clarifying language to the amendment, arguably “[n]ot only do . . . [lawyers] . . . have a duty to understand and appreciate the potential pitfalls of online investigation, but . . . [they] . . . may also have a duty to actually use the Internet and social media to gather information in some situations.”<sup>126</sup> This theory is further supported by the ethics opinions concerning discovery issues, which are discussed below and have been primarily generated as a result of attorneys inquiring about proper methodology. In other words, the opinions focus not on whether social media should be used, but rather the proper manner in which to integrate social media into a case. Additionally, competence may dictate that lawyers have “an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients’ position emanating from the clients’ use of social media.”<sup>127</sup>

In 2012, the New York City Bar Association (“NYCBA”) opined on the duty of competence as it relates to social media and jury selection.<sup>128</sup> The NYCBA analyzed the extent to which attorneys can research jurors on social media websites without violating the ethics

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123. MODEL RULES OF PROF’L CONDUCT R. 1.3 (2006).

124. MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 8 (2013) (emphasis added).

125. ABA 20/20 Report, *supra* note 115. “The amendment to Comment 8 illustrates the ABA’s desire to nudge lawyers into the 21st century when it comes to technology,” but the Commission’s report “suggests only a ‘gentle nudge.’” Matt Nelson, *New Changes to Model Rules a Wake-Up Call for Technologically Challenged Lawyers*, INSIDECOUNSEL 1 (Mar. 28, 2013), <http://www.insidecounsel.com/2013/03/28/new-changes-to-model-rules-a-wake-up-call-for-tech>.

126. Mary Dunnewold, *An Ethical Duty to Use the Internet?*, 41 ABA STUDENT LAWYER 5 (2013), [http://www.americanbar.org/publications/student\\_lawyer/2012-13/jan/professionalism.html](http://www.americanbar.org/publications/student_lawyer/2012-13/jan/professionalism.html).

127. N.Y. Cnty. Lawyers’ Ass’n, Formal Op. 745 (2013) (“Thus, an attorney may properly review a client’s social media pages, and advise the client that certain materials posted on a social media page may be used against the client for impeachment or similar purposes.”).

128. N.Y.C. Bar Ass’n, Formal Op. 2012-2 (2012), <http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02>.

rules.<sup>129</sup> This opinion will be discussed in greater detail below; however, it is worthy of mention here because the NYCBA opinion found that when lawyers conduct research on social media, they must understand how a prohibited communication can occur via a social media website.<sup>130</sup> Additionally, the NYCBA proclaimed that “standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case,”<sup>131</sup> thereby suggesting that social media research may be a requirement rather than an option.

## 2. MERITORIOUS CLAIMS AND CONTENTIONS

Lawyers must avoid filing frivolous lawsuits, which means that they must fully investigate a client’s case to ensure that they can make a good-faith argument in support of their client’s position.<sup>132</sup>

Whether a claim or contention is frivolous under Model Rule 3.1 is generally measured by an objective ‘reasonable attorney’ standard . . . not every meritless allegation is frivolous. For claims or contentions to be frivolous under Rule 3.1, there must be such ‘a complete absence of actual facts or law that a reasonable person could not have expected the court to rule in his favor.’<sup>133</sup>

As John Browning’s hypotheticals highlight, a client may provide his lawyer with a narrative that omits relevant facts.<sup>134</sup> Today, those missing facts may appear on the client’s social media pages and make clear that the client does not have a valid case. Rather than having opposing counsel discover the frivolous nature of a pending lawsuit, a lawyer should

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129. *Id.*

130. *Id.*

131. *Id.*

132. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2006) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law”); MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. 2 (2006) (“The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions. Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.”).

133. Douglas R. Richmond, *Saber-Rattling and the Sound of Professional Responsibility*, 34 AM. J. TRIAL ADVOC. 27, 31 (2010) (quoting *Disciplinary Bd. v. Hoffman*, 670 N.W.2d 500, 506 (N.D. 2003) (citing *Lawrence v. Delkamp*, 658 N.W.2d 758, 766 (N.D. 2003))).

134. Browning, *Digging for the Digital Dirt*, *supra* note 77, at 465.



investigate social media to avoid the risk of filing the case.<sup>135</sup> Arguably, lawyers should routinely employ social media to conduct preliminary case investigations.<sup>136</sup>

### 3. COMMUNICATION

Lawyers have a fundamental duty to communicate with their clients, and the nature of that duty may be expanding as the various methods of client communication expand.<sup>137</sup> In 2012, the ABA Ethics 20/20 Commission amended Comment 4 to Model Rule 1.4, changing it from “[c]lient telephone calls should be promptly returned or acknowledged,” to “[I]awyers should promptly respond to or acknowledge client communications.”<sup>138</sup> In making the change, the Commission stated that this latter phrase “more accurately describes a lawyer’s obligations in light of the increasing number of ways in which clients use technology to communicate with lawyers.”<sup>139</sup> It is worth noting that as clients employ texting and social media, lawyers need to understand the communication possibilities and define the technology through which they will communicate with a client.

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135. N.Y. Cnty. Lawyers’ Ass’n, Formal Op. 745 (2013) (“[I]f a client’s social media posting reveals to an attorney that the client’s lawsuit involves the assertion of material false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using those false statements.”).

136. Andrew B. Delaney & Darren A. Heitner, *Made for Each Other: Social Media and Litigation*, N.Y. ST. B.J., Feb. 2013 at 11, 12, available at <http://martinassociateslaw.us/new/wp-content/uploads/2013/10/nysba022013.pdf> (Performing preliminary research “can help the attorney to be more informed prior to filing suit. In some cases, it might help a litigator avoid bringing a claim that sounds great on the surface but breaks down under scrutiny.”).

137. Under Model Rule 1.4,

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

MODEL RULES OF PROF’L CONDUCT R. 1.4 (2006).

138. Compare MODEL RULES OF PROF’L CONDUCT R. 1.4 cmt. 4 (2012) with MODEL RULES OF PROF’L CONDUCT R. 1.4 cmt. 4 (2013); see also Andrew Pearlman, *Ethics 20/20 Proposal to Amend Rule 1.4 (Communication)*, LEGAL ETHICS FORUM (Feb. 27, 2012, 8:35 AM), <http://www.legalethicsforum.com/blog/2012/02/ethics-2020-proposal-on-rule-14-communication.html>.

139. ABA 20/20 Report, *supra* note 115.

#### 4. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

As discussed above, jury selection may be another area in which the use of social media is becoming a requirement rather than an option. The value of researching jurors is demonstrated by some specific examples: a Florida lawyer filed a complaint to recover compensation for injuries sustained by his client when she was forced to clean a machine in a confined space. The lawyer conducted Internet research on the jury venire and learned that one prospective juror belonged to a support group for claustrophobics. The person was selected for the jury and served as the foreman. The jury came back with a verdict in favor of plaintiff.<sup>140</sup>

The Zimmerman case provides another example that was widely reported. One of the potential jurors questioned during voir dire stated that he had little knowledge of the Zimmerman case; however, his Facebook activity indicated otherwise.<sup>141</sup> The juror had posted on the Facebook page of a group stating, "I CAN tell you THIS. 'Justice' . . . IS Coming."<sup>142</sup> Needless to say, that individual was dismissed. Individual jurors may have tremendous influence in the outcome of a case. One trial consultant has suggested that a lawyer who fails to employ the Internet in jury selection is bordering on malpractice.<sup>143</sup> Moreover, the New York County Lawyers' Association issued an opinion in 2011 that affirmatively indicates that "[p]assive monitoring of jurors, such as viewing a publicly available blog or Facebook page, may be permissible."<sup>144</sup>

Additionally, courts are acknowledging the benefit of lawyers using technology to investigate jurors. One Missouri opinion granted a new trial—when a search on the courthouse's electronic service uncovered that a juror was dishonest during voir dire—suggesting that technology places an increased burden on lawyers to thoroughly investigate potential jurors.<sup>145</sup>

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140. Robert B. Gibson & Jesse D. Capell, *Researching Jurors on the Internet—Ethical Implications*, 84 N.Y. St. B.J., Nov./Dec. 2012 at 11, 12.

141. Elicia Dover, *Did Potential Zimmerman Juror Lie to Court?*, ABC NEWS BLOG (June 13, 2013, 10:09 AM), <http://gma.yahoo.com/blogs/abc-blogs/did-potential-zimmerman-juror-lie-court-034710693.html>.

142. *Id.*

143. 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 (quoting Dallas-based trial consultant Robert B. Hirschhorn as saying that "[a]nyone who doesn't make use of [Internet searches during jury selection] is bordering on malpractice").

144. N.Y. Cnty. Lawyers' Ass'n, Formal Op. 743 (2011).

145. *Johnson v. McCullough*, 306 S.W.3d 551, 558–59 (Mo. 2010) (en banc). After *Johnson*, the Missouri Supreme Court Rules were changed to affirmatively require attorneys to conduct a review of "Case.net" before the jury is sworn. Missouri Supreme Court Rule 69.025 was added to

In New Jersey, an attorney who was conducting an online search of potential jurors was admonished and ordered to close his laptop by the court after opposing counsel, who was without a laptop, objected.<sup>146</sup> On appeal, the Superior Court of New Jersey, Appellate Division found that the lower court's ruling was not prejudicial; however, it noted that it would not have been an unfair advantage to allow plaintiff's counsel to conduct research on the laptop because plaintiff's counsel was not being disruptive and both counsels had access to the free Wi-Fi in the courthouse.<sup>147</sup> Simply because plaintiff's counsel "had the foresight to bring his laptop computer to court, and defense counsel did not, [] cannot serve as a basis for judicial intervention in the name of 'fairness' or maintaining 'a level playing field.'"<sup>148</sup>

The NYCBA opinion, mentioned above, which focused on investigating jurors on social media, cautioned that a lawyer using social media must assure that he does not cause a *communication* to occur with a juror sitting on the lawyer's case.<sup>149</sup> According to the NYCBA, lawyers must understand the websites they choose to use to research jurors to

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the Rules in January 2011. Section (a) reads, "A party seeking to inquire as to the litigation history of potential jurors shall make a record of the proposed initial questions before voir dire. Failure to follow this procedure shall result in waiver of the right to inquire as to litigation history." Mo. SUP. CT. R. 69.025(a) (2011). Section (b) reads, "For purposes of this Rule 69.025, a 'reasonable investigation' means review of Case.net before the jury is sworn." Mo. SUP. CT. R. 69.025(b) (2011). *See also* Khoury v. ConAgra Foods, Inc., 368 S.W.3d 189 (Mo. Ct. App. 2012) (upholding removal of juror after separate information apart from litigation history was discovered following the jury being empanelled but prior to opening statements). In *Khoury*, the court and counsel for both parties agreed to conduct a search on Case.net prior to voir dire to ascertain whether potential jurors might be disqualified based upon discrepancies between their responses during voir dire and Case.net's report on the jurors' history of litigation. However, the following day after the jury had been empanelled, defense counsel moved to strike one of the jurors based upon information that counsel had found on a juror's Facebook page that allegedly indicated prejudicial bias and a failure to disclose that bias thereby warranting disqualification of the juror. The lower court granted a motion to strike the juror. The appellate court affirmed, noting that the trial court had not abused its discretion and commented further:

Neither *Johnson* nor any subsequently promulgated Supreme Court rules on the topic of juror nondisclosure require that *any and all* research—Internet based or otherwise—into a juror's alleged material nondisclosure must be performed and brought to the attention of the trial court *before* the jury is empanelled or the complaining party waives the right to seek relief from the trial court. While the day may come that technological advances may compel our Supreme Court to re-think the scope of required "reasonable investigation" into the background of jurors that may impact challenges to the veracity of responses given in voir dire *before* the jury is empanelled—that day has not arrived as of yet. *Id.* at 193, 202–03.

146. Carino v. Muenzen, No. L-0028-07, 2010 WL 3448071, at \*4 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

147. *Id.* at \*10.

148. *Id.*

149. N.Y.C. Bar Ass'n, Formal Op. 2012-2 (2012), <http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02>.

prevent prohibited communications from occurring.<sup>150</sup> A prohibited communication would occur if the juror: (1) received a “friend” request or a similar request to share information as a result of an attorney’s research or (2) otherwise became aware of an attorney’s deliberate viewing or attempt at viewing the juror’s social media page.<sup>151</sup> The attorney cannot use deception to gain access to the juror’s information, and the attorney cannot cause an inadvertent communication.<sup>152</sup>

Thus, appropriately investigating jurors on social media during voir dire may be an indispensable way to eliminate jurors with prejudice or bias from being decision makers in a case. Using social media may ultimately provide lawyers with a more complete picture of both the jury venire and the empaneled jury because jurors are much more likely to be candid in an online environment.<sup>153</sup>

Additionally, pre-trial social media research may reveal pertinent information about the judge presiding over a case. A number of states, as well as the ABA, have opined on the propriety of judges and the lawyers who appear before them being social media “friends.” The ABA concluded that, subject to the Judicial Canons, a judge is permitted to participate in social media and can be “friends” with lawyers on those websites because that friendship does not necessarily connote a relationship showing bias or the need for recusal.<sup>154</sup> All of the states that have opined have encouraged judges to be cautious in their use of social media, with some states going so far as to conclude that judges and the lawyers who appear before them should not be social media “friends,” with others finding that judges and lawyers may be “friends,” but they must not discuss a matter in which the lawyer is appearing before the judge.<sup>155</sup> Regardless of a state’s view on judges and lawyers being social

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150. *Id.* (“Because of the differences from service to service and the high rate of change, the Committee believes that it is an attorney’s duty to research and understand the properties of the service or website she wishes to use for jury research in order to avoid inadvertent communications.”). See also MODEL RULES OF PROF’L CONDUCT R. 3.5(a)–(b) (2013) (stating that “[a] lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; [or] (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order”).

151. N.Y.C. Bar Ass’n, Formal Op. 2012-2 (2012).

152. *Id.*

153. Chip Babcock & Luke Gilman, *Use of Social Media in Voir Dire*, 60 THE ADVOC. (TEXAS), Fall 2012 at 44, 44–45.

154. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 462 (2013). See also Jan Jacobowitz, *Same Rules, Different Application: The ABA Formally Opines on Judges Using Social Media*, LEGAL ETHICS IN MOTION (Feb. 21, 2013), <http://www.legaethicsinmotion.com/2013/02/same-rules-different-application-the-aba-formally-opines-on-judges-using-social-media/>.

155. States that have opined on the issue of judges being social media “friends” with lawyers are Maryland, Florida, California, Kentucky, South Carolina, Ohio, New York, Massachusetts, and Oklahoma. Florida and Oklahoma concluded that judges should not be social media “friends” with lawyers that may appear before them. Tennessee urges caution in becoming social media

media friends, social media may nonetheless provide insight into the judge before whom a lawyer is representing his client.

### C. *The Model Rules and the Ethical Use of Social Media*

Assuming the proposition that social media use is a requirement for effective lawyering, it is important to understand the developing guidelines for integrating social media into the practice of law. The following rules have been the subject of ethics opinions that are facilitating the discussion and reflect not only valuable practice pointers but also the global impact of social media upon the law of lawyering.

#### 1. CANDOR TO THE TRIBUNAL AND FAIRNESS TO OPPOSING PARTY AND COUNSEL

In addition to a lawyer's duties of competence and diligence that require a lawyer to fully investigate a case, Model Rules 3.3 and 3.4 require lawyers to provide truthful information to the courts and opposing parties.<sup>156</sup> Social media supports these additional obligations.

Social media offers a virtual gold mine of information.<sup>157</sup> Divorce lawyers are discovering damaging information concerning the opposing spouse,<sup>158</sup> and personal injury lawyers are discovering damaging infor-

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"friends," and South Carolina allows for the friendship to exist but states that lawyers and judges may not discuss a matter in which the lawyer may appear before the judge. Daniel Ilani, *Judges and Attorneys Should Think Twice Before Clicking "Add Friend,"* LEGAL ETHICS IN MOTION 1 (Feb. 11, 2013), <http://www.legalethicsinmotion.com/2013/02/judges-and-attorneys-should-think-twice-before-clicking-add-friend/>. Md. Jud. Ethics Comm., Formal Op. 2012-07 (2012); Fla. Jud. Ethics Advisory Comm., Formal Op. 2009-20 (2009); Cal. Judges Assoc. Jud. Ethics Comm., Formal Op. 66 (2010); Ky. Ethics Comm. of the Ky. Jud., Formal Op. JE-119 (2010); S.C. Advisory Comm. on Standards of Jud. Conduct, Formal Op. 17-2009 (2009); Ohio Bd. of Comm'rs on Grievance & Discipline, Formal Op. 2010-7 (2010); N.Y. Advisory Comm. on Jud. Ethics, Formal Op. 08-176 (2009); Mass. Comm. on Jud. Ethics, Formal Op. 2011-6 (2011); Okla. Jud. Ethics Advisory Panel, Formal Op. 2011-3 (2011).

156. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1), (3) (2006) ("(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . [or] (3) offer evidence that the lawyer knows to be false."); MODEL RULES OF PROF'L CONDUCT R. 3.4(a), (d) (2006) ("A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value . . . [or] (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."). See also MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2006) ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.").

157. Christopher B. Hopkins & Tracy T. Segal, *Discovery of Facebook Content in Florida Cases*, TRIAL ADVOC. Q. Spring 2012 at 14, 14 (noting that "Facebook can provide a treasure trove of information in litigation").

158. *Id.* ("The American Academy of Matrimonial Lawyers says that 81% of its members have used or defended against evidence from social networking sites.").

mation concerning a plaintiff's exaggeration of alleged injuries.<sup>159</sup> Social media has also provided useful evidence in employment practice cases.<sup>160</sup> However, the use of social media must be accomplished in accordance with the legal ethics rules and the discovery rules.

The *Lester* case, discussed above, is a prime example of a failure by plaintiff's counsel to understand the significance of social media that led to disastrous consequences.<sup>161</sup> Moreover, the case also illustrates a defense counsel who apparently understood the potential value of a request for production that included the plaintiff's Facebook page with a picture from that page attached.<sup>162</sup> Plaintiff's counsel not only violated the rules by instructing the deletion of Facebook evidence,<sup>163</sup> but he was also arguably negligent in failing to explore the client's social media presence at the onset of the case.

Facebook and other social media discovery have been the subject of several cases and ethics opinions throughout the country. In one New York case, a plaintiff brought a personal injury action alleging perma-

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159. *Id.* ("In specific cases, Facebook content revealed that some personal injury plaintiffs may have exaggerated their injuries."). Evan E. North, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. KAN. L. REV. 1279, 1286 (2010) ("As attorneys join social networks themselves, there is a growing awareness of the potential pitfalls—and gold mines—to be found on these sites. In civil lawsuits for damages, especially in the personal injury and insurance litigation context, potentially relevant and discoverable information is often abundant on these sites.").

160. Hanna, *supra* note 92.

161. See *supra* notes 78–86 and accompanying text. See generally *Allied Concrete Co. v. Lester*, 736 S.E.2d 702 (Va. 2013).

162. *Id.* Note that under Rule 4.2 if the person is represented, "a lawyer shall not communicate about the subject of the representation with [the] person . . . unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." MODEL RULES OF PROF'L CONDUCT R. 4.2 (2006). However, in the *Lester* case, the Murray disciplinary order indicates that Lester initiated contact by sending a friend request to opposing counsel, negating the need for opposing counsel to contact Lester, but perhaps raising the question of whether opposing counsel should have accepted the friend request. See *In re Matthew B. Murray*, Nos. 11-070-088405, 11-070-088422 (July 17, 2013).

163. See *supra* notes 82–86 and accompanying text. But see N.Y. Cnty. Lawyers' Ass'n, Formal Op. 745 (2013). ("Under some circumstances, where litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding destruction or spoliation of evidence, there is no ethical bar to "taking down" such material from social media publications, or prohibiting a client's attorney from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer.") This recent advisory opinion has caused controversy and begs the question as to whether printing copies of social media pages and then deleting the online presence of these pages is permissible. If found to be permissible, then a savvy counsel must now consider propounding discovery that requests information regarding not only current social media posts, but also any and all social media that is or has ever been posted between particular dates that are relevant to the case. No doubt, if discovery moves in this direction, then additional technology will be required to support the validity of both the request and response.

ment injuries and the inability to participate in certain activities.<sup>164</sup> The defendant's counsel reviewed the public portions of the plaintiff's Facebook and MySpace profiles and discovered that the plaintiff lived an active lifestyle since the accident and had traveled up and down the east coast despite her claim that she was unable to travel.<sup>165</sup> The court found that "[p]laintiffs who place their physical condition in controversy may not shield from disclosure material which is necessary to the defense of the action,"<sup>166</sup> and that the plaintiff has no reasonable expectation of privacy in her Facebook or MySpace profiles.<sup>167</sup> The "[d]efendant's need for access to the information outweighs any privacy concerns that may be voiced by [the] [p]laintiff."<sup>168</sup>

In two Florida cases, the courts ruled that information contained on individual social media pages was discoverable *if* the party seeking discovery could prove that the information was relevant to the case.<sup>169</sup> However, parties may not engage in general fishing expeditions when the information sought on social media pages is clearly not relevant.<sup>170</sup>

Finally, in a criminal case in New York, the prosecutor served a subpoena on Twitter to obtain a defendant's tweets that contained information that negated his alleged defense.<sup>171</sup> The court denied Twitter's motion to quash and stated:

If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world . . . In dealing with social media issues, judges are asked to make decisions based on statutes that can never keep up with technology . . . The world of social media is evolving, as is the law around it. As the laws, rules

164. *Romano v. Steelcase, Inc.*, 907 N.Y.S.2d 650, 651 (N.Y. Sup. Ct. 2010).

165. *Id.* at 651–54.

166. *Id.* at 652.

167. *Id.* at 656 (“Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy.”).

168. *Id.* at 656.

169. *Beswick v. Northwest Med. Ctr., Inc.*, No. 07-020592 CACE (03), 2011 WL 7005038, at \*4 (Fla. 17th Cir. Ct. Nov. 3, 2011) (Defendants sought discovery of information Plaintiff shared on social networking sites concerning her noneconomic damages, and the court found this information to be “clearly relevant to the subject matter of the current litigation and . . . reasonably calculated to lead to admissible evidence.”); *Levine v. Culligan of Fla., Inc.*, No. 50-2011-CA-010339-XXXXMB (Fla. 15th Cir. Ct. Jan. 29, 2013), at \*10 (finding that “the critical factor in determining when to permit discovery of social media is whether the requesting party has a basis for the request” and that “Defendant ha[d] not come forth with any information from the public portions of any of Plaintiff’s profiles that would indicate that there [was] relevant information on her profiles that would contradict the claims in th[e] case”).

170. *Levine*, No. 50-2011-CA-010339-XXXXMB, at \*10 (“Just because Plaintiff has a social networking account, this Court should not assume that she posted information relevant to this case on her private profile.”).

171. *People v. Harris*, 949 N.Y.S.2d 590, 591–92 (N.Y. Crim. Ct. June 30, 2012).

and societal norms evolve and change with each new advance in technology, so too will the decisions of our courts.<sup>172</sup>

## 2. TRUTHFULNESS IN STATEMENTS TO OTHERS, COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL, AND DEALING WITH UNREPRESENTED PERSON

Investigation of witnesses is another area of trial preparation that has prompted ethics advisory opinions. Lawyers must adhere to rule 4.1, which requires truthfulness;<sup>173</sup> lawyers are guided by different constraints depending upon whether a witness has counsel or qualifies as an unrepresented person. If counsel represents a witness, then any contact with the witness must be through the counsel or with the counsel's permission.<sup>174</sup> A lawyer may communicate directly with an unrepresented witness (or opposing party) but may not "state or imply that the lawyer is disinterested."<sup>175</sup>

Various state and local bar associations have interpreted these rules in the context of social media. In 2009, the Philadelphia Bar Association issued one of the first ethics advisory opinions in the country to address whether an attorney may have his paralegal contact a witness on a social networking site. The opinion advises that an attorney may not use a third party, such as a paralegal, to "friend" a non-party, unrepresented witness if that person fails to reveal his association with the attorney.<sup>176</sup>

A year later, both the NYCBA and the New York State Bar Association ("NYSBA") issued opinions on similar issues. The NYSBA

172. *Id.* at 595–97. In acknowledging the evolution of the law and technology the court further commented:

While the U.S. Constitution clearly did not take into consideration any tweets by our founding fathers, it is probably safe to assume that Samuel Adams, Benjamin Franklin, Alexander Hamilton and Thomas Jefferson would have loved to tweet their opinions as much as they loved to write for the newspapers of their day (sometimes under anonymous pseudonyms similar to today's Twitter user names). Those men, and countless soldiers in service to this nation, have risked their lives for our right to tweet or to post an article on Facebook; but that is not the same as arguing that those public tweets are protected. The Constitution gives you the right to post, but as numerous people have learned, there are still consequences for your public posts.

173. See MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2006).

174. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2006) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.").

175. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2006).

176. Phila. Bar Ass'n Prof'l Guidance Comm., Formal Op. 2009-02 (2009), available at [http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion\\_2009-2.pdf](http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf). Note also Model Rule 8.4, which generally prohibits misrepresentation and fraud and was discussed in the Philadelphia opinion.



focused on other parties in the litigation and decided that a lawyer “may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer’s client in litigation as long as the party’s profile is available to all members in the network and the lawyer neither ‘friends’ the other party nor directs someone else to do so.”<sup>177</sup> The NYCBA issued what remains a controversial opinion because it found that lawyers may use their own names and profiles to “friend” an unrepresented person on a social networking site without explicitly disclosing their purpose for making the “friend” request.<sup>178</sup>

The San Diego County Bar Association evaluated an employment discrimination case and the “friending” of two high-ranking employees in the defendant’s company.<sup>179</sup> The opinion cautioned that if these employees were decision makers then they may be considered “represented” by defense counsel, thereby barring plaintiff’s lawyer from sending them “friend” requests.<sup>180</sup> A lawyer’s “ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party.”<sup>181</sup>

Most recently, the New Hampshire Bar Association Ethics Committee found that it is a violation of a lawyer’s ethical duty of truthfulness in statements to others for a lawyer to send a “friend” request and not disclose his identity and role in the pending litigation.<sup>182</sup>

These opinions further reflect the use of social media in the practice of law and emphasize not only that lawyers are exploring social media for evidence, but also that the legal ethics rules apply to investigations on the Internet. As the O’Mara Law Group suggests,<sup>183</sup> social media and the law should be embraced in a professional, ethical manner.

#### D. *Other Social Media Considerations*

While the focus of this article is the proposition that social media

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177. N.Y. State Bar Ass’n, Formal Op. 843 (2010), available at [http://www.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions826900/EO\\_843.pdf](http://www.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions826900/EO_843.pdf).

178. N.Y.C. Bar Ass’n, Formal Op. 2010-2 (2010), available at <http://www.nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites>. There are boundaries to allowing a lawyer to “friend” an unrepresented party, but they are not crossed when the lawyer uses “only truthful information.” *Id.*

179. San Diego Cnty. Bar Ass’n, Formal Op. 2011-2 (2011), available at <http://www.sdcbabar.org/index.cfm?pg=LEC2011-2>.

180. *Id.*

181. *Id.*

182. N.H. Bar Ass’n Ethics Comm., Advisory Op. 2012-13/05 (2013), available at [http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13\\_05.asp](http://www.nhbar.org/legal-links/Ethics-Opinion-2012-13_05.asp).

183. See *supra* notes 1–3 and accompanying text.

research is becoming a requirement in the practice of law, lawyers also employ social media for marketing, accessing legal information, or heightening awareness and promoting legal reform. Generally, these areas reflect the optional use of social media, although some lawyers may consider this type of social media engagement to be necessary to maintain a competitive edge in the legal profession. The discussion of the relevant rules below is offered to portray another aspect of the pervasive effect of social media on the practice of law, but not to suggest that engaging in social media for the purpose of marketing or sharing one's views is or should be a requirement for effective lawyering. Nonetheless, lawyers who opt to advertise their services or express their opinions on a social media network must be mindful of the ethical implications of their actions.

### 1. DUTIES TO PROSPECTIVE CLIENT

In the age of the Internet and social media, communication occurs rapidly and in novel formats so that duties to a prospective client may arise inadvertently.<sup>184</sup> Model Rule 1.18 provides that “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.”<sup>185</sup> Furthermore, a consultation for legal services has likely occurred if the lawyer has requested information from an individual, without providing a disclaimer limiting the lawyer's obligations, and the individual responds.<sup>186</sup> However, an individual does not become a “prospective client” by simply providing information unilaterally to a lawyer without any reasonable expectation of a client-lawyer relationship ever being formed.<sup>187</sup> These parameters frame the circumstances in which lawyers may be responsible to a prospective client on a social networking site.<sup>188</sup>

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184. Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 122 (2009) (“The speed of social networking . . . may facilitate referrals, advice, and the formation of apparent attorney-client relationships, all with a few clicks of a mouse. In social networking, casual interactions sometimes cannot be distinguished from more formal relationships. Thus, extreme caution must be exercised.”) (internal citations omitted).

185. MODEL RULES OF PROF'L CONDUCT R. 1.18 (2013).

186. MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. 2 (2013). The key in determining whether someone becomes a prospective client over the Internet or via social networking “is whether the lawyer makes a communication that is seen as *inviting the submission* of information.” Peter A. Joy & Kevin C. McMunigal, *Ethical Concerns of Internet Communication*, 27 CRIM. JUST. Winter 2013 at 45, 46.

187. *Id.*

188. For example, if a lawyer is posting on a blog and not engaging directly with a potential client about the specific facts of a case, then an attorney-client relationship is generally not created. Martin Whittaker, *Ethical Considerations Related to Blogs, Chat Rooms, and Listservs*, 21 THE PROF. LAW., no. 2, 2012, at 3, 5 (“[M]ost blogging software only allows readers to post short, public comments visible to other blog readers—and the fact that people who post to blogs convey the information not to specific lawyers, but to all subscribers or readers of the blog, makes

Arizona, New Mexico, the District of Columbia, and Florida have all opined on the issue of lawyers providing advice online and the potential for duties to a prospective client to arise.<sup>189</sup> All of the aforementioned jurisdictions have cautioned lawyers to draw the line between providing specific legal advice and general information.<sup>190</sup> “Lawyers should not answer specific legal questions from lay people through the Internet unless the question presented is of a general nature and the advice given is not fact-specific.”<sup>191</sup>

## 2. CONFIDENTIALITY

Confidentiality has been the subject of ethics opinions and disciplinary actions arising from conduct on blogs and attorney advertising.<sup>192</sup> Model Rule 1.6 provides that “(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”<sup>193</sup>

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blogs less likely to be the forums in which a potential client discusses representation with a lawyer and is thereby transformed into a prospective client.”). Chat rooms and listservs, on the other hand, have different qualities than blogs—more posts, private one-on-one communications, and real-time communication. *Id.* Lawyers have been warned that when they participate in more personal communication that they “may be taking on duties to preserve confidences and to avoid conflicts of interest.” *Id.*

189. State Bar of Ariz., Formal Op. 97-04 (1997), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=480>; N.M. Ethics Advisory Ops. Comm., Formal Op. 2001-1 (2001), available at <http://www.nmbar.org/legalresearch/eao/2000-2002/2001-1.doc>; D.C. Bar Ass’n, Formal Op. 316 (2002), available at [http://www.dcbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion316.cfm](http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm); Fla. Bar Standing Comm. on Adver., Advisory Op. A-00-1 (2010), available at <http://www.floridabar.org/tfb/TFBETOpin.nsf/SMTGT/ETHICS,%20OPINION%20A-00-1%20Revised>.

190. *See id.*

191. State Bar of Ariz., Formal Op. 97-04 (1997), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=480>. General questions posed by individuals to which lawyers respond with general answers are unlikely to create a lawyer-client relationship, but specific questions pose a much more difficult situation. N.M. Ethics Advisory Ops. Comm., Formal Op. 2001-1 (2001), available at <http://www.nmbar.org/legalresearch/eao/2000-2002/2001-1.doc>.

192. An exploration of attorney advertising and the Internet is beyond the scope of this article; however, it is interesting to note that some states have used the language of Model Rule 1.6 as one of the standards for regulating attorney advertising regarding references to an attorney’s cases or clients on a blog or firm website. *See, e.g.,* RULES REGULATING FLA. BAR 4-7.13 cmt. (2013) (“The fact that some or all of the information a lawyer may wish to advertise is in the public record does not obviate the need for the client’s informed consent.”).

193. ABA MODEL RULES OF PROF’L CONDUCT R. 1.6 (2013). Paragraphs (b) and (c) state:

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

Lawyers must proceed cautiously when using social media and referencing clients' cases.<sup>194</sup> Former public defender Kristine Peshek is the proverbial poster child for violating client confidentiality online. As a public defender, she maintained a blog on which she commented about her clients' cases, referring to her clients by their first names, some derivative of their first names, or their jail identification numbers.<sup>195</sup> Both the Illinois and Wisconsin Supreme Courts suspended Peshek's license to practice law for sixty days, as she was found to have violated Rule 1.6 by publishing client confidences or secrets on the Internet.<sup>196</sup>

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(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) 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.

MODEL RULES OF PROF'L CONDUCT R. 1.6(b)-(c).

194. In California, the State Bar considered whether a lawyer could use her personal Facebook page to talk generally about her cases and victories. State Bar of Cal. Standing Comm. on Prof'l Resp. and Conduct, Formal Op. 2012-186 (2012), available at [http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202012-186%20\(12-21-12\).pdf](http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202012-186%20(12-21-12).pdf). The Bar concluded that most of the statements under consideration were subject to California's advertising regulations. *Id.* It is interesting to note that California did not examine these statements in terms of confidentiality issues, but confidentiality should certainly be a concern when a lawyer posts about her cases on social media. *Id.* Another recent case in Illinois exemplifies the need to avoid divulging client information on social media websites. Betty Tsamis, an Illinois employment lawyer, took to AVVO to respond to negative comments posted by a former client. Tsamis posted "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." Tsamis now faces discipline for alleged violations of Illinois Rules of Professional Conduct 1.6(a), 4.4, and 8.4. Complaint at ¶¶ 21, 23, *In re Matter of Tsamis* (No. 6288664) (Ill. Aug. 26, 2013).

195. Complaint at ¶ 2, *In re Matter of Peshek* (No. 6201779) (Ill. 2009), available at <https://www.iardc.org/09CH0089CM.html>.

196. *In re Kristine Ann Peshek*, Disciplinary Comm'n, M.R. 23712 (Ill. May 18, 2010), available at <http://www.state.il.us/court/SupremeCourt/Announce/2010/051810.pdf>; *In re Disciplinary Proceedings Against Peshek*, 798 N.W.2d 879, 880-81 (Wis. 2011). The Virginia Supreme Court recently ruled, however, that a lawyer may blog about his clients' completed cases using information in the public record, even if the information would be embarrassing or detrimental to the client. *Hunter v. Va. State Bar*, 744 S.E.2d 611, 614-20 (Va. 2013). However,

### 3. JUDICIAL AND LEGAL OFFICIALS

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.<sup>197</sup>

However, a lawyer may express statements about such matters that are “honest and candid” because those statements contribute to “improving the administration of justice.”<sup>198</sup>

The Sean Conway and JoAnne Denison cases illustrate the application of these rules to social media. Sean Conway is a Florida attorney who posted a blog entry on a public website that was entitled, “Judge Aleman’s New (illegal) ‘One-week to prepare’ policy.”<sup>199</sup> Conway made numerous derogatory remarks about the judge before whom he had recently appeared, such as she was an “EVIL UNFAIR WITCH.”<sup>200</sup> When the Florida Bar instituted disciplinary proceedings, Conway defended his comments as permissible in accordance with the First Amendment, but he eventually agreed to a settlement, which was ultimately approved by the Florida Supreme Court.<sup>201</sup>

JoAnne Denison is currently the subject of a disciplinary action in Illinois as a result of her blog posts expounding upon what she alleges to be a corrupt probate system in Illinois.<sup>202</sup> Denison’s blog focuses on the case of a specific former client, which is provided as an example of

the Virginia confidentiality rule retains the Model Code language that information learned from the client may not be revealed if it “would be embarrassing or would be likely to be detrimental to the client” as opposed to the broader definition of confidentiality propounded by the Model Rules and adopted by many states, which states that confidentiality pertains to all information contained in the course of representation. VA. RULES OF PROF’L CONDUCT R. 1.6(a) (2013). The ruling is controversial and is currently limited to Virginia lawyers.

197. ABA MODEL RULES OF PROF’L CONDUCT R. 8.2 (2013).

198. ABA MODEL RULES OF PROF’L CONDUCT R. 8.2 cmt. 1 (2013). *See also* ABA MODEL RULES OF PROF’L CONDUCT R. 8.4(d) (“It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice.”).

199. Report of Referee at 3, Fla. Bar v. Conway, No. SC08-326 (Fla. Oct. 29, 2008).

200. *Id.* Other remarks include stating that Judge Aleman was “seemingly mentally ill”; that she has an “ugly, condescending attitude”; that she “is clearly unfit for her position and knows not what it means to be a neutral arbiter”; and “there’s nothing honorable about that malcontent.” *Id.*

201. *Id.* at 4 (These remarks “not only unfairly undermined public confidence in the administration of justice, but these statements were prejudicial to the proper administration of justice.”). *See also* Jonathan Turley, *Florida Supreme Court Upholds Sanction Against Lawyer Who Called Judge a “Witch” on a Blog*, RES IPSA LOQUITUR (Sept. 30, 2009), <http://jonathanturley.org/2009/09/30/florida-supreme-court-upholds-sanction-against-lawyer-who-called-judge-a-witch-on-a-blog/>.

202. Complaint at ¶ 6, *In re Denison*, No. 6192441 (Ill. Jan. 8, 2013), available at <http://themindfullawstudent.org/resources/JMD-ARDC-Complaint-Jan08.pdf>.

corruption in the probate system.<sup>203</sup> The Illinois Attorney Registration and Disciplinary Commission filed a complaint against Denison alleging that she knew her statements were false or made with reckless disregard as to the truth or falsity of the statements.<sup>204</sup> As this article went to press, Denison was posting documents and discussion about the disciplinary case, which had not yet been resolved.<sup>205</sup>

Thus, whether it is a lawyer posting about her own disciplinary matter, a court decision or ethics advisory opinion encouraging social media investigation of jurors, or an opposing counsel using a Facebook page to propound discovery, all of these circumstances reflect and reinforce the potential value and necessity of incorporating social media into the practice of law in accordance with the legal ethics rules. As discussed above, the legal ethics rules often play a role in a malpractice case, so it follows that the impact of social media upon malpractice law is worthy of consideration.

## V. MALPRACTICE LAW AND SOCIAL MEDIA

The law of malpractice emanated from England,<sup>206</sup> where its early stages of development insulated the elite barristers as opposed to the solicitors and focused primarily on errors of inadvertence rather than errors of judgment.<sup>207</sup> In fact, until the middle of the eighteenth century, the courts struggled to define malpractice as the law of negligence was just beginning to take root.<sup>208</sup> An early 1767 English decision held that a lawyer should not be held accountable for an “honest mistake,” but he could be held accountable for “gross negligence.”<sup>209</sup> This decision laid the foundation for the concept of the standard of care, which was more clearly articulated by an English court in 1830 in the case of *Godefrey v.*

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203. *Id.* In her writings, Denison alleged “that there was corruption in the probate court of Cook County, particularly in relation to Mary Sykes’ probate case, that Sykes was the victim of elder abuse, and that the GALs and the court had acted inappropriately with respect to Sykes’ estate, that they had violated the law, and that they had physically or mentally harmed Sykes.” *Id.* Additionally, she alleged that “there was impropriety going on in relation to the Sykes case; that the GALs and the judges were corrupt; that the GALs and the court had engaged in financial exploitation or had financially profited in some way in relation to Sykes’ guardianship case; that the judge had inappropriately taken away Sykes’ rights; and that Stern, Farenga, and the judge had committed crimes.” *Id.* ¶¶ 6, 10.

204. *Id.*

205. MaryGSykes.com, <http://marygsykes.com/click-here-to-read-my-ardc-complaint-just-for-running-this-blog/> (last visited Nov. 5, 2013).

206. 1 RONALD E. MALLIN & JEFFREY M. SMITH WITH ALLISON D. RHODES, *LEGAL MALPRACTICE* § 1:5, at 19 (2013 ed.).

207. *Id.* (“Barristers manipulated the legal system to remove themselves from possible judicial sanctions from legal malpractice.”).

208. *Id.* (“With negligence just barely emerging, the courts could deal with errors of inadvertence but not those of judgment.”).

209. *Id.* (citing *Pitt v. Yalden*, 98 Eng. Rep. 74, 75 (K.B. 1767)).

*Dalton*.<sup>210</sup> The court explained,

It would be extremely difficult to define any exact limit by which the skill and diligence which an attorney undertakes to furnish the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa* mentioned in some of the cases, for which he is undoubtedly responsible.<sup>211</sup>

The court's holding reflects the emergence of modern malpractice law, which was eventually defined in the United States as "an affirmative duty to use 'reasonable skill and diligence.'"<sup>212</sup>

Despite its early recognition in the United States, legal malpractice claims based upon professional negligence did not become a significant concern for the legal profession until the 1970s when both the number of lawyers and the number of claims significantly increased.<sup>213</sup> Thus,

[l]egal malpractice, as a substantive area of the law, only began to develop within the last 50 years. Even today, many of the procedural rules governing the litigation of a legal malpractice suit are still developing. The law of legal malpractice continues to evolve and is doing so more on a national level rather than by jurisdiction.<sup>214</sup>

A common malpractice cause of action today may involve an allegation of failure to properly investigate or a failure to properly prepare for trial. Unlike the legal ethics rules under which a failure to properly investigate or prepare for trial may give rise to a disciplinary action for violation of the duties of competence and diligence, a failure to properly investigate alone is not necessarily evidence of malpractice.<sup>215</sup> Once the plaintiff establishes that there was a failure to properly investigate, the plaintiff is required to prove that the failure is the proximate cause of actual damages sustained.<sup>216</sup> In fact, an action for malpractice may be based upon a failure to investigate and propound adequate discovery even if the case settles prior to a trial, assuming that proximate cause and actual damage may be proven.<sup>217</sup>

Jett Hanna has suggested that "[i]t should now be a matter of pro-

210. *Godefroy v. Dalton*, 130 Eng. Rep. 1357 (Ct. Com. Pl. 1830).

211. 1 RONALD E. MALLIN & JEFFREY M. SMITH WITH ALLISON D. RHODES, *LEGAL MALPRACTICE* § 1:5, at 20 (2013 ed.) (citing *Godefroy*, 130 Eng. Rep. at 1360).

212. *Id.* (citing *Pennington's Ex'rs v. Yell*, 11 Ark. 212 (1850)).

213. *Id.* § 1:6, at 20.

214. *Id.* at 32.

215. *See, e.g.*, *Bill Branch Chevrolet v. Philip L. Burnett, P.A.*, 555 So. 2d 455, 455 (Fla. 2d DCA 1990) ("An action for legal malpractice must allege the employment of the attorney and neglect of a reasonable duty that has been the proximate cause of loss to his client.").

216. *Id.*

217. *Id.* at 455-56 ("We cannot say as a matter of law that the settlement of this case negates any alleged legal malpractice as a proximate cause of loss.").

fessional competence for attorneys to take the time to investigate social networking sites.”<sup>218</sup> He adds that failure to investigate social media could give rise to a malpractice claim. Hanna’s proposition may be characterized by some as an overreaction to the growing use of social media in the practice of law—especially given that there does not yet appear to be a reported malpractice case based upon the failure to investigate social media. However, conceding the lack of reported precedent, Hanna points to several cases that he claims indicate that investigation of social media may already exist as a requisite standard of care.

For example, in a medical malpractice case in which a motion for a new trial was granted, thereby overturning a defense verdict based upon juror nondisclosure that was discovered in an online database, the Missouri Supreme Court commented, “[I]n light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court’s attention at an earlier stage.”<sup>219</sup> Hanna also notes a few cases in which “the courts have chastised lawyers for failing to use an Internet search to obtain information about parties who cannot be located.”<sup>220</sup> He posits that the failure to properly authenticate social media evidence could provide yet another basis for a malpractice claim and concludes that “[t]he distance to a finding that a lawyer negligently failed to search social media for evidence is a short one.”<sup>221</sup>

Diane Karpman appears to agree with Hanna when she writes about the value of conducting a Google search of jurors and adds, “When a practice or technique becomes ubiquitous in the profession, it demonstrates a potential change in standards of conduct. Failing to routinely employ a free product—in this case Google—that is a wealth of information (almost universally embraced) could provide fodder in a subsequent legal malpractice claim.”<sup>222</sup>

Hanna and Karpman’s observations are reinforced in William Peacock’s recent blog post entitled *Will It Soon be Malpractice Not to be Social Media Savvy?*.<sup>223</sup> Peacock comments on the pervasive nature of

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218. Hanna, *supra* note 92, at 1.

219. Johnson v. McCullough, 306 S.W.3d 551, 558–59 (Mo. 2010).

220. Hanna, *supra* note 92, at 5 (citing Munster v. Groce, 829 N.E.2d 52 (Ind. Ct. App. 2005); DuBois v. Butler *ex. rel.* Butler, 901 So.2d 1029 (Fla. 4th DCA 2005); Weatherly v. Optimum Asset Mgmt., 928 So.2d 118 (La. Ct. App. 2005)).

221. Hanna, *supra* note 92.

222. Diane Karpman, *Web Offers Pearls of Wisdom, but Also Legal Tangles, Ethics Byte*, CAL. ST. B.J. (Aug. 2013), <http://www.calbarjournal.com/August2013/EthicsByte.aspx>.

223. William Peacock, *Will It Soon be Malpractice Not to be Social Media Savvy?*, STRATEGIST (May 17, 2013, 8:59 AM), <http://blogs.findlaw.com/strategist/2013/05/is-it-malpractice-not-to-be-social-media-savvy.html>.



social media and its growing impact on the practice of law. He advises,

What if the most valuable evidence you could possibly locate lies in social media? Are you doing your client a disservice by not understanding the intricacies of tweeting, the snapshot streams of Instagram, or the persons pinning to pin posts on Pinterest? The beauty, and danger of social media is that users are disinhibited about over-sharing. Instagram now, get arrested for identity theft later, right?

We're almost certainly not at the point where the standard of care involves social media savvy, but if you want to do the absolute best by your client, you might want to start looking into the various services, or at least consider adding a Tweeting, Instagramming, status-updating, Flipboard-flipping and blogging guru to your support staff.<sup>224</sup>

Peacock's suggestion that regardless of whether social media use has yet been elevated to a standard of care status, social media may make one a more competent, effective lawyer dovetails with Hanna's observation that currently there remains only a short distance to travel to assign negligence to a lawyer who fails to use social media. Although finding causation and damages renders a social-media-based malpractice claim a more complex pursuit than the proof required to support a legal-ethics-based disciplinary action or court-ordered sanctions for discovery abuse, the indications in all three areas are that lawyers who do not take heed of the availability and significance of social media are vulnerable.

## VI. CONCLUSION

Social media use has become ubiquitous in our society. It has the potential to facilitate uprisings, contribute to political elections, unite people with common interests and hobbies, educate people, and allow people to share any and every aspect of their lives. Social networking is a well-established subculture; the network contains evidence of peoples' lifestyles, thoughts about current issues, and comments about events that occasionally become the subject of legal action. The current generation in law school considers participation in social media to be second nature; personal privacy has morphed into a vastly more limited space.<sup>225</sup>

How much longer, then, may the legal profession continue to prac-

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224. *Id.*

225. Rick Whiting, *Facebook's Zuckerberg: Face It, No One Wants Online Privacy Anymore*, CRN (Jan. 11, 2010, 10:36 AM), <http://www.crn.com/news/security/222300279/facebook-zuckerberg-face-it-no-one-wants-online-privacy-anymore.htm>; BROWNING, *LAWYER'S GUIDE TO SOCIAL NETWORKING*, *supra* note 5, at 21 ("Facebook founder and chief executive Mark Zuckerberg, however, points to a generational shift in expectations of privacy, saying that people

tice without incorporating social media as a component of competence, diligence, and a reasonable duty to investigate a case? Change—especially driven by technology—often brings uncertainty and discomfort. The telephone was discombobulating for some. The advent of the Internet and email was initially overwhelming for some lawyers who were accustomed to having secretaries type letters from a handwritten draft or a dictation device. Neither the developers of the telephone nor those of the Internet and email slowed their progress for the legal profession.

Social media use is infiltrating global society at a record pace, thereby compelling the legal profession to take note or suffer the consequences. In the words of Robert Ambrosi, “When you have an institution not addressing social networking it overlooks the fact that any number of people are involved in social networking . . . It’s important that law firms wake up and smell the coffee because this is happening all around them and they should be a part of it.”<sup>226</sup>

Perhaps the legal ethics and malpractice considerations further compel the metaphor and suggest that lawyers should “wake up and *drink* the coffee,” as they peruse social media networks to discover relevant evidence and thereby more effectively represent their clients. As the Pennsylvania court that ordered that a defendant be granted access to the non-public portions of a plaintiff’s social media pages explains,

By definition, a social networking site is the interactive sharing of your personal life with others; the recipients are not limited in what they do with such knowledge. With the initiation of litigation to seek a monetary award based upon limitations or harm to one’s person, any relevant, non-privileged information about one’s life that is shared with others and can be gleaned by defendants from the internet is fair game in today’s society.<sup>227</sup>

Perhaps the larger message to be gleaned is if you are not in the game, you cannot win.

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no longer want “complete privacy.” He says, “Our core belief is that one of the most transformational things in this generation is that there will be more information available.”).

226. Carol Elefant, *How Lawyers Are Using Social Media*, LEGAL BLOG WATCH (Mar. 6, 2009, 4:32 PM), [http://legalblogwatch.typepad.com/legal\\_blog\\_watch/2009/03/how-lawyers-are-using-social-media.html#comments](http://legalblogwatch.typepad.com/legal_blog_watch/2009/03/how-lawyers-are-using-social-media.html#comments) (citing the Robert Ambrosi comments in the Chicago Lawyer Magazine).

227. *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535, 2011 WL 2065410 (Pa.Ct. Com. Pl. of Northumberland Cnty., Pa. May 19, 2011).