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LAWYERS AND SOCIAL MEDIA: THE LEGAL ETHICS OF TWEETING, FACEBOOKING AND BLOGGING

By Michael E. Lackey Jr.[*] *and Joseph P. Minta*[**]

I. INTRODUCTION[***]

Lawyers should not—and often cannot—avoid social media. Americans spend more than 20% of their online time on social media websites, which is more than any other single type of website.[1] Many young lawyers grew up using the Internet and spent most of their college and law school years using social media sites. Some older attorneys have found that professionally-focused social media sites are valuable networking tools, and few big companies or law firms would ignore the marketing potential of websites like Facebook, Twitter, LinkedIn or YouTube. Finally, for litigators, these sites provide valuable information about witnesses and opposing parties.[2]

Yet social media sites are also rife with professional hazards for unwary attorneys. Rapidly evolving legal doctrines, fast-paced technological developments, a set of laws and professional rules written for the offline world, and the Internet's infancy provide only an incomplete map for lawyers trying to navigate the social media landscape.

Recent developments in social media technology are exposing the tensions inherent in older ethical rules and provoking difficult questions for lawyers seeking to take advantage of this new technolo-

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[***] This article expresses the views of the authors, but not of the firm.

[1] *What Americans Do Online: Social Media and Games Dominate Activity*, NIELSEN WIRE (Aug. 2, 2010), http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/. This number jumps to more than twenty-five percent when video-viewing sites like YouTube are added to the total. *Id.*

[2] Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious, It's Also Dangerous*, 97 A.B.A. J. 48, 51 (2011).

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gy. For example, how can a "tweet" comply with legal advertising disclaimer rules when the required disclaimer exceeds the 140-character limit for the mini-post?[3] How can attorneys avoid the unauthorized practice of law in far-flung states when blog posts and Facebook messages are sent nationally or even globally?[4] And how can an attorney avoid an inadvertent conflict of interest when he receives an anonymous online comment that actually comes from an adverse party?[5]

Additional questions arise when social media infiltrate the courthouse and the courtroom. For instance, can (and, perhaps more importantly, should) a judge "friend" or "follow" an attorney online? Can that judge friend a third party to resolve a discovery dispute? Can an attorney friend an opposing party to obtain potentially incriminating information, or can an attorney obtain that information directly from the social media provider?

This article discusses these common social media scenarios and aims to provide guidance on the proper way for lawyers to participate in the social media space. Part II provides a brief primer on social media and the most popular social media sites. Part III examines some of the potential ethical conflicts arising from social media and highlights many of the recent cases discussing lawyers' use of these increasingly popular sites. Specifically, this section focuses on some of the most likely sources of ethical violations, including potential violations of the duty of confidentiality, of legal advertising rules, and of prohibitions of the unauthorized practice of law. In doing so, this section makes some recommendations for lawyers trying to find their way through the largely uncharted ethical areas in the intersection between law and cyberspace. Part IV focuses on the ethical implications of social media by members of the judiciary, examining sensitive areas for attorneys, judicial employees, and judges. Finally, Part V discusses some of the basics that lawyers need to know so they can use social media to better serve a client's needs. In

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[3] *See generally* MODEL CODE OF PROF'L CONDUCT R. 7.3(c) (2007) (requiring that written and electronic communications to clients bear the words "Advertising Material").

[4] *See generally* MODEL CODE OF PROF'L CONDUCT R. 5.5(a) (2007) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.").

[5] *See* MODEL CODE OF PROF'L CONDUCT R. 1.7 (2007); MODEL CODE OF PROF'L CONDUCT R. 1.8 (2007); MODEL CODE OF PROF'L CONDUCT R. 1.10 (2007); MODEL CODE OF PROF'L CONDUCT R. 1.11 (2007). Each rule contains restrictions that would certainly raise ethical issues resulting from such contact.

particular, this section recommends that lawyers understand how to ethically obtain social media information in discovery or investigations and suggests that in-house counsel carefully craft policies governing appropriate social media use in hiring, firing, and other employment decisions.

II. BACKGROUND ON SOCIAL MEDIA

Although social media sites share certain key characteristics,[6] the purposes and architecture of these sites are nearly limitless. Social media has been defined as:

> web-based services that allow individuals to (1) construct public or semi-public profiles within a bounded system, (2) articulate a list of other users with whom they share a common connection, and (3) view and traverse their list of connections and those made by others within the system.[7]

Sites can conform to this definition while nonetheless taking a variety of forms. For instance, blogs (a blend of the term "web log") are "personal Internet journals" that are updated on a regular basis by the author or "blogger," who often does not have any specialized training.[8] These sites were some of the earliest social media sites, first sprouting up in the earliest days of the Internet.[9] Blogs can contain information related to a specific topic and often are written in a personal tone.[10] Thanks in part to websites like Blogspot, Word Press, and Tumblr that make blog creation relatively simple, there are now more than 165 million blogs.[11]

Today, the most well-known social media sites include social networking sites like Facebook and Myspace.[12] These sites allow individuals and organizations to connect virtually with others to com-

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[6] Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 210 (2007).

[7] *Id.* at 211.

[8] *See What Are Blogs?*, WISEGEEK, http://www.wisegeek.com/what-are-blogs.htm (last visited July 20, 2011).

[9] *Id.*

[10] *Id.*

[11] *BlogPulse Stats*, BLOGPULSE, http://www.blogpulse.com/ (last visited July 20, 2011).

[12] Myspace, previously known as "MySpace," rebranded its website and introduced a new suite of products on October 27, 2010. *See Meet the New Myspace*, MYSPACE (Oct. 27, 2010), http://www.myspace.com/pressroom/2010/10/meet-the-new-myspace/.

municate privately, share photographs and other digital media, and make public or semi-public announcements.[13] LinkedIn provides similar services to professionals, allowing these individuals to network in cyberspace by posting resumes, sending messages, and connecting with current and former colleagues.[14] Currently, Facebook has more than 750 million active users, with 50% of those users logging in on any given day.[15]

Twitter, one of the fastest growing social media sites, is a free social networking and micro-blogging service that enables users to send and read each others' updates, known as "tweets."[16] Because Twitter relies heavily on cell phone text message technology, these "tweets" are limited to 140 characters.[17] These tweets are displayed on the author's profile page and are delivered to other users who have subscribed to the author's messages by following the author's account.[18] Twitter reportedly has more than 100 million users.[19]

Video and photo-sharing sites like YouTube, Veoh, Flickr, Yahoo! Video, and MSN Soapbox are also examples of social media. YouTube users alone posted 13 million hours of video in 2010, with forty-eight hours of video uploaded to the site every minute.[20]

Originally, users joined sites like these to share information and individual user-generated content with smaller networks of friends and relatives.[21] Today, however, social media sites are becoming popular tools for open marketing, viral or stealth marketing, and information sharing.[22] For example, many politicians, entertain-

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[13] *See What Is Facebook?*, WISEGEEK, http://www.wisegeek.com/what-is-facebook.htm (last visited Oct. 11, 2011); *What Is Myspace?*, WISEGEEK,http://www.wisegeek.com/what-is-myspace.htm (last visited Oct. 11, 2011).

[14] *About Us*, LINKEDIN, http://press.linkedin.com/about (last visited Oct. 11, 2011).

[15] *Statistics*, FACEBOOK, http://www.facebook.com/press/info.php?statistics (last visited July 20, 2011).

[16] *About Twitter*, TWITTER, http://twitter.com/about (last visited July 20, 2011).

[17] *What Is Twitter?*, TWITTER, http://business.twitter.com/basics/what-is-twitter (last visited July 6, 2011).

[18] *Id.*

[19] *Id.* According to Twitter, its users post 230 million "tweets" per day. *Id.*

[20] *Statistics*, YOUTUBE, http://www.youtube.com/t/press_statistics (last visited Oct. 11, 2011).

[21] Boyd & Ellison, *supra* note 6, at 214. The first recognizable site was launched in 1997, called SixDegrees.com. However, it closed and its founders later stated that the site was too ahead of its time. *Id.*

[22] *See How to Use Social Networking Sites for Marketing and PR*, N.Y. TIMES, Dec. 24, 2008, http://www.nytimes.com/allbusiness/AB11702023_primary.html. PR managers are advising companies to use social networking sites as an outlet for marketing and PR. *Id.*

ers, universities, nonprofit organizations, sports leagues, media companies, and other businesses all have their own "channels" on YouTube.[23] Moreover, on Facebook, consumers can "friend" companies like Starbucks, Coca-Cola, and McDonalds.[24] In all, 79% of Fortune 100 companies use at least one form of social media, and 20% of companies are using all of the four main technologies (Facebook, Twitter, YouTube, and blogs).[25] As a result, a variety of industries, including the legal industry, have been forced to figure out how social media fit into their marketing models.

III. COMMON ETHICAL PROBLEMS POSED BY SOCIAL MEDIA

Like most professionals, lawyers have been unable to avoid social media. As of 2009, more than 70% of lawyers are members of a social media site—up nearly 25% from the past year—with 30% growth reported among lawyers ages forty-six and older.[26] According to the ABA's 2010 Legal Technology Survey Report, 56% of attorneys in private practice are on social media sites, up from 43% the year before.[27]

Law firms are also experimenting with how social media fit into their marketing models. Some firms, for example, operate Twitter accounts, touting litigation news and law firm accomplishments 140 characters at a time.[28] Consequently, the viral nature of social

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[23] *See Channels—YouTube*, YOUTUBE, http://www.youtube.com/members (last visited July 20, 2011). Individuals and organizations with their own YouTube channels include President Obama, Harvard University, Universal Music Group, Showtime, Justin Bieber, Apple, Inc., and the Travel Channel. *Id.*

[24] *See* James Ledbetter, *Introducing the Big Money Facebook 50*, THEBIGMONEY (Nov. 30, 2009, 12:00 AM), http://www.thebigmoney.com/articles/-big-money-facebook-50/2009/11/30/introducing-big-money-facebook-50?page=0,0 (discussing the companies making the best use of Facebook). *Id.* Several consumer products also have their own Facebook pages. For example, at one point Kellogg's Pop-Tarts were winning over more than 7,000 new Facebook "fans" per day. *See* Stuart Elliott, *Marketers Trade Tales About Getting to Know Facebook and Twitter*, N.Y. TIMES, Oct. 15, 2010, at B2.

[25] *See* Catherine Smith, *Fortune 100 Companies' Social Media Savvy (STATS)*, HUFFINGTON POST (last updated Aug. 10, 2010, 5:12 AM), http://www.huffingtonpost.com/2010/06/10/fortune-100-companies-soc_n_607366.html (noting that the Fortune 100 Companies are the most active on Twitter).

[26] Tresa Baldas, *They Blog, They Tweet, They Friend; And, Oh Yes, They Discover Electronically: Tech Advances Redesigned Lawyers' Lives*, 32 NAT'L L.J. 11, 11 (2009).

[27] Press Release, ABA, ABA Legal Tech. Survey Results Released (Sept. 28, 2010) (on file with the Touro Law Review).

[28] *See, e.g.*, Tamer El-Ghobashy, *Tweeting for Lawyers 101*, WALL ST. J. LAW BLOG (July 15, 2011, 10:14 AM), http://blogs.wsj.com/law/2011/07/15/tweeting-for-lawyers-101/.

media can cause management headaches when, for example, partners at one major law firm learned that a lighthearted self-congratulatory song intended for firm ears only found its way onto a legal blog and then onto YouTube.[29]

In addition to public relations frustration, lawyers and law firms also need to consider whether their forays into the social media world place them on the wrong side of any ethical or legal rules. Lawyers around the country have learned that in the social media universe, serious professional fallout can be just one click away.[30] However, interpreting the various ethical proscriptions can be difficult because existing ethics rules generally are geared toward the offline world, and most laws and rules were promulgated in the early years of the Internet before most social media sites were invented.[31]

In response to new technologies, the American Bar Association formed its "Commission on Ethics 20/20" in 2009, recognizing that "[t]echnological advances and globalization have changed our profession in ways not yet reflected in our ethics codes and regulatory structure."[32] This commission released its initial proposal on June 29, 2011.[33] The initial recommendations focus on when electronic communications give rise to an attorney-client relationship, which types of client development tools lawyers may use, and when online communications constitute "solicitations."[34] These suggestions will undergo additional comment and revision before they are presented

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[29] Michael J. de la Merced, *Unauthorized Enjoyment of Song Irks Law Firm*, N.Y. TIMES, Aug. 27, 2007, http://www.nytimes.com/2007/08/27/business/media/27lawsuit.html (discussing Nixon Peabody's attempts to stop the viral spread of a song touting a recent legal award).

[30] *See generally* Seidenberg, *supra* note 2.

[31] The ABA Model Rules of Professional Conduct were last revised in 2002. *Model Rules of Professional Conduct: Preface*, AM.BAR, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preface.html (last visited July 20, 2011). Congress enacted the Stored Communications Act (SCA) in 1986, which restricts the ability of certain third-party service providers to release user information. 18 U.S.C. § 2701 (a)(1)-(2) (2006). The majority of today's most popular social media sites, however, did not exist until 2003 or later. *See* Boyd & Ellison, *supra* note 6, at 212 fig.1 (showing that LinkedIn and MySpace were invented in 2003, Facebook was launched in 2004, YouTube in 2005, and Twitter in 2006).

[32] Press Release, ABA, ABA President Carolyn B. Lamm Creates Ethics Comm'n to Address Tech. and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009) (on file with the Touro Law Review).

[33] Press Release, ABA, ABA Comm'n on Ethics 20/20 Recommends No New Restrictions on Lawyer Adver., (June 29, 2011) (on file with the Touro Law Review).

[34] *Id.*

to the association's policymaking House of Delegates in 2012.[35] It is too soon to know just how much clarity these revised rules will provide, and in the meantime, lawyers need to understand how their online actions correspond to existing ethics rules.

This Part examines common ethical hazards for lawyers using social media in practice. In particular, this Part considers the duty of confidentiality, legal advertising rules, and the unauthorized or inadvertent practice of law. This Part also analyzes some of the recommendations from the ABA's Commission on Ethics 20/20 and provides a few best practices for attorneys on each of these subjects.

A. The Duty of Confidentiality

Model Rule 1.6(a) protects lawyer-client confidentiality and prohibits lawyers from revealing information "relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted" under one of a handful of listed exceptions.[36] The ease of sharing and publicizing information through social media, however, raises a danger that lawyers might fall afoul of this duty.

The disclosure of confidential information can occur in myriad ways. Blog posts, Facebook status messages, and tweets all allow for instant publication of information, including information about procedural developments, interparty negotiations, courtroom developments, and business-related travel.[37] Many social media sites such as Facebook and LinkedIn also offer the ability to import contact information from existing e-mail accounts, but doing so may publicize details about clients, witnesses, consultants, and vendors.[38] Photo-sharing sites can host photos that accidentally display confidential information such as evidence, trial materials, or personnel locations, while geo-mapping sites like Foursquare that publish users' location information could permit lawyers to reveal information such as a current investigatory trip or meeting.[39] Even a post that hides the

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[35] *Id.*

[36] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007).

[37] Jeffrey T. Kraus, *Online Social Networking—Ethics and Liability Issues*, 2010 LOSS PREVENTION J. 8, 9.

[38] *Id.*; Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 118-19 (2009).

[39] Antone Johnson, *Ethics Tips for Lawyers Using Social Media*, BOTTOM LINE LAW

identity of a client and recounts only public details of a trial still might reveal confidential information.[40]

Indeed, there can be an inherent " 'tension between the duty of confidentiality and the Facebook norm of enormously reduced, if not nonexistent, personal boundaries.' "[41] And although many lay people tweet, post, or blog their every thought with little self-censorship and few repercussions, inappropriate use of social media in the legal world can result in the release of confidential information, a waiver of the attorney client-privilege, or disciplinary action.[42]

Social media even cost one Illinois public defender her job after it was revealed that she was blogging about her cases.[43] In the blog posts, the assistant public defender referred to "clients by either their first name, a derivative of their first name, or by their jail identification number."[44] In the posts she disclosed her clients' crimes and drug use as well as the details of private client conversations.[45] Because the posts included confidential client information, she was fired, charged with violating legal ethics, and ultimately received a sixty-day suspension from the state supreme court.[46]

A client's use of social media can similarly create problems with respect to attorney-client confidentiality. A federal judge in California, for example, upheld an order compelling discovery of a

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GROUP, http://bottomlinelawgroup.com/bllg/wp-content/uploads/2010/11/Ethics-Tips-for-Lawyers-Using-Social-Media.pdf (last visited Oct. 13, 2011).

[40] Nev. Comm. on Ethics & Prof'l Responsibility, Formal Op. 411 (2009) (discussing Rule 1.6(a) which requires that all information relating to a client be confidential, including the mere identity of a client).

[41] Leslie A. Gordon, *Why Can't We Be Friends?*, ABA J. (Jan. 1, 2010, 9:00 PM), http://www.abajournal.com/magazine/article/why_cant_we_be_friends/ (quoting legal ethicist, John Steele).

[42] *See* Rita M. Glavin, Note, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 63 FORDHAM L. REV. 1809, 1810-11, 1823-24 (1995) ("A prosecutor, . . . is not authorized to disclose representational information for purposes unrelated to his professional duties, such as for literary or media purposes, and he must obtain consent, as required by confidentiality rules, to do so."); Adam C. Losey, Note, *Clicking Away Confidentiality: Workplace Waiver of Attorney-Client Privilege*, 60 FLA. L. REV. 1179, 1182 (2008) ("[E]mployees who e-mail an attorney from the workplace, or from a workplace e-mail account, often lose the evidentiary protections of attorney-client privilege.").

[43] *See* Seidenberg, *supra* note 2, at 43.

[44] Complaint at ¶ 2, In the Matter of Kristine Ann Peshek, No. 09 CH 89 (Ill. Attorney Registration & Disciplinary Comm'n Aug. 25, 2009).

[45] *Id.* ¶¶ 4-8.

[46] Debra Cassens Weiss, *Blogging Assistant PD Gets 60-Day Suspension for Post on Little-Disguised Clients*, ABA J. (May 26, 2010, 8:57 AM), http://www.abajournal.com/news/article/blogging_assistant_pd_gets_60-day_suspension_for_posts_on_little-disguised_/.

client's e-mails, instant message conversations, and blog posts after concluding that discussions of conversations with counsel waived attorney-client privilege.[47] In the lawsuit, which itself involved social media, a woman sued Universal Music after the company asked YouTube to remove a video she posted of her son dancing to the Prince song, "Let's Go Crazy."[48] Universal Music sought discovery of the plaintiff's communications with her lawyer after computer records revealed that the woman used a social media service to discuss her counsel's motivations for representing her pro bono, her decision to abandon her state law claims, and the factual allegations behind her case.[49] As the judge explained, "When a client reveals to a third party that something is 'what my lawyers thinks,' she cannot avoid discovery on the basis that the communication was confidential."[50]

The current proposal from the ABA's Commission on Ethics 20/20 does not include any changes to the existing confidentiality rules.[51] The comments on the current rule note only that lawyers "must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure"[52] and must choose a method of communication that has a reasonable expectation of confidentiality when transmitting information.[53] Because, in this instance, emerging technologies merely provide a new medium for conveying information, this guidance can continue to be applied with relative ease to the online world. For example, as with other technologies, lawyers should understand how social media sites function and the information that is shared by each site used.[54] And,

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[47] *See* Lenz v. Universal Music Corp., No. 5:07-cv-03783 JF, 2010 WL 4789099, at *1 (N.D. Cal. Nov. 17, 2010).

[48] *Id.*

[49] *Id.* at *1-4. In one chat, for example, she told her friend that she had told one of her attorneys that it was fine to drop her state law claim because "pursuing the federal portion of the case achieves the ends [she has] in mind." *Id.* at *3. In another conversation, she hinted at the content of an unfiled brief her lawyer had drafted. *Id.* at *4 n.2.

[50] *Lenz*, 2010 WL 4789099, at *5.

[51] *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.6 (existing confidentiality rules), *with* Memorandum from the ABA Comm'n on Ethics 20/20 on Initial Draft Proposals on Lawyers' Use of Tech. and Client Dev. (June 29, 2011) (on file with the Touro Law Review) (proposing amendments to Rule 1.18 entitled Duties to Prospective Clients, and 7.3 entitled Direct Contact with Prospective Clients, but no proposals made to amend Rule 1.6) [hereinafter Technology and Client Development].

[52] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 16.

[53] *Id.* R. 1.6 cmt. 17.

[54] *See* J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 301 (2004)

as discussed in greater detail below, privacy settings on social media sites can play an important role in limiting the disclosure of information; lawyers should employ these filters and settings to the extent possible.[55] Finally, carefully dividing personal and professional networks can help avoid issues relating to contact-sharing.

B. Legal Advertising

Social media use can often blur the lines between private communication and public advertisement. If that line is crossed, lawyers could run afoul of their jurisdictions' ethical rules governing attorney advertising and solicitation.

With respect to explicit social media advertising, the guidance for lawyers is rather straightforward. In general, lawyers and law firms should ensure that any postings, messages, and video campaigns are permitted and are approved by the required authorities under their jurisdictions' relevant rules.[56] This may include the need to keep copies of the social media posting for later review by state authorities.[57]

Some specific types of social media communication pose additional risks that attorneys need to consider, as many attorneys may not realize their actions online may fall under the rules governing advertising. For example, Connecticut's ethical rules suggest that even a simple LinkedIn invitation to another user that links to a lawyer's personal page describing his practice may be an advertisement subject to regulation.[58] With some social media sites, however, it can be impossible for an attorney's communications to comply with legal advertising rules that have yet to adapt to this new technology. For

(observing that lawyers "may be required to keep abreast of technological advances in security, as well as the technological advances being developed by hackers who are seeking to steal secrets from third parties").

[55] *See infra* Section V: A.

[56] *See* Merri A. Baldwin, *Ethical and Liability Risks Posed by Lawyers' Use of Social Media*, AM. BAR (July 28, 2011), http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html (noting that "[t]he same ethical and professional rules apply to communications made on social networking sites as apply to any other communications by lawyers, and it is important for lawyers to understand how to apply these rules to new situations").

[57] *See, e.g.*, Ariz. Comm. on Ethics & Prof'l Responsibility, Informal Op. 97-04 (1997) (noting that for certain solicitations "a copy of the communication must be maintained for three years").

[58] *See* Martin Whittaker, *Internet Advertising Isn't Exempt from Rules, Speakers Make Clear in Separate Programs*, 24 LAW. MAN. PROF. CONDUCT 444, 444-45 (2008).

example, the 140-character limit on tweets sometimes can make it impossible to include the required disclaimer requirements.[59]

In some instances, attorneys can even be required to police the content others post online. Rating and review sites that allow consumers to search for a particular type of business or company and read reviews that other consumers post can implicate local ethics rules.[60] Although lawyers have little or no control about what clients post to their "profiles" on many of these sites, some state bar associations have nonetheless concluded that these sites can implicate state advertising rules. For instance, the Ethics Advisory Committee for the South Carolina Bar Association concluded that any lawyer who adopts, endorses, or otherwise "claims" information on a rating or review site is responsible for making sure the information complies with the relevant rules of professional conduct.[61] The committee explained that lawyers generally are not responsible for information not placed or disseminated by the lawyer or on the lawyer's behalf, but "by requesting access to and updating any website listing (beyond merely making corrections to directory information), a lawyer assumes responsibility for the content of the listing."[62]

Once a posting qualifies as an advertisement, the traditional rules apply. Model Rule 4.1, for instance, prohibits "puffery," or "mak[ing] a false statement of material fact or law to a third person."[63] Professional rules in Illinois and New York prohibit attorneys from using words like "specialist," "certified," or "expert" in advertising, unless they possess certain qualifications.[64] The Arizona State Bar concluded that such rules mean that a lawyer cannot state in an online chat that he "specializes" in a particular area of law unless he is certified in that area of law with the state bar.[65] Finally, Texas requires attorney video advertising to be filed with the state's Advertis-

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[59] *See, e.g.*, WASH. RULES OF PROF'L CONDUCT R. 7.2(c) (2006) (requiring that all advertisements contain "the name and office address of at least one lawyer or law firm responsible for its content").

[60] *See* S.C. Ethics Advisory Comm., Advisory Op. 09-10 (2009) (presuming that lawyers adopt or authorize certain advertisements).

[61] *Id.*

[62] *Id.*

[63] MODEL RULES OF PROF'L CONDUCT R. 4.1 (2007).

[64] *See, e.g.*, ILL. RULES OF PROF'L CONDUCT R. 7.4(c) (2010); N.Y. RULES OF PROF'L CONDUCT R. 7.4(a) (2011).

[65] Ariz. Comm. on Ethics & Prof'l Responsibility, Informal Op. 97-04.

ing Review Committee,[66] and the Texas State Bar reminds attorneys that this filing requirement extends to firm videos posted on video-sharing sites like YouTube, Myspace, or Facebook if those videos solicit legal services and no exemption applies.[67]

To avoid these risks, lawyers should refrain from editing, updating, expanding, or otherwise "claiming" profiles created by third parties, unless they are comfortable being responsible for the content.[68] Regardless, attorneys should monitor social profiles for factual accuracy, whether those profiles are third-party created or self-maintained.[69] This includes omitting any representation of expertise if it has not been approved by the proper authorities.[70] Finally, lawyers should phrase descriptions of past work and experience in ways that emphasize the fact-specificity of each outcome and include appropriate disclaimers.[71]

Because of some of the confusion surrounding online legal advertising, the ABA's Commission on Ethics 20/20 studied the existing advertising rules extensively.[72] The commission's initial proposal, however, recommended few changes.[73] The commission advised leaving the text of the current Model Rule 7.2 unchanged,[74] but in its report the commission acknowledged that the Internet blurs the lines between advertising and lawyer referral.[75] For example, one firm recently distributed free t-shirts bearing the firm's name, then offered a chance to win a prize to everyone who posted a photo on Facebook of them wearing the shirt.[76] The commission explained that because the firm was arguably giving people something "of val-

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[66] TEX. MODEL CODE OF PROF'L CONDUCT DR 7.07 (2005).

[67] Kraus, *supra* note 37, at 10.

[68] S.C. Ethics Advisory Comm., Advisory Op. 09-10.

[69] *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT R. 7.1 (2007) (prohibiting "a false or misleading communication about the lawyer or the lawyer's services"). Careful monitoring can also help uncover potentially defamatory reviews from disgruntled clients. *See* Cynthia Foster, *Lawyer Sues Over Ex-Client's Bad Review*, THE RECORDER (Nov. 3, 2011), *available at* http://www.law.com/jsp/ca/PubArticleFriendlyCA.jsp?id=1202523864054.

[70] *See* MODEL RULES OF PROF'L CONDUCT R. 7.4(a) (2007) (stating that "[a] lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law").

[71] *See, e.g.*, Ariz. Comm. on Ethics & Prof'l Responsibility, Informal Op. 97-04 (prohibiting advertisements that "create an unjustified expectation").

[72] *See* Memorandum from the ABA Comm'n on Ethics 20/20 on Client Confidentiality and Lawyers' Use of Tech., (Sept. 20, 2010) (on file with the Touro Law Review).

[73] Press Release, *supra* note 33.

[74] Technology and Client Development, *supra* note 51.

[75] *Id.*

[76] *Id.*

ue" by offering them an opportunity to win a prize for "recommending" the law firm's services, such a promotion might violate existing ethics rules.[77]

The main change the ABA Commission recommended can be found in its comments on Rule 7.2, which clarify what it means to "recommend" a lawyer's services, defining a lawyer recommendation as "[a] communication. . .[that] endorses or vouches for a lawyer's credentials, abilities or qualities."[78] The comment also clarifies when "a lawyer may pay others for generating [Internet-based] client leads."[79] Under this new definition, the t-shirt promotion, for example, would not be a recommendation because "wearing the t-shirts could not reasonably be understood as a 'recommendation' (i.e., it is not reasonably understood as an endorsement of the law firm's credentials, abilities, or qualities)."[80]

Beyond this clarification, however, the proposal does little more than add "the Internet, and other forms of electronic communication" to the list of "most powerful media for getting information to the public."[81] A co-chairwoman of the ABA Commission explained that "[t]hough the Model Rules were written before these technologies had been invented, their prohibition of false and misleading communications apply just as well to online advertising and other forms of electronic communications that are used to attract new clients today."[82] The proposal, however, does little to resolve other existing ambiguities.

C. The Unauthorized or Inadvertent Practice of Law

Although it is possible to use social media merely for passive advertising, these platforms facilitate, and even encourage, dynamic, interactive use. However, this dynamism, combined with the broad reach of social media, creates the risk of the inadvertent, and sometimes unauthorized, practice of law.

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[77] *Id.*

[78] *Id.*

[79] Technology and Client Development, *supra* note 51.

[80] *Id.* ("[A] lawyer may pay others for generating client leads, such as Internet-based client leads, . . . as long as the person does not recommend the lawyer and any payment is consistent with Rule 1.5(e) . . . and Rule 5.4 . . . .").

[81] *Id.*

[82] Press Release, *supra* note 33 (quoting Commission Co-Chair Jamie Gorelick, a partner at Wilmer Cutler Pickering Hale and Dorr LLP in Washington, D.C.).

First, social media communications are rarely one sided. Social media sites make it just as easy for people in other jurisdictions to leave blog comments, send Facebook messages, or tweet back to lawyers, and because anonymity or pseudonymity are common online, it is not always possible for the lawyer to know where the communication originated. This further complicates a lawyer's attempts to follow licensing rules.

As one commentator notes, "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[, and i]n social networking, casual interactions sometimes cannot be distinguished from more formal relationships."[83] As a result, lawyers need to monitor interactions with non-lawyers carefully to avoid creating the appearance of an attorney-client relationship, or even a *prospective* attorney-client relationship. This is particularly important because ethics rules provide that "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation," except in limited circumstances.[84] Under Model Rule 1.18, if a lawyer receives information from a prospective client that would be harmful to an existing client, he is disqualified from representing clients with materially adverse interests.[85] Such disqualification can have far-reaching consequences because Rule 1.18 also prevents attorneys at the same firm from representing the client unless both the existing client and the prospective client consent or if the lawyer who received the information "took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client," the disqualified lawyer is "timely screened" from representation, and the prospective client receives prompt written notice.[86]

Second, social media sites permit users to send information regionally, nationally, or even globally. But the practice of law is still bound by jurisdictional limits with lawyers regulated and licensed on a state-by-state basis, with disciplinary charges awaiting those who practice in jurisdictions where they are not licensed.[87]

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[83] Bennett, *supra* note 38, at 122.

[84] MODEL RULES OF PROF'L CONDUCT R. 1.18(b) (2007).

[85] *Id.* R. 1.18(c).

[86] *Id.* R. 1.18(d)(2).

[87] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 5.5(a) ("A lawyer shall not practice law

With the growth of social media, the same technology that allows lawyers to easily send information across global networks also makes it easy for lawyers to engage in law practice within jurisdictions where they are not licensed.[88]

Finally, the frequent use of anonymity and pseudonymity online also can give rise to inadvertent conflicts of interests as lawyers unintentionally develop relationships with parties who have interests that are adverse to those of existing clients.[89] A lawyer also may state a position on an issue that is adverse to the interests of a client, inadvertently creating an issue conflict.[90]

The ABA's Commission on Ethics 20/20 has proposed various revisions to Rule 1.18 to clarify when online communications give rise to a prospective client relationship.[91] One proposed revision includes a more detailed definition of a "prospective client," defining the term as someone who has "a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship."[92] Similar language now appears in Comment 2, and "[t]he Commission concluded that this language . . . more accurately characterizes the applicable standard and is more capable of application to electronic communications."[93]

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in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."); *see also* Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 156 (1999) ("Lawyers answering questions about the law in jurisdictions in which they are not licensed to practice may violate restrictions against the unauthorized practice of law.").

[88] *See* Melissa H. Weresh, *A Bold New Frontier—To Blog Where No Lawyer Has Blogged Before*, IOWA LAW., Jan. 2009, at 13 (discussing the difficulty non-location-specific internet posts pose for lawyers).

[89] *See* Lanctot, *supra* note 87, at 156 ("The possibility that a lawyer might inadvertently create a conflict of interest by answering legal questions from someone with an interest adverse to a current or former client is particularly troubling in the sometimes-anonymous world of cyberspace.").

[90] *See id.*

[91] *See* Technology and Client Development, *supra* note 51.

[92] *Id.*

[93] *Id.* Proposed additions to Comment 3 elaborate on the new definition by listing a number of factors to use in assessing whether someone has become a prospective client. *See id.* These factors include:

> whether the lawyer previously represented or declined to represent the person; whether the person, prior to communicating with the lawyer, encountered any warnings or cautionary statements that were intended to limit, condition, waive or disclaim the lawyer's obligations; whether those warnings or cautionary statements were clear, reasonably understandable, and conspicuously placed; and whether the lawyer acted or communicated in a manner that was contrary to the warnings or cautio-

The proposal also broadens the types of interactions that give rise to a prospective client relationship. For example, the commission suggests changing "discusses" to "communicates" in the first paragraph "to make clear that a prospective client-lawyer relationship can arise even when an oral discussion between a lawyer and client has not taken place."[94] Similarly, the commission recommends replacing the phrase "had discussions with a prospective client" to "learned information from a prospective client."[95]

Additionally, the commission recommends adding a sentence in one of the comments to make it clear that a person is not owed any duties under Rule 1.18 if the person contacts a lawyer for the purpose of disqualifying the lawyer from representing an opponent.[96]

The current proposal does not address the problem of unauthorized practice of law through social media, but there are steps lawyers can take to avoid these risks. For example, lawyers should not give fact-specific legal advice and should instead stick to discussing general legal topics and information. As the Arizona Bar explains, attorneys should treat online discussion groups and chat rooms the same way they treat offline legal seminars for lay people.[97] In other words, an attorney should avoid answering specific legal questions "unless the question presented is of a general nature and the advice given is not fact-specific."[98] For similar reasons, lawyers should exercise caution when using social media to discuss sensitive client matters.[99]

Any blog or social media posting should also contain a clear and conspicuous disclaimer to prevent misunderstandings. These notices "should disclaim the existence of an attorney-client relationship, except on express agreement from the lawyer, and caution prospective clients not to send a lawyer confidential information, without

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nary statements.

Id.

[94] Technology and Client Development, *supra* note 51.

[95] *Id.*

[96] *Id.* This concept is commonly referred to as "taint shopping." *See, e.g.*, Assoc. of the Bar of the City of New York, Formal Op. 2006-02 (2006); Va. Legal Ethics Comm., Legal Ethics Op. 1794 (2004). Some states already incorporate the concept into their versions of Rule 1.18. *See, e.g.*, N.Y. RULES OF PROF'L CONDUCT R.1.18(e)(2).

[97] Ariz. Comm. on Ethics & Prof'l Responsibility, Informal Op. 97-04.

[98] *Id.*

[99] *See id.* (noting that "[l]awyers also may want to caution clients about transmitting highly sensitive information via e-mail if the e-mail is not encrypted or otherwise secure from unwanted interception").

confirmation of an agreement to undertake representation."[100] Moreover, the disclaimer should indicate the state (or states) in which the attorney is admitted to practice.[101] Lawyers can also use "click-wrap" disclaimers, also known as "click-through" disclaimers, which require readers to acknowledge their understanding that the communication does not form an attorney-client relationship by clicking "accept" prior to accessing the website.[102]

IV. SOCIAL MEDIA AND THE JUDICIARY

Because of special ethics rules and practices governing lawyers and the judiciary, lawyers must take particular care when social media use involves judges, clerks, or other judicial employees.[103] Similarly, because of their special role in the judicial system, judges and judicial employees must be especially careful in their social media use to maintain an appearance of impartiality and to prevent security risks. This Part discusses some of the pitfalls of social media posts about the judiciary and judicial proceedings as well as some of the specific considerations facing judges and judicial employees who use social media.

A. Attorney Comments About Tribunals and the Judiciary

Lawyers have quickly learned that social media sites provide

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[100] Bennett, *supra* note 38, at 121 (citing David Hricik, *To Whom It May Concern: Using Disclaimers to Avoid Disqualification by Receipt of Unsolicited E-mail from Prospective Clients*, 2005 PROF. LAW. 1, 3-4).

[101] *Id.* at 127. As an extra precaution, an attorney also should ask posters and commenters about their state of residence before answering any questions or sending any messages. *Id.*

[102] As one example of a "click-wrap" disclaimer:

> By clicking "accept" you agree that our review of the information contained in e-mail and any attachments that you submit in a good faith effort to retain us will not preclude any lawyer in our firm from representing a party in any matter where that information is relevant, even if that information is highly confidential and could be used against you, unless that lawyer has actual knowledge of the content of the e-mail. We will otherwise maintain the confidentiality of your information.

Id. at 122 n.61.

[103] Seidenberg, *supra* note 2.

a useful tool for uncovering opposing parties' misconduct.[104] For example, photos, videos, and online posts can catch a party in a lie or can unwittingly reveal inside information. What attorneys sometimes forget, however, is that these tools can just as easily reveal their own misconduct, and attorneys who "overshare" online can end up facing disciplinary action.

Model Rule 3.3 prohibits attorneys from making false statements to a tribunal.[105] This prohibition is not new, but when lawyers share personal information on publicly accessible platforms, these lies become easier to detect. One Texas judge, for example, checked a lawyer's Facebook page after the lawyer requested a continuance because of the death of her father. The young lawyer's Facebook posts revealed that "there wasn't a lot of grief expressed online."[106] Instead, the lawyer's posts described a week of partying and drinking with friends.[107] When the lawyer asked for a second continuance, the judge declined and disclosed the results of her research to a senior partner at the lawyer's firm.[108]

Attorneys also should never disparage judges online. Florida lawyer, Sean Conway, received a public reprimand from the Florida Supreme Court after calling a Fort Lauderdale judge an "Evil, Unfair Witch" on a popular South Florida legal blog.[109] And a lawyer in California received a forty-five-day suspension after posting blog entries disparaging a judge and defendant while serving as a juror.[110] In general, the best way to avoid sanctions arising out of social media

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[104] *See infra* Section V: A-B.

[105] MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007).

[106] John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 13, 2009, http://www.nytimes.com/2009/09/13/us/13lawyers.html?_r=1&hp (quoting Judge Susan Criss); *see also* Molly McDonough, *Facebooking Judge Catches Lawyer in a Lie, Sees Ethical Breaches*, A.B.A. J. (July 31, 2009, 3:16 PM) http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/ (discussing instances of a judge exposing lies and other borderline unethical behavior from attorneys' Facebook statuses).

[107] Schwartz, *supra* note 106.

[108] *Id.*

[109] The Fla. Bar v. Conway, 996 So. 2d 213 (Fla. 2008); Schwartz, *supra* note 106. A South Florida county bar association recently examined the blog itself to examine whether it adheres to local standards of professional conduct. *See* Tonya Alanez, *Courthouse Gossip Blog Faces Scrutiny from County Bar*, S. FLA. SUN-SENTINEL, Apr. 1, 2010, at 3B. The blog, however, is still active. *See JaaBlog Welcome*, JAABLOG.COM, http://jaablog.jaablaw.com/ (last visited July 20, 2011).

[110] *See* Martha Neil, *Calif. Lawyer Suspended over Trial Blogging While Serving as Juror*, A.B.A. J. (Aug. 4, 2009, 2:58 PM) http://www.abajournal.com/news/article/calif._lawyer_suspended_over_trial_blog_while_serving_as_juror/.

posts is simple and straightforward: never communicate a false statement or post disparaging comments. Furthermore, effective use of social media sites' privacy settings can help mitigate the damage of such statements, if they do occur.

B. Social Media and Judicial Employees

Social media use raises special ethical, confidentiality, and security concerns for law clerks and other judicial employees.[111] Some potential ethical problems include:

- Tweets or Facebook posts may inadvertently reveal confidential information from court filings or discussions that take place in a judge's chambers;
- Videos, photos, or online comments revealing improper or even illegal conduct can reflect poorly on the court;
- Social network connections with parties or attorneys appearing before the court can suggest special access or favoritism;
- Commenting on pending matters or on matters that may soon appear before the court could present an image of impropriety.[112]

Beyond ethical concerns, posting photos of the interior of the courthouse or posting information about a judge's location at a certain day or time could put the safety of judicial employees at risk.[113]

To avoid these problems, many judges and courts provide social media policies and guidelines to their employees. These policies, however, vary by court and even by judge. While some policies might include sweeping social media bans, others simply contain basic rules or general guidelines for employees.

Because of the unique safety risks facing judges and judicial employees, the most detailed portions of many of these policies contain prohibitions designed to reduce security risks. For example, the social media policies of several courts bar judicial employees from posting pictures of court events, judicial offices, and even the court-

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[111] *See generally* JUDICIAL CONFERENCE OF THE UNITED STATES, RESOURCE PACKET FOR DEVELOPING GUIDELINES ON USE OF SOCIAL MEDIA BY JUDICIAL EMPLOYEES (2010) [hereinafter JUDICIAL EMPLOYEE SOCIAL MEDIA GUIDELINES].

[112] For additional examples, *see id.* at 15-16.

[113] *Id.* at 18.

house itself.[114]

Unlike the more uniform safety rules, ethical prohibitions and guidelines tend to vary more among the courts. For example, the District of Rhode Island simply provides its law clerks and interns with a list of broad guidelines, like "Think before you post," "Speak for yourself, not your institution," and "Keep secrets secret," but its policy includes few blanket prohibitions.[115] Several policies also include general advice to obey libel and copyright laws.[116]

In contrast, the Southern District of Indiana and the Central District of California provide a more detailed list of prohibitions; both bar employees from using a court e-mail address for social networking, from disclosing confidential information, from posting photos or profile information that affiliates a judicial employee with a candidate or political party, and from "friending," "following," or "recommending" a lawyer or law firm that appears before the court.[117]

The Central District of California also prohibits employees from using United States District Court seals and logos, and from "identifying yourself as a court employee at all in social media."[118] In contrast, the Southern District of Indiana's policy states that employees may identify themselves by a "court-related job title" such as law clerk or administrative assistant, on the condition that employees do not identify their specific court or judge.[119] The Southern District

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[114] *Id.* at 30 (quoting UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND, SOCIAL MEDIA POLICY/GUIDELINES, at 1 (2010) [hereinafter DISTRICT OF RHODE ISLAND SOCIAL MEDIA POLICY]); *id.* at 34 (quoting UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, CLERKS OFFICE EMPLOYEE SOCIAL MEDIA AND SOCIAL NETWORKING POLICY, at 3 [hereinafter CENTRAL DISTRICT OF CALIFORNIA SOCIAL MEDIA POLICY]); *see also* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, SOCIAL MEDIA AND SOCIAL NETWORKING POLICY FOR CHAMBERS' OFFICE STAFF, at 1 [hereinafter SOUTHERN DISTRICT OF INDIANA SOCIAL MEDIA POLICY].

[115] JUDICIAL EMPLOYEE SOCIAL MEDIA GUIDELINES, *supra* note 111, at 27-29 (quoting DISTRICT OF RHODE ISLAND SOCIAL MEDIA POLICY, *supra* note 114). To be sure, the court's policy also notes that law clerks and interns also are bound by the First Circuit's Social Media Policy. *Id.* at 27 (quoting DISTRICT OF RHODE ISLAND SOCIAL MEDIA POLICY, *supra* note 114, at n.1).

[116] *Id.* at 34 (quoting CENTRAL DISTRICT OF CALIFORNIA SOCIAL MEDIA POLICY, *supra* note 114); SOUTHERN DISTRICT OF INDIANA SOCIAL MEDIA POLICY, *supra* note 114.

[117] JUDICIAL EMPLOYEE SOCIAL MEDIA GUIDELINES, *supra* note 111, at 33-36 (quoting CENTRAL DISTRICT OF CALIFORNIA SOCIAL MEDIA POLICY, *supra* note 114); SOUTHERN DISTRICT OF INDIANA SOCIAL MEDIA POLICY, *supra* note 111.

[118] JUDICIAL EMPLOYEE SOCIAL MEDIA GUIDELINES, *supra* note 111, at 32-33, 36 (quoting CENTRAL DISTRICT OF CALIFORNIA SOCIAL MEDIA POLICY, *supra* note 114).

[119] SOUTHERN DISTRICT OF INDIANA SOCIAL MEDIA POLICY, *supra* note 114, at 1.

of Indiana's policy also instructs judicial employees that "*[a]ny* commentary you post that could reveal an association with the court must contain an explicit disclaimer that states: 'These are my personal views and not those of my employer.' "[120]

Finally, some of the same rules that apply to most employees also apply to judicial employees, and social media policies caution judicial employees not to post photos of themselves engaging in improper or illegal conduct.[121]

C. Social Media and Judges

Attorneys and judicial employees are not the only members of the legal profession using social media. More than forty percent of judges reported that they use social media sites.[122] Judges, however, must exercise additional caution when it comes to social media use. In particular, judges need to decide whether to "friend" or "follow" attorneys who appear before them and how to communicate with attorneys over social media. Some judges also must mediate social media discovery disputes that arise in the cases before them, which often require creative solutions.

1. Judges and Attorneys as Social Media "Friends"

States disagree over whether a judge may friend an attorney who appears before him.[123] The Ohio Supreme Court's Board of

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[120] *Id.* To be sure, at fifty-six characters in length, this disclaimer would effectively preclude judicial employees from Tweeting about the court.

[121] JUDICIAL EMPLOYEE SOCIAL MEDIA GUIDELINES, *supra* note 111, at 28-29 (quoting DISTRICT OF RHODE ISLAND SOCIAL MEDIA POLICY, *supra* note114); *Id.* at 34 (quoting CENTRAL DISTRICT OF CALIFORNIA SOCIAL MEDIA POLICY); SOUTHERN DISTRICT OF INDIANA SOCIAL MEDIA POLICY, *supra* note 114, at 1.

[122] CONFERENCE OF COURT PUBLIC INFORMATION OFFICERS, NEW MEDIA AND THE COURTS 65 (2010).

[123] *Compare* Fla. Jud. Ethics Advisory Comm., Formal Op. No. 2009-20 (2009) ("The Committee believes that listing lawyers who may appear before the judge as 'friends' on a judge's social networking page reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge."), *with* Ohio Bd. of Comm'rs on Grievances and Discipline, Formal Op. No. 2010-7 (2010) ("A judge may be a 'friend' on a social networking site with a lawyer who appears as counsel in a case before the judge."), *and* Ky. Judicial Ethics Comm., Formal Op. JE-119 (2010) ("While the nomenclature of a social networking site may designate certain participants as 'friends,' the view of the Committee is that such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge."), *and* N.Y. Jud. Ethics Comm., Informal Op. 08-176 (2009) ("The Committee cannot discern anything inherently inappro-

Commissioners on Grievances and Discipline, for example, wrote that "[a] social network 'friend' may or may not be a friend in the traditional sense of the word" because "[a]nyone who sets up a profile page on a social networking site can request to become a 'friend' (or similar designation) of any of the millions of users on the site."[124] "There are hundreds of millions of 'friends' on social networking sites."[125] As a result, a judge may friend a lawyer who appears before him in court, provided he follows ethical guidelines, avoids posting comments about a pending matter, and disqualifies himself when necessary.[126]

New York's committee on judicial conduct further explains that there is nothing "inherently inappropriate" about a judge joining a social network because in some ways it "is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting."[127] The committee noted, however, that the public nature of the online link could create the appearance of a stronger bond, a factor judges should consider when deciding whether a particular relationship requires disclosure or recusal.[128]

In Florida, the state's judicial ethics advisory committee concluded that judges could not be social media friends with attorneys who appear before them.[129] The committee acknowledged that it was not saying "that simply because a lawyer is listed as a 'friend' on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, [it] means that this lawyer is, in fact, in a special position to influence the judge."[130] The committee explained that the real issue was not whether the lawyer is *actually* in a position to influence the judge, but whether the online friendship conveys the *impression* that the lawyer has such influence.[131]

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priate about a judge joining and making use of a social network.").

[124] Ohio Bd. of Comm'rs on Grievances and Discipline, Formal Op. No. 2010-7, at 2.

[125] *Id.*

[126] *See id.* at 6-7.

[127] N.Y. Jud. Ethics Comm., Informal Op. 08-176, at 4.

[128] *Id.*

[129] Fla. Jud. Ethics Advisory Comm., Formal Op. No. 2009-20, at 9.

[130] *Id.* at 3-4.

[131] *Id.* at 4. Following this opinion, some Florida lawyers found themselves with far fewer "friends" as judges "defriended" practicing attorneys on their friend lists. Tonya Alanez, *Ethics Group Frowns on Judicial 'Friends,'* S. FLA. SUN SENTINEL, Jan. 17, 2010, at 3B. At

Even in jurisdictions that permit a judge to friend an attorney, "a judge's actions and interactions must at all times promote confidence in the judiciary [and a] judge must avoid impropriety or the appearance of impropriety . . . ."[132] As a result, *ex parte* communications should be avoided in the online world, just as they must be avoided if stated in person or over the phone. A North Carolina judge, for example, was reprimanded for discussing a case with an attorney on Facebook. In that case, a judge presiding over a child custody case became Facebook friends with the father's attorney.[133] In response to a posting from the attorney, the judge posted that he had "two good parents to choose from."[134] The judge also posted that he "feels that he will be back in court," a reference to the fact that the case had not settled.[135] The father's counsel responded to these posts by writing "I have a wise judge."[136] The judge later disclosed the exchanges to the mother's attorney, but was ultimately reprimanded for the communications.[137]

In addition to avoiding *ex parte* communications, state ethics committees also have explained that a judge "must not investigate matters before the judge, must not make improper public statements on pending or impending cases, and must disqualify from cases when the judge has personal bias or prejudice concerning a party or a party's lawyer or when the judge has personal knowledge of facts in dispute."[138]

2. Using Social Media to Address Discovery Disputes

The difficulties inherent in social media sometimes have required judges to respond creatively to discovery disputes. Social media sites have become invaluable discovery resources,[139] but the personal nature of many social media profiles and posts implicates

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least one county court judge, however, sent an e-mail to the ten attorneys affected asking them not to take his actions personally. *Id.*

[132] Ohio Bd. of Comm'rs on Grievances and Discipline, Formal Op. No. 2010-7.

[133] John C. Martin, *Public Reprimand of Terry*, North Carolina Judicial Standards Commission, Inquiry No. 08-234, at 2-3, 5 (Apr. 1, 2009).

[134] *Id.* at 2.

[135] *Id.*

[136] *Id.*

[137] *Id.* at 2, 5.

[138] *See, e.g.*, Ohio Bd. of Comm'rs on Grievances and Discipline, Formal Op. No. 2010-7.

[139] *See infra* Parts V: A-B.

considerable privacy concerns. As a result, judges have needed to figure out how to mediate these disputes.

In Tennessee, for example, a magistrate judge adopted an unorthodox approach to a protracted discovery dispute involving photos taken by the plaintiff and other witnesses.[140] The judge offered to create a Facebook account to expedite discovery of the photos, captions, and comments.[141] The judge then explained that if the witnesses accepted his friend requests he would conduct an *in camera* inspection of photos and related comments, disseminate any relevant information to the parties, and then close the Facebook account.[142]

Other judges have ordered parties to turn over hard copies of their social profile information for a more traditional *in camera* review. For example, one defendant requested production of Facebook content related to a plaintiff's alleged teasing and taunting, or any content related to the communications involving the student's claims in *Bass v. Miss Porter's School*.[143] The student had since lost access to her account but requested the information from Facebook.[144] When Facebook agreed to provide "reasonably available data," the judge ordered the student to provide responsive documents to the school and give the entire set of documents to the court for *in camera* review.[145] The defendant provided about a hundred pages of documents to the school and "more than 750 pages of wall postings, messages, and pictures" to the court.[146] After reviewing the documents, the court ultimately concluded that there was "no meaningful distinction" between the two sets of documents and ordered the plaintiff to provide the entire set of documents to the school.[147]

Other judges have eschewed such detailed reviews entirely and simply have ordered parties to turn over social media posts and

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[140] *See* Barnes v. CUS Nashville, LLC, No. 3:09-cv-00764, 2010 WL 2265668, at *1 (M.D. Tenn. June 3, 2010).

[141] *Id.*

[142] *Id.*

[143] No. 3:08cv1807, 2009 WL 3724968, at *1 (D. Conn. Oct. 27, 2009).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* In fact, Facebook now has a feature that makes it easier for courts to conduct more traditional *in camera* reviews of social media information by allowing users to download copies of their entire profile. *See Download Your Information*, FACEBOOK, http://www.facebook.com/help/?page=18830 (last visited July 20, 2011). Users then can provide this information to judges for an offline review.

account information directly to opposing parties.[148] It is unclear, however, whether such decisions comport with federal online privacy laws.[149]

V. THE DUTY OF COMPETENCE

Model Rule 1.1 explains that "[a] lawyer shall provide competent representation to a client."[150] One of the comments on this rule further clarifies that to fulfill this duty and "maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice."[151] As a result, today's lawyers need to understand how social media sites work and how they can be used to serve a client's needs.[152] To that end, this Part briefly discusses some of the basic information that attorneys need to know to obtain social media information in discovery and investigations. It also highlights a few of the key points in-house counsel should consider when crafting social media policies that comply with regulatory requirements and employment laws.

A. Using Social Media in Court

Social media can provide an abundance of information about opposing parties, especially given the tendency of most social media users to "over-share" online. As a result, attorneys in a variety of practice areas recognize that social media sites can be invaluable sources of information. Family law attorneys, for example, have learned that social media sites can provide all types of information once available only through extensive investigation or by hiring a private detective. Now, with just a few clicks of a mouse, Facebook photos can reveal infidelity, a YouTube video can show a spouse partying instead of watching the kids, and irate social media posts can

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[148] *See infra* Part V: B (discussing the discoverability of social media).

[149] *See infra* Part V: B (discussing the application of the Stored Communications Act with the Internet today).

[150] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

[151] *Id.* R. 1.1 cmt. 6.

[152] One could actually argue that, at least in some contexts, attorneys who do not use social media as part of their representation of clients are actually failing to live up to their ethical obligations. *See* Margaret DiBianca, *Complex Ethical Issues of Social Media*, THEBENCHER, Nov./Dec. 2010, *available at* http://www.innsofcourt.org/Content/Default.aspx?Id=5497 (discussing whether "ethical duties may *require* lawyers to be adept in social media").

establish that one spouse in a custody dispute has a terrible temper.[153]

Similarly, attorneys for personal injury defendants have a diminished need to hire investigators to follow plaintiffs with video cameras because YouTube videos or Facebook photos can reveal if a plaintiff is exaggerating, or even falsifying alleged injuries, particularly where social media users have lax privacy settings in place for their accounts. In one case, for example, photos of a personal injury plaintiff smiling happily outside her home contradicted claims that her injuries from falling from an allegedly defective chair left her "largely confined to her house and bed."[154]

Even one of the most famous names in social media, Facebook founder Mark Zuckerberg, learned the hard way that once litigation is underway, social media posts can easily reveal comments one would prefer to keep private. During a legal battle surrounding allegations that Zuckerberg stole the idea for his social media site, Facebook's legal team pulled unflattering instant messages from Zuckerberg's computer.[155] A Silicon Valley technology site later obtained and published some of the posts.[156] Although readers of the messages contend that they do not support the theft claim, they "portray Zuckerberg as backstabbing, conniving, and insensitive."[157]

To take advantage of this social media bounty, however, lawyers need to know how to legally (and ethically) obtain this information, and the law in this area is not always clear.

B. The Discoverability of Social Media

In general, social media is discoverable to the same extent as any other information. In fact, Federal Rule of Civil Procedure 26 specifically provides for the production of "electronically stored information."[158] Pursuant to Rule 26, relevant information in any format "need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible

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[153] *See* Seidenberg, *supra* note 2; *see also* Stephanie Chen, *Divorce Attorneys Catching Cheaters on Facebook*, CNN.COM (June 1, 2010), http://articles.cnn.com/2010-06-01/tech/facebook.divorce.lawyers_1_privacy-settings-social-media-facebook?_s=PM:TECH.

[154] Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 654 (Sup. Ct. 2010).

[155] *See* Jose Antonio Vargas, *The Face of Facebook*, THE NEW YORKER (Sept. 20, 2010), http://www.newyorker.com/reporting/2010/09/20/100920fa_fact_vargas.

[156] *Id.*

[157] *Id.*

[158] FED. R. CIV. P. 26(b)(2)(B).

evidence."[159]

Nonetheless, because the information on a social media site is stored on the provider's server rather than on the user's hard drive, the provider, not the user, typically possesses the right to share the information.[160] Generally, it is difficult to obtain this information directly from a provider because of the Stored Communications Act ("SCA").[161] Congress enacted the SCA as Title II of the Electronic Communications Privacy Act[162] to address privacy concerns arising out of new technologies such as the Internet.[163] The SCA "regulat[es] the relationship between government investigators and [network] service producers in possession of users' private information," and limits the government's ability to compel disclosure of this information from third parties.[164] More specifically, the SCA prevents certain third-party providers from disclosing their users' electronic communications to the government or a third party without a search warrant in most circumstances.[165]

In 1986, however, when Congress enacted the SCA, the Internet was drastically different from the technology many know and use today.[166] As a result, applying this law to social media technologies can be like trying to force a square peg into a round hole, and courts

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[159] FED. R. CIV. P. 26(b)(1).

[160] Ariana Eunjung Cha, *What Sites Such as Facebook and Google Know and Whom They Tell*, WASH. POST (May 29, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/05/28/AR2010052804853.html.

[161] 18 U.S.C. § 2701 (2006).

[162] Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. § 2510 (2006)).

[163] *See generally* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004) (explaining the history and flaws of the SCA).

[164] *See id.* at 1212-14.

[165] *See* 18 U.S.C. §§ 2702-03 (2006 & Supp. III 2009). For a more detailed discussion of which types of third-party providers must comply with the SCA, see Kerr, *supra* note 163, at 1213-14.

[166] The World Wide Web, for example, did not exist, and cloud computing services and social network sites would not be developed for nearly a decade. Tim Berners-Lee invented the World Wide Web in 1989. *See Tim Berners-Lee*, WORLD WIDE WEB CONSORTIUM, http://www.w3.org/People/Berners-Lee/ (last visited Jan. 9, 2012); *see also* Boyd & Ellison, *supra* note 6. Instead, at the time Congress enacted the SCA, Internet users could effectively do three things: (1) download and send e-mail; (2) post messages to online bulletin boards; and (3) upload and store information that they could then access on other computers. *See* S. REP. NO. 99-541, at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3562-63 (describing "some of the new telecommunications and computer technologies referred to in the [ECPA]").

in different jurisdictions have reached different conclusions in their struggles to do so. In *Crispin v. Christian Audigier, Inc.*,[167] the Central District of California became the first court to extend SCA protection to some social media posts and messages.[168] In that case, the defendant sought basic subscriber information and certain communications from several social media sites.[169] The court drew distinctions among the different types of communications on social media sites and concluded that the SCA protects private messages between individual users because these messages are similar to the e-mail services that existed when Congress adopted the SCA.[170] The court also held that the SCA protects a user's Facebook wall posts and MySpace comments, but the court added that in order to be protected from disclosure, these posts and comments must not be "completely public."[171] As a result, under this rule, SCA protection turns on a user's privacy settings.[172]

Other courts have been more willing to release social media information. In *Ledbetter v. Wal-Mart Stores, Inc.*,[173] for example, a district court in Colorado issued a brief order finding that requests for the private messages, blog entries, photos, user logs, and other social media information of a personal injury defendant were "reasonably calculated to lead to the discovery of admissible evidence."[174] In a similar holding, a state judge in New York granted the defendants access to a personal injury plaintiff's current and historical social media pages.[175] The court held that the plaintiff had no expectation

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[167] 717 F. Supp. 2d 965 (C.D. Cal. 2010).

[168] *Id.* at 991.

[169] *Id.* at 968-69.

[170] *Id.* at 981-82. The court further held that the SCA protects unread private messages because storage of these messages was "incidental" to the original transmission. *Id.* at 987.

[171] *Crispin*, 717 F. Supp. 2d at 981 (citing Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 875 (9th Cir. 2002)).

[172] Most social media sites allow users to restrict who can view their profiles and information. Facebook users can limit access to their profiles, even tailoring their settings to list which people can view individual pieces of information on their pages. *See Data Use Policy*, FACEBOOK, http://www.facebook.com/about/privacy/(last visited Jan. 9, 2012). Similarly, YouTube users can mark their videos as private so they "can only be viewed by others authorized by the user who posted . . . them." Viacom Int'l v. YouTube, Inc., 253 F.R.D. 256, 264 (S.D.N.Y. 2008). Finally, although Twitter's default setting is to make information public, users also can add additional privacy filters. *Twitter Privacy Policy*, TWITTER, https://twitter.com/privacy (last visited Jan. 9, 2012).

[173] No. 06-cv-01958-WYD-MJW, 2009 WL 1067018 (D. Colo. Apr. 21, 2009).

[174] *Id.* at *2.

[175] *Romano*, 907 N.Y.S.2d at 651; *see also* Patterson v. Turner Constr. Co., 2011 N.Y.

of privacy in her Facebook and MySpace pages because "neither Facebook nor MySpace guarantee complete privacy," and therefore "when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings."[176] Both of these decisions, however, omit discussion of the SCA, so it is unclear how—or even if—they would apply in future cases or in other jurisdictions.[177]

Attorneys can overcome the SCA's hurdles by seeking information directly from the social media user. Attorneys, however, need to be careful about how they access these social media profiles. In particular, ethical rules prohibit lawyers from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."[178] Other rules restrict communications with unrepresented persons[179] as well as persons represented by another attorney.[180] Based on these rules, state bar associations conclude that attorneys can access a user's social media information in some cases, but not others. Generally, state bar associations have found that accessing a publicly available website or social media page does *not* violate ethics rules prohibiting dishonesty or rules governing communications with adverse parties.[181] This is because, as these bodies explain, accessing a public

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Slip Op. 07572 (N.Y. App. Div. Oct. 27, 2011) ("The postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access . . . ").

[176] *Id.* at 656-57. One state court went even further, requiring a plaintiff to provide his Facebook and MySpace user names and passwords to the defendant. *See* McMillen v. Hummingbird Speedway, Inc., No. 113-2010 CD (Pa. Ct. of Common Pleas Sept. 9, 2010), *available at* http://www.padisciplinaryboard.org/documents/McMillen-v-Hummingbird-Speedway.pdf. The court in this case, however, has been heavily criticized for, among other things, glossing over any relevance analysis in its decision. *See, e.g.*, Venkat, *Court Orders Disclosure of Facebook and MySpace Passwords in Personal Injury Case—McMillen v. Hummingbird Speedway*, TECH. & MKTG. LAW BLOG (Oct. 24, 2010, 10:24 AM), http://blog.ericgoldman.org/archives/2010/10/court_orders_di_1.htm.

[177] There is at least one proposal to amend the Stored Communications Act. *See* Electronic Communications Privacy Act Amendments Act of 2011, S.1011, 112th Cong. (2011). However, these proposed amendments are generally focused on other aspects of the Act.

[178] MODEL RULES OF PROF'L CONDUCT R. 8.4 (2007).

[179] MODEL RULES OF PROF'L CONDUCT R. 4.3 (2007) (stating that a lawyer will not state or imply to an unrepresented person that he is disinterested in the matter and requiring a lawyer to take reasonable steps to correct any misunderstandings that arise).

[180] MODEL RULES OF PROF'L CONDUCT at R. 4.2 (2007) (barring a lawyer from communicating with a person represented by counsel about the subject of the representation absent the consent of the other lawyer or a court order).

[181] *See, e.g.*, N.Y. State Bar Assoc. Op. 843 (2010) (concluding that accessing a page open to all members of a public network does not implicate a local ethics rule barring deception);

site "is no different from reading a magazine article or purchasing a book written by that adversary."[182]

However, local bar associations differ on whether ethical rules permit attorneys or their agents to "friend" a potential witness in an effort to gain access to the witness's information. The Bar Association of the City of New York concluded that "an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request."[183] The committee explained that such a conclusion is consistent with judicial policies favoring informal discovery.[184] Conversely, the Philadelphia Bar Association concluded that it would be deceptive for a lawyer to ask a third party to request access to a potential witness's social networking site without first revealing the connection to the lawyer or the true purposes for seeking access.[185]

To avoid running into ethical problems attorneys should proceed cautiously when attempting to obtain social media information. Attorneys should not make misrepresentations via social media, especially when those misrepresentations are designed to obtain information that would not otherwise be available.[186] Attorneys also should avoid contact with victims, witnesses, and other individuals involved in an opposing counsel's case without disclosing their professional interests and affiliations.[187]

C. In-House Policies Governing Social Media Use

Social media also pose additional challenges for in-house counsel, and these attorneys need to carefully craft policies governing appropriate social media use. Although the details will depend in part on the needs of the organization, the drafters should consider ad-

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Or. State Bar Legal Ethics Comm. Op. 2005-164 (2005) (finding that accessing an opposing party's public website does not violate ethics rules limiting communications with adverse parties).

[182] Or. State Bar Legal Ethics Comm., Op. 2005-164, at 453.

[183] N.Y. City Bar Ass'n Comm. on Prof'l and Ethics, Formal Op. 2010-2 (2010).

[184] *Id.*

[185] Phila. Bar Ass'n Prof'l Guidance Comm., Formal Op. No. 2009-02 (2009). The committee stated, however, that it would be permissible for the attorney to "ask[] the witness forthrightly for access." *Id.*

[186] *Id.*

[187] *Id.*

dressing:

1. Litigation/Document Holds

Generally, a party has a duty to preserve information relevant to an issue when it is reasonably foreseeable that the issue is or will be the subject of litigation.[188] Typically, when faced with reasonably anticipated litigation, companies identify individuals and entities connected to litigation as well as the data they may have regarding the relevant issues.[189] The entity then "suspend[s the] routine document retention/destruction policy and put[s] in place a 'litigation hold' to ensure the preservation of relevant documents."[190]

Normally, enforcing these litigation or document holds is relatively straightforward because the information is held on a local server, hard drive, or network drive, but social media sites complicate these holds because the information is frequently stored on a third party's computer, limiting the company's ability to control the information and ensure that it remains preserved.[191] In these cases, the party's relationship with the service provider or the provider's terms of service will influence the data preservation process, and parties should be aware of these policies before litigation arises.[192]

2. Regulatory Requirements

Corporate social media use also implicates various regulatory limits already placed on offline communications. For example, social media communications could violate federal securities laws and associated securities trading rules, including federal disclosure require-

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[188] *See* Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010); Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003).

[189] *Zubulake*, 220 F.R.D. at 218.

[190] *Id.*

[191] This problem is essentially one of "cloud computing." In cloud computing, users store their data on a virtual platform known as "the cloud," "where users interact with Internet applications and store data on distant servers rather than on their own hard drives." Oregon v. Bellar, 217 P.3d 1094, 1111 n.10 (Or. Ct. App. 2009) (Sercombe, J., dissenting).

[192] *See generally* David D. Cross & Emily Kuwahara, *E-Discovery and Cloud Computing: Control of ESI in the Cloud*, EDDE JOURNAL (Spring 2010) http://www2.americanbar.org/sections/scitech/ST203001/Pages/default.aspx (last visited Jan. 9, 2012) (discussing the effect of cloud computing on electronic discovery).

ments and antifraud provisions.[193] Furthermore, allowing employees in the medical industry to use social media without proper training could lead to violations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[194] and other patient privacy laws.[195] As a result, in-house counsel need to consider regulatory rules when crafting corporate social media policies and should examine any relevant agency guidance when interpreting how existing regulatory rules apply in the social media context.

3. Employment Decisions

Finally, employers need to consider how to utilize social media when making hiring and firing decisions, as well as how to regulate the social media use of existing employees. Employers are increasingly using social media sites to search for information on prospective employees.[196] These searches can cause additional legal headaches because in addition to providing information on an applicant's ability to perform a particular job, social media sites also can reveal characteristics that are protected under state and federal employment laws, such as the prospective employee's age, ethnicity, gender, religion, marital status, sexual orientation, and other characteristics. Employment decisions cannot be based on this information, but the information often cannot be "unseen" once someone with hiring authority has viewed it.

Further, once an employee is hired, social media sites can disclose what an employee does outside the office, and employers do not always have the freedom to make adverse employment decisions based on those discoveries. Certain states have "lifestyle" statutes that prohibit employers from making employment decisions based on all or some off-duty behavior.[197] As a result, employers must ensure

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[193] *See generally* Regulatory Notice 10-06: *Social Media Websites*, FINRA, 2 (Jan. 2010), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf; Commission Guidance on the Use of Company Websites, 73 Fed. Reg. 45862 (proposed Aug. 7, 2008) (to be codified at 17 C.F.R. pt. 241, 271).

[194] *See* 42 U.S.C. § 1320d-2(d) (2006 & Supp. IV 2010).

[195] *See generally* David Gevertz & Gina Greenwood, *Creating an Effective Social Media Policy for Healthcare Employees*, 6 HEALTH LAW. 28, 28-30 (2010) (discussing the risks of social networking in an age of medical privacy laws).

[196] *Id.* at 28.

[197] For example, Colorado, North Dakota, California, and New York have statutes prohibiting discrimination on the basis of lawful conduct outside of work. *See* COLO. REV. STAT. § 24-34-402.5 (2007); N.D. CENT. CODE § 14-02.4-01 (1993); CAL. LAB. CODE 96(k) (2000);

that they are not making employment decisions based on this information. Generally, however, employers have considerably more latitude to regulate and monitor employee social media use on employer-owned electronic equipment.[198] To minimize the risk that social media searches will lead to an employment discrimination claim, in-house counsel often implement "screening" features in hiring decisions. These features monitor when prospective employees visit certain social media sites, and pass along non-protected information to those who will make the ultimate hiring decisions. With respect to current employees, written policies explaining the appropriate use of social media and contemporaneous documentation of non-discriminatory reasons for adverse employment decisions are generally advisable.

Finally, the National Labor Relations Board has recently begun taking a close look at employers' social media policies to examine whether the policies inappropriately restrict employees' rights under Section 7 of the National Labor Relations Act.[199] Where a policy prohibits employees from discussing wages and working conditions, the NLRB has found the policy overly broad.[200] Nonetheless, narrowly tailored policies designed to protect business interests (such as maintaining a consistent public message) will usually be considered permissible.[201]

N.Y. LAB. LAW § 201-d(2)(a) (McKinney 1992). California, New York, and the District of Columbia prohibit discrimination based on an employee's political affiliation. *See* CAL. LAB. CODE § 1101 (2011); N.Y. LAB. LAW § 201-d (McKinney 1992); D.C. CODE § 2-1402.31(a) (2006). Also, at least sixteen jurisdictions plus the District of Columbia have statues barring discrimination based on the off-duty use of tobacco. *See Off-Duty Conduct*, NCSL, http://www.ncsl.org/IssuesResearch/EmploymentWorkingFamilies/Employee Off-DutyConduct/tabid/13369/Default.aspx.Portals/1/documents/legismgt/%5CDefault.aspx (last updated May 30, 2008).

[198] The Supreme Court has not directly addressed employer monitoring of employee social media use, but in *City of Ontario v. Quon*, where the Court upheld an employer's ability to monitor messages sent on employer-owned pagers, the Court suggested that it plans to proceed on a case-by-case basis in this area of the law. 130 S. Ct. 2619, 2628-29 (2010).

[199] 29 U.S.C. § 157 (2006).

[200] *Am. Med. Response of Conn., Inc. and Nat'l Emergency Med. Servs. Ass'n*, No. 34-CA-12576, 2011 WL 1788948, at *30 (N.L.R.B. May 10, 2011).

[201] *See generally* Memorandum from Lafe Solomon, Acting Gen. Counsel, N.L.R.B., Report of the Acting General Counsel Concerning Social Media Cases, OM 11-74 (Aug. 18, 2011), *available at* http://www.nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases.

VI. CONCLUSION

Some attorneys have found that social media can provide potential benefits in marketing, networking, and as a litigation resource. However, attorneys who are not careful about the use of social media risk breaching client confidences, incurring disciplinary action, or even losing their jobs. Ethical risks include breaching the duty of confidentiality, violating legal advertising rules, and engaging in the unauthorized or inadvertent practice of law. Additionally, attorneys face sanctions for revealing misconduct or disparaging judges on social media sites. The use of social media by judges and judicial employees presents additional ethical and security risks. Judicial employees must ensure that they are not revealing confidential information, posting comments or photos that would reflect poorly on the court, or disclosing information that would put the safety of a judge or judicial employee at risk. Meanwhile, judges need to consider their social media ties to attorneys who appear before them and must decide if, when, and how to use social media to resolve discovery disputes.

Litigators and corporate employers alike hope to take advantage of the bounty of information on most social media sites, but also must make sure that their use of that information complies with legal and ethical standards. Unfortunately, existing ethics rules and legal standards provide few clear guidelines, and fast-changing legal doctrines and technologies add to the complications. Proposed revisions to the ABA's Model Rules of Professional Conduct might provide additional clarity, but are unlikely to resolve the existing questions surrounding the ethical use of social media. As this technology continues its rapid evolution, lawyers should exercise caution in their use of social media. While online actions frequently have offline ethical analogues, social media often exposes tensions inherent in the application of rules written for the pre-Internet practice of law. Nonetheless, by understanding the current rules and following certain best practices, attorneys can take advantage of the potential benefits of social media, while avoiding many of its hazards.