Not *Just* Another Rodeo: Staying At the Top of Your Game
92nd Annual
National Conference of Bankruptcy Judges

October 28–31, 2018
San Antonio, TX

Not Just Another Rodeo:
Staying At the Top of Your Game

Hon. Lori S. Simpson, U.S. Bankruptcy Court, D. Md.
# Table of Contents

1. *Student Loan Debt and Bankruptcy*. By Hon. Robert D. Berger (U.S. Bankruptcy Court, District of Kansas) .....................................................................................................................1

2. *Judicial Estoppel*. By Hon. Lori S. Simpson (U.S. Bankruptcy Court, District of Maryland)...................................................................................................................................7


4. Appendix¹

   a. Understanding LinkedIn Privacy Settings and Closing LinkedIn and Facebook Accounts ................................................................................................................55

   b. *In re Emery*, 799 S.E.2d 295 (S.C. 2017) .................................................................59

   c. State Bar of California, Formal Opinion No. 2012-186 .............................................68

   d. Texas Disciplinary Rules of Professional Conduct, Rules 7.02–7.05 ..................74

   e. Georgia Rules of Professional Conduct, Rules 7.1–7.4 ........................................93

   f. California Rules of Professional Conduct, Rule 1-400........................................100

   g. John Browning, *Why Can’t We Be Friends? Judges’ Use of Social Media*, 68
      UNIV. MIAMI L. REV. 487 (2014)² ........................................................................103

   h. *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249 (W.D. Wash. 2007)³ .......................151

---

¹ See also Debra Cassens Weiss, *Lawyer says judge’s Facebook comment about being ‘tortured’ by trial lawyer was just a joke*, ABA JOURNAL (July 11, 2017, 4:47 PM), [http://www.abajournal.com/news/article/lawyer_says_judge_s_facebook_comment_about_being_tortured_by_trial_lawyer_was_just_a_joke](http://www.abajournal.com/news/article/lawyer_says_judge_s_facebook_comment_about_being_tortured_by_trial_lawyer_was_just_a_joke); Stephanie Francis Ward, *Yelp sues bankruptcy law firm, alleging it posted fake positive reviews*, ABA JOURNAL (Sept. 10, 2013, 7:20 PM), [http://www.abajournal.com/news/article/yelp_sues_bankruptcy_law_firm_alleging_it_posted_fake_positive_reviews](http://www.abajournal.com/news/article/yelp_sues_bankruptcy_law_firm_alleging_it_posted_fake_positive_reviews).

² See also Hassell v. Bird, Op. No. S235986 (Cal. Ct. App., July 2, 2018) (In this case, a disgruntled client wrote negative Yelp reviews about her personal injury attorney. The attorney sued the client and Yelp to get the reviews taken down. Ultimately, the California appeals court determined that 47 U.S.C § 230 applies and Yelp may not be ordered to remove negative reviews.), [http://www.courts.ca.gov/opinions/documents/S235968.PDF](http://www.courts.ca.gov/opinions/documents/S235968.PDF); Great Wall...

4 Reprinted with permission from St. Mary’s Law Journal.
I. Introduction

The discharge of student loans in bankruptcy is a difficult, some would say near impossible, task. Below are factors to consider when seeking a student loan discharge in a bankruptcy proceeding.

II. Types of Student Loans

a. Federal

A. U.S. Department of Education issues or issued several types of federal loans:

   a. Direct Loans;

   b. Federal Family Education Loans;

   c. Perkins Loan Programs, which include

      i. Stafford;

      ii. PLUS; and

      iii. Perkins Loans.

B. All federal loans typically offer various ways to cure defaults, income-based repayment options, and/or the availability of an administrative discharge to certain qualifying individuals.

b. Private Student Loans

   A. Issued by private banks and lending institutions.

   B. Typically have no income-based repayment options, forgiveness options, or other mandated means for curing defaults.
III. Discharge in Bankruptcy

a. Governing Statute

For most student loans, Title 11 U.S.C. § 523(a)(8) governs the discharge of student loan debt. That section provides, in relevant part:

(a) A discharge under section ... 1328(b) of this title does not discharge an individual debtor from any debt—

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for –

(A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit… ; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan… incurred by a debtor who is an individual...

(Emphasis added.)

b. Notable Procedural Hurdles

(i) Debtors seeking a § 523(a)(8) undue hardship discharge are required to file an adversary proceeding under Fed. R. Bankr. P. 7001(6).1 The Complaint and Summons must be served in the manner for service set out in Rule 7004.

(ii) In a Chapter 13 case, debtors should not seek an undue hardship discharge under § 523(a)(8) until “after completion by the debtor of all payments under the plan.”2

1 But see United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 262 (2010) (finding that “[a]lthough the Bankruptcy Court’s failure to find undue hardship was a legal error, the confirmation order is enforceable and binding on [the creditor] because it had actual notice of the error and failed to object or timely appeal.”). Unless otherwise noted, all references to Rules herein are to the Federal Rules of Bankruptcy Procedure.

2 § 1328(a). See also Bender v. Educ. Credit Mgmt. Corp. (In re Bender), 368 F.3d 846 (8th Cir. 2004) (stating that undue hardship should be determined at the time of discharge, not at commencement of the § 523(a)(8) proceeding); Raisor v. Educ. Loan Serv. Ctr. (In re Raisor), 180 B.R. 163 (Bankr. E.D. Tex. 1995) (dismissing as premature a student loan dischargeability action filed seven months after the Chapter 13 plan, but three years before the plan’s scheduled completion).
c. Standard for Discharge

To determine what constitutes “undue hardship,” most circuit courts\(^3\) employ some version of the three-part test set forth in *Brunner v. New York State of Higher Education Services*:

1. that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans;

2. that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and

3. that the debtor has made good faith efforts to repay the loans\(^4\).

The *Brunner* test has been refined by some courts. For example, the Tenth Circuit explicitly cautioned that the *Brunner* test should not be applied in a formulaic way, but instead “to better advance the Bankruptcy Code’s ‘fresh start policy,’” and applied in a manner “such that debtors who truly cannot afford to repay their loans may have their loans discharged.”\(^5\) The Tenth Circuit has clarified that adoption of the *Brunner* test does not “rule out consideration of all the facts and circumstances” surrounding the case.\(^6\)

(i) First Prong – Ability to Maintain Minimal Standard of Living

The Court must “evaluate the debtor’s current financial situation” and “take into consideration whether the debtor has demonstrated any reason why he or she is unable to earn sufficient income to maintain him/herself and dependants while repaying the student loan debt.”\(^7\) This first prong requires Debtors to demonstrate “more than simply tight finances.”\(^8\)

---

\(^3\) Including the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth and Tenth Circuits. The Eighth Circuit adopted a totality of the circumstances test, In re Long, 322 F.3d 549 (8th Cir. 2003); and the First Circuit has so far declined to adopt either test, In re Nash, 446 F.3d 188, 190 (1st Cir. 2006).

\(^4\) Educ. Credit Mgmt. Corp. v. Polleys (In re Polleys), 356 F.3d 1302, 1307 (10th Cir. 2004) (quoting Brunner, 831 F.2d 395, 396 (2d Cir. 1987)).

\(^5\) Id. at 1308–09.

\(^6\) Id. at 1309.


The Court requires “more than temporary financial adversity, but typically stops short of utter hopelessness.”\(^9\) “A minimal standard of living includes what is minimally necessary to see that the needs of the debtor and his dependents are met for care, including food, shelter, clothing, and medical treatment.”\(^{10}\) This “necessarily entails an analysis of all relevant factors, including the health of the debtor and any of his dependents and the debtor’s education and skill level.”\(^{11}\) Further, a court should also be “hesitant to impose a spartan life on family members who do not personally owe the underlying student loan, particularly when those family members are children.”\(^{12}\)

(ii) Second Prong – Additional Circumstances

Courts require that additional circumstances exist indicating that the debtor will be unable to repay the loans while maintaining a minimal standard of living for a significant portion of the repayment period. The “additional circumstances” prong “properly recognizes that a student loan is viewed as a mortgage on the debtor’s future.”\(^{13}\) This factor does not require a “certainty of hopelessness,”\(^{14}\) but rather, requires a realistic look into the debtor’s circumstances and the debtor’s ability to “provide for adequate shelter, nutrition, health care, and the like.”\(^{15}\) The “additional circumstances requirement” recognizes that almost every debtor in bankruptcy is strapped financially and that there must be something more than mere economic distress to justify a finding of undue hardship.\(^{16}\) The second prong “requires an analysis of all the facts and circumstances that affect the debtor’s future financial position.”\(^{17}\) Examples of

\(^9\) Id.
\(^{10}\) Id.
\(^{11}\) Polleys, 356 F.3d at 1309.
\(^{13}\) Polleys, 356 F.3d at 1310 (internal quotation omitted).
\(^{14}\) Id.
\(^{15}\) Id.
\(^{16}\) See, e.g., Educ. Credit Mgmt. Corp. v. Davis (In re Davis), 373 B.R. 241, 250 (W.D.N.Y. 2007) (“The type of additional circumstances contemplated by Brunner are well beyond those hardships that normally accompany any bankruptcy.”).
\(^{17}\) Polleys, 356 F.3d at 1309.
exceptional circumstances include illness, recent disability, or an exceptionally large number of dependents that would hamper a debtor’s ability to repay the student loan.\textsuperscript{18}

(iii) Third Prong – Good Faith Efforts

The Court must consider whether the debtor has made a good faith effort to repay the student loan debt “as measured by his or her efforts to obtain employment, maximize income and minimize expenses.”\textsuperscript{19} The inquiry into a debtor’s good faith “should focus on questions surrounding the legitimacy of the basis for seeking a discharge.”\textsuperscript{20} While a finding of good faith is not precluded by a debtor’s failure to make a payment,\textsuperscript{21} a debtor cannot satisfy the good faith prong if he has contributed to his hardship.\textsuperscript{22}

IV. Other Considerations – Chapter 13

a. Separate classification and fair discrimination of student loans under §1322(b)(1). See In re Engen, 561 B.R. 523 (Bankr. D. Kan. 2016) (Berger, J.). Debtors’ Chapter 13 plan proposed to pay their student loan debts before other general unsecured claims. The Chapter 13 Trustee objected to the proposed treatment, arguing § 1322(b)(1) prohibits unfair treatment among unsecured claims. In response, Debtors argued their plan’s separate treatment of their student loan debt was not unfair because prior to filing bankruptcy they entered into a Debt Management Plan under which they paid down their general unsecured debts, not including student loans, from $73,884.89 to $12,192.16. The Court, observing the Tenth Circuit had not considered unfair discrimination under § 1322(b)(1), first walked through the various tests courts have employed to analyze unfair discrimination. Believing the various tests too inflexible to accommodate the diversity of cases the Court considers, the Court opted to employ a totality of the circumstances standard beginning with the Bentley Baseline Test used

\textsuperscript{18} Id.

\textsuperscript{19} In re Innes, 284 B.R. 496, 510 (D. Kan. 2002) (quoting Goulet v. Educ. Credit Mgmt. Corp. (In re Goulet), 284 F.3d 773,779 (7th Cir. 2002)).

\textsuperscript{20} Polleys, 356 F.3d at 1310.

\textsuperscript{21} Innes, 284 B.R. at 510.

\textsuperscript{22} Polleys, 356 F.3d at 1310; Penn. Higher Educ. Assistance Agency v. Faish (In re Faish), 72 F.3d 298, 305 (3d Cir. 1995) (citing Matter of Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993) (“[U]ndue hardship encompasses a notion that a debtor may not willfully or negligently cause his own default, but rather his condition must result from factors beyond his control.”).
by Bankruptcy Courts in Kansas. After detailed analysis, the Court rejected the notion that the nondischargeability of student loans alone cannot serve as a basis for preferred treatment in a Chapter 13 plan. The Court concluded Debtors’ plan did not unfairly discriminate in favor of Debtors’ student loans under either the Bentley Baseline Test or the broader totality of the circumstances test. Accordingly, the Court overruled the Trustee’s objection and confirmed Debtors’ plan.

b. Cure arrearage over life of plan and maintain long term student loan debt under § 1322(b)(5).


23 The Bentley Baseline Test “looks at whether, despite the different treatment for each classification, the plan nevertheless offers each class benefits and burdens equivalent to those the class would receive under a Chapter 13 plan without separate classification” and considers “(1) equality of distribution; (2) nonpriority of student loans; (3) mandatory versus optional contributions; and (4) the debtor’s fresh start.” Engen, 561 B.R. at 537 (citing Bentley v. Boyajian (In re Bentley), 266 B.R. 229, 240–43 (B.A.P. 1st Cir. 2001)).
This article addresses the doctrine of Judicial Estoppel as applied to bankruptcy. To begin, judicial estoppel is an equitable doctrine that prevents a party from taking inconsistent positions in litigation. Specifically, in the bankruptcy context, judicial estoppel is more frequently seen when a debtor fails to disclose a pending lawsuit, or fails to disclose a right to claim that may result in a favorable award on their schedules as required by 11 U.S.C. § 521 of the Bankruptcy Code.\textsuperscript{2} As a result, the debtor is judicially estopped from taking the position of having no interest in a claim on their bankruptcy schedules, when in fact they have asserted a claim against a third-party outside bankruptcy court. Further, failure to disclose interests can result in a denial of a discharge, a finding of bad-faith in the bankruptcy case, and dismissal of the non-bankruptcy case.\textsuperscript{3}

I. BACKGROUND

\textit{New Hampshire v. Maine,} 532 U.S. 742 (2001), provides a succinct rule, stating that a debtor will be judicially estopped if (1) a party’s later position is clearly inconsistent with an earlier position; (2) the party succeeded in having the court adopt their earlier position which would lead to the appearance that the court was misled if the second position is adopted; and (3) the adoption of inconsistent positions would be unfairly advantageous to the debtor in either proceeding.

Several key provisions have been echoed throughout the country when courts have sought to apply judicial estoppel. Specifically, the debtor’s failure to list an asset is treated as an intentional attempt to mislead the court, as if the asset does not exist.\textsuperscript{4} The court must have also found the nondisclosure to be intentional, or “not inadvertent.”\textsuperscript{5} Although the motive for deceiving a court is often clear, the court should be cautioned to view the totality of the circumstances before determining intent as some causes of action may be unknown to the debtor or did not accrue at the time the bankruptcy was filed.\textsuperscript{6}

\begin{enumerate}
\item Thank you to my Law Clerk, Brittani Gordon, and Judicial Intern, Miles Taylor, for their efforts and assistance with this article.
\item Unless otherwise noted, all statutory citations are to the Bankruptcy Code (Code) found at Title 11 of the United States Code and all rule citations are to the Federal Rules of Bankruptcy Procedure (Rules).
\item See, e.g., 11 U.S.C. § 727(a)-(d).
\item See, e.g., \textit{In re Superior Crewboats}, 374 F.3d 330 (5th Cir. 2004).
\item Id. at 335.
\item An example would conceivably be a medical malpractice claim where the injury presents after a bankruptcy case has been closed or discharged.
\end{enumerate}
Perhaps the most significant development in judicial estoppel law is the treatment of nondisclosures in the Chapter 7 and Chapter 13 contexts. A Chapter 13 debtor is under a continuing duty to disclose all assets throughout the pendency of the bankruptcy case.\(^7\)

A Chapter 7 case can become slightly more complicated. A debtor’s failure to disclose an interest in pending litigation within a Chapter 7 plan can be remedied by the trustee stepping in as the real-party-in-interest and settling for the benefit of creditors.\(^8\) Debtors may cure a deficiency unless an opposing party has asserted judicial estoppel, and claiming ignorance or ineffective assistance of counsel is not a recognizable defense to the claim.\(^9\) If a Chapter 7 debtor has already received a discharge, the trustee must move to re-open the bankruptcy case and have the debtor amend his or her schedules to include the pending litigation, and any interest arising from the debtor’s inconsistent position, can be retrieved for the benefit of outstanding creditors.\(^10\)

II. RECENT 2nd CIRCUIT DEVELOPMENT

Recently the Second Circuit heard and remanded *Clark v. AII Acquisition, LLC*,\(^11\) which examined judicial estoppel in the Chapter 13 context where the plan was nearly complete. The court in the case held, in relevant part, the standard of review for judicial estoppel is abuse of discretion. In reaching this conclusion, the Second Circuit determined that judicial estoppel, though a doctrine of equity, is not a mechanical rule.\(^12\) Prior to determining that judicial estoppel applies, the Court must “inquire into whether the particular factual circumstances of a case ‘tip the balance of equities in favor’ of doing so.”\(^13\)

Judge Calabresi, writing for the circuit, reminded all parties that the doctrine of judicial estoppel is an equitable doctrine that should not be wielded for the sake of itself, and a district court should not apply the doctrine mechanically without review of the underlying issues. Specifically, Judge Calabresi stated that, although the necessary elements (failure to disclose and adoption of the inconsistent position) were present, those conditions are necessary for judicial estoppel but not sufficient.\(^14\) In taking into consideration the underlying facts, the court reiterated that the balance of equities must tip in the proper party’s favor—unless there has been some clear harm caused by the inconsistent position, abuse of discretion may restrict a court from judicially estopping a party.\(^15\)

---


\(^8\) See, e.g., *Eastman v. Union Pacific Railroad Company*, 493 F.3d 1151 (10th Cir. 2007).

\(^9\) Id.; see also *Superior Crewboats*, 374 F.3d at 336.

\(^10\) Not all courts are in agreement with treating a failure to disclose as a bad-faith eligible action; the Ninth Circuit in *Meyer v. Northwest Trustee Services, Inc.*, No. 15-35560 (9th Cir. Aug. 29, 2017), recently demanded schedules be revised in order to avoid a case from being judicially estopped.

\(^11\) 886 F.3d 261, 264 (2d Cir. 2018).

\(^12\) Id. at 266.

\(^13\) Id. at 266-67 (citing *New Hampshire v. Maine*, 532 U.S. 742, 751, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)).

\(^14\) Id. at 266.

\(^15\) Id. at 268.
III. QUICK REFERENCE

Below is a quick-reference chart concerning the various approaches of judicial estoppel—missing circuits follow the standard Supreme Court rule, or have not taken up the question of judicial estoppel in a manner contrary to the majority. Although most circuits employ some form of judicial estoppel, there are varying degrees of severity and variances regarding what inconsistent positions will mean for a debtor. What is clear from all of these cases is that the best course of action for a debtor with any potential claim is to disclose those potential rights early and unequivocally. Disclosure may mean the debtor is entitled to a smaller share of the proceeds, but that is a small price to pay to ensure a complete and final discharge being rewarded at the end of the bankruptcy process. Bankruptcy, at its core, is about providing the debtor with a fresh start—failure to disclose assets leaves the debtor in a worse position than they started.
<table>
<thead>
<tr>
<th>Case Name</th>
<th>Citation</th>
<th>Court</th>
<th>Facts</th>
<th>Position on Judicial Estoppel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clark v. All Acquisition, LLC</td>
<td>886 F.3d 261 (2d Cir. 2018)</td>
<td>2nd Circuit</td>
<td>Personal injury action filed one week before the Chapter 13 plan was to be completed was improperly terminated—judicial estoppel doctrine did not apply where Chapter 13 plan had been substantially completed, the taking of an inconsistent position did not create an unjust advantage within the courts, and where equity tipped the balance in favor of reversal.</td>
<td>Equitable doctrine that should be applied based on the totality of the circumstances. Elements are necessary but not sufficient and the doctrine should not be applied mechanically.</td>
</tr>
<tr>
<td>Eastman v. Union Pacific Railroad Co.</td>
<td>493 F.3d 1151 (10th Cir. 2007)</td>
<td>10th Circuit</td>
<td>Personal injury action went undisclosed for approximately 8 months while debtor was in Chapter 7; bankruptcy trustee was permitted leave to intervene after debtor “unequivocally responded no when the trustee asked him if he had a personal injury suit pending.”</td>
<td>Schedules may be revised until the moment an opposing party asserts judicial estoppel claim</td>
</tr>
<tr>
<td>Gronchocinski v. Mayer Brown</td>
<td>719 F.3d 785 (7th Cir. 2013)</td>
<td>7th Circuit</td>
<td>Potentially fraudulent malpractice claim stemming from default judgment granted in bankruptcy court. Judicial estoppel applied to prevent a perversion of the judicial process.</td>
<td>Equitable doctrine that should be applied based on the totality of the circumstances. Elements are necessary but not sufficient and the doctrine should not be applied mechanically.</td>
</tr>
<tr>
<td><strong>In re Superior Crewboats</strong></td>
<td>374 F.3d 330 (5th Cir. 2004)</td>
<td>5th Circuit</td>
<td>Debtors, after Chapter 7 discharge, attempted to sue for $2.5M stemming from personal injury case arising prior to bankruptcy being finalized. Failure of debtors to list potential claim “tantamount to a representation that no such claim existed.”</td>
<td>Failure to disclose seen as intentional, presumption that debtor intended to mislead and will likely be judicially estopped.</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>Marshall v. Honeywell Tech. Sys., Inc.</strong></td>
<td>828 F.3d 923 (D.C. Cir. 2016)</td>
<td>D.C. Circuit</td>
<td>Debtors were judicially estopped from asserting a Title VII discrimination claim when events giving rise to the action were not disclosed to bankruptcy trustee/attorney prior to Chapter 7 discharge.</td>
<td>Equitable doctrine that should be applied based on the totality of the circumstances. Elements are necessary but not sufficient and the doctrine should not be applied mechanically.</td>
</tr>
<tr>
<td><strong>McNemar v. Disney Store, Inc.</strong></td>
<td>91 F.3d 610 (3d Cir. 1996)</td>
<td>3rd Circuit</td>
<td>HIV-positive former employee judicially estopped from bringing action against employer under ADA, NJLAD, and ERISA due to sworn statement saying he was totally disabled and court documents stating he was a qualified individual with disability. <em>But see Montrose Medical Group Participating Savings Plan v. Bulger</em>, 243 F.3d 773 (10th Cir. 2001) (declining to follow <em>McNemar</em>, holding judicial estoppel doctrine does not apply where inconsistent positions were not accepted in prior suit).</td>
<td>Equitable doctrine that should be applied based on the totality of the circumstances. Elements are necessary but not sufficient and the doctrine should not be applied mechanically.</td>
</tr>
<tr>
<td>Case Name</td>
<td>Citation</td>
<td>Circuit</td>
<td>Description</td>
<td>Rule</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>-------------------</td>
<td>------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------------------------</td>
</tr>
<tr>
<td>Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.</td>
<td>867 F.3d 449 (4th Cir. 2017)</td>
<td>4th Circuit</td>
<td>Circumstances did not suggest insured was judicially estopped from bringing forth a claim. Contract provisions could not do away with rights and liberties guaranteed under Virginia state constitution.</td>
<td>Equitable doctrine that should be applied based on the totality of the circumstances. Elements are necessary but not sufficient and the doctrine should not be applied mechanically.</td>
</tr>
<tr>
<td>New Hampshire v. Maine</td>
<td>532 U.S. 742 (2001)</td>
<td>Supreme Court</td>
<td>New Hampshire was equitably estopped from asserting inconsistent position regarding where the stateline was because New Hampshire had taken a contrary position in a previous case that would otherwise make a mockery of the judicial system.</td>
<td>Standard Rule</td>
</tr>
<tr>
<td>Stallings v. Hussmann Corp.</td>
<td>447 F.3d 1041 (8th Cir. 2006)</td>
<td>8th Circuit</td>
<td>Judicial estoppel prohibited where lower court conflated claim based on retaliation as opposed to FMLA rights. Wrongful termination suit was improperly terminated based on abuse of discretion review.</td>
<td>Equitable doctrine that should be applied based on the totality of the circumstances. Elements are necessary but not sufficient and the doctrine should not be applied mechanically.</td>
</tr>
<tr>
<td>Talavera v. School Board</td>
<td>129 F.3d 1214 (11th Cir. 1997)</td>
<td>11th Circuit</td>
<td>Employee not judicially estopped based on ADA certification from stating employee was qualified individual with disability.</td>
<td>Equitable doctrine that should be applied based on the totality of the circumstances. Elements are necessary but not sufficient and the doctrine should not be applied mechanically.</td>
</tr>
<tr>
<td><strong>Trustees in Bankr. Of N. Am. Rubber Thread Co. v. United States</strong></td>
<td>Fed. Circuit</td>
<td>Judicial estoppel applied where party took inconsistent position in a previous proceeding, that position was accepted by the court, and now asserting a contrary position would provide an unfair advantage.</td>
<td>Equitable doctrine that should be applied based on the totality of the circumstances. Elements are necessary but not sufficient and the doctrine should not be applied mechanically.</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
</tbody>
</table>
Social Media Ethics Issues

in Consumer Bankruptcy

Hon. Lisa Ritchey Craig

Materials prepared by:

Lindsey Anderson
12th Floor Law Clerk
Northern District of Georgia Bankruptcy Court
lindsey_Anderson@ganb.uscourts.gov

October 29, 2018
The Rapid Evolution of Social Media


First Blogs Launch LinkedIn Launch YouTube Launch Google+ Launch

Google Launch Facebook Launch Twitter Launch

Source: LinkedIn, Facebook, Twitter, Google
Bankruptcy Basics
United States Courts • 9 videos • 57,771 views • Last updated on May 14, 2014

Find information about bankruptcy laws, including answers to some of the most frequently asked questions. These videos will give you basic information about the process, the relief it offers, and how to find the legal help you may need.

<table>
<thead>
<tr>
<th>#</th>
<th>Title</th>
<th>Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Bankruptcy Basics - Part 1: Introduction</td>
<td>2:51</td>
</tr>
<tr>
<td>2</td>
<td>Bankruptcy Basics - Part 2: Types of Bankruptcy</td>
<td>4:07</td>
</tr>
<tr>
<td>3</td>
<td>Bankruptcy Basics - Part 3: Limits of Bankruptcy</td>
<td>4:45</td>
</tr>
<tr>
<td>4</td>
<td>Bankruptcy Basics - Part 4: Filing for Bankruptcy</td>
<td>3:09</td>
</tr>
<tr>
<td>5</td>
<td>Bankruptcy Basics - Part 5: Creditors' Meeting</td>
<td>1:40</td>
</tr>
<tr>
<td>6</td>
<td>Bankruptcy Basics - Part 6: Bankruptcy Crime</td>
<td>3:37</td>
</tr>
<tr>
<td>7</td>
<td>Bankruptcy Basics - Part 7: Courts Hearings</td>
<td>3:53</td>
</tr>
<tr>
<td>8</td>
<td>Bankruptcy Basics - Part 8: The Discharge</td>
<td>1:49</td>
</tr>
</tbody>
</table>
United States Courts

“Civility is hard to codify or legislate, but you know it when you see it.”

~ JUSTICE SANDRA DAY O’CONNOR

Civility: In the Law and In Life
414 views 5 days ago
Civility is a critical factor in making difficult decisions in the law and in life. That is the conclusion that can be drawn from this video that captures the insights of federal judges who have several lifetimes of experience dealing with contentious, high-stakes issues in their courtrooms.

This four-minute video is an educational component of a real-life civics program on civility and decision making for young adults coached by volunteer... Read more

Uploads

Sign in now to see your channels and recommendations!
# Social Media in Florida Courts

Courts in Florida are using social media for a variety of reasons: to communicate during emergency situations, to push high-profile case information, and to increase public trust and confidence in the judiciary by improving understanding of the judicial process.

To find your circuit, see the listing of courts below: [Circuit Courts (with counties)](http://www.flcourts.org/resources-and-services/education-outreach/social-media.shtml) / [Appellate Courts](http://www.flcourts.org/resources-and-services/education-outreach/social-media.shtml) (with circuits)

<table>
<thead>
<tr>
<th>Twitter</th>
<th>Facebook</th>
<th>Instagram</th>
<th>Podcasts</th>
<th>LinkedIn</th>
<th>Video</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Circuit</td>
<td>5th Circuit</td>
<td>9th Circuit</td>
<td>9th Circuit</td>
<td>9th Circuit</td>
<td>4th Circuit</td>
</tr>
<tr>
<td>2nd Circuit</td>
<td>6th Circuit</td>
<td>9th Circuit</td>
<td>11th Circuit</td>
<td>9th Circuit</td>
<td>5th Circuit</td>
</tr>
<tr>
<td>3rd Circuit</td>
<td>9th Circuit</td>
<td>10th Circuit</td>
<td>Supreme Court</td>
<td>Supreme Court</td>
<td>9th Circuit-Vimeo</td>
</tr>
<tr>
<td>4th Circuit</td>
<td>11th Circuit</td>
<td>Supreme Court</td>
<td>State Courts</td>
<td>State Courts</td>
<td></td>
</tr>
<tr>
<td>5th Circuit</td>
<td>17th Circuit</td>
<td>State Courts</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6th Circuit</td>
<td>18th Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7th Circuit</td>
<td>19th Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8th Circuit</td>
<td>Supreme Court</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9th Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10th Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11th Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12th Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>13th Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>14th Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>15th Circuit</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
• 81% of lawyers use social media for professional purposes.

• 77% of law firms have a social media presence.

• Although you might think younger lawyers would be most active on social media, the lawyers most likely to maintain a personal presence on social media were those 40-49 years old (93%).

• The social network lawyers used most often for professional purposes was LinkedIn, with 90% of lawyers indicating that they had a LinkedIn profile.
  • Facebook = 40%
  • Twitter = 26%

• 71% of firms with 500 or more attorneys maintain at least one law firm blog.
Why do lawyers use social media?

• Career development and networking (67%)
• Client development (56%)
• Education and current awareness (39%)
• Case investigation (21%)
Scenario #1: Status Updates

*When does sharing become advertising?*
The Status Updates:

• “Plan finally confirmed! Celebrating tonight. 😊”

• “Another great victory in court today! My client is delighted. Who wants to be next?”

• “Won an adversary against a major financial institution today. Tell your friends to check out my website.”

• “Helped another client retain a personal injury settlement. Call me for a free consultation.”

• “Just published an article on discharging student loans in bankruptcy. Let me know if you would like a copy.”
The Status Updates:

- “Plan finally confirmed! Celebrating tonight. 😊”
- “Another great victory in court today! My client is delighted. Who wants to be next?”
- “Won an adversary against a major financial institution today. Tell your friends to check out my website.”
- “Helped another client retain a personal injury settlement. Call me for a free consultation.”
- “Just published an article on discharging student loans in bankruptcy. Let me know if you would like a copy.”
What if the status updates were posted by a non-lawyer employee?

Rule 1.6: Confidentiality Of Information
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistance
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

Rule 7.1: Communications Concerning A Lawyer's Services
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.
The Canons of Judicial Ethics

- **Canon 1**: A Judge Should Uphold the Integrity and Independence of the Judiciary
- **Canon 2**: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities
- **Canon 3**: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently
- **Canon 4**: A Judge May Engage in Extrajudicial Activities That are Consistent With the Obligations of Judicial Office
- **Canon 5**: A Judge Should Refrain From Political Activity
Status Updates: Judges

• “I’ve had the worst cold but instead of staying home I’m being tortured by an attorney in a trial. So, I’m actually jealous of you!”

--A state court judge
• “We finished up sentencing today with a very challenging defendant.”

--A state court judge
Advertising v. Social Media: Judges

- “That new Italian restaurant by the courthouse sure is tasty! Check it out and ask for Maria!”
Status Updates: Judges

• “I’ve had the worst cold but instead of staying home I’m being tortured by an attorney in a trial. So, I’m actually jealous of you!”

• “We finished up sentencing today with a very challenging defendant.”

• “That new Italian restaurant by the courthouse sure is tasty! Check it out and ask for Maria!”
Status Updates: Judges

I've had the worst cold, but instead of staying home I'm being tortured by an attorney in a trial. So, I'm actually jealous of you!

- “We finished sentencing today with a very challenging defendant.”
- “That new Italian restaurant by the courthouse is tasty! Check it out and ask for Maria!”
Scenario #2: LinkedIn

Is LinkedIn advertising or social media?
CAN Do:

• “Tombstone Information”
• Network with other attorneys, friends, and current clients.
• Educational content (articles, blog posts, etc.)
• Job searching
SHALL NOT Do:

- Provide false or misleading information, especially comparing the lawyer’s services to other lawyers’ services (unless the comparison can be factually substantiated).
- State that attorney is a specialist unless she is a certified specialist.
- State or imply that the attorney practices in a partnership when she does not.
Al Litigator, Esquire
Litigator & Litigator, LLP
*Consumer Bankruptcy Specialist*

“I file more bankruptcies than anyone else!”

- **Review:** “The best bankruptcy lawyer I’ve ever hired. My business sailed through bankruptcy, and yours will too!”

- **Friends with:** Judge Judy
• In 2009, the Florida Supreme Court decided that judges may not be social media “friends” with lawyers who practice before them.
• This is the minority rule. See N.Y. Ethics Op. 13-39 (May 28, 2013) ("The Committee believes that the mere status of being a “Facebook friend,” without more, is an insufficient basis to require recusal.")
• For the federal judiciary,
  • “Frequent public communications between a judge and a lawyer who appears before the judge may give the appearance of impropriety.”
• “With respect to judges, communication of this nature may ‘convey or permit others to convey the impression that they are in a special position to influence the judge.’” Ethics Op. 112.
Avoid the Appearance of Impropriety

• “when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge’s honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.”

• Code of Conduct of United States Judges, cmt. to Canon 2A.
Support organizations

- “Where a judge demonstrates on a social media site a comparatively weak but obvious affiliation with an organization that frequently litigates before the court (i.e., identifying oneself as a “fan” of an organization),” this may violate ethics rules.

- “Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge’s participation in or association with the organization, would conflict with the judge’s obligation to refrain from activities that reflect adversely upon a judge’s independence, integrity, and impartiality.”
SHOULD
Do:

Write and share scholarly work
Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives.

As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice.

To the extent that the judge’s time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law.

---

I want to make my LinkedIn page private.
You’ll find the following sub-sections on the Privacy tab:

- **How others see your profile and network information**
- **How others see your LinkedIn activity**
- **How LinkedIn uses your data**
- **Job seeking preferences**
- **Blocking and hiding** - Choose who can follow you, view your blocked list, and see who you’ve unfollowed.
When I post something on Facebook, how do I choose who can see it?
Scenario #3: Bad Reviews Online
CAN Do: 
Apologize & Empathize

- “I’m so sorry this happened. I feel bad for you!”
- Only 37% of upset customers were satisfied when offered something in return.
- If the business said sorry on top of the credit, satisfaction increased to 74%.
- Saying sorry is an effective, cheap way to turn around a bad client experience.

- HOWEVER, you may not respond directly to the matters raised in the review.
- Do NOT prematurely admit fault or assign blame.
“A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.”

- Texas Disciplinary Rule of Professional Conduct 1.05(a) defines “confidential information” as including “all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.”

- Includes public information
SHOULD
Do:

• Ask your clients to post positive reviews.
SHALL NOT Do:

- Sue the client or the ratings website.

- *Browne v. Avvo Inc.*, 525 F. Supp. 2d 1249 (W.D. Wash. 2007)
SHALL NOT

Do:

• Post fake reviews.
SHALL NOT Do:

• Pre-dispute mandatory no-review clauses in retention agreements.
“A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.”

--Code of Conduct of United States Judges, cmt. to Canon 2A.
SHALL NOT
Do:

• Engage in discriminatory or harassing behavior online:

  • “Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge’s official or judicial actions, are likely to appear to a reasonable person to call into question the judge’s integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status.” MRJC 3.1 cmt. 3.
Understanding Your LinkedIn Privacy Settings

The Privacy tab covers all privacy and security settings related to what can be seen about you, how information can be used, and downloading your data.

To access your LinkedIn privacy settings:

1. Click the Me icon at the top of your LinkedIn homepage.
2. Select Settings & Privacy from the dropdown.
3. Click the Privacy tab at the top of the page.

You’ll find the following sub-sections on the Privacy tab:

- *How others see your profile and network information* - Choose how and what you share about yourself on LinkedIn.
- *How others see your LinkedIn activity* - Control the visibility of your profile activity.
- *How LinkedIn uses your data* - Manage the ways your data is used on LinkedIn.
- *Job seeking preferences* - Set your preferences regarding job seeking, including letting recruiters know you’re open to opportunities.
- * Blocking and hiding* - Choose who can follow you, view your blocked list, and see who you’ve unfollowed.
Closing LinkedIn Account

To close your LinkedIn account from the Settings & Privacy page:
1. Click the Me icon at top of your LinkedIn homepage.
2. Select Settings & Privacy from the dropdown.
3. Under the Account management section of the Account tab, click Change next to Closing your LinkedIn account
4. Check the reason for closing your account and click Next.
5. Enter your account password and click Close account.

Forgot LinkedIn Password

You can reset your password on the Sign in page.
1. Click the ? question mark beside the Password field or the Forgot password? link.
2. Enter an email address you have on your account.
If you only have an email address on your account

1. LinkedIn will email a link to reset your password to the email address you provided.
2. Go to the email account and follow the instructions in the message from LinkedIn.

No Access to Email Address

There are instances when you no longer use or have access to the email address used to register your LinkedIn account. We suggest first trying to sign in with a secondary email address that's associated with your account. We allow you to sign in with any email address associated with your account.

If you can locate the email address, but can't remember your password

If you have access to your email address but can't remember your password, reset your password using the instructions above.

Once you successfully sign in, add another email address or a phone number to make sure you can always access your account in the future.

If you still can't access your account

If you haven't been able to recover your password or don't have access to an email address associated with your account, we can help by verifying your identity. To do this, we use a
technology that processes encrypted scans of your government-issued ID so that we can help get you back into your account as quickly and securely as possible.

We'll only use the ID information you provide to verify who you are, and we'll only hold onto it for a short period of time while your account issues are being resolved. Generally, scans and any associated personal information are permanently deleted within 14 days.

To get started, you'll need:

1. A smartphone or computer with a webcam.
2. Your driver license, state-issued ID card, or passport.
3. An email address where we can reach you.
4. Access to a desktop computer.

Please follow the steps below on desktop:

1. Once you begin the identity verification process, you'll be asked to take a photo of your ID with your smartphone or webcam.
2. Enter the email address associated with your account so that we can locate your account, and follow the onscreen instructions.
3. On the following page, click I don't have access to my email address. First, we'll ask you for a new email address. Next, we'll ask you to provide a valid passport or government ID.

   • After you're finished, we'll process your information and be in contact to assist you further.
Deactivating Facebook Account

To deactivate your account:

1. Click at the top right of any Facebook page.
2. Select Settings.
3. Click General in the left column.
4. Click Manage your account, then click Deactivate your account and follow the instructions to confirm.

When your account is deactivated:

- No one else can see your profile.
- Some information, like messages you sent to friends, may still be visible.

To permanently delete your Facebook account, you must reach out to customer service and wait 14 days for account deletion to become effective.
MATTER OF EMERY

Cite as 799 S.E.2d 295 (S.C. 2017)

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur. JAMES, J., not participating.

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, Esquire, of Bogan Law Firm, of Columbia, for respondent.

PER CURIAM:

In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand. She further agrees: 1) to pay the costs incurred in the investigation and prosecution of this matter within thirty (30) days of the imposition of discipline; 2) to complete the Legal Ethics and Practice Program Trust Account School within one (1) year of the imposition of discipline; and 3) to refund $2,995.00 to Client B, $2,995.00 to Client C, and $3,000.00 to Client E within ninety (90) days of the imposition of discipline. We accept the Agreement and issue a public reprimand with conditions as specified in the conclusion of this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent is licensed to practice law in South Carolina, New York, Maryland, and the District of Columbia. Prior to her admission in South Carolina in 2013, respondent was employed by three firms in other states, primarily conducting real estate closings. Since 2013, respondent has operated a solo practice, Emery Law, from an office in Myrtle Beach. Respondent also maintained office space for Emery Law in New York, but she performed little work there. Emery Law had no non-lawyer employees, but was, instead, staffed by contract paralegals employed by Precision Paralegal, a non-lawyer-owned company. Emery Law also used the support services of First Legal Net, a non-lawyer-owned company contracted through Precision Paralegals. During the times relevant to this Agreement, respondent had no partners or
associates at Emery Law. Her practice in South Carolina has consisted of residential and commercial real estate closings and mortgage loan modification matters.

**Matter I**

During the time relevant to these complaints, respondent operated a website for Emery Law. Respondent admits that she retained a website professional to prepare the content of her website without discussing the Rules of Professional Conduct with him or reviewing the website before it was disseminated. The website professional developed the website content by cutting and pasting from other law firm websites which resulted in a number of inaccurate representations and improper statements.

Respondent acknowledges the following errors on her law firm website:

1. the website referred to “attorneys” and “lawyers” when in fact respondent was the only attorney at Emery Law;
2. the website claimed “over 12 years of experience” and “fifteen years combined experience” in reference to respondent. Although respondent had been admitted to practice for twelve years, she had only practiced law for about eight years prior to becoming admitted in South Carolina;
3. the website included a form of the word “expert,” although respondent was not a certified specialist; and
4. the website advertised for “wrongful foreclosure lawsuits” when respondent had no experience in, or intention to accept, cases related to litigation.

**Matter II**

Respondent maintained a law firm profile on www.facebook.com. Both respondent and a paralegal employed through Precision Paralegal created content for the Facebook page. Respondent did not adequately monitor the posts made by the contract paralegal. Respondent acknowledges the following errors on her Facebook page:

1. the paralegal created Facebook posts congratulating respondent’s clients after each real estate closing. Respondent did not have her clients’ permission to post their names and other information about their legal matters on Facebook.
2. the paralegal included unsubstantiated comparative descriptions of respondent and her legal services such as “best,” and
3. the paralegal advertised special discounted rates for respondent’s legal fees without disclosing whether or not those rates included anticipated costs.

**Matter III**

In 2013, respondent signed a contract with Friedman Law, a New York law firm, to accept referrals of mortgage loan modification cases. In connection with her association with Friedman Law, respondent received client referrals from an internet marketing company. Respondent paid for this service based on the number of potential clients referred to her, not based on the number of referred clients who ultimately hired her. Respondent charged her clients a “flat” fee for loan modification cases.

In this marketing campaign, advertisements were placed on the internet with a link to respondent’s website. A potential client would access the website and complete an online questionnaire. Regardless of the residence of the potential client or the location of the property, the case would be assigned to Emery Law as part of the Friedman Law network. A non-lawyer employee of the internet marketing company or Friedman Law would review the completed questionnaire, send a solicitation or introduction email to the potential client, and conduct an initial telephone consultation with the potential client. That contact would include discussing the scope of the representation and fees, and providing the client with the fee agreement and electronic payment authorization forms on Emery Law letterhead. Once the forms were signed and initial payment received, the client’s information would be sent to non-lawyers working on behalf of Emery Law employed by Friedman Law, Precision Paralegal, or First Legal Net.

Upon receipt of client information, a non-lawyer employee of Friedman Law, Precision
Paralegal, or First Legal Net would contact the client by telephone for a “quality control interview” to ensure that the client qualified for a loan modification. These non-lawyers would then set up the file and contact the client to complete necessary forms, request financial loan documentation, and schedule a telephone conference with a representative of the lender. In their communications with respondent’s clients and potential clients, the non-lawyers included Emery Law in their signature blocks and used documents with Emery Law letterhead.

In connection with her association with Friedman Law, respondent accepted cases in states where she is not licensed to practice law. Six of those clients filed disciplinary complaints. Other than some of the Precision Paralegal employees who physically worked in her office, respondent had no direct supervision of the non-lawyers who worked on these clients’ cases. Respondent was rarely copied on emails between the non-lawyers and these clients or internal emails among the non-lawyers. Respondent supervised their work by reviewing their notes, documents, and some emails on a shared electronic case management system.

Review of these clients’ files reveals that, for the most part, the non-lawyers worked diligently to try to secure modifications of the mortgage loans and adequately communicated with the clients. In each of these cases, however, some issue or complication resulted in the client’s dissatisfaction and, ultimately, the disciplinary complaints. Respondent had no personal, direct communication with these clients during their representation except when the cases reached the point at which the clients complained about her services or demanded refunds of their fees.

With regard to the conduct of the non-lawyers working on her behalf in these cases, respondent admits the following misconduct:

1. the non-lawyers presented the fee agreement and discussed the scope of the representation and the fee structure to the clients before respondent reviewed the file and accepted the cases. The written fee agreement was confusing and self-contradictory; it also contradicted statements made to the clients by some of the non-lawyers and subsequent emails and documents sent to the clients, particularly with regard to available legal services, fee refunds, and termination of the representation;

2. when issues arose about how the clients’ cases were progressing, the non-lawyers discussed those issues and made decisions amongst themselves then advised the clients without respondent’s input;

3. the non-lawyers negotiated the terms of loan modifications with lender representatives, sought continuances or stays of sales of properties from lenders’ counsel and courts, and otherwise provided legal services to the clients without review or additional effort by respondent. In one case, a non-lawyer (referred to as a “bankruptcy specialist”) assisted a client in preparing a pro se bankruptcy petition and advised her about filing procedures. The petition filed by the client was deficient and did not meet the requirements of the Bankruptcy Court. In another case, a non-lawyer advised the client to stop making mortgage payments during the modification negotiations (in spite of the client’s ability to do so and the risk of foreclosure), contrary to respondent’s customary advice to similarly situated clients; and

4. in email messages and telephone calls, the non-lawyers held themselves out as employees of Emery Law when, in fact, none of them were Emery Law employees, only a few physically worked in respondent’s office, and most did not even work in South Carolina. At any given time, the clients did not know if they were communicating with an employee of Emery Law, Friedman Law, Precision Paralegal, First Legal Net, or an associated firm in the Friedman Law network.

Matter IV

Respondent relied on representations from Friedman Law that assisting a client in negotiating a mortgage loan modification was not
the practice of law and that Friedman Law’s network of attorneys in other states satisfied the requirements for multijurisdictional practice. Respondent admits the following with regard to her arrangements with Friedman Law:

1. assisting clients in loan modification matters is the practice of law in South Carolina when performed by a lawyer;
2. simply associating with a licensed attorney in another state might not be sufficient to avoid the unauthorized practice of law, depending on the rules and laws in place in that state;
3. she did not research the law in the states from which she accepted cases to determine the appropriateness of representing residents of those states; and
4. regardless of whether or not a particular state has adopted a rule permitting multijurisdictional practice and regardless of whether or not a particular state has determined that loan modification assistance is the practice of law, respondent’s fee agreement specifically and repeatedly refers to her firm’s services as “legal services” and to herself as “Attorney.” Respondent admits that her clients reasonably believed that they were retaining an attorney at a law firm to provide them with legal services and that they would be afforded the protections of an ethical code specific to the legal profession.

**Matter V**

Client A is a resident of the State of Washington. Client A hired respondent to represent her in an attempt to modify the terms of a mortgage loan on residential property located in Washington. Client A agreed to a flat fee of $2,995.00, and made a payment of $1,500.00 towards that fee. Respondent was not licensed to practice law in Washington and did not disclose to Client A that she was not licensed to practice law in that state. Client A terminated respondent’s services prior to modification of the loan and sought the assistance of an attorney licensed in Washington. Respondent ultimately refunded fees paid by Client A and signed an agreement with Washington authorities that she will no longer perform services in that state.

Respondent admits the following misconduct with regard to her representation of Client A:

1. the loan modification services provided by her in Washington in connection with her law practice was subject to the Washington Rules of Professional Conduct;
2. her representation of Client A was part of a systematic and continuous presence in Washington and constituted the unauthorized practice of law in violation of Washington’s Rules of Professional Conduct Rule 5.5(b);
3. funds were drawn on Client A’s bank account through an authorized electronic transfer and paid directly into respondent’s operating account prior to Client A signing the fee agreement and before those funds were earned. Washington Rules of Professional Conduct Rule 1.15A(c)(2) requires that fees paid in advance be held in trust until earned unless certain disclosures are made in a written fee contract. Respondent did not include those disclosures in Client A’s fee contract and, therefore, she was not entitled to deposit the funds directly into her operating account; and
4. respondent’s failure to adequately supervise the work of non-lawyers on Client A’s case violated Washington Rules of Professional Conduct Rule 5.3(a).

**Matter VI**

Mr. and Mrs. B (Client B) are residents of the State of Wisconsin. Client B hired respondent to attempt to modify the terms of a mortgage loan on residential property located in Wisconsin. Client B paid respondent a flat fee of $2,995.00 through a series of electronic funds transfers. Ultimately, Client B terminated respondent’s services before obtaining a loan modification.
Respondent was not licensed to practice law in Wisconsin. She did not disclose to Client B that she was not licensed to practice law in Wisconsin.

Respondent admits the following misconduct with regard to her representation of Client B:

1. her representation of Client B was part of a systematic and continuous presence in Wisconsin and, as such, was the unauthorized practice of law in violation of Wisconsin Supreme Court Rule 20.5.5(b)(1); and

2. funds were drawn on Client B’s bank account through an authorized electronic transfer and paid directly into respondent’s operating account before those funds were earned. Wisconsin Supreme Court Rule 20.1.15 requires that fees paid in advance are to be held in trust until earned unless certain disclosures are made in a written fee contract. Respondent did not include those disclosures in Client B’s fee contract and, therefore, she was not entitled to deposit the funds directly into her trust account.

Matter VII

Client C is a resident of the State of Pennsylvania. Client C hired respondent to represent her in an attempt to modify the terms of a mortgage loan on residential property located in Pennsylvania. Client C paid a flat fee of $2,995.00 through a series of electronic funds transfers. Respondent was not licensed to practice law in Pennsylvania. Respondent terminated the representation prior to modification of the loan because Client C filed a disciplinary complaint.

Respondent admits the following misconduct with regard to her representation of Client C:

1. the loan modification services provided by respondent in Pennsylvania in connection with her law practice was subject to the Pennsylvania Rules of Professional Conduct, 204 Pa. Code § 81.4 pursuant to Rule 5.7;

2. her representation of Client C was part of a systematic and continuous presence in Pennsylvania and, as such, was the unauthorized practice of law in violation of Rule 5.5(b) of the Pennsylvania Rules of Professional Conduct;

3. funds were drawn on Client C’s bank account through an authorized electronic transfer and paid directly into respondent’s operating account before those funds were earned. Rule 1.15(i) of the Pennsylvania Rules of Professional Conduct requires that fees paid in advance be held in trust until earned unless the client gives informed consent, confirmed in writing, to the handling of fees in a different manner. Respondent did not obtain Client C’s informed consent, confirmed in writing. Therefore, respondent was not entitled to deposit the funds directly into her operating account; and

4. her failure to adequately supervise the work of non-lawyers on Client C’s case violated Rule 5.3(a) of the Pennsylvania Rules of Professional Conduct.

Matter VIII

Client D is a resident of the State of Texas. Client D hired respondent to represent him in an attempt to modify the terms of a mortgage loan on residential property located in Texas. Client D agreed to a flat fee of $2,995.00 and paid a total of $2,250.00 by cashier’s checks. Respondent was not licensed to practice law in Texas, and she did not disclose to Client D that she was not licensed to practice law in that state. Client D terminated the representation prior to modification of the loan because of his concerns over the progress of the case. Respondent has refunded his fees.

Respondent admits the following misconduct with regard to her representation of Client D:

1. based on representations made in her written fee contract, the loan modification services provided by respondent in Texas in connection with her law practice were legal services subject to the Texas Disciplinary Rules of Professional Conduct.
2. respondent’s representation of Client D was the unauthorized practice of law in violation of Rule 5.05(a) of the Texas Disciplinary Rules of Professional Conduct;

3. the cashier’s checks submitted by Client D were deposited into respondent’s operating account before the funds were earned. Rule 1.14(c) of the Texas Rules of Professional Conduct requires that fees paid in advance be held in trust until earned, therefore, respondent was not entitled to deposit the funds directly into her operating account; and

4. respondent’s failure to adequately supervise the work of non-lawyers on Client D’s case violated Rule 5.03(a) of the Texas Disciplinary Rules of Professional Conduct.

Matter IX

Mr. and Mrs. E (Client E) are residents of the State of Utah. Client E hired respondent to modify the terms of a mortgage loan on residential property located in Utah. Client E agreed to a flat fee of $3,000.00 which was paid through a series of electronic funds transfers. Respondent was not licensed to practice law in Utah. Respondent did not disclose to Client E that she was not licensed to practice law in Utah. Client E terminated the representation prior to modification of the loan because of concerns over the progress of the case.

Respondent admits the following misconduct with regard to her representation of Client E:

1. the loan modification services provided by respondent in Utah in connection with her law practice was subject to the Utah Rules of Professional Conduct pursuant to Rule 5.7(b) of those rules;

2. her representation of Client E was part of a systematic and continuous presence in Utah and, as such, was the unauthorized practice of law in violation of Rule 5.5(b) of the Utah Rules of Professional Conduct;

3. funds were drawn on Client E’s bank account through authorized electronic transfers and paid directly into respondent’s operating account before those fees were earned. Rule 1.15(c) of the Utah Rules of Professional Conduct requires that fees paid in advance be held in trust until earned, therefore, respondent was not entitled to deposit the funds directly into her operating account; and

4. her failure to adequately supervise the work of non-lawyers on Client E’s case violated Rule 5.3(a) of the Utah Rules of Professional Conduct.

Matter X

Client F is a resident of the State of Illinois. Client F hired respondent to represent her in an attempt to modify the terms of a mortgage loan on residential property located in Illinois. Client F agreed to a flat fee of $2,995.00 which was paid with a series of electronic funds transfers. Respondent was not licensed to practice law in Illinois. Respondent did not disclose to Client F that she was not licensed to practice law in Illinois. Client F terminated the representation prior to modification of the loan. Respondent entered into a settlement agreement to refund $1,300.00 of the fees paid. Client F filed a disciplinary complaint with the disciplinary authority in Illinois which then referred the matter to the Commission on Lawyer Conduct (the Commission). Ultimately, respondent refunded Client F the full amount of the fees paid.

Respondent admits the following misconduct with regard to her representation of Client F:

1. based on representations set forth in her fee agreement, the loan modification services provided by respondent in Illinois in connection with her law practice were legal services subject to the Illinois Rules of Professional Conduct;

2. her representation of Client F was part of a systematic and continuous presence in Illinois and, as such, was
the unauthorized practice of law in violation of Rule 5.5(b) of the Illinois Rules of Professional Conduct;

3. funds were drawn on Client F’s bank account through an authorized electronic transfer and paid directly into respondent’s operating account before the fees were earned. Rule 1.15(c) of the Illinois Rules of Professional Conduct requires fees paid in advance be held in trust until earned unless certain disclosures are made in a written fee contract. Respondent did not include those disclosures in Client F’s fee contract and, therefore, was not entitled to deposit the funds directly into her operating account;

4. her failure to adequately supervise the work of non-lawyers on Client F’s case violated Rule 5.3(a) of the Illinois Rules of Professional Conduct; and

5. in entering into a settlement agreement with Client F, respondent prospectively limited her liability to Client F without the involvement of, or the advice to seek the advice of independent counsel, in violation of Rule 1.8(h) of the Illinois Rules of Professional Conduct.

Matter XI

Respondent represented Apex Homes and its sole shareholder (LW) in real estate matters. In August 2015, LW retained respondent to file a collection action in South Carolina on behalf of Apex against US Development Company, LLC (US Development) on a promissory note guaranteed by three individuals (DB, TP, and JP) (referred to as the Collection Action).

Respondent attempted service on US Development and the three guarantors, all named as defendants in the Collection Action. Robert Lewis, Esquire, contacted respondent and advised her he would be representing US Development, TP, and JP in the Collection Action. Mr. Lewis also advised respondent that he would not be representing DB nor would he accept service on his behalf.

Respondent was unable to perfect service on DB. On January 27, 2016, respondent filed a Motion for Order of Publication which was granted. DB did not file an answer. In June 2016, respondent filed a Motion for Default against DB. A hearing was held in which DB (through counsel) argued that DB should be permitted to file a late answer because respondent did not serve Mr. Lewis (as counsel for the other three defendants) with the Motion for Order of Publication.

Following the hearing on the Motion for Default, Mr. Lewis and DB’s counsel requested respondent provide proof of service of the Motion for Order of Publication and proposed order on Mr. Lewis. Respondent produced a copy of a cover letter to the clerk of court showing a carbon copy (“cc”) to Mr. Lewis. An examination of the clerk of court’s file showed that the copy of the cover letter was not the same as the one actually sent to the clerk of court. The letter in the clerk’s file did not show a “cc” to Mr. Lewis and differed in a number of other significant ways from the copy. Respondent also produced a copy of an affidavit of her paralegal attesting that she had served Mr. Lewis with the Motion and proposed order. The affidavit of service was not filed with the clerk of court.

Respondent informed the court that it was the practice of her paralegal to add a “cc” reference to a copy of a cover letter, then to serve the amended copy along with an affidavit of service on the parties listed in the “cc” reference. Respondent further asserts that, in the case of the Motion for Order by Publication and proposed order in the Collection Action, her paralegal misplaced the copy and, therefore, recreated the cover letter and added the “cc” reference, thus accounting for the inconsistencies between the original in the clerk’s file and the copy. Mr. Lewis reviewed the clerk of court’s file and found respondent’s cover letters for the Order of Publication, Affidavit of Publication, affidavits of service and of nonservice, a Motion for Summary Judgment and a Motion for Protective Order. The original cover letters for these documents do not have “cc” references indicating that Mr. Lewis was served.
In her order denying the Motion for Default Judgment, the judge found that respondent "did not serve Robert Lewis—who represented the other Defendants in the suit—with the Motion for Order of Publication. The failure to serve the co-defendants seems to be a result of a break down in office procedures, and was not the result of willful actions on behalf of [respondent]. However, the clerk of court’s file corroborates Lewis’s contention that he was not served with the motion and other pertinent documents."

Respondent asserts her paralegal followed the practice set forth above with the other documents as well. That is, she made copies of the cover letters and added the “cc:” references to them before she served them on Mr. Lewis. Respondent acknowledges that this practice makes it difficult for her to establish that she actually served Mr. Lewis with the documents. She also acknowledges that showing a copy to opposing counsel on a motion allows the judge to ensure compliance with Canon 3(B)(7) of the Code of Judicial Conduct, Rule 501, SCACR. Respondent has now put in place a better procedure in her office to ensure that service of motions and other papers is properly documented.

**Matter XII**

In March 2016, respondent filed a defamation action in South Carolina on behalf of LW and Apex against US Development, TP, JP, Mr. Lewis, and Mr. Lewis’s law firm (referred to as the Defamation Action). The alleged defamatory statements were made in connection with a Department of Labor, Licensing, and Regulation complaint defendants filed against an appraiser involved in the transaction underlying the Collection Action.

After she filed the Defamation Action Summons and Complaint, but before she attempted service, respondent issued third party subpoenas for documents she believed would support her clients’ defamation claims. She did not serve Mr. Lewis or any of the other Defamation Action defendants with copies of the subpoenas. Ultimately, respondent was unable to obtain documents to support those claims so she dismissed the Defamation Action with prejudice. Respondent mistakenly believed that she did not have to serve the defendants with copies of the subpoenas as they had not yet been served with the Defamation Action Summons and Complaint. Respondent now recognizes that Rule 45(b)(1) of the South Carolina Rules of Civil Procedure (SCRPC) requires that she serve notice and a copy of a third-party subpoena to all parties to an action. She further acknowledges that it was improper to issue subpoenas prior to service of the Defamation Action Summons and Complaint and that the proper procedure for obtaining the information she sought would have been to file a petition pursuant to Rule 27(a), SCRPC.

**Law**

Respondent admits that by her conduct she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation); Rule 1.6 (lawyer shall not reveal information relating to representation of client unless client gives informed consent); Rule 5.3(a) (with respect to non-lawyer employed by lawyer, lawyer shall make reasonable efforts to ensure that firm has in effect measures giving reasonable assurance that person’s conduct is compatible with professional obligations of lawyer); Rule 5.5(a) (lawyer shall not practice law in jurisdiction in violation of regulation of law in that jurisdiction); Rule 5.7 (lawyer shall be subject to Rules of Professional Conduct with respect to provision of law related services); Rule 7.1(a) (lawyer shall not make false, misleading, or deceptive communications about lawyer or lawyer’s services; communication violates rule if it contains material misrepresentation of fact or omits fact necessary to make statement considered as whole not materially misleading); Rule 7.1(e) (lawyer shall not make false, misleading, or deceptive communications about lawyer or lawyer’s services; communication violates rule if it compares lawyer’s services with other lawyers’ services, unless comparison can be factually substantiated); Rule 7.2(g) (lawyer who advertises specific fee or range of fees for particular service shall honor advertised fee or fee range for at least ninety (90) days following dissemination of advertisement, unless advertisement specifies shorter period; provided fee advertised in publication issued
not more than annually, shall be honored for one (1) year following publication; Rule 7.4(b) (lawyer who is not certified specialist may not use word or form of words “certified,” “specialist,” “expert,” or “authority” in advertisement); Rule 7.5(d) (lawyer may state or imply lawyer practices in partnership or other organization only when that is fact); Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice); and Rule 8.5(c) (lawyer giving advice or providing services that would be considered practice of law if provided while lawyer affiliated with law firm is subject to Rules of Professional Conduct with respect to giving of such advice or providing of such services whether or not lawyer actively engaged in practice of law or affiliated with law firm; in giving such advice and in providing such services, lawyer shall be considered to be representing client for purposes of Rules of Professional Conduct.).

Respondent also admits she has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion
We find respondent’s misconduct warrants a public reprimand. Accordingly, we accept the Agreement and publicly reprimand respondent for her misconduct. In addition, respondent shall: 1) pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission no later than thirty (30) days from the date of this opinion and 2) provide proof of completion of the Legal Ethics and Practice Program Trust Account School to the Commission no later than one (1) year from the date of this opinion. Further, within ninety (90) days of the date of this opinion, respondent shall refund $2,995.00 to Client B, $2,995.00 to Client C, and $3,000 to Client E.

PUBLIC REPRIMAND.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.
ISSUE: Under what circumstances would an attorney’s postings on social media websites be subject to professional responsibility rules and standards governing attorney advertising?

DIGEST: Material posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a “communication” within the meaning of rule 1-400 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California; or (2) “advertising by electronic media” within the meaning of Article 9.5 (Legal Advertising) of the State Bar Act. The restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in a social media setting.

AUTHORITIES INTERPRETED: Rule 1-400 of the Rules of Professional Conduct of the State Bar of California.1/

Business and Professions Code section 6106, 6151, and 6152.

Business and Professions Code sections 6157 through 6159.2.

STATEMENT OF FACTS

Attorney has a personal profile page on a social media website. Attorney regularly posts comments about both her personal life and professional practice on her personal profile page. Only individuals whom the Attorney has approved to view her personal page may view this content (in Facebook parlance, whom she has “friended”).2/ Attorney has about 500 approved contacts or “friends,” who are a mix of personal and professional acquaintances, including some persons whom Attorney does not even know.

In the past month, Attorney has posted the following remarks on her profile page:

- “Case finally over. Unanimous verdict! Celebrating tonight.”
- “Another great victory in court today! My client is delighted. Who wants to be next?”
- “Won a million dollar verdict. Tell your friends and check out my website.”
- “Won another personal injury case. Call me for a free consultation.”
- “Just published an article on wage and hour breaks. Let me know if you would like a copy.”

1/ Unless otherwise noted, all rule references are to the Rules of Professional Conduct of the State Bar of California.

2/ References to Facebook and “friending” should not be construed as limiting this opinion to that particular social media website. For example, Attorney could post the same language on Twitter, which would be viewed by all of her followers. Guidance to attorneys in this area has not kept pace with all forms of social media usage. Rather than discussing each form of social media, which forms likely will change over time, this opinion sets forth the general analysis that an attorney should undertake when considering use of any particular form of social media.
DISCUSSION

Although attorneys are permitted to advertise, any such advertisements must comply with a number of restrictions in both the Rules of Professional Conduct and the Business and Professions Code. For example, Business and Professions Code section 6157.1 prohibits any “false, misleading or deceptive statement” in an advertisement, while section 6157.2 prohibits including in an advertisement any “guarantee or warranty regarding the outcome of a legal matter.” Bus. & Prof. Code, §§ 6157.1 and 6157.2; see also rule 1-400, Std. 1. Rule 1-400 provides even more detailed requirements with which attorney advertising must comply. Specifically, rule 1-400(D) provides rules that must be followed to ensure that a communication is not false or misleading, or made in a coercive manner. Rule 1-400 also provides sixteen enumerated “Standards” listing examples of communications which are presumed to be in violation of rule 1-400.

In the above hypothetical, Attorney must determine whether her postings constitute advertisements that must comply with these various advertising rules. Rule 1-400, however, speaks in terms of “communications” rather than “advertisements.” Thus, it is important to look at how both terms are defined.

Business and Professions Code section 6157(c) defines “advertise” or “advertisement” as:

[any] communication, disseminated by television or radio, by any print medium, including, but not limited to, newspapers and billboards, or by means of a mailing directed generally to members of the public and not to a specific person, that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on the behalf of, an attorney.

Bus. & Prof. Code, § 6157(c) (emphasis added). Although section 6157(c) does not refer to computer-based communications like Facebook or Twitter postings, there is little doubt that the restrictions of sections 6157.1 and 6157.2 indeed apply to computer-based communications. See, e.g., Bus. & Prof. Code, §§ 6158 (referring to “advertising by electronic media” in the context of Sections 6157.1 and 6157.2); 6157(d) (defining “electronic medium” as including “computer networks”). What may be less clear is whether a posting on Facebook or Twitter, like that described in the hypothetical, is considered “directed generally to members of the public and not to a specific person,” as required under section 6157(c)’s definition of an advertisement. This opinion does not take a position on this point because, whether or not the hypothetical posting constitutes an “advertisement” as defined in section 6157(c), it nonetheless will be subject to the same requirements as any other advertisement by virtue of rule 1-400 – provided it is a “communication,” as specified in section 6157(c) and rule 1-400(A).

3/ This Formal Opinion interprets such rules and statutes under a number of factual scenarios. Questions of legal constitutionality of those rules or statutes (even as applied) are outside of the scope of this Formal Opinion.

4/ Unless otherwise noted, all rule references are to the Rules of Professional Conduct of the State Bar of California.

5/ The Standards actually go through No. 16, but Standard 11 has been repealed, thereby leaving 15.

6/ In California State Bar Formal Opinion No. 2001-155, this Committee concluded that a law firm website is subject to professional responsibility standards governing attorney advertising. The website considered was a commercial website that included, among other promotional content: a description of the law firm and its history and practice; and the education, professional experience, and activities of the firm’s attorneys. Specifically, this Committee found that a commercial law firm website is governed by rule 1-400 because the website’s content concerns a lawyer’s availability for professional employment. This Committee similarly found that such websites are subject to the State Bar Act provisions governing electronic media advertising in Article 9 of the Business and Professions Code.

7/ Each of the restrictions and requirements included in Business and Professions Code sections 6157.1 and 6157.2 can be found – in a substantially similar form – in rule 1-400. For example, section 6157 prohibits false or deceptive statements; this same concept is captured, among other places, in rule 1-400(D). Section 6157.2 (a) through (c) prohibits guarantees and misleading testimonials; these concepts are captured in rule 1-400, Standards 1, 2, and 13. Section 6157(d) requires disclosure about whether the client will be responsible for certain costs; this concept is captured in rule 1-400, Standard 14.
Rule 1-400, which is entitled “Advertising and Solicitation,” applies to any “communication,” without concerning itself with whether such communication also constitutes an “advertisement.” Indeed, rule 1-400(A) provides four non-exclusive examples of “communications” subject to the rule, only one of which is based on the communication being an “advertisement . . . directed to the general public or any substantial portion thereof.” Rule 1-400(A)(3).

Thus, in our hypothetical, Attorney primarily must determine whether any of her postings constitute “communications” under rule 1-400(A). If they do, then those postings that constitute “communications” must comply with several significant requirements imposed elsewhere in rule 1-400 and the accompanying standards.

Communications under Rule 1-400

Rule 1-400(A) defines “communications” for purposes of that rule as: “any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client . . .” (emphasis added). Rule 1-400(A) then goes on to provide non-exclusive examples of types of messages or offers that are covered by the rule, provided that they are “concerning the availability for professional employment.” This includes, without limitation:

1. Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
2. Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
3. Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
4. Any unsolicited correspondence from a member or law firm directed to any person or entity.

Rule 1-400 does not expressly refer to electronic communications, like those occurring on Facebook, Twitter, or other internet-based social media websites. Nonetheless, just as there is little doubt that a Facebook or Twitter posting that otherwise meets the definition of “advertising” in Business and Professions Code section 6157(c) would be considered an advertisement, there is little doubt that a social media posting that otherwise meets the criteria described in rule 1-400(A) would be a communication for purposes of that rule. Thus, the pertinent question for determining whether a posting constitutes a “communication” under rule 1-400(A) is whether it “concern[s] the availability for professional employment” of Attorney.8

If a posting is found to be a communication subject to rule 1-400, the result is that the posting must comply with the mandates of Rule 1-400(D); it also should avoid falling within one of the sixteen enumerated types of communications presumed to be in violation of rule 1-400, as set forth in the Standards. Rule 1-400(D) generally provides that a communication must not be untrue or misleading (rule 1-400(D)(1), (2) & (3)), must disclose that it is a communication (rule 1-400(D)(4)), and must not be transmitted in a coercive or intrusive manner (rule 1-400(D)(5)).9 As discussed above, the sixteen Standards provide various types of communications (such as, for

---

8/ This opinion does not address whether the initial “friend” or “connection” request, if motivated primarily by business development purposes, can itself constitute a communication subject to rule 1-400.

9/ Specifically, rule 1-400(D) provides, in pertinent part:

(D) A communication or a solicitation (as defined herein) shall not:

1. Contain any untrue statement; or
2. Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
3. Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
4. Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
5. Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

...
example, communications using font size smaller than 12 point, Std. 5, or testimonials or guarantees of results without appropriate disclaimers, Stds. 1 & 2), which are presumed to be in violation of rule 1-400.

In our scenario, Attorney posts two types of professional information: (1) general legal information, such as recommendations of good articles; and (2) information about her legal practice, such as complaints she has filed and victories in court. With respect to the first type of information (e.g., Example Number 5, below), we conclude that this does not constitute information concerning availability for employment. When Attorney posts information about her practice, however, rule 1-400 may apply.

Specific Examples

Consider the following examples\(^{10}\) of Attorney’s use of personal social media sites for status postings which are visible to all of her “friends,” “connections,” or “followers” (although not to the public at large):

**Example Number 1: “Case finally over. Unanimous verdict! Celebrating tonight.”**

In the Committee’s opinion, this statement, standing alone, is not a communication under rule 1-400(a) because it is not a message or offer “concerning the availability for professional employment,” whatever Attorney’s subjective motive for sending it.\(^ {11}\) Attorney status postings that simply announce recent victories without an accompanying offer about the availability for professional employment generally will not qualify as a communication.

**Example Number 2: “Another great victory in court today! My client is delighted. Who wants to be next?”**

Similarly, the statement “Another great victory in court today!” standing alone is not a communication under rule 1-400(a) because it is not a message or offer “concerning the availability for professional employment.” However, the addition of the text, “[w]ho wants to be next?” meets the definition of a “communication” because it suggests availability for professional employment. Thus, it is subject to rule 1-400(D) and rule 1-400’s Standards.

Having concluded this status posting is a communication, the post violates the prohibition on client testimonials. An attorney cannot disseminate “communications” that contain testimonials about or endorsements of a member unless the communication also contains an express disclaimer. See Rules Prof. Conduct, rule 1-400(E), Std. 2; see also *Belli v. State Bar* (1974) 10 Cal.3d 824 [112 Cal.Rptr. 527] (holding that suggesting clients are “dazzled by the services they have received from the attorney” is prohibited, and consequently an attorney “cannot advertise that he has performed his services so well that his clients consequently praise him”). Attorney has not included a disclaimer, so her status posting is presumed to violate rule 1-400.

Similarly, the post may be presumed to violate rule 1-400 because it includes “guarantees, warranties, or predictions regarding the result of the representation.” See Rules Prof. Conduct, rule 1-400(E), Std. 1. The post expressly relates to a “victory,” and could be interpreted as asking who wants to be the next victorious client.

The Committee further concludes that “Who wants to be next?” when viewed in context, seeks professional employment for pecuniary gain. Accordingly, Attorney’s post runs afoul of rule 1-400(E), Std. 5, because it does not bear the word “Advertisement,” “Newsletter,” or words to that effect.\(^ {12}\) Attorneys may argue that including this

---

\(^{10}\) To the extent a status posting invites further discussions between the poster and the reader, this opinion does not address whether those further discussions themselves may constitute communications subject to rule 1-400.

\(^{11}\) If, in fact, the statement is not true, then Attorney may be violating other rules not addressed in this opinion – for example, Business and Professions Code section 6106.

\(^{12}\) Rule 1-400, Standard 5 states that the word “Advertisement,” “Newsletter,” or similar words appear in “12-point print on the first page.” The Committee recognizes that certain social media postings may not allow for the user to choose the font size of postings, and thus technical compliance with Standard 5 may be impossible. It may be that the State Bar needs to review such standards to bring them current in the face of the prevalence of electronic communications. Until any changes are made to this language, however, the Committee cannot express an opinion to the effect that the use of font size of less than 12-point is acceptable.
wording for each “communication” posting would be overly burdensome, and destroy the conversational and impromptu nature of a social media status posting. The Committee is of the view, however, that an attorney has an obligation to advertise in a manner that complies with applicable ethical rules. If compliance makes the advertisement seem awkward, the solution is to change the form of advertisement so that compliance is possible.\(^{13/}\)

Finally, the Committee notes that a true and correct copy of any “communication” must be retained by Attorney for two years. Rule 1-400(F) expressly extends this requirement to communications made by “electronic media.” If Attorney discovers that a social media website does not archive postings automatically, then Attorney will need to employ a manual method of preservation, such as printing or saving a copy of the screen.

**Example Number 3: “Won a million dollar verdict. Tell your friends to check out my website.”**

In the Committee’s opinion, this language also qualifies as a “communication” because the words “tell your friends to check out my website,” in this context, convey a message or offer “concerning the availability for professional employment.” It appears that Attorney is asking the reader to tell others to look at her website so that they may consider hiring her. This language therefore is subject to the adverse presumption in rule 1-400(E), Standard 5 (e.g., it must contain the word “Advertisement” or a similar word) and the preservation requirement in rule 1-400(F).\(^{14/}\)

**Example Number 4: “Won another personal injury case. Call me for a free consultation.”**

Again, the Committee concludes that this posting is a “communication” under rule 1-400(A), due primarily to the second sentence.

A communication has to include an offer about availability for professional employment so the “free” consultation language at first might indicate the posting is not a communication. Yet the rule does not limit “communications” to messages seeking financial compensation for services. To the contrary, a communication includes any “message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm.” See Rules Prof. Conduct, rule 1-400(A).\(^{15/}\) Given that the rule does not require that all communications are for pecuniary gain, we conclude that an offer to perform a professional service for free can constitute a communication. An offer of a free consultation is a step toward securing potential employment, and the offer of a

---

\(^{13/}\) For example, Facebook offers businesses the opportunity of creating a “Fan Page,” on which statements of “Advertisement” or “Newsletter” might be considered less awkward, provided that the “Fan Page” complies with Business and Professions Code sections 6157 and 6158.

\(^{14/}\) The posting in this example is distinct from running and capping as described in the California Business and Professions Code. A “runner” or “capper” is defined in California Business and Professions Code section 6151 as “any person, firm, association or corporation acting for consideration” as an agent for a lawyer or law firm, in soliciting business. In contrast to prohibited running and capping activities identified in Business and Professions Code section 6152, Attorney’s posting does not establish or seek to establish an agency relationship for profit with anyone who views her postings, nor does it imply that Attorney is seeking to do so. Nonetheless, because it is a communication subject to rule 1-400, Attorney must comply with rule 1-400(D) and the Standards set forth in rule 1-400.

\(^{15/}\) In contrast, solicitations – an express subset of communications subject to further restrictions – are defined to be communications “[c]oncerning the availability for professional employment of a member or law firm in which a significant motive is pecuniary gain,” and which “is delivered in person or by telephone, or directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.” Rule 1-400(B). Because Attorney is not reaching out in person or on the telephone, her postings cannot be solicitations, regardless of whether she seeks pecuniary gain. See Cal. State Bar Formal Opn. 2001-155 (describing the “delivered in person or by telephone” requirement for a solicitation as very specific and thus intended as an easy-to-understand “bright line” test); see also Cal. State Bar Formal Opn. 2004-166 (lawyer’s communication with a prospective fee-paying client in an internet chat room for victims of mass disaster not a prohibited solicitation, but an improper communication, because it is delivered to a prospective client whom the attorney knows may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel).
free consultation indicates that the lawyer is available to be hired. On balance, this example in the Committee’s opinion constitutes a “communication.”

Example Number 5: “Just published an article on wage and hour breaks. Let me know if you would like a copy.”

In this instance, we believe the statement does not concern “availability for professional employment.” The attorney is merely relaying information regarding an article she has published, and is offering to provide copies. See *Belli v. State Bar, supra*, 10 Cal.3d 824, 839 [112 Cal.Rptr. 527] (holding that “[e]xposition of an attorney’s accomplishments in an effort to interest persons” in an event involving an attorney did not violate restrictions on attorney advertising); see also *Los Angeles County Bar Assn. Formal Opn. 494* (“Communications or solicitations solely relating to the availability of seminars or educational programs, or the mailing of bulletins or briefs where there is no solicitation of business, are also constitutionally protected under the State Constitution and First Amendment as noncommercial speech.”). Accordingly, this posting does not fall under rule 1-400, and need not comply with any of the Standards of rule 1-400(E).

CONCLUSION

Attorney may post information about her practice on Facebook, Twitter, or other social media websites, but those postings may be subject to compliance with rule 1-400 if their content can be considered to be “concerning the availability for professional employment.” Such communications also may be subject to the relevant sections of California Business and Professions Code sections 6157 et seq.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.
Unpopular Causes

4. A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. Frequently, however, the needs of such a client for a lawyer's services are particularly pressing and, in some cases, the client may have a right to legal representation. At the same time, either financial considerations or the same qualities of the client or the client's cause that make a lawyer reluctant to accept employment may severely limit the client's ability to obtain counsel. As a consequence, the lawyer's freedom to reject clients is morally qualified. Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

5. An individual lawyer may fulfill the ethical responsibility to provide public interest legal service by accepting a fair share of unpopular matters or indigent or unpopular clients. History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse. Likewise, a lawyer should not reject tendered employment because of the personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community.

VII. INFORMATION ABOUT LEGAL SERVICES

Rule 7.01. Firm Names and Letterhead

(a) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the names of a professional corporation, professional association, limited liability partnership, or professional limited liability company may contain “P.C.,” “L.L.P.,” “P.L.L.C.,” or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Nothing herein shall prohibit a married woman from practicing under her maiden name.

(b) A firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer occupying a judicial, legislative, or public executive or administrative position shall not be used in the name of a firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) A lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.
(e) A lawyer shall not advertise in the public media or seek professional employment by any communication under a trade or fictitious name, except that a lawyer who practices under a firm name as authorized by paragraph (a) of this Rule may use that name in such advertisement or communication but only if that name is the firm name that appears on the lawyer's letterhead, business cards, office sign, fee contracts, and with the lawyer's signature on pleadings and other legal documents.

(f) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.02(a).

Comment:

1. A lawyer or law firm may not practice law using a name that is misleading as to the identity of the lawyers practicing under such name, but the continued use of the name of a deceased or retired member of the firm or of a predecessor firm is not considered to be misleading. Trade names are generally considered inherently misleading. Other types of firm names can be misleading as well, such as a firm name that creates the appearance that lawyers are partners or employees of a single law firm when in fact they are merely associated for the purpose of sharing expenses. In such cases, the lawyers involved may not denominate themselves in any manner suggesting such an ongoing professional relationship as, for example, “Smith and Jones” or “Smith and Jones Associates” or “Smith and Associates.” Such titles create the false impression that the lawyers named have assumed a joint professional responsibility for clients' legal affairs. See paragraph (d).

2. The practice of law firms having offices in more than one state is commonplace. Although it is not necessary that the name of an interstate firm include Texas lawyers, a letterhead including the name of any lawyer not licensed in Texas must indicate the lawyer is not licensed in Texas.

3. Paragraph (c) is designed to prevent the exploitation of a lawyer's public position for the benefit of the lawyer's firm. Likewise, because it may be misleading under paragraph (a), a lawyer who occupies a judicial, legislative, or public executive or administrative position should not indicate that fact on a letterhead which identifies that person as an attorney in the private practice of law. However, a firm name may include the name of a public official who is actively and regularly practicing law with the firm. But see Rule 7.02(a)(5).

4. With certain limited exceptions, paragraph (a) forbids a lawyer from using a trade name or fictitious name. Paragraph (e) sets out this same prohibition with respect to advertising in public media or communications seeking professional employment and contains additional restrictions on the use of trade names or fictitious names in those contexts. In a largely overlapping measure, paragraph (f) forbids the use of any such name or designation if it would amount to a “false or misleading communication” under Rule 7.02(a).
Rule 7.02. Communications Concerning a Lawyer's Services

(a) A lawyer shall not make or sponsor a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) contains any reference in a public media advertisement to past successes or results obtained unless

(i) the communicating lawyer or member of the law firm served as lead counsel in the matter giving rise to the recovery, or was primarily responsible for the settlement or verdict.

(ii) the amount involved was actually received by the client,

(iii) the reference is accompanied by adequate information regarding the nature of the case or matter, and the damages or injuries sustained by the client, and

(iv) if the gross amount received is stated, the attorney's fees and litigation expenses withheld from the amount are stated as well;

(3) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law;

(4) compares the lawyer's services with other lawyers' services, unless the comparison can be substantiated by reference to verifiable, objective data;

(5) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official;

(6) designates one or more specific areas of practice in an advertisement in the public media or in a solicitation communication unless the advertising or soliciting lawyer is competent to handle legal matters in each such area of practice; or

(7) uses an actor or model to portray a client of the lawyer or law firm.

(b) Rule 7.02(a)(6) does not require that a lawyer be certified by the Texas Board of Legal Specialization at the time of advertising in a specific area of practice, but such certification shall conclusively establish that such lawyer satisfies the requirements of Rule 7.02(a)(6) with respect to the area(s) of practice in which such lawyer is certified.
(c) A lawyer shall not advertise in the public media or state in a solicitation communication that the lawyer is a specialist except as permitted under Rule 7.04.

(d) Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or solicitation communication with respect to which such required statement or disclaimer relates; provided however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.

Comment:

1. The Rules within Part VII are intended to regulate communications made for the purpose of obtaining professional employment. They are not intended to affect other forms of speech by lawyers, such as political advertisements or political commentary, except insofar as a lawyer's effort to obtain employment is linked to a matter of current public debate.

2. This Rule governs all communications about a lawyer's services, including advertisements regulated by Rule 7.04 and solicitation communications regulated by Rules 7.03 and 7.05. Whatever means are used to make known a lawyer's services, statements about them must be truthful and nondeceptive.

3. Sub-paragraph (a)(1) recognizes that statements can be misleading both by what they contain and what they leave out. Statements that are false or misleading for either reason are prohibited. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

4. Sub-paragraphs (a)(2) and (3) recognize that truthful statements may create “unjustified expectations.” For example, an advertisement that truthfully reports that a lawyer obtained a jury verdict of a certain amount on behalf of a client would nonetheless be misleading if it were to turn out that the verdict was overturned on appeal or later compromised for a substantially reduced amount, and the advertisement did not disclose such facts as well. Even an advertisement that fully and accurately reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Those unique circumstances would ordinarily preclude advertisements in the public media and solicitation communications that discuss the results obtained on behalf of a client, such as the amount of a damage award, the lawyer's record in obtaining favorable settlements or verdicts, as well as those that contain client endorsements.

5. Sub-paragraph (a)(4) recognizes that comparisons of lawyer's services may also be misleading unless those comparisons “can be substantiated by reference to verifiable objective data.” Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the
comparison can be substantiated. Statements comparing a lawyer’s services with those of another where the comparisons are not susceptible of precise measurement or verification, such as “we are the toughest lawyers in town”, “we will get money for you when other lawyers can’t”, or “we are the best law firm in Texas if you want a large recovery,” can deceive or mislead prospective clients.

6. The inclusion of a disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client, but it will not necessarily do so. Unless any such qualifications and disclaimers are both sufficient and displayed with equal prominence to the information to which they pertain, that information can still readily mislead prospective clients into believing that similar results can be obtained for them without reference to their specific factual and legal circumstances. Consequently, in order not to be false, misleading, or deceptive, other of these Rules require that appropriate disclaimers or qualifying language must be presented in the same manner as the communication and with equal prominence. See Rules 7.04 (q) and 7.05(a)(2).

7. On the other hand, a simple statement of a lawyer’s own qualifications devoid of comparisons to other lawyers does not pose the same risk of being misleading and so does not violate sub-paragraph (a)(4). Similarly, a lawyer making a referral to another lawyer may express a good faith subjective opinion regarding that other lawyer.

8. Thus, this Rule does not prohibit communication of information concerning a lawyer’s name or firm name, address, and telephone numbers; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; names of references and with their consent, names of clients regularly represented; and other truthful information that might invite the attention of those seeking legal assistance. When a communication permitted by Rule 7.02 is made in the public media, the lawyer should consult Rule 7.04 for further guidance and restrictions. When a communication permitted by Rule 7.02 is made by a lawyer through a solicitation communication, the lawyer should consult Rules 7.03 and 7.05 for further guidance and restrictions.

9. Sub-paragraph (a)(5) prohibits a lawyer from stating or implying that the lawyer has an ability to influence a tribunal, legislative body, or other public official through improper conduct or upon irrelevant grounds. Such conduct brings the profession into disrepute, even though the improper or irrelevant activities referred to are never carried out, and so are prohibited without regard to the lawyer's actual intent to engage in such activities.

Communication of Fields of Practice

10. Paragraphs (a)(6), (b) and (c) of Rule 7.02 regulate communications concerning a lawyer's fields of practice and should be construed together with Rule 7.04 or 7.05, as applicable. If a lawyer in a public media advertisement or in a solicitation communication designates one or more specific areas of practice, that designation is at least an implicit representation that the lawyer is qualified in the areas designated. Accordingly, Rule 7.02(a)(6) prohibits the designation of a field of practice unless the communicating lawyer is in fact competent in the area.
11. Typically, one would expect competency to be measured by special education, training, or experience in the particular area of law designated. Because certification by the Texas Board of Legal Specialization involves special education, training, and experience, certification by the Texas Board of Legal Specialization conclusively establishes that a lawyer meets the requirements of Rule 7.02(a)(6) in any area in which the Board has certified the lawyer. However, competency may be established by means other than certification by the Texas Board of Legal Specialization. See Rule 7.04(b).

12. Lawyers who wish to advertise in the public media that they specialize should refer to Rule 7.04. Lawyers who wish to assert a specialty in a solicitation communication should refer to Rule 7.05.

**Actor Portrayal Of Clients**

13. Sub-paragraph (a)(7) further protects prospective clients from false, misleading, or deceptive advertisements and solicitations by prohibiting the use of actors to portray clients of a lawyer or law firm. Other rules prohibit the use of actors to portray lawyers in the advertising or soliciting lawyer's firm. See Rules 7.04(g), 7.05(a). The truthfulness of such portrayals is extremely difficult to monitor, and almost inevitably they involve actors whose apparent physical and mental attributes differ in a number of material respects from those of the actual clients portrayed.

**Communication in a Second Language**

14. The ability of lawyers to communicate in a second language can facilitate the delivery and receipt of legal services. Accordingly, it is in the best interest of the public that potential clients be made aware of a lawyer's language ability. A lawyer may state an ability to communicate in a second language without any further elaboration. However, if a lawyer chooses to communicate with potential clients in a second language, all statements or disclaimers required by the Texas Disciplinary Rules of Professional Conduct must also be made in that language. See paragraph (d). Communicating some information in one language while communicating the rest in another is potentially misleading if the recipient understands only one of the languages.

**Rule 7.03. Prohibited Solicitations and Payments**

(a) A lawyer shall not by in-person contact, or by regulated telephone or other electronic contact as defined in paragraph (f) seek professional employment concerning a matter arising out of a particular occurrence or event, or series of occurrences or events, from a prospective client or nonclient who has not sought the lawyer's advice regarding employment or with whom the lawyer has no family or past or present attorney-client relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. Notwithstanding the provisions of this paragraph, a lawyer for a qualified nonprofit organization may communicate with the organization's members for the purpose of educating the members to understand the law, to recognize legal problems, to make intelligent selection of counsel, or to use legal services. In those situations where in-person or telephone or other electronic contact is permitted by this paragraph, a lawyer shall not have such a contact with a prospective client if:
(1) the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;

(2) the communication contains information prohibited by Rule 7.02(a); or

(3) the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) A lawyer shall not pay, give, or offer to pay or give anything of value to a person not licensed to practice law for soliciting prospective clients for, or referring clients or prospective clients to, any lawyer or firm, except that a lawyer may pay reasonable fees for advertising and public relations services rendered in accordance with this Rule and may pay the usual charges of a lawyer referral service that meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(c) A lawyer, in order to solicit professional employment, shall not pay, give, advance, or offer to pay, give, or advance anything of value, other than actual litigation expenses and other financial assistance as permitted by Rule 1.08(d), to a prospective client or any other person; provided however, this provision does not prohibit the payment of legitimate referral fees as permitted by Rule 1.04(f) or by paragraph (b) of this Rule.

(d) A lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation of Rule 7.03(a), (b), or (c).

(e) A lawyer shall not participate with or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(f) As used in paragraph (a), “regulated telephone or other electronic contact” means any electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. For purposes of this Rule a website for a lawyer or law firm is not considered a communication initiated by or on behalf of that lawyer or firm.

Comment:

1. In many situations, in-person, telephone, or other prohibited electronic solicitations by lawyers involve well-known opportunities for abuse of prospective clients. Traditionally, the principal concerns presented by such contacts are that they can overbear the prospective client's will, lead to hasty and ill advised decisions concerning choice of counsel, and be very difficult to police. The approach taken by this Rule may be found in paragraph (f), which prohibits such communications if they are initiated by or on behalf of a lawyer or law firm and will result in the person contacted communicating with any person by telephone or other electronic means. Thus, forms of electronic communications are prohibited that pose comparable dangers to face-to-face solicitations, such as soliciting business and “chat rooms” or
transmitting an unsolicited, interactive communication to a prospective client that, when accessed, puts the recipient in direct contact with another person. Those that do not present such opportunities for abuse, such as pre-recorded telephone messages requiring a separate return call to speak to or retain an attorney or websites that must be accessed by an interested person and that provide relevant and truthful information concerning a lawyer or law firm, are permitted.

2. Nonetheless, paragraph (a) and (f) unconditionally prohibit those activities only when profit for the lawyer is a significant motive and the solicitation concerns matters arising out of a particular occurrence, event, or series of occurrences or events. The reason this outright ban is so limited is that there are circumstances where the dangers of such contacts can be reduced by less restrictive means. As long as the conditions of sub-paragraphs (a)(1) through (a)(3) are not violated by a given contact, a lawyer may engage in in-person, telephone, or other electronic solicitations when the solicitation is unrelated to a specific occurrence, event, or series of occurrences or events. Similarly, subject to the same restrictions, in-person, telephone, or other electronic solicitations are permitted where the prospective client either has a family or past or present attorney-client relationship with the lawyer or where the potential client had previously contacted the lawyer about possible employment in the matter.

3. In addition, Rule 7.03(a) does not prohibit a lawyer for a qualified non-profit organization from in-person, telephone, or other electronic solicitation of prospective clients for purposes related to that organization. Historically and by law, nonprofit legal aid agencies, unions, and other qualified nonprofit organizations and their lawyers have been permitted to solicit clients in-person or by telephone, and more modern electronic means of communication pose no additional threats to consumers justifying a more restrictive treatment. Consequently, Rule 7.03(a) is not in derogation of those organizations' constitutional rights to employ such methods. Attorneys for such nonprofit organizations, however, remain subject to this Rule's general prohibitions against undue influence, intimidation, overreaching, and the like.

**Paying for Solicitation**

4. Rule 7.03(b) does not prohibit a lawyer from paying standard commercial fees for advertising or public relations services rendered in accordance with these Rules. In addition, a lawyer may pay the fees required by a lawyer referral service that meet the requirements of Occupational Code Title 5, Subtitle B, Chapter 952. However, paying, giving, or offering to pay or give anything of value to persons not licensed to practice law who solicit prospective clients for lawyers has always been considered to be against the best interest of both the public and the legal profession. Such actions circumvent these Rules by having a non-lawyer do what a lawyer is ethically proscribed from doing. Accordingly, the practice is forbidden by Rule 7.03(b). As to payments or gifts of value to licensed lawyers for soliciting prospective clients, see Rule 1.04(f).

5. Rule 7.03(c) prohibits a lawyer from paying or giving value directly to a prospective client or any other person as consideration for employment by that client except as permitted by Rule 1.08(d).

6. Paragraph (d) prohibits a lawyer from agreeing to or charging for professional employment obtained
in violation of Rule 7.03. Paragraph (e) further requires a lawyer to decline business generated by a lawyer referral service unless the lawyer knows or reasonably believes that service is operated in conformity with statutory requirements.

7. References to “a lawyer” in this and other Rules include lawyers who practice in law firms. A lawyer associated with a firm cannot circumvent these Rules by soliciting or advertising in the name of that firm in a way that violates these Rules. See Rule 7.04(e).

Rule 7.04. Advertisements in the Public Media

(a) A lawyer shall not advertise in the public media by stating that the lawyer is a specialist, except as permitted under Rule 7.04(b) or as follows:


(2) A lawyer may permit his or her name to be listed in lawyer referral service offices that meet the requirements of Occupational Code Title 5, Subtitle B, Chapter 952, according to the areas of law in which the lawyer will accept referrals.

(3) A lawyer available to practice in a particular area of law or legal service may distribute to other lawyers and publish in legal directories and legal newspapers (whether written or electronic) a listing or an announcement of such availability. The listing shall not contain a false or misleading representation of special competence or experience, but may contain the kind of information that traditionally has been included in such publications.

(b) A lawyer who advertises in the public media:

(1) shall publish or broadcast the name of at least one lawyer who is responsible for the content of such advertisement; and

(2) shall not include a statement that the lawyer has been certified or designated by an organization as possessing special competence or a statement that the lawyer is a member of an organization the name of which implies that its members possess special competence, except that:

(i) a lawyer who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, may state with respect to each such area, “Board Certified, area of specialization – Texas Board of Legal Specialization;” and
(ii) a lawyer who is a member of an organization the name of which implies that its members possess special competence, or who has been certified or designated by an organization as possessing special competence, may include a factually accurate statement of such membership or may include a factually accurate statement, “Certified area of specialization name of certifying organization,” but such statements may be made only if that organization has been accredited by the Texas Board of Legal Specialization as a bona fide organization that admits to membership or grants certification only on the basis of objective, exacting, publicly available standards (including high standards of individual character, conduct, and reputation) that are reasonably relevant to the special training or special competence that is implied and that are in excess of the level of training and competence generally required for admission to the Bar; and

(3) shall, in the case of infomercial or comparable presentation, state that the presentation is an advertisement;

(i) both verbally and in writing at its outset, after any commercial interruption, and at its conclusion; and

(ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.

(c) Separate and apart from any other statements, the statements referred to in paragraph (b) shall be displayed conspicuously, and in language easily understood by an ordinary consumer.

(d) Subject to the requirements of Rules 7.02 and 7.03 and of paragraphs (a), (b), and (c) of this Rule, a lawyer may, either directly or through a public relations or advertising representative, advertise services in the public media, such as (but not limited to) a telephone directory, legal directory, newspaper or other periodical, outdoor display, radio, television, the Internet, or electronic, or digital media.

(e) All advertisements in the public media for a lawyer or firm must be reviewed and approved in writing by the lawyer or a lawyer in the firm.

(f) A copy or recording of each advertisement in the public media and relevant approval referred to in paragraph (e), and a record of when and where the advertisement was used, shall be kept by the lawyer or firm for four years after its last dissemination.

(g) In advertisements in the public media, any person who portrays a lawyer whose services or whose firm's services are being advertised, or who narrates an advertisement as if he or she were such a lawyer, shall be one or more of the lawyers whose services are being advertised.

(h) If an advertisement in the public media by a lawyer or firm discloses the willingness or potential willingness of the lawyer or firm to render services on a contingent fee basis, the advertisement must state whether the client will be obligated to pay all or any portion of the court costs and, if a client may be
liable for other expenses, this fact must be disclosed. If specific percentage fees or fee ranges of contingent fee work are disclosed in such advertisement, it must also disclose whether the percentage is computed before or after expenses are deducted from the recovery.

(i) A lawyer who advertises in the public media a specific fee or range of fees for a particular service shall conform to the advertised fee or range of fees for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement specifies a shorter period; but in no instance is the lawyer bound to conform to the advertised fee or range of fees for a period of more than one year after the date of publication.

(j) A lawyer or firm who advertises in the public media must disclose the geographic location, by city or town, of the lawyer's or firm's principal office. A lawyer or firm shall not advertise the existence of any office other than the principal office unless:

(1) that other office is staffed by a lawyer at least three days a week; or

(2) the advertisement states:

   (i) the days and times during which a lawyer will be present at that office, or

   (ii) that meetings with lawyers will be by appointment only.

(k) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media for a lawyer not in the same firm unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.

(l) If an advertising lawyer knows or should know at the time of an advertisement in the public media that a case or matter will likely be referred to another lawyer or firm, a statement of such fact shall be conspicuously included in such advertisement.

(m) No motto, slogan or jingle that is false or misleading may be used in any advertisement in the public media.

(n) A lawyer shall not include in any advertisement in the public media the lawyer’s association with a lawyer referral service unless the lawyer knows or reasonably believes that the lawyer referral service meets the requirements of Occupational Code Title 5, Subtitle B, Chapter 952.

(o) A lawyer may not advertise in the public media as part of an advertising cooperative or venture of two or more lawyers not in the same firm unless each such advertisement:

   (1) states that the advertisement is paid for by the cooperating lawyers;
(2) names each of the cooperating lawyers;

(3) sets forth conspicuously the special competency requirements required by Rule 7.04(b) of lawyers who advertise in the public media;

(4) does not state or imply that the lawyers participating in the advertising cooperative or venture possess professional superiority, are able to perform services in a superior manner, or possess special competence in any area of law advertised, except that the advertisement may contain the information permitted by Rule 7.04(b)(2); and

(5) does not otherwise violate the Texas Disciplinary Rules of Professional Conduct.

(p) Each lawyer who advertises in the public media as part of an advertising cooperative or venture shall be individually responsible for:

(1) ensuring that each advertisement does not violate this Rule; and

(2) complying with the filing requirements of Rule 7.07.

(q) If these rules require that specific qualifications, disclaimers or disclosures of information accompany communications concerning a lawyer's services, the required qualifications, disclaimers or disclosures must be presented in the same manner as the communication and with equal prominence.

(r) A lawyer who advertises on the Internet must display the statements and disclosures required by Rule 7.04.

Comment:

1. Neither Rule 7.04 nor Rule 7.05 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Advertising Areas of Practice and Special Competence

2. Paragraphs (a) and (b) permit a lawyer, under the restrictions set forth, to indicate areas of practice in advertisements about the lawyer's services. See also paragraph (d). The restrictions are designed primarily to require that accurate information be conveyed. These restrictions recognize that a lawyer has a right protected by the United States Constitution to advertise publicly, but that the right may be regulated by reasonable restrictions designed to protect the public from false or misleading information. The restrictions contained in Rule 7.04 are based on the experience of the legal profession in the State of Texas and are designed to curtail what experience has shown to be misleading and deceptive advertising. To ensure accountability, sub-paragraph (b)(1) requires identification of at least one lawyer responsible for the content of the advertisement.
3. Because of long-standing tradition a lawyer admitted to practice before the United States Patent Office may use the designation “patents,” “patent attorney,” or “patent lawyer” or any combination of those terms. As recognized by paragraph (a)(1), a lawyer engaged in patent and trademark practice may hold himself out as concentrating in “intellectual property law,” “patents, or trademarks and related matters,” or “patent, trademark, copyright law and unfair competition” or any combination of those terms.

4. Paragraph (a)(2) recognizes the propriety of listing a lawyer’s name in legal directories according to the areas of law in which the lawyer will accept new matters. The same right is given with respect to lawyer referral service offices, but only if those services comply with statutory guidelines. The restriction in paragraph (a)(2) does not prevent a legal aid agency or prepaid legal services plan from advertising legal services provided under its auspices.

5. Paragraph (a)(3) continues the historical exception that permits advertisements by lawyers to other lawyers in legal directories and legal newspapers (whether written or electronic), subject to the same requirements of truthfulness that apply to all other forms of lawyer advertising. Such advertisements traditionally contain information about the name, location, telephone numbers, and general availability of a lawyer to work on particular legal matters. Other information may be included so long as it is not false or misleading. Because advertisements in these publications are not available to the general public, lawyers who list various areas of practice are not required to comply with paragraph (b).

6. Some advertisements, sometimes known as tombstone advertisements, mention only such matters as the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, dates of admission to bars, the acceptance of credit cards, and fees. The content of such advertisements is not the kind of information intended to be regulated by Rule 7.04 (b). However, if the advertisement in the public media mentions any area of the law in which the lawyer practices, then, because of the likelihood of misleading material, the lawyer must comply with paragraph (b).

7. Sometimes lawyers choose to advertise in the public media the fact that they have been certified or designated by a particular organization or that they are members of a particular organization. Such statements naturally lead the public to believe that the lawyer possesses special competence in the area of law mentioned. Consequently, in order to ensure that the public will not be misled by such statements, sub-paragraph (b)(2) and paragraph (c) place limited but necessary restrictions upon a lawyer’s basic right to advertise those affiliations.

8. Rule 7.04(b)(2) gives lawyers who possess certificates of specialization from the Texas Board of Legal Specialization or other meritorious credentials from organizations approved by the Board the option of stating that fact, provided that the restrictions set forth in subparagraphs (b)(2)(i) and (b)(2)(ii) are followed.

9. Paragraph (c) is intended to ensure against misleading or material variations from the statements required by paragraph (b).
10. Paragraphs (e) and (f) provide the advertising lawyer, the Bar, and the public with requisite records should questions arise regarding the propriety of a public media advertisement. Paragraph (e), like paragraph (b)(1), ensures that a particular attorney accepts responsibility for the advertisement. It is in the public interest and in the interest of the legal profession that the records of those advertisements and approvals be maintained.

**Examples of Prohibited Advertising**

11. Paragraphs (g) through (o) regulate conduct that has been found to mislead or be likely to mislead the public. Each paragraph is designed to protect the public and to guard the legal profession against these documented misleading practices while at the same time respecting the constitutional rights of any lawyer to advertise.

12. Paragraph (g) prohibits lawyers from misleading the public into believing a non-lawyer portrayor or narrator in the advertisement is one of the lawyers prepared to perform services for the public. It does not prohibit the narration of an advertisement in the third person by an actor, as long as it is clear to those hearing or seeing the advertisement that the actor is not a lawyer prepared to perform services for the public.

13. Contingent fee contracts present unusual opportunities for deception by lawyers or for misunderstanding by the public. By requiring certain disclosures, paragraph (h) safeguards the public from misleading or potentially misleading advertisements that involve representation on a contingent fee basis. The affirmative requirements of paragraph (h) are not triggered solely by the expression of “contingent fee” or “percentage fee” in the advertisement. To the contrary, they encompass advertisements in the public media where the lawyer or firm expresses a mere willingness or potential willingness to render services for a contingent fee. Therefore, statements in an advertisement such as “no fee if no recovery” or “fees in the event of recovery only” are clearly included as a form of advertisement subject to the disclosure requirements of paragraph (h).

14. Paragraphs (i), (j), (k) and (l) jointly address the problem of advertising that experience has shown misleads the public concerning the fees that will be charged, the location where services will be provided, or the attorney who will be performing these services. Together they prohibit the same sort of “bait and switch” advertising tactics by lawyers that are universally condemned.

15. Paragraph (i) requires a lawyer who advertises a specific fee or range of fees in the public media to honor those commitments for the period during which the advertisement is reasonably expected to be in circulation or otherwise expected to be effective in attracting clients, unless the advertisement itself specifies a shorter period. In no event, however, is a lawyer required to honor an advertised fee or range of fees for more than one year after publication.

16. Paragraph (j) prohibits advertising the availability of a satellite office unless the requirements of subparagraphs (1) or (2) are satisfied. Paragraph (j) does not require, however, that a lawyer or firm specify which of several properly advertised offices is its “principal” one, as long as the principal office is
among those advertised and the advertisement discloses the city or town in which that office is located. Experience has shown that, in the absence of such regulation, members of the public have been misled into employing a lawyer in a distant city who advertises that there is a nearby satellite office, only to learn later that the lawyer is rarely available to the client because the nearby office is seldom open or is staffed only by lay personnel. Paragraph (j) is not intended to restrict the ability of legal services programs to advertise satellite offices in remote parts of the program's service area even if those satellite offices are staffed irregularly by attorneys. Otherwise low-income individuals in and near such communities might be denied access to the only legal services truly available to them.

17. When a lawyer or firm advertises, the public has a right to expect that lawyer or firm will perform the legal services. Experience has shown that attorneys not in the same firm may create a relationship wherein one will finance advertising for the other in return for referrals. Nondisclosure of such a referral relationship is misleading to the public. Accordingly, paragraph (k) prohibits such a relationship between an advertising lawyer and a lawyer who finances the advertising unless the advertisement discloses the nature of the financial relationship between the two lawyers. Paragraph (l) addresses the same problem from a different perspective, requiring a lawyer who advertises the availability of legal services and who know or should know at the time that the advertisement is placed in the media that business will likely be referred to another lawyer or firm, to include a conspicuous statement of that fact in any such advertising. This requirement applies whether or not the lawyer to whom the business is referred is financing the advertisements of the referring lawyer. It does not, however, require disclosure of all possible scenarios under which a referral could occur, such as an unforeseen need to associate with a specialist in accordance with Rule 1.01(a) or the possibility of a referral if a prospective client turns out to have a conflict of interest precluding representation by the advertising lawyer. Lawyers participating in any type of arrangement to refer cases must comply with Rule 1.04(f).

18. Paragraph (m) protects the public by forbidding mottos, slogans, and jingles that are false or misleading. There are, however, mottos, slogans, and jingles that are informative rather than false or misleading. Accordingly, paragraph (m) recognizes an advertising lawyer's constitutional right to include appropriate mottos, slogans, and jingles in advertising.

19. Some lawyers choose to band together in a cooperative or joint venture to advertise. Although those arrangements are lawful, the fact that several independent lawyers have joined together in a single advertisement increases the risk of misrepresentation or other forms of inappropriate expression. Special care must be taken to ensure that cooperative advertisements identify each cooperating lawyer, state that each cooperating lawyer is paying for the advertisement, and accurately describe the professional qualifications of each cooperating lawyer. See paragraph (o). Furthermore, each cooperating lawyer must comply with the filing requirements of Rule 7.07. See paragraph (p).

20. The use of disclosures, disclaimers and qualifying information is necessary to inform the public about various aspects of a lawyer or firm's practice in public media advertising and solicitation communications. In order to ensure that disclaimers required by these rules are conspicuously displayed, paragraph (q) requires that such statements be presented in the same manner as the communication and with prominence equal to that of the matter to which it refers. For example, in a television advertisement that
necessitates the use of a disclaimer, if a statement or claim is made verbally, the disclaimer should also be included verbally in the commercial. When a statement or claim appears in print, the accompanying disclaimer must also appear in print with equal prominence and legibility.

**Rule 7.05. Prohibited Written, Electronic, Or Digital Solicitations**

(a) A lawyer shall not send, deliver, or transmit or knowingly permit or knowingly cause another person to send, deliver, or transmit a written, audio, audio-visual, digital media, recorded telephone message, or other electronic communication to a prospective client for the purpose of obtaining professional employment on behalf of any lawyer or law firm if:

1. the communication involves coercion, duress, fraud, overreaching, intimidation, undue influence, or harassment;
2. the communication contains information prohibited by Rule 7.02 or fails to satisfy each of the requirements of Rule 7.04(a) through (c), and (g) through (q) that would be applicable to the communication if it were an advertisement in the public media; or
3. the communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.

(b) Except as provided in paragraph (f) of this Rule, a written, electronic, or digital solicitation communication to prospective clients for the purpose of obtaining professional employment:

1. shall, in the case of a non-electronically transmitted written communication, be plainly marked “ADVERTISEMENT” on its first page, and on the face of the envelope or other packaging used to transmit the communication. If the written communication is in the form of a self-mailing brochure or pamphlet, the word “ADVERTISEMENT” shall be:
   
   (i) in a color that contrasts sharply with the background color; and

   (ii) in a size of at least 3/8” vertically or three times the vertical height of the letters used in the body of such communication, whichever is larger

2. shall, in the case of an electronic mail message, be plainly marked “ADVERTISEMENT” in the subject portion of the electronic mail and at the beginning of the message's text;

3. shall not be made to resemble legal pleadings or other legal documents;

4. shall not reveal on the envelope or other packaging or electronic mail subject line used to transmit the communication, or on the outside of a self-mailing brochure or pamphlet, the nature of the legal problem of the prospective client or non-client; and
(5) shall disclose how the lawyer obtained the information prompting the communication to solicit professional employment if such contact was prompted by a specific occurrence involving the recipient of the communication, or a family member of such person(s).

(c) Except as provided in paragraph (f) of this Rule, an audio, audio-visual, digital media, recorded telephone message, or other electronic communication sent to prospective clients for the purpose of obtaining professional employment:

(1) shall, in the case of any such communication delivered to the recipient by non-electronic means, plainly and conspicuously state in writing on the outside of any envelope or other packaging used to transmit the communication, that it is an “ADVERTISEMENT.”

(2) shall not reveal on any such envelope or other packaging the nature of the legal problem of the prospective client or non-client;

(3) shall disclose, either in the communication itself or in accompanying transmittal message, how the lawyer obtained the information prompting such audio, audio-visual, digital media, recorded telephone message, or other electronic communication to solicit professional employment, if such contact was prompted by a specific occurrence involving the recipient of the communication or a family member of such person(s);

(4) shall, in the case of a recorded audio presentation or a recorded telephone message, plainly state that it is an advertisement prior to any other words being spoken and again at the presentation's or message's conclusion; and

(5) shall, in the case of an audio-visual or digital media presentation, plainly state that the presentation is an advertisement;

(i) both verbally and in writing at the outset of the presentation and again at its conclusion; and

(ii) in writing during any portion of the presentation that explains how to contact a lawyer or law firm.

(d) All written, audio, audio-visual, digital media, recorded telephone message, or other electronic communications made to a prospective client for the purpose of obtaining professional employment of a lawyer or law firm must be reviewed and either signed by or approved in writing by the lawyer or a lawyer in the firm.

(e) A copy of each written, audio, audio-visual, digital media, recorded telephone message, or other electronic solicitation communication, the relevant approval thereof, and a record of the date of each such communication; the name, address, telephone number, or electronic address to which each such communication was sent; and the means by which each such communication was sent shall be kept by
the lawyer or firm for four years after its dissemination.

(i) The provisions of paragraphs (b) and (c) of this Rule do not apply to a written, audio, audiovisual, digital media, recorded telephone message, or other form, of electronic solicitation communication:

(1) directed to a family member or a person with whom the lawyer had or has an attorney client relationship;

(2) that is not motivated by or concerned with a particular past occurrence or event or a particular series of past occurrences or events, and also is not motivated by or concerned with the prospective client's specific existing legal problem of which the lawyer is aware;

(3) if the lawyer's use of the communication to secure professional employment was not significantly motivated by a desire for, or by the possibility of obtaining, pecuniary gain; or

(4) that is requested by the prospective client.

Comment:

1. Rule 7.03 deals with in-person, telephone, and other prohibited electronic contact between a lawyer and a prospective client wherein the lawyer seeks professional employment. Rule 7.04 deals with advertisements in the public media by a lawyer seeking professional employment. This Rule deals with solicitations between a lawyer and a prospective client. Typical examples are letters or other forms of correspondence (including those sent, delivered, or transmitted electronically), recorded telephone messages, audiotapes, videotapes, digital media, and the like, addressed to a prospective client.

2. Written, audio, audio-visual, and other forms of electronic solicitations raise more concerns than do comparable advertisements. Being private, they are more difficult to monitor, and for that reason paragraph (e) requires retention for four years of certain information regarding all such solicitations. See also Rule 7.07(a). Paragraph (a) addresses such concerns as well as problems stemming from exceptionally outrageous communications such as solicitations involving fraud, intimidation, or deceptive and misleading claims. Because receipt of multiple solicitations appears to be most pronounced and vexatious in situations involving accident victims, paragraphs (b)(1), (b)(2), (c)(1), (c)(4) and (c)(5) require that the envelope or other packaging used to transmit the communication, as well as the communication itself, plainly disclose that the communication is an advertisement, while paragraphs (b)(5) and (c)(3) require disclosure of the source of information if the solicitation was prompted by a specific occurrence.

3. Because experience has shown that many written, audio, audio-visual, electronic mail, and other forms of electronic solicitations have been intrusive or misleading by reason of being personalized or being disguised as some form of official communication, special prohibitions against such practices are necessary. The requirements of paragraph (b) and (c) greatly lessen those dangers of deception and harassment.
4. Newsletters or other works published by a lawyer that are not circulated for the purpose of obtaining professional employment are not within the ambit of paragraph (b) or (c).

5. This Rule also regulates audio, audio-visual, or other forms of electronic communications being used to solicit business. It includes such formats as recorded telephone messages, movies, audio or audio-visual recordings or tapes, digital media, the Internet, and other comparable forms of electronic communications. It requires that such communications comply with all of the substantive requirements applicable to written solicitations that are compatible with the different forms of media involved, as well as with all requirements related to approval of the communications and retention of records concerning them. See paragraphs (c), (d), and (e).

6. In addition to addressing these special problems posed by solicitations, Rule 7.05 regulates the content of those communications. It does so by incorporating the standards of Rule 7.02 and those of Rule 7.04 that would apply to the solicitation were it instead a comparable form of advertisement in the public media. See paragraphs (a)(2) and (3). In brief, this approach means that, except as provided in paragraph (f), a lawyer may not include or omit anything from a solicitation unless the lawyer could do so were the communication a comparable form of advertisement in the public media.

7. Paragraph (f) provides that the restrictions in paragraph (b) and (c) do not apply in certain situations because the dangers of deception, harassment, vexation and overreaching are quite low. For example, a written solicitation may be directed to a family member or a present or a former client, or in response to a request by a prospective client without stating that it is an advertisement. Similarly, a written solicitation may be used in seeking general employment in commercial matters from a bank or other corporation, when there is neither concern with specific existing legal problems nor concern with a particular past event or series of events. All such communications, however, remain subject to Rule 7.02 and paragraphs (h) through (o) of Rule 7.04. See sub-paragraph (a)(2).

8. In addition, paragraph (f) allows such communications in situations not involving the lawyer's pecuniary gain. For purposes of these rules, it is presumed that communications made on behalf of a nonprofit legal aid agency, union, or other qualified nonprofit organization are not motivated by a desire for, or by the possibility of obtaining, pecuniary gain, but that presumption may be rebutted.

Rule 7.06: Prohibited Employment

(a) A lawyer shall not accept or continue employment in a matter when that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by that lawyer personally or by any other person whom the lawyer ordered, encouraged, or knowingly permitted to engage in such conduct.

(b) A lawyer shall not accept or continue employment in a matter when the lawyer knows or reasonably should know that employment was procured by conduct prohibited by any of Rules 7.01 through 7.05, 8.04(a)(2), or 8.04(a)(9), engaged in by any other person or entity that is a shareholder, partner, or member of, an associate in, or of counsel to that lawyer's firm; or by any other person whom any of the
RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

(a) A lawyer may advertise through all forms of public media and through written communication not involving personal contact so long as the communication is not false, fraudulent, deceptive or misleading. By way of illustration, but not limitation, a communication is false, fraudulent, deceptive or misleading if it:

1. contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;
2. is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Georgia Rules of Professional Conduct or other law;
3. compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated;
4. fails to include the name of at least one lawyer responsible for its content; or
5. contains any information regarding contingent fees, and fails to conspicuously present the following disclaimer:

"Contingent attorneys' fees refers only to those fees charged by attorneys for their legal services. Such fees are not permitted in all types of cases. Court costs and other additional expenses of legal action usually must be paid by the client."

6. contains the language 'no fee unless you win or collect' or any similar phrase and fails to conspicuously present the following disclaimer:

"No fee unless you win or collect" [or insert the similar language used in the communication] refers only to fees charged by the attorney. Court costs and other additional expenses of legal action usually must be paid by the client. Contingent fees are not permitted in all types of cases.

(b) A public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication.

(c) A lawyer retains ultimate responsibility to insure that all communications concerning the lawyer or the lawyer's services comply with the Georgia Rules of Professional Conduct.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] This rule governs the content of all communications about a lawyer's services, including the various types of advertising permitted by Rules 7.3 through 7.5. Whatever means are used to make known a lawyer's services, statements about them should be truthful.

[2] The prohibition in sub-paragraph (a)(2) of this Rule 7.1: Communications Concerning a Lawyer's Services of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may
create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

Affirmative Disclosure

[3] In general, the intrusion on the First Amendment right of commercial speech resulting from rationally-based affirmative disclosure requirements is minimal, and is therefore a preferable form of regulation to absolute bans or other similar restrictions. For example, there is no significant interest in failing to include the name of at least one accountable attorney in all communications promoting the services of a lawyer or law firm as required by sub-paragraph (a)(5) of Rule 7.1: Communications Concerning a Lawyer's Services. Nor is there any substantial burden imposed as a result of the affirmative disclaimer requirement of sub-paragraph (a)(6) upon a lawyer who wishes to make a claim in the nature of "no fee unless you win." Indeed, the United States Supreme Court has specifically recognized that affirmative disclosure of a client's liability for costs and expenses of litigation may be required to prevent consumer confusion over the technical distinction between the meaning and effect of the use of such terms as "fees" and "costs" in an advertisement.

[4] Certain promotional communications of a lawyer may, as a result of content or circumstance, tend to mislead a consumer to mistakenly believe that the communication is something other than a form of promotional communication for which the lawyer has paid. Examples of such a communication might include advertisements for seminars on legal topics directed to the lay public when such seminars are sponsored by the lawyer, or a newsletter or newspaper column which appears to inform or to educate about the law. Paragraph (b) of this Rule 7.1: Communications Concerning a Lawyer's Services would require affirmative disclosure that a lawyer has given value in order to generate these types of public communications if such is in fact the case.

Accountability

[5] Paragraph (c) makes explicit an advertising attorney's ultimate responsibility for all the lawyer's promotional communications and would suggest that review by the lawyer prior to dissemination is advisable if any doubts exist concerning conformity of the end product with these Rules. Although prior review by disciplinary authorities is not required by these Rules, lawyers are certainly encouraged to contact disciplinary authorities prior to authorizing a promotional communication if there are any doubts concerning either an interpretation of these Rules or their application to the communication.

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through:
   (1) public media, such as a telephone directory, legal directory, newspaper or other periodical;
   (2) outdoor advertising;
   (3) radio or television;
   (4) written, electronic or recorded communication.
(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.
(c) Prominent disclosures. Any advertisement for legal services directed to potential clients in Georgia, or intended to solicit employment for delivery of any legal services in Georgia, must include prominent disclosures, clearly legible and capable of being read by the average person, if written, and clearly intelligible by an average person, if spoken aloud, of the following:
   (1) Disclosure of identity and physical location of attorney. Any advertisement shall include the
name, physical location and telephone number of each lawyer or law firm who paid for the advertisement and who takes full personal responsibility for the advertisement. In disclosing the physical location, the responsible lawyer shall state the full address of the location of the principal bona fide office of each lawyer who is prominently identified pursuant to this paragraph. For the purposes of this Rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm from which the lawyer or law firm furnishes legal services on a regular and continuing basis. In the absence of a bona fide physical office, the lawyer shall prominently disclose the full address listed with the State Bar of Georgia or other Bar to which the lawyer is admitted. A lawyer who uses a referral service shall ensure that the service discloses the location of the lawyer's bona fide office, or the registered bar address, when a referral is made.

(2) Disclosure of referral practice. If the lawyer or law firm will refer the majority of callers to other attorneys, that fact must be disclosed and the lawyer or law firm must comply with the provisions of Rule 7.3(c) regarding referral services.

(3) Disclosure of spokespersons and portrayals. Any advertisement that includes a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of a client by a non-client, or any paid testimonial or endorsement, shall include prominent disclosure of the use of a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, or of a client by a non-client.

(4) Disclosures regarding fees. A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service.

(5) Appearance of legal notices or pleadings. Any advertisement that includes any representation that resembles a legal pleading, notice, contract or other legal document shall include prominent disclosure that the document is an advertisement rather than a legal document.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.
Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3: Direct Contact with Prospective Clients prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule.

**RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

(a) A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer's firm, lawyer's partner, associate or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:
   (1) it has been made known to the lawyer that a person does not desire to receive communications from the lawyer;
   (2) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;
   (3) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication; or
   (4) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

(b) Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked "Advertisement" on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.

(c) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client; except that the lawyer may pay for public communications permitted by Rule 7.1 and except as follows:
   (1) A lawyer may pay the usual and reasonable fees or dues charged by a lawyer referral service, if the service:
      (i) does not engage in conduct that would violate the Rules if engaged in by a lawyer;
(ii) provides an explanation to the prospective client regarding how the lawyers are selected by the service to participate in the service; and
(iii) discloses to the prospective client how many lawyers are participating in the service and that those lawyers have paid the service a fee to participate in the service.

(2) A lawyer may pay the usual and reasonable fees or dues charged by a bar-operated non-profit lawyer referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:

(i) the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the State Disciplinary Board a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;
(ii) the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;
(iii) the combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and
(iv) a lawyer who is a member of the qualified lawyer referral service must maintain in force a policy of errors and omissions insurance in an amount no less than $100,000 per occurrence and $300,000 in the aggregate.

(3) A lawyer may pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer's services, the lawyer's partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;

(4) A lawyer may pay for a law practice in accordance with Rule 1.17.

(d) A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner or associate through direct personal contact or through live telephone contact, with a nonlawyer who has not sought advice regarding employment of a lawyer.
(e) A lawyer shall not accept employment when the lawyer knows or reasonably should know that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization that would violate these Rules if engage in by a lawyer.

The maximum penalty for a violation of this Rule is disbarment.

Comment

Direct Personal Contact

[1] There is a potential for abuse inherent in solicitation through direct personal contact by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming
from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

[2] The situation is therefore fraught with the possibility of undue influence, intimidation and overreaching. The potential for abuse inherent in solicitation of prospective clients through personal contact justifies its prohibition, particularly since the direct written contact permitted under paragraph (b) of this Rule offers an alternative means of communicating necessary information to those who may be in need of legal services. Also included in the prohibited types of personal contact are direct, personal contact through an intermediary and live contact by telephone.

Direct Written Solicitation

[3] Subject to the requirements of Rule 7.1 and paragraphs (b) and (c) of this Rule, promotional communication by a lawyer through direct written contact is generally permissible. The public's need to receive information concerning their legal rights and the availability of legal services has been consistently recognized as a basis for permitting direct written communication since this type of communication may often be the best and most effective means of informing. So long as this stream of information flows cleanly, it will be permitted to flow freely.

[4] Certain narrowly-drawn restrictions on this type of communication are justified by a substantial state interest in facilitating the public's intelligent selection of counsel, including the restrictions of paragraphs (a) (3) and (a) (4) which proscribe direct mailings to persons such as an injured and hospitalized accident victim or the bereaved family of a deceased.

[5] In order to make it clear that the communication is commercial in nature, paragraph (b) requires inclusion of an appropriate affirmative "advertisement" disclaimer. Again, the traditional exception for contact with close friends, relatives and former clients is recognized and permits elimination of the disclaimer in direct written contact with these persons.

[6] This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[7] A lawyer is allowed to pay for communications permitted by these Rules, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency, a prepaid legal services plan or prepaid legal insurance organization may pay to advertise legal services provided under its auspices.

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.

The maximum penalty for a violation of this Rule is a public reprimand.
Comment

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted to so indicate.

[2] A lawyer may truthfully communicate the fact that the lawyer is a specialist or is certified in a particular field of law by experience or as a result of having been certified as a "specialist" by successfully completing a particular program of legal specialization. An example of a proper use of the term would be "Certified as a Civil Trial Specialist by XYZ Institute" provided such was in fact the case, such statement would not be false or misleading and provided further that the Civil Trial Specialist program of XYZ Institute is a recognized and bona fide professional entity.

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.
(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
(c) The name of a lawyer holding public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.
(e) A trade name may be used by a lawyer in private practice if:
   (1) the trade name includes the name of at least one of the lawyers practicing under said name.
   A law firm name consisting solely of the name or names of deceased or retired members of the firm does not have to include the name of an active member of the firm; and
   (2) the trade name does not imply a connection with a government entity, with a public or charitable legal services organization or any other organization, association or institution or entity, unless there is, in fact, a connection.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] Firm names and letterheads are subject to the general requirement of all advertising that the communication must not be false, fraudulent, deceptive or misleading. Therefore, lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

[2] Trade names may be used so long as the name includes the name of at least one or more of the lawyers actively practicing with the firm. Firm names consisting entirely of the names of deceased or retired partners have traditionally been permitted and have proven a useful means of identification. Sub-paragraph (e)(1) permits their continued use as an exception to the requirement that a firm name include the name of at least one active member.
(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Discussion:

Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member’s or law firm’s availability for professional employment. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 1-400  Advertising and Solicitation

(A) For purposes of this rule, “communication” means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or

(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(B) For purposes of this rule, a “solicitation” means any communication:

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which is:

(a) delivered in person or by telephone, or

(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member’s or law firm’s professional duties is not prohibited.

(D) A communication or a solicitation (as defined herein) shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or

(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(6) State that a member is a “certified specialist” unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. “Presumption affecting the burden of proof”
RULES OF PROFESSIONAL CONDUCT

means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

[Publisher’s Note: Former rule 1-400(D)(6) repealed by order of the Supreme Court effective November 30, 1992. New rule 1-400(D)(6) added by order of the Supreme Court effective June 1, 1997.]

Standards:

Pursuant to rule 1-400(E) the Board has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of “communication” defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

(1) A “communication” which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A “communication” which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as “this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.”

(3) A “communication” which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A “communication” which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

(5) A “communication,” except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word “Advertisement,” “Newsletter” or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word “Advertisement,” “Newsletter” or words of similar import on the outside thereof.

(6) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

(7) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A “communication” which states or implies that a member or law firm is “of counsel” to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is close, personal, continuous, and regular.

(9) A “communication” in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.

(10) A “communication” which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

(11) (Repealed. See rule 1-400(D)(6) for the operative language on this subject.)
RULES OF PROFESSIONAL CONDUCT

(12) A “communication,” except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.

(13) A “communication” which contains a dramatization unless such communication contains a disclaimer which states “this is a dramatization” or words of similar import.

(14) A “communication” which states or implies “no fee without recovery” unless such communication also expressly discloses whether or not the client will be liable for costs.

(15) A “communication” which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

(16) An unsolicited “communication” transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. (Amended by order of Supreme Court, operative September 14, 1992. Standard (5) amended by the Board, effective May 11, 1994. Standards (12) - (16) added by the Board, effective May 11, 1994. Standard (11) repealed June 1, 1997.)

[Publisher’s Note re Rule 1-400(D)(6) and (E): Operative January 1, 2012, Business and Professions Code section 6010, in part, provides that the State Bar is governed by a board known as the board of trustees of the State Bar and that any provision of law referring to the “board of governors” shall be deemed to refer to the “board of trustees.” In accordance with this law, references to the “board of governors” included in the current Rules of Professional Conduct are deemed to refer to the “board of trustees.”]

Rule 1-500 Agreements Restricting a Member’s Practice

(A) A member shall not be a party to or participate in offering or making an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the agreement restricts the right of a member to practice law, except that this rule shall not prohibit such an agreement which:

1. Is a part of an employment, shareholders’, or partnership agreement among members provided the restrictive agreement does not survive the termination of the employment, shareholder, or partnership relationship; or
2. Requires payments to a member upon the member’s retirement from the practice of law; or
3. Is authorized by Business and Professions Code sections 6092.5 subdivision (i), or 6093.

(B) A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules.

Discussion:

Paragraph (A) makes it clear that the practice, in connection with settlement agreements, of proposing that a member refrain from representing other clients in similar litigation, is prohibited. Neither counsel may demand or suggest such provisions nor may opposing counsel accede or agree to such provisions.
1-1-2014

Why Can't We Be Friends? Judges' Use of Social Media

John G. Browning

Follow this and additional works at: http://repository.law.miami.edu/umlr

Part of the Law Commons

Recommended Citation
Available at: http://repository.law.miami.edu/umlr/vol68/iss2/9

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.
I. INTRODUCTION

According to the latest Pew Internet studies, as of May 2013, 72% of adult Americans have at least one social networking profile, up from 67% in 2012. Even among older age groups, the percentages are sur-
prismingly high and growing: 60% of those aged 50 to 64 are active on social media, while 43% of those aged 65 and older use social networking sites.\(^2\) It only stands to reason, therefore, that as the percentage of the population that has embraced the paradigm shift in communications that social networking represents continues to grow, an increasing number of those with an online presence will be members of the judiciary. Yet, this inescapable reality raises larger questions that lawyers, judges, and judicial ethics authorities all over the country are confronting: Should a judge maintain a social networking presence? How active should he or she be? Should a judge be Facebook “friends” with a lawyer who practices in her court or with members of the public who may wind up as litigants before her? And how attenuated can a Facebook “friendship” be? If a party or witness happens to count a member of a judge’s family among his online contacts, is that itself a sufficient ground for recusal? In short, to what extent is social media activity at odds with applicable canons of judicial ethics?

In 2010, the Conference of Court Public Information Officers (CCPIO) conducted a survey entitled “New Media and the Courts: The Current Status and a Look at the Future.”\(^3\) Forty percent of the responding judges said that they used one or more social networking sites—nearly 90% reported using Facebook, while 21% had a LinkedIn account.\(^4\) Not surprisingly, judges who were elected were far more likely to use social media (66.7%) than their counterparts who were appointed (8.8%).\(^5\) The majority of judges using social networking sites characterized their use as purely personal in nature, and they were clearly comfortable with this personal use—only about 35% of those using social media felt that personal use could compromise their judicial ethics in any way.\(^6\) The judges were considerably more divided when it came to using Facebook and other sites in their professional lives: Half either disagreed or strongly disagreed with the statement, “[j]udges can use social media profile sites, such as Facebook, in their professional lives without compromising professional conduct codes of ethics.”\(^7\) When the study was repeated in 2013, more than 30% of the judges responding stated that they had privacy concerns about using social media.

---

\(^4\) Id. at 65.
\(^5\) Id.
\(^6\) Id. at 66.
\(^7\) Id.
media tools, while 21.7% reported having ethical concerns about social media use.8

This article examines both the positive aspects of judges participating in social media as well as the ethical pitfalls. It will look at not only individual instances of judges’ misconduct in their use of social media, but also the varying treatment seen in the ethics opinions and judicial rulings from around the country that have addressed the issue. These decisions reveal that attitudes toward judges being active on social media vary among the states that have dealt with this issue. These decisions, and the attitudes they reflect, shed light on how we view judges and their role in society. Are judges to be viewed as isolated from society? Are they to be viewed as philosopher-priests toiling away in our jurisprudential temples? Should they be regarded as fully connected to society and all of its foibles, with their work reflecting accessibility to the citizens they serve?

Part of the problem in analyzing judges’ use of social media is that those few scholars who have looked at this area, not to mention many of the ethics bodies that have tried to tackle it as well, tend to take one of two paths in looking at the subject.9 The first could best be described as the restrictive approach—judges should either have no social networking presence whatsoever or, at least, a severely limited one, such as a Facebook fan page for political purposes maintained by an election campaign representative.10 For advocates of this approach, such a policy of avoidance “not only safeguards the public better . . . , it also decreases the risks of judicial disqualification and recusal.”11

The second approach is what might be called the cautiously integrative12 or “permissive approach.”13 This gives cautious consent to the concept of judicial use of social media, albeit with considerable trepidation, while imposing multiple caveats on such use.14 Advocates of this approach have even called for social media-specific rules of judicial ethics.15

---

10. See Jones, supra note 9 at 287–88, 300.
11. Id. at 302.
12. Id. at 287–88.
13. Estlinbaum, supra note 9, at 6 (citing Jones, supra note 9).
14. Id. at 23–25.
15. E.g., Jones, supra note 9, at 284 & n.26; Estlinbaum, supra note 9, at 28.
But a more sound approach than either of these two would be the digitally enlightened or realistic approach. Social networking is here to stay, with over 1.11 billion Facebook users and nearly 500 million active Twitter users attesting to this fact,\textsuperscript{16} not to mention the continued proliferation of other social networking applications like Instagram, Pinterest, Vine, and countless others. While the technology involved may be newer, at their core, social networking sites are simply platforms for communication and social interaction. Judges have had to contend with the ethical risks, such as the appearance of impropriety posed by other forms of social interaction for decades, if not centuries. Existing rules of judicial conduct are more than sufficient to provide guidance when it comes to judges’ use of social media, once one recognizes that communications and interaction via social media are no different in their implications than more traditional forms of communication. In other words, an ex parte communication in cyberspace is no less inappropriate than one made over drinks at a bar association gathering, whereas being a golfing buddy of the judge at a local country club is perhaps more likely to risk conveying to the public the appearance of a special relationship with or an ability to influence the judge than being Facebook “friends” with him.

Other approaches minimize or ignore the value of social media for judges not only as a practical tool for judicial election campaigns, but also as a means of public outreach about the role of courts and judicial decisions. The integrity and independence of the judiciary is aided by social media use, just as much as misuse of social networking by judges can damage the public’s perception of this integrity and independence. In fact, social networking sites themselves provide tools for minimizing the risks that observers often point to when discussing judicial use of social media, such as maintaining appropriate privacy settings, having a separate professional profile or fan page, or disabling comment functions.

Those opposed to judges using social media, as well as those who favor serious restrictions on it, are all too often guilty of not understanding the technology itself or its benefits as a means of social engagement. Even more fundamentally however, such critics operate under a flawed understanding of the nature of relationships in the digital age. Accordingly, this article will begin with a look at the contrast between how some judicial ethics bodies have understood the term “friend” in the

social media context and the significance, or lack thereof, attributed to
that relationship by the courts themselves.

II. A "FRIEND" BY ANY OTHER NAME? THE TRUE MEANING OF
FRIENDSHIP IN THE DIGITAL AGE

Florida, the most draconian of jurisdictions when it comes to judges
and social media, has made it grounds for automatic disqualification of a
judge if a lawyer for one of the parties is a Facebook "friend." However,
a minority of the Florida Supreme Court Judicial Ethics Advisory
Committee reached a different conclusion when this issue was examined
because of a very different understanding—and, I would argue, a better
reasoned and pragmatic one—of the true meaning of "friend" in this
digital age. The minority's view stated:

The minority concludes that social networking sites have become so
ubiquitous that the term "friend" on these pages does not convey the
same meaning that it did in the pre-[I]nternet age; that today, the term
"friend" on social networking sites merely conveys the message that
a person so identified is a contact or acquaintance; and that such an
identification does not convey that a person is a "friend" in the tradi-
tional sense, i.e., a person attached to another person by feelings of
affection or personal regard. In this sense, the minority concludes that
identification of a lawyer who may appear before a judge as a
"friend" on a social networking site does not convey the impression
that the person is in a position to influence the judge and does not
violate Canon 2B [of the Florida Code of Judicial Conduct].

This minority view of friendship in the Facebook context has been
more widely accepted in courts around the country than the Florida Judi-
cial Ethics Advisory Committee majority's view. For example, in Wil-
liams v. Scribd Inc., a case concerning copyright claims against Scribd,
the court observed, "it's no secret that the 'friend' label means less in
cyberspace than it does in the neighborhood, or in the workplace, or on
the schoolyard, or anywhere else that humans interact as real people." In
a securities law case, Quigley Corp. v. Karkus, the plaintiff (Quigley

.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html; see also Gena
Slaughter & John G. Browning, Social Networking Dos and Don'ts for Lawyers and Judges, 73
TEx. B.J. 192, 194 (2010).
*16 (S.D. Cal. June 23, 2010) (citation omitted); see also Slaughter & Browning, supra note 17, at
194 (discussing S.C. Judicial Dep't Advisory Comm. on Standards of Judicial Conduct, Op. 17-
cfm?advOpinNo=17-2009 ("A judge may be a member of Facebook and be friends with law
enforcement officers . . . as long as they do not discuss anything related to the judge's position as
a magistrate.").
Corporation) asserted that certain shareholders were trying to take control of the company by making "materially false statements in proxy materials."20 The plaintiff claimed that some of these shareholders maintained "extensive personal and professional connections"; therefore, the plaintiff argued, the court should find that they were acting in collusion to "solicit proxies and vote shares."21 Had the shareholders—through their networks of Facebook "friends"—acquired a sufficient degree of "beneficial ownership," certain statutory disclosure requirements would have been triggered.22 The court dismissed this argument, however, attributing "no significance" to these Facebook "friendships."23 The court "note[d] that electronically connected 'friends' are not among the litany of relationships targeted by the Exchange Act or the regulations issued pursuant to the statute. Indeed, 'friendships' on Facebook may be as fleeting as the flick of a delete button."24

Similarly, in Invidia, LLC, v. DiFonzo (a state court dispute over a non-compete agreement involving a hairstylist and the salon that formerly employed her), the court weighed the distinction between true friendship, "Facebook friendship," and the instance when a "friend" is little more than a business contact.25 Invidia claimed that it had experienced an "unprecedented" wave of 90 customer cancellations after DiFonzo left to work at a rival salon.26 The salon pointed to the fact that their former employee was "Facebook friends" with at least eight of their clients and argued that its customer lists were valuable trade secrets.27 The court, however, was not persuaded that any solicitation had taken place or that anything deep or meaningful was conveyed by being Facebook "friends," stating the following:

[O]ne can be Facebook friends with others without soliciting those friends to change hair salons, and Invidia has presented no evidence of any communications, through Facebook or otherwise, in which Ms. DiFonzo has suggested to these Facebook friends that they should take their business to her chair at David Paul Salons. . . . If [the 90 clients who cancelled] are accustomed to communicating with Invidia through Facebook, they are probably Facebook-savvy enough to locate Ms. DiFonzo's Facebook page after she left Invidia.28

In Onnen v. Sioux Falls Independent School District, a wrongful

21. Id. at *3.
22. Id.
23. Id. at *5 n.3.
24. Id.
26. Id. at *6.
27. Id. at *2, *6.
28. Id. at *6.
termination case, the plaintiff argued that the trial judge should have recused himself because “a major witness” for the defense posted a happy birthday message on the judge’s Facebook page in Czech during trial, but before the witness testified.\(^{29}\) The South Dakota Supreme Court concluded that the message was not an ex parte communication because it did not “concern a pending or impending proceeding.”\(^{30}\) Moreover, the court noted that the post was inconsequential and that the judge neither invited, responded to, nor acknowledged it, stating, “Judge Srstka noted that the post was only one of many and that he did not personally know [the witness]. Furthermore, Judge Srstka . . . also stated that . . . [the message] did not affect [his] decision-making, as [he] did not know it occurred.”\(^{31}\)

Even in a case involving potentially devastating consequences of a Facebook “friendship” between two jurors and the mother of a victim in a criminal case, the Kentucky Supreme Court acknowledged the often-fleeting nature of this relationship:

But “friendships” on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships or relationships in the community, which are generally the concern during voir dire. The degree of relationship between Facebook “friends” varies greatly, from passing acquaintanceships and distant relatives to close friends and family. The mere status of being a “friend” on Facebook does not reflect this nuance and fails to reveal where in the spectrum of acquaintanceship the relationship activity falls.\(^{32}\)

Perhaps the ultimate example that “friend” can often mean anything but comes from a criminal case with important constitutional implications, United States v. Meregildo.\(^{33}\) In Meregildo, one of the criminal defendants, Colon, moved to suppress evidence seized pursuant to a warrant from his Facebook account.\(^{34}\) Colon challenged the government’s methods used to obtain evidence supporting its showing of probable cause and argued that he had a legitimate expectation of privacy when he posted to “friends” on his Facebook profile about his criminal activities.\(^{35}\) The prosecutors accessed Colon’s “Mellymel Balla” Facebook profile through the account of one of Colon’s “friends,” who was a cooperating witness.\(^{36}\) Thanks to this “friend,” the prosecution

\(^{29}\) 801 N.W.2d 752, 754, 757 (S.D. 2011).
\(^{30}\) Id. at 757–58.
\(^{31}\) Id. at 758.
\(^{34}\) Id. at 524.
\(^{35}\) Id. at 525.
\(^{36}\) Id.
saw messages posted by Colon about previous violent acts and threats of violence against rival gang members, as well as demands of loyalty from fellow gang members. While the court acknowledged that the question of "[w]hether the Fourth Amendment precludes the Government from viewing a Facebook user's profile absent a showing of probable cause depends . . . on the user's privacy settings," and that "postings using more secure privacy settings reflect the user's intent to preserve information as private and may be constitutionally protected," ultimately, the decision came down to Colon placing his faith in "friends" who were anything but friendly:

While Colon undoubtedly believed that his Facebook profile would not be shared with law enforcement, he had no justifiable expectation that his "friends" would keep his profile private. . . . And the wider his circle of "friends," the more likely Colon's posts would be viewed by someone he never expected to see them.

In other words, with "friends" like these, who needs enemies?

The increasingly connected world wrought by Facebook and other social networking sites has also brought with it a heightened risk of verdicts being overturned by online misconduct by jurors (a topic that is outside the scope of this article), as well as by social networking relationships undisclosed during voir dire. While some courts have found an undisclosed Facebook "friendship" (as well as Facebook communications) between a juror and a party or witness serious enough to warrant a new trial, other courts have been more skeptical and recognize the casual nature of Facebook "friendship." For example, in one recent case involving a feud between neighbors that led to a murder, the appellant challenged his conviction because of a juror's failure to disclose a Facebook "friendship" with the victim's wife. The juror was not specifically asked during voir dire about social networking relationships, but like all prospective jurors, she was asked if she knew anyone involved in the case. She answered that she was acquainted with the victim's family, describing the relationship as "casual" and as "not close, but I do know them." In rejecting the appellant's argument that this rose to the level of hidden impartiality that prejudiced the rights of

37. Id. at 526.
38. Id. at 525.
39. Id. (citing Katz v. United States, 389 U.S. 347, 351-52 (1967)).
40. Id. at 526 (internal citation omitted).
43. Id.
44. Id.
WHY CAN'T WE BE FRIENDS?

the accused, the court opined on the casual nature of social media connections:

It is now common knowledge that merely being friends on Facebook does not, per se, establish a close relationship from which bias or partiality on the part of a juror may reasonably be presumed. . . . Friendships on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships or relationships in the community, which are generally the concern during voir dire. 45

In fact, the court pointed out, with said juror having 629 "friends" on Facebook, "[s]he could not possibly have had a disqualifying relationship with each one of them." 46

In another criminal case, a Missouri appellate court dealt with the defendant's challenge to his conviction on multiple sex offenses involving his stepdaughter. 47 During voir dire, one prospective juror, who ultimately served as foreperson, acknowledged knowing the victim's mother casually. 48 When the defendant claimed that this same juror's failure to disclose his Facebook "friendship" with the mother was improper, the court held a hearing at which the juror professed "that he did not use Facebook often and his Facebook interaction with [the victim's mother] was limited to: (1) an initial 'hey, what's up?' [message] when they first became Facebook 'friends'; and (2) a post-trial message written . . . to congratulate [the mother] on the trial." 49 He also testified that he did not use Facebook during the trial and was unaware of the postings made by the mother during the proceedings. 50 The court found no improper conduct by the juror, noting that while he was not specifically asked about Facebook relationships, he had truthfully characterized his limited interaction with the victim's mother, a degree of intersection that the court found to be consistent with a "Facebook relationship." 51

In yet another criminal case, a defendant convicted of murdering his then-girlfriend's son, raised the issue of juror partiality based on an undisclosed Facebook relationship. 52 The defendant maintained that during voir dire, the juror in question had failed to disclose that he was a

45. Id. at *4.
46. Id.
48. Id.
49. Id.
50. Id.
51. Id. at *3.
Facebook "friend" of the victim's aunt. The court, which considered affidavits from the individuals in question, found there was no evidence of any such bias. It noted that, according to uncontradicted affidavits, the juror and the victim's aunt "did not communicate since elementary school, other than being Facebook friends."

As these cases demonstrate, even when something as vital as a defendant's Sixth Amendment right to a trial "by an impartial jury" is at stake, when examining whether an improper relationship existed involving a juror, courts view Facebook "friendships" the way most courts have—with a realistic, even somewhat jaundiced, eye.

Nevertheless, occasionally cases have popped up in which a Facebook "friendship" has been held to represent at least the possibility of a closer relationship that might meet the legal standard of bias. For example, in Black v. Hennig, a child support and custody case, the petitioner, Black, argued that the trial court erred by not admitting evidence that showed bias on the part of an expert witness who had a purported Facebook "friendship" with one of the opposing party's attorneys. According to Black, the court should have admitted screenshots from the Facebook page of Dr. Valerie Hale, "the clinical psychologist who conducted the custody evaluation," because they pointed to a "friendship" with Hennig's attorney and showed the two discussed such things as shopping for clothes and otherwise "carried on a regular and personal correspondence . . . ." According to Black, this "improper conduct . . . violated the Association of Family and Conciliation Courts . . . standards and compromised her professional integrity thereby invalidating her recommendations to the court . . . ." The appellate court concluded that "the Facebook . . . evidence should have been admitted."

In Furey v. Temple University, a college student, who was involved in an altercation with campus police and charged with violating Temple's code of conduct, challenged his disciplinary hearing, claimed lack of due process. Furey appealed the decision of a panel that recommended expulsion partly because one of the student representatives on the panel, Malcolm Kenyatta, was Facebook "friends" with the campus police officer.

53. Id.
54. Id. at *23–24.
55. Id. at *23.
56. U.S. CONST. amend. VI.
58. Id. at 1260.
59. Id. at 1262–63 & n.8.
60. Id. at 1264.
61. Id. at 1271.
police officer, Wolfe, involved in the incident. While an investigator who looked into the matter was dismissive of the Facebook connection (Kenyatta stated that he had over 400 “friends” and that he and the officer “were not ‘friends’ in the traditional sense”), a review board considered it a procedural defect. However, when the Vice President of Student Affairs decided to expel Furey, the young man went to federal court. The federal court held that Furey’s claims that he had been denied procedural due process could go forward, concluding that the Facebook “friendship” may have procedurally interfered with the disciplinary hearing.

III. JUDGES BEHAVING BADLY ON SOCIAL MEDIA

Besides the significance of a Facebook “friendship,” judges have demonstrated that when it comes to social media use, they are human too, and capable of missteps, both large and small. Essentially, judges—like lawyers and members of the public at large—need to keep in mind that the use of emerging technologies does not relieve them of traditional ethical conventions and duties. Consider the following examples:

A. Angela Dempsey

This Florida circuit judge was formally reprimanded by the Florida Supreme Court for two mistakes that appeared in her 2008 campaign materials. One was a mailing that misrepresented Dempsey’s years of legal experience, while the other was a statement asking voters to “re-elect” her on a link to a YouTube campaign video when Judge Dempsey had in fact been appointed, not elected to the bench. According to the Florida Supreme Court, this violated a judicial canon barring misrepresentation about a judge’s qualifications. Chief Justice Peggy Quince said, “This case stands as a warning to all judicial candidates . . . . You will be held responsible and accountable for the actions of your campaign consultants including the way they choose to use new technology like the social media.”

63. Id. at 390.
64. Id.
65. Id. at 397.
66. See id. at 391.
67. Id. at 397.
68. In re Dempsey, 29 So. 3d 1030, 1033–34 (Fla. 2010).
69. Id. at 1032.
70. Id. at 1033.
B. Doe v. Sex Offender Registry Board

Although not technically judges, hearing officers serve in quasi-judicial capacities and, consequently, can be held to many of the same standards of conduct as judges. In Doe, the claimant appealed his classification as a sex offender. Among his arguments, Doe claimed that the hearing officer who made this determination later posted "inappropriate" comments about Doe's case on a co-worker's Facebook page. The Massachusetts court described the hearing officer's actions as "most unfortunate" and impugning the "dignity" of the judicial process. Surprisingly, however, the court did not find that the hearing officer should have recused herself.

C. Eugenio Mathis

This New Mexico judge resigned in February 2013 amid allegations of improper conduct involving his wife, who also worked at the courthouse. According to charges brought against the jurist, Mathis had violated the court's computer and Internet-use policy by engaging in "excessive and improper" instant messaging with his wife. These included "communications of a sexual nature" during working hours, including "intimations that he had or would be having sexual relations with her during the workday and/or on court premises." According to chat logs filed with the petition, one message actually read, "Don't come knocking if the jury room is rockin.'" Other comments that Mathis electronically shared included statements about the veracity of witnesses during trials, vulgar comments about parties in a domestic-violence case, and disparaging comments about other judges. The New Mexico Juri-

73. See, e.g., FLA. CODE OF JUD'L CONDUCT ("Anyone . . . who performs judicial functions, including but not limited to . . . hearing officer[s] shall, while performing judicial functions, conform with [these Canons] . . . and such other provisions of this Code that might reasonably be applicable depending on the nature of the judicial function performed."); TENN. SUP. CT. R. 10 ("A judge . . . is anyone authorized to perform judicial functions, including but not limited to . . . [a] hearing officer.").
74. Doe, 959 N.E.2d at 991.
75. Id. at 993.
76. Id. at 993 & n.4.
77. Id. at 993.
79. Id.
80. Id.
81. Id.
82. Id.
cial Standards Commission also alleged that many of these instant messages were sent while the judge was on the bench presiding over trials and hearings and that he permitted his wife to read confidential reports. 83

D. Lee Johnson

This Ennis, Texas municipal judge ignited a firestorm of controversy by posting on his Facebook page about Heisman Trophy winner and Texas A&M quarterback Johnny Manziel receiving a speeding ticket in his town in January 2013. 84 The post did not identify Manziel by name, instead referring to a “(very) recent Heisman Trophy winner from a certain unnamed ‘college’ town down south of here . . . [who] was speeding on the 287 bypass yesterday . . . Time to grow up/slow down young’un.” 85 Johnson later added a second, apologetic Facebook post: “I meant to say ‘allegedly’ speeding, my bad.” 86 The judge, who went to the rival school of Baylor, 87 inadvertently brought the subject of legal ethics to national sports news through his actions, which also prompted a reprimand from the Ennis city manager. 88 It is bad enough to pre-judge a party in any case, but sharing that partiality with the world on Facebook? Judge Johnson also faces possible disciplinary action from the state Judicial Conduct Commission. 89

E. Ernest “Bucky” Woods 90

This jurist retired from his position as Superior Court Chief Justice in 2009 after relatives of a former defendant filed complaints against

85. Id.
86. Id.
87. Id.
90. The events involving former Judge Woods and Judge B. Carlton Terry, infra note 114, were previously discussed in an article I co-wrote 2010. See Slaughter & Browning, supra note 17, at 194; see also Katheryn Hayes Tucker, Ga. Judge Steps down Following Questions About
him for improper involvement with the defendant’s ex-girlfriend, Tara Black. He had used Facebook to contact Ms. Black, who also appeared before him on drug charges. Over the course of this relationship, he advised her on how to proceed in court appearances before him, helped her receive deferred prosecution, and signed an order “allowing her to be released on her own recognizance so she wouldn’t have to post a cash bond.” Other messages between the judge and the stylist (thirty-three pages of which were turned over as part of the response to a newspaper’s open records request) detailed money that he loaned to her, lunch dates with her, and visits he made to Black’s apartment. Besides helping Black “behind the scenes” in her own criminal theft by deception case, Woods also used a photo taken off her Facebook page as a basis for issuing a probation revocation against a drug defendant; the defendant’s family subsequently complained about Judge Woods’ involvement with Ms. Black, leading to the investigation and his retirement.

F. Shirley Strickland Saffold

The Cuyahoga County Common Pleas Court judge was linked to anonymous Internet discussions about cases in her court, leading to her removal from presiding over the high-profile trial of an accused serial killer. More than 80 postings were made by “Lawmiss” on Cleveland.com, website of the Cleveland Plain Dealer. “Lawmiss” was then traced back to Saffold’s email account and her court-issued computer. The comments that were posted included calling a defense lawyer a “buffoon” and wishing he would “shut his Amos and Andy style mouth.” She also commented about a sentence in a 2008 multiple homicide case: “If a black guy had massacred five people then he would’ve received the death penalty . . . . A white guy does it and he gets pat on the hand. The jury didn’t care about the victims . . . . All of them ought to be ashamed.” In removing Saffold from presiding over

91. Slaughter & Browning, supra note 17, at 194.
92. See Tucker, supra note 90.
93. Id.
94. Id.
95. Id.
98. Id.
99. See Hill, supra note 98.
100. See James F. McCarty, Anonymous Online Comments Are Linked to the Personal E-mail
the trial, the Ohio Supreme Court wrote, "[T]he nature of these comments and their widespread dissemination might well cause a reasonable and objective observer to harbor serious doubts about the judge's impartiality."101

Judge Saffold was outed by the Cleveland Plain Dealer, whose public records request included the browser history of her courtroom computer.102 Although "Lawmiss" was Saffold's screen name, her twenty-three-year-old daughter Sydney came forward and admitted to making "quite a few" of the "Lawmiss" posts.103 While still denying making posts about her cases online, Judge Saffold brought a $50 million lawsuit against the newspaper for invasion of privacy and breach of contract, claiming that the Plain Dealer violated the terms of use of its website by disclosing the identities of her and her daughter.104

G. William Adams

A kind of "dishonorable mention" goes out to Judge William Adams, an Aransas County, Texas court-at-law judge.105 Although Adams did not post the social media activity in question, the attention it attracted led to national outrage as well as a public warning and a suspension from the bench.106 In November 2011, a YouTube video (made in 2004) depicting Adams beating his then-teenage daughter with a belt and cursing at her went viral.107 Adams' daughter, who wanted to bring public attention to the abuse, posted the video; ironically, Judge Adams actually presides over family court cases.108 The disturbing video prompted a police investigation, a temporary suspension by the Texas Supreme Court, and a public warning issued to Adams by the Texas Commission on Judicial Conduct.109

102. See Hill, supra note 98.
103. See McCarty, supra note 100.
104. Bobkoff, supra note 96.
106. Id.
107. Id.
108. Id.
109. See id.; see also Joe Sutton, Texas Judge in Video Beating Is Back at Work, CNN (Nov. 15, 2012, 1:01 AM), http://www.cnn.com/2012/10/04/justice/texas-beating-video/index.html. A police investigator suggested that the reason that Judge Adams was not criminally charged was because the statute of limitations had expired. See Walker, supra note 105.
H. James Oppliger

It is somewhat surprising that, in an age in which judges and lawyers have become sensitized to jurors engaging in online misconduct, we actually encounter a judge who blabs online about his jury service. Fresno County Judge James Oppliger, excited about actually being picked to serve on a jury, emailed several of his jurist colleagues about the unusual turn of events.\textsuperscript{110} Among the comments was a reference to the two lawyers squaring off in the case: "Here I am livin' the dream, jury duty with Mugridge and Jenkins!"\textsuperscript{111} While none of the emails discussed the evidence or deliberations in the case, one of the judges on the receiving end of Oppliger's electronic communications was the presiding judge in the case, Judge Arlan Harrell.\textsuperscript{112} After the defendant was convicted of second-degree murder, Judge Harrell disclosed the online communications, prompting defense counsel to consider seeking a new trial.\textsuperscript{113}

I. B. Carlton Terry, Jr.\textsuperscript{114}

Perhaps the most infamous, oft-cited case of a "judge behaving badly" on social media is that of North Carolina Judge B. Carlton Terry, Jr. In April 2009, the North Carolina Judicial Standards Commission publicly reprimanded Judge Terry for the activities of a Facebook "friendship" between himself and an attorney appearing before him.\textsuperscript{115} Just before a child custody and support proceeding that lasted from September 9 to September 12, 2008, Judge Terry was in chambers with Charles Schieck, counsel for Mr. Whitley, and Jessie Conley, attorney for Mrs. Whitley.\textsuperscript{116} When the conversation turned to Facebook, Ms. Conley said she was not familiar with it and, in any event, did not have time for it.\textsuperscript{117} However, the judge and Mr. Schieck were Facebook "friends."\textsuperscript{118} The next day, during another in-chambers meeting, the judge and attorneys discussed testimony that raised the possibility of Mr. Whitley having had an affair, at which point Schieck commented on

\begin{flushleft}
\textsuperscript{111} Id.
\textsuperscript{113} Id.
\textsuperscript{114} See supra note 90.
\textsuperscript{116} Public Reprimand: B. Carlton Terry, at 2–3.
\textsuperscript{117} Id. at 2.
\textsuperscript{118} Id.
having to “prove a negative.” That evening, Schieck posted on Facebook, “how do I prove a negative. [sic]” Judge Terry responded with a comment about having “two good parents to choose from,” as well as a comment about the case continuing. Schieck, proving that one can “suck up” to a judge in cyberspace as well as in person, posted, “I have a wise Judge.” In addition, on September 11, 2008, Terry and Schieck exchanged Facebook comments about whether or not the case was in its last day of trial, with Terry responding, “[Y]ou are in your last day of trial.” Judge Terry also went online to view a website that Mrs. Whitley maintained for her photography business, looking at photos and poetry she posted. On September 12, 2008, in announcing his ruling, Judge Terry even quoted from one of her poems.

Although Judge Terry disclosed to Ms. Conley the Facebook exchanges between himself and Mr. Schieck the day before he ruled, he waited until after ruling to disclose the independent Internet research he had done. Days after the trial, Ms. Conley filed a motion asking that Judge Terry’s order be vacated, that he be disqualified, and that a new trial be granted. On October 14, 2008, Judge Terry disqualified himself; his order was vacated, and a new trial was granted on October 22, 2008. The Judicial Standards Commission determined that he “was influenced by information he independently gathered,” as well as his ex parte communications with Mr. Schieck. Furthermore, his behavior demonstrated “a disregard of the principles embodied in the North Carolina Code of Judicial Conduct” and “constitute[d] conduct prejudicial to the administration of justice that brings the judicial office into disrepute.”

IV. OTHER USES FOR SOCIAL MEDIA

The Judge Terry episode serves as a cautionary tale for members of the judiciary and a reminder that while judges may avail themselves—carefully—of new media, existing canons of ethics still apply regardless of the medium of communication. Even when charges of improper con-

119. Id.
120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id. at 2-3.
126. Id. at 3.
127. Id.
128. Id.
129. Id.
130. Id. at 3–4 (citations omitted); see also Slaughter & Browning, supra note 17, at 194.
duct have not been raised, the ease of use and pervasiveness of social media can make sites like Facebook tempting for judges. For example, in one federal court case, the judge took it upon herself to investigate the plaintiff’s Facebook page to verify the plaintiff’s claim of being disabled due to asthma. The court “note[d] that in the course of its own research, it discovered one profile picture on what [wa]s believed to be [the plaintiff’s] Facebook page where she appear[ed] to be smoking . . . . If accurately depicted, [the plaintiff’s] credibility [would have been] justifiably suspect.”

While researching litigants on Facebook is not advisable for judges, in that case, it helped avoid Social Security fraud. But even harmless activity on social media can invite unwelcome attention for judges. In New York, Judge Matthew A. Sciarrino, Jr. was very active on Facebook—posting a photo of his crowded courtroom, details of his schedule, and even status updates from the bench. Some speculated that his Facebook devotion was the reason for his transfer to a different bench in Manhattan.

Judges who actively use social networking platforms often have to decide just how connected they want to be. In January 2012, a judge from Will County, Illinois, Amy Bertani-Tomczak, was urged by prosecutors to view Facebook posts by a reckless homicide defendant, Tomasz Maciaszek, before sentencing him. The twenty-five-year-old defendant, whose fatal 2008 car crash claimed the life of a seventeen-year-old high school student, professed to being contrite and leading a secluded, haunted life in the wake of the tragedy. Yet, despite the prosecution’s attempts to provide the court with printouts from Maciaszek’s Facebook profile that supposedly undermined his claims, Judge Bertani-Tomczak refused to consider any of it: “I have not seen anything or looked at anything,” she said.

Other judges have taken the opposite approach and incorporated social media into their judicial role:

132. Id.
134. Id.
136. Id.
137. Id.
Michigan Judge A.T. Frank uses social networking sites to monitor offenders on probation under his jurisdiction, occasionally finding photos on Myspace or Facebook pages in which the defendants are engaged in drug use or other prohibited behavior. Galveston juvenile court Judge Kathryn Lanan employs a similar tactic, requiring all juveniles under her jurisdiction to “friend” her on Facebook or MySpace so that she can review their postings for any signs of inappropriate conduct that might warrant a return to her court.  

Another Galveston judge, Susan Criss, “friends” lawyers on Facebook—a handy tool to keep them honest.  

Judges do find positive uses for social media. “A recent issue of Case in Point, the National Judicial College’s magazine, suggested that participating in social media provides judges with a low-cost means of staying informed while simultaneously enhancing public understanding of the judiciary.” The number of judges using social networking sites increases every year, due in part to the increasingly important political role played by social media. In states where judges are elected, social media and other forms of electronic communication can be vital in getting judicial candidates’ names out to voters, building awareness among the electorate, campaign organizing, and, of course, fundraising.

For those who consider social media an ethical minefield for unwary judges, it is important to remember that concerns over judges’ use of social networking go beyond U.S. borders. In France, for instance, a number of judges have developed robust Twitter followings as tweeting from the courtroom has become popular. Two French magistrates sparked controversy in 2012, however, with their attempts at humorous tweets during the middle of a trial for attempted murder in the southwestern town of Mont-de-Marsan. One magistrate, “Ed,” tweeted about strangling the chief judge in open court before discussing

138. Slaughter & Browning, supra note 17, at 194.
139. Id.
140. Id.
141. Id. at 193.
142. See id. at 194.
143. Id.
killing another member of the court out of "exasperation." 145 Another judge tweeted an inquiry wondering about the possibility of slapping a witness. 146 The tweets did not go unnoticed by the local press, and soon regional judicial authorities launched a formal inquiry into the tweeting judges. 147 Both judges shut down their Twitter accounts, which led to an outcry from their thousands of Twitter followers. One of these followers decried the criticism of the judges, saying they had taken such precautions as using pseudonyms and refraining from giving much detail of the case. 148

In 2012, the United Kingdom adopted new rules banning judges from blogging or posting on social media about their jobs. 149 The guidelines include the following admonition:

Judicial officeholders should be acutely aware of the need to conduct themselves, both in and out of court, in such a way as to maintain public confidence in the impartiality of the judiciary. Blogging by members of the judiciary is not prohibited. However, judicial office holders who blog (or who post comments on other people’s blogs) must not identify themselves as members of the judiciary. They must also avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the judiciary in general. 150

Failure to adhere to these guidelines, which also cover Twitter and other social networking sites, can lead to disciplinary action. 151 The rules apply to all holders of judicial office in courts and tribunals, including barristers who serve as part-time judges (many of whom are used to blogging, tweeting, or going on Facebook to discuss their cases—a practice that is not forbidden as it is in the United States). 152

145. See French Judges Humorously Tweeted Trial, UNITED PRESS INT’L, supra note 144.
146. Id.
147. See id.
148. See id.
150. Id.
151. Id.
152. Another country that has seen fit to regulate the activity of judges on social media is the island nation of Malta. "On February 8, 2010, Malta’s Commission for the Administration of Justice approved an amendment to its Code of Ethics for Members of the Judiciary. It states, 'Since propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge, membership of "social networking Internet sites" is incompatible with judicial office. Such membership exposes the judge to the possibility of breach of the record part of rule 12 of the Code.'" JOHN G. BROWNING, THE LAWYER’S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA’S IMPACT ON THE LAW 170 (Eddie Fournier, ed., 2010).
V. ATTENUATED TIES AS A CHALLENGE TO JUDICIAL IMPARTIALITY

In what may frequently be a desperate, last-gasp attempt at challenging a verdict or disqualifying a presiding judge, social media connections involving members of the judiciary have been cited by disgruntled litigants. Interestingly, while Georgia’s judicial ethics authorities have not issued an opinion on judges and social networking, one recent case did feature an allegation of supposedly improper conduct in which social networking played a part. In a divorce case, a father appealed three different trial court orders from three different judges. With regard to one of the orders, in what was evidently a contentious case, the father argued that the trial judge, Judge Parrott, should have recused himself sua sponte on grounds of bias toward the mother. In support of this argument, the father produced a “photocopy of a comment on his Facebook page, purportedly made by the mother weeks after the hearing occurred, in which she boasted, ‘Judge Parrott and my dad had a meeting the week before our case and guess what you lost your kids.’” The appellate court was not persuaded that such an accusation held any merit, stating, “[T]he mother’s reference on Facebook to a meeting is not evidence that the judge obtained information relevant to the case from an extra-judicial source, much less that he based his ruling on any such external information.” It is worth noting that this same case was rife with disparaging comments being made by both parents via social media, such that the trial court entered an injunction—upheld by the appellate court—barring both parties from making comments about the other on social networking sites.

A similar challenge was made during another contentious divorce case, this time in Alabama. In it, the trial court entered an order that divided the marital assets and awarded some rehabilitative alimony to the ex-wife, albeit considerably less than had been sought. The ex-wife moved for a new trial, alleging that the judge’s “social networking connection [with] the parties’ adult daughter” (who grew up in the trial venue but now lived in England) somehow tainted the judge’s ruling and warranted her recusal. The trial judge denied the motion, pointing out the following:

154. Id. at 699.
155. Id. at 701.
156. Id.
157. Id. at 702–03.
158. Id. at 699.
160. Id. at *1–4.
161. Id. at *4–5.
This Facebook is a social networking site where the word "friend" is used in a way that doesn’t have anything to do with the way before this Facebook.com ever existed—the way we used the word "friend." . . . Just because a person is connected to me on here in this manner doesn’t have anything to do with a personal relationship. I don’t have a personal relationship with this friend. We all live in a small town. I have heard both of you all’s [sic] names. I’ve heard the daughter’s name before we came in here today.162

The appellate court agreed, observing that the ex-wife never raised the issue at any earlier stage in the proceedings, and noting that a showing of something more than "the bare status of the parties’ daughter as a 'friend' of the judge" would be necessary before any recusal could be granted.163

In Cumberland County, Pennsylvania, District Judge Thomas Placey discovered the downside to having too many Facebook "friends."164 During a 2011 criminal case concerning defendant Barry Horn, Jr.’s standoff with police, it was discovered that Judge Placey and the defendant were Facebook "friends."165 Placey explained that while he knew Horn’s father, a former sheriff’s deputy, he did not consider Horn a real friend and pointed out that he accepted every "friend" request he received on Facebook.166 Judge Placey explained that he doesn’t really use Facebook and that “[s]omeone says you want to be my friend, I say yes. You could be a Facebook friend of mine, I wouldn’t know it.”167

Although the prosecutor did not plan to seek Judge Placey’s recusal,168 other observers were more troubled by it. Shira Goodman, deputy director of Pennsylvanians for Modern Courts, stated, “[m]any judges will tell you this: There are certain things you give up when you become a judge. Some of that is social ties. [sic] . . . You have to not put yourself in situations where your impartiality can be challenged.”169

Sometimes it is not even the judge’s own Facebook “friend” status that attracts controversy, but the social media connections of family members. In Will County, Illinois in 2011, defendant Kelly Klein—charged with battering a seven-month-old boy left in her day care—

162. Id. at *7.
163. Id.
165. Id.
166. Id.
167. Id.
168. Id.
169. Id.
sought a new trial over the discovery that the presiding judge in her case, Daniel Rozak, had several children who were Facebook “friends” with members of the victim’s family.\(^\text{170}\) Klein’s lawyer “claim[ed] the relationship between [Rozak’s children] and [the family in question was] deeper than a simple social-media connection,” and “the Facebook friendships between the Rozaks and the Bashars are only the tip of the iceberg.”\(^\text{171}\) Judge Rozak declined to recuse himself, pointing out that his children were all adults who moved out of his home years ago and, consequently, “I no longer vet their ‘friends’ and do not utilize their ‘electronic social networking sites.’”\(^\text{172}\)

The only state ethics committee to address whether a judge’s Facebook “friendship” with a party or someone related to a party requires recusal is New York.\(^\text{173}\) In May 2013, New York’s Committee on Judicial Ethics, which responds to written inquiries from the approximately 3,400 full-time and part-time judges in that state, addressed the following question: “[W]hether [a judge] must, [upon request] . . . exercise recusal in a criminal matter because [he is] ‘Facebook friends’ with the parents or guardians of certain minors who allegedly were affected by the defendant’s conduct.”\(^\text{174}\) Referring to an earlier ethics opinion about lawyers and social media,\(^\text{175}\) the Committee held “the mere status of being a ‘Facebook friend,’ without more, is an insufficient basis to require recusal.”\(^\text{176}\) As long as the parents of the purported victims were only acquaintances, the Committee wrote, there was no appearance of impropriety.\(^\text{177}\) The Committee did, however, “recommend[] that [the judge] make a record, such as a memorandum to the [court’s] file, of the basis for [his] conclusion,” should a challenge to the decision surface.\(^\text{178}\)

The Committee noted that “[d]espite the Facebook nomenclature,” one has to look at the actual relationship itself.\(^\text{179}\) Here, the judge had


\(^{171}\) Id.

\(^{172}\) Id.


\(^{174}\) Id.

\(^{175}\) See N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009), available at http://www.nycourts.gov/ip/judicialethics/opinions/08-176.htm (determining that judicial officers may use social networks, but “[a] judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network . . . .”).


\(^{177}\) See id.

\(^{178}\) Id.

\(^{179}\) Id.
indicated that the victim's parents were only acquaintances of his. 180 It mentioned, "interpersonal relationships are varied, fact-dependent, and unique to the individuals involved." 181 Accordingly, the Committee stated that it could "provide only general guidelines to assist judges who ultimately must determine the nature of their own specific relationships with particular individuals and their ethical obligations resulting from those relationships." 182

VI. JUDGED BY THE COMPANY YOU KEEP: A LOOK AT EACH JURISDICTION’S TREATMENT OF JUDGES AND SOCIAL MEDIA

Can a judge be Facebook "friends" with lawyers? What if they practice in front of that judge? And what about other courthouse personnel or members of the general public? For that matter, even if a judge does have a social networking presence, what limitations are there on what he or she can post? The answer to such questions can be found by borrowing a common Facebook phrase to describe relationships—it's complicated. At least ten states, 183 plus an ABA Judicial Ethics Opinion, 184 and a couple of recent appellate cases, 185 have attempted to address these issues. In a nutshell, most states looking at the issue have adopted an attitude of, "it's fine for judges to be on social media, but proceed with caution," except for the most restrictive state, Florida, where merely being "friends" on Facebook with an attorney of record means automatic disqualification. 186 Because of variations from state to state, a summary and analysis is provided on a state-by-state basis. In those states that have not yet addressed the question of judges on social networking sites, attorneys and judges alike would be well advised to examine the reasoning of the only opinion that is national in scope: the ABA Standing Committee on Ethics and Professional Responsibility.

A. ABA Formal Opinion 462

ABA Formal Opinion 462, Judges' Use of Electronic Social Networking Media, was issued on February 21, 2013 by the ABA Standing Committee on Ethics and Professional Responsibility, and it reminds judges to heed the ABA Model Code of Judicial Conduct when using

180. Id.
181. Id.
182. Id.
183. See infra Part VI.B–L.
184. See infra Part VI.A.
185. See infra Part VII.
"electronic social media" ("ESM"). This opinion is a detailed, well-reasoned look at the issue and likely will be looked at as a guide for states examining this issue in the future.

First, the ABA Opinion is pro-social media and acknowledges that "judicious use" of such sites can be a valuable means of reaching out to and remaining accessible to the public. As the opinion points out, "[w]hen used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forums of social connection such as U.S. Mail, telephone, email, or texting." The opinion also notes the value of social media in political campaigns in jurisdictions where judges are elected, but it warns judges (and judicial candidates) to be mindful of how common features of social networking sites can be ethical traps for the unwary. For example, under Model Rule 4.1(A)(3), "sitting judges and judicial candidates are expressly prohibited from 'publicly endorsing or opposing a candidate for any public office.'" By clicking a "like" button to photos, shared messages, et cetera, on the political campaign sites of others, a judge could be viewed as having improperly endorsed such a candidate. By the same token, the opinion urges judges who might privately express their views about candidates to make sure that these expressions are indeed kept private "by restricting the circle of those having access to the judge's ESM page, limiting the ability of some connections to see others, limiting who can see the contact list, or blocking a connection altogether.

In addition, Formal Opinion 462 reminds judges that they must "maintain the dignity of the judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives," particularly with regard to who they connect with and

188. Id. at 4.
189. Id.
190. Id. at 3.
191. Id. at 4 (quoting MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(3) (2011)).
192. Id. at 4 & n.20 (citing Kansas Judge Causes Stir with Facebook "Like", REAL CLEAR POLITICS, July 29, 2012, http://www.realclearpolitics.com/news/ap/politics/2012/jul/29/kansas_judge-causes_stir_with_facebook_like.html). Butler County, Kansas District Judge Jan Satterfield caused a controversy when she was among several dozen people who clicked "like" on a Facebook post by the campaign of Sheriff Kelly Herzet. Kansas Judge Causes Stir, supra. A complaint was filed against Judge Satterfield with the Kansas Commission of Judicial Qualifications over the endorsement by a supporter of Herzet's opponent; the complainant wrote to the newspaper reporting on the controversy, "[w]ith the growth of social media, the court system needs to define how its rules for judges apply in cyberspace." Id. Judge Satterfield, in initial comments, did not seem to understand how a "like" could be an endorsement. Id.
what they share via social media. Judges, the opinion reminds us, “must assume that comments posted to an ESM site will not remain within the circle of the judge’s connections.” Dissemination of embarrassing comments or images, the opinion warns, can potentially “compromise or appear to compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary.”

Besides providing some sobering, common-sense reminders about social networking interactions in general, the opinion also makes it clear that concerns about ex parte communications, independent research, and the impression that others may be in a position to influence the judge are just as valid in cyberspace as they are with more traditional modes of communication. It warns that

“judge[s] should not form relationships with persons or organizations that may . . . convey[] an impression that these persons or organizations are in a position to influence the judge. A judge must also take care to avoid comments and interactions that may be interpreted as ex parte communications concerning pending or impending matters . . . and avoid using any ESM site to obtain information regarding a matter before the judge in violation of [ABA Model Code of Judicial Conduct] Rule 2.9(C). Indeed, a judge should avoid comment about a pending or impending matter in any court.

The opinion also provides valuable guidance on disclosure or disqualification concerns for judges using the same social media sites used by lawyers and others who may appear before a judge. Judges can be Facebook “friends” with lawyers or parties who appear before them, but when it comes to disclosure, “context is significant.” The opinion points out that “[b]ecause of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed.”

The opinion goes on to observe that whenever anyone—whether lawyer, witness, or party—with whom the judge shares a social networking connection, “the judge must be mindful that such connection may give rise to the level of social relationship or the perception of such

194. Id. at 1 (quoting ABA Model Code of Judicial Conduct pmbl. 2 (2011)).
195. Id. at 1.
196. Id. at 1–2.
197. Id. at 2–3.
198. Id. at 2.
199. Id. (citations omitted).
200. Id. at 3.
a relationship that requires disclosure or recusal."\textsuperscript{201} In this regard, the opinion states, a "judge should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally."\textsuperscript{202} This includes officially disclosing any information that parties "might reasonably consider relevant to a possible motion for disqualification even if the judge himself believes there is no basis for the disqualification."\textsuperscript{203} Importantly, judges need not review all Facebook "friends," LinkedIn connections, et cetera, "if a judge does not have specific knowledge of an ESM connection" that may potentially or actually be problematic.\textsuperscript{204} In such circumstances, the number of "friends" that a judge has, whether the judge has a practice of simply accepting all "friend" requests, and other factors may help prove that there is no meaningful connection between the judge and a given individual.

Formal Opinion 462 offers a practical, well-reasoned approach for judges' activities on social media. While recognizing that judges are not expected to lead isolated existences, and in fact experience a benefit of remaining connected and accessible via social media, the opinion simultaneously urges caution in using these sites and reminds judges that traditional ethical standards will still apply to new technologies.

B. New York

Like its ABA counterpart, New York Advisory Opinion 08-176\textsuperscript{205} is a model of common sense. In concluding that it is perfectly appropriate for a judge to embrace social networking, it points out the many reasons for a judge to do so, including "reconnecting with law school, college, or even high school classmates; increased interaction with distant family members; staying in touch with former colleagues; or even monitoring the usage of that same social network by minor children in the judge's immediate family."\textsuperscript{206} Like the ABA opinion, it urges caution, reminding judges to "employ an appropriate level of prudence, discretion and decorum in how they make use of this technology."\textsuperscript{207} It also reminds judges that social networks and technology in general are subject to change and that accordingly judges "should stay abreast of new

\textsuperscript{201} Id. (citations omitted).
\textsuperscript{202} Id. (citing Jeremy M. Miller, Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance), 33 Pepp. L. Rev. 575, 578 (2006)).
\textsuperscript{203} Id. (citing ABA Model Code of Judicial Conduct R. 2.11 cmt. 5 (2011)).
\textsuperscript{204} Id.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
features of, and changes to, any social networks they use," lest new developments of social media cause judges to run afoul of the principles of the Rules of Judicial Conduct. Finally, New York’s Advisory Opinion also sounds the now-familiar—but no less important—refrains to judges: Avoid impropriety and the appearance of it when using social networking and be mindful of the appearance that might be created by virtue of establishing a Facebook “friendship” with a lawyer or anyone else appearing in the judge’s court.

C. Kentucky

Kentucky’s approach echoes that of New York in its cautious approval of judges being active on social networking sites. Its ethics opinion holds that a judge may “participate in an [I]nternet-based social networking site, such as Facebook, LinkedIn, MySpace, or Twitter, and be ‘friends’ with . . . persons who appear before the judge in court, such as attorneys, social workers, and/or law enforcement officials.” However, this is a “qualified yes” from the Committee that comes with a note of caution for “judges [to] be mindful of ‘whether online connections alone or in combination with other facts rise to the level of a ‘close social relationship’ which should be disclosed and/or require recusal” and how to be careful that their social media activities do not lead to violations of the Kentucky Code of Judicial Conduct. Sounding alarms for the unwary, the Kentucky opinion notes, “[S]ocial networking sites are fraught with perils for judges,” warning them that the Committee’s approval of social media use “should not be construed as an explicit or implicit statement that judges may participate in such sites in the same manner as members of the general public.”

With all of the caveats, one may wonder why the Ethics Committee of the Kentucky Judiciary gave social media a “like” in the first place. The Committee was swayed in favor of approving participation by judges by “the reality that Kentucky judges are elected and should not be

208. Id.
209. See id.
211. Id. at 3 (quoting N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176).
212. Id. at 5.
213. Id. at 4.
214. Id. at 5.
isolated from the community in which they serve . . . “215 Like the New York opinion, the Kentucky Committee also discussed the reality that a designation like “friend” on Facebook was merely a term of art used by the site and that, in and of itself, being designated a “friend” “does not reasonably convey to others an impression that such persons are in a special position to influence the judge.”216

D. South Carolina

Opinion Number 17-2009 from South Carolina’s Advisory Committee on Standards of Judicial Conduct is brief and limited in scope.217 It concludes, “A judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge’s position as magistrate.”218 The opinion is silent as to any other issues, such as whether a judge would be subject to disclosure or possible disqualification if he or she were Facebook “friends” with a lawyer or party who appeared before the court. However, the opinion did note the positive side of judges being on Facebook or other social networking sites, observing, “[A] judge should not become isolated from the community in which the judge lives,” and that permitting a judge to use social media “allows the community to see how the judge communicates and gives the community a better understanding of the judge.”219

E. Maryland

Maryland entered the fray with its own opinion issued in June 2012.220 The Maryland Judicial Ethics Committee addressed two main questions—the first of which was whether “the mere fact of a social [media] connection creates a conflict” for a judge.221 The Committee found that it does not.222 Analogizing an online connection to friendships outside of cyberspace, the Committee observed that the mere fact of a friendship between a judge and an attorney does not automatically warrant disqualification from cases involving the attorney, and with regard to online relationships, the Committee “sees no reason to view or

215. Id.
216. Id. at 2.
218. Id.
219. Id.
221. Id. at 1.
222. Id. at 5.
treat "Facebook friends" differently."^223

The Committee also asked more broadly, "What are the restrictions on the use of social networking by judges?"^224 Like its counterparts in other states, the Maryland Committee urged caution, "admonish[ing] members of the Judiciary to "avoid conduct that would create in reasonable minds a perception of impropriety.""^225 The opinion approvingly references ethics opinions from other states, including New York and California, ultimately concluding that a judge may participate in social media as long as he or she does so in a manner that complies with the existing rules of judicial conduct.^226 Quoting the California opinion,^227 the Maryland authorities key in on the fact that the nature of the social interaction, rather than the medium in which it takes place, is what ultimately governs the analysis.^228 Like other ethics committees, it advises judges to proceed with caution.^229

F. Massachusetts

Massachusetts has also weighed in on this issue. Like other states examining this issue, it held that judges can be members of social networking sites.^230 However, it provided more specific guidance, rather than just sounding a general note of caution. Referencing specific activities proscribed by the Code of Judicial Conduct, it warns judges to refrain from the following activities on social media:

comment[ing] on or permit[ting] others to comment on cases currently pending before [the judge] . . .; join[ing] "Facebook groups" that would constitute membership in an organization in violation of Section 2C [of the Code of Judicial Conduct]; . . . [making] political endorsements . . .; [or] identify[ing] [oneself] as a judge or permit[ting] others to do so . . . [so as to avoid] lend[ing] the prestige of judicial office to advance the private interests of the judge or others.^231

Importantly, Massachusetts' stance on "friending" of attorneys is stricter than most states. The opinion states, "[T]he Code prohibits judges from associating in any way on social networking web sites [sic] with attor-
neys who may appear before them. Stated another way, in terms of a bright-line test, judges may only ‘friend’ attorneys as to whom they would recuse themselves when those attorneys appeared before them.”232 Here, the Massachusetts authorities cited with approval the most draconian of the states to examine this issue, Florida, agreeing that such relationships “create[ ] a class of special lawyers who have requested this status” and that such lawyers would at least “appear to the public to be in a special relationship with the judge.”233 Significantly, Massachusetts does not focus on the number of “friends” a judge may have, his or her practice with regard to “friend” requests (i.e., accept them all or be more selective), or even the nature of the relationship.234 For Massachusetts, the most important element is apparent impropriety, and Massachusetts justifies such a limitation on judges with the fact that it comes with the territory—judges must “accept restrictions on . . . the judge’s conduct that might be viewed as burdensome by the ordinary citizen.”235

G. Tennessee

In an October 2012 advisory opinion, Tennessee joined the majority of states in allowing judges to use social networking sites, albeit cautiously.236 Citing other states that have previously addressed this issue, with particular emphasis on California’s analysis, Tennessee warns judges that their use of social networking “will be scrutinized [for] various reasons by others.”237 The Committee declined to provide specific details on permissible or prohibited activity by judges “[b]ecause of constant changes in social media.”238 Instead, it urges judges to “be constantly aware of ethical implications as they participate in social media,” and to decide “whether the benefit and utility of participating in social media justify the attendant risks.”239

H. Oklahoma

Oklahoma offered its contribution to the dialogue on whether judges may participate in social media in July 2011. Oklahoma’s opin-

232. Id.
234. See id.
235. Id. (quoting MASS. CODE OF JUDICIAL CONDUCT R. 2A cmt. (2003)).
237. Id. at 3–4.
238. Id. at 4.
239. Id.
ion answers the question of whether or not a judge may have a social networking profile with a cautious "yes." However, in answer to the question of whether a judge may add "court staff, law enforcement officers, social workers, attorneys and others who may appear in his or her court as 'friends,'" Oklahoma's Judicial Ethics Advisory Panel provides a resounding "no" (except for court staff). Agreeing with the observation that "social networking sites are fraught with peril for judges," Oklahoma's Panel opines that whether or not being a Facebook "friend" of the judge actually puts that individual in a special position is immaterial. What matters, as far as the Panel is concerned, is whether or not the designation of "friend" could convey the impression of inappropriate influence over the judge to others. Stating "public trust in the impartiality and fairness of the judicial system is so important that it is imperative to err on the side of caution," Oklahoma held that judges should not be Facebook "friends" with "social workers, law enforcement officers, or others who regularly appear in court in an adversarial role."

I. Ohio

Ohio also cleared the way for judges to be active on social media in an opinion by the Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline in December 2010. However, doing so, said the Board, "require[s] a judge's constant vigil." Acknowledging a basic reality of the Facebook era—that "[a] social network 'friend' may or may not be a friend in the traditional sense of the word"—the Ohio Board stated that there was nothing wrong with a judge being Facebook "friends" with lawyers, including lawyers who appear before the judge. The Ohio opinion goes into considerable detail, discussing not only ethics opinions from other states, but also the Judge B. Carlton Terry disciplinary proceeding from North Carolina.
Equally significant is the fact that the Ohio Board does not merely content itself with making sweeping generalizations or urging jurists to be careful. Instead, it goes through a detailed litany of specific rules of judicial conduct that might be impacted by social networking, including several that have escaped commentary by other states’ judicial ethics authorities, including the following specific admonitions:

A judge must maintain dignity in every comment, photograph, and other information shared on the social network. . . .

A judge must not foster social networking interactions with individuals or organizations if such communications will erode confidence in the independence of judicial decision making. . . .

A judge should not make comments on a social networking site about any matters pending before the judge . . . .

A judge should not view a party’s or witness’ page on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge. . . .

A judge should disqualify himself or herself from a proceeding when the judge’s social networking relationship with a lawyer creates bias or prejudice concerning the lawyer for a party . . . .

A judge may not give legal advice to others on a social networking site. 252

Like several other ethics opinions, the Ohio Board’s opinion also urges judges to be cautious posting content to their social networking profiles and to keep abreast of specific site policies and privacy controls. 253

J. California

California’s impressive contribution to the body of knowledge on judicial ethics and social media came in the form of California Judges Association Judicial Ethics Committee Opinion 66, issued in November 2010. 254 While the California Committee gave “a very qualified yes” to the questions of whether a judge may be a member of an “online social networking community” and whether a judge may be Facebook “friends” with lawyers who may appear before him, it was not quite as receptive when it came to judges “friending” lawyers who actually appear before the judge. 255 On that point, the Committee answered in the negative. 256

253. Id.
255. Id. at 1.
256. Id.
The opinion begins with a helpful overview of social networking sites and their features, including two features that might come in particularly handy for a judge proceeding with caution in the use of social media: "unfriending" people and creating a "block list" of those precluded from accessing a user's page.257 It then examines some of the ethical risks that can be posed by using social media, including posting information about cases currently before the judge on "friends'" "walls"; expressing views or not deleting posts by others that may call into question a judge's impartiality; posting inappropriate comments or pictures that may demean the judicial office; endorsing candidates for non-judicial office by "liking" their candidate pages; and "lending the prestige of the judicial office" to improperly advance the personal interests of the judge or others.258

Perhaps the greatest value of the California opinion, however, is its thoughtful analysis of factors that should be considered by a judge before participating in social media and determining if there are any appearance issues with attorney "friends" appearing before that judge. These factors include the following:

1.) The nature of the site: Essentially, a site that has more unique and personal details available to the public is more likely to create at least the perception that the attorney has inappropriate influence over the judge.259 Conversely, social media pages for an organization like an alumni group or bar association are less likely to create such an impression.260

2.) The number of persons "friended" by the judge: Simply put, "the greater number of 'friends' on the judge's page, the less likely it is . . . that any one individual participant is in a position to influence the judge."261

3.) How the judge determines whom to "friend": A judge who accepts all "friend" requests would be less likely to create the impression that a certain lawyer or lawyers holds any sway with the judge.262 However, a more selective practice of "friending" only lawyers from the plaintiff's bar, or excluding lawyers from a particular firm, is more likely to lead to the appearance of bias, either for parties with whom the judge is "friends" or against those who lack such a Facebook "friendship" with the judge.263

257. Id. at 3.
258. Id. at 4–5.
259. Id. at 8.
260. Id.
261. Id.
262. Id.
263. Id.
4.) How regularly an attorney appears before a judge: Essentially, the more frequently an attorney actually appears before a judge, the less likely it is that being Facebook "friends" would be permissible. On the other hand, online relationships pose less of a risk of creating the appearance of having a special position of influence when the attorney rarely appears before his "friend" the judge. For example, a civil litigator who happens to have a "friend" relationship with a criminal court judge is less likely to prompt cries of "foul."

It is also worth noting that the California ethics opinion provides several helpful hypothetical scenarios of where social media interaction would and would not be permissible. With regard to its position that a judge should not be Facebook "friends" with an attorney who has a case pending before him, the California Ethics Committee is direct. And, if the online interaction were permitted, a judge would have to disclose not only the fact that interaction took place in the first instance, but also that it is going to continue. This continuing contact could create the impression that the attorney is in a special position to influence the judge simply by virtue of the ready access afforded by the social networking site.

K. Florida

Without a doubt, there is no state more restrictive when it comes to judges and social media than Florida. Florida has released not just one ethics opinion, but five between 2009 and 2013. It has also spawned a dispute over how restrictively to interpret its ethical prohibitions on judges and social networking that went all the way to the Florida Supreme Court.

The first and most widely criticized ethics opinion from the Florida Supreme Court Judicial Ethics Advisory Committee was Opinion No. 2009-20, issued in November 2009. It posited several questions: (1) whether judges could be "friends" on a social networking site with

264. Id.
265. Id.
266. See id. at 9–10.
267. Id. at 10.
268. Id. at 11.
270. See, e.g., supra text accompanying notes 17–18. The rejection of Florida's draconian restrictions is implicit in the fact that other states have refused to adopt similar approaches. See supra Part VI.B–J.
lawyers; (2) whether a judges’ campaign committee could post material related to a judge’s candidacy on a social networking site; and (3) whether lawyers and other supporters may list themselves as “fans” on a judge’s campaign social networking site.272 The answers to the second and third inquiries, perhaps bowing to the realities of political campaigning in the digital age, were yes—as long as the judge or his campaign committee do not control who is permitted to list himself as a “fan” or supporter.273

However, it is the first inquiry, and particularly the Committee majority’s negative response to it, that has elicited the sharpest reactions. The majority felt that allowing a judge to accept or reject contacts or “friends” on his or her social networking profile would violate Canon 2B of the Code of Judicial Conduct, because “this selection and communication process . . . [may] convey[ ] or permit[ ] others to convey the impression that [such ‘friends’] are in a special position to influence the judge.”274 According to the Committee, there is something special about being classified as a judge’s “friend” because that status is viewable not only to the judge’s other “friends,” but to all of their “friends” as well.275 While the majority conceded that “friend” status doesn’t automatically mean that such individuals are in a special position of favor or influence, it was more fixated on the appearance of such a status.276 Accordingly, the Committee concluded, “[S]uch identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.”277

To its credit, the opinion did discuss the position of a minority of the Committee, which felt that the majority was attributing an importance to the status of being “friends” on Facebook that bears no resemblance to the term’s actual meaning in an online context.278 The majority opinion also draws a clear delineation between lawyers who may practice before a given judge (who are prohibited from being “friended”) and persons who are either not lawyers or are lawyers who don’t appear before the judge. As the Committee makes clear,

this opinion does not apply to the practice of listing as ‘friends’ persons other than lawyers, or to listing as ‘friends’ lawyers who do not appear before the judge, either because they do not practice in the judge’s area or court or because the judge has listed them on the

272. Id.
273. Id.
274. Id.
275. Id.
276. See id.
277. Id.
278. Id.
judge’s recusal list so that their cases are not assigned to the judge.\textsuperscript{279}

The second opinion, Judicial Ethics Advisory Committee Opinion No. 2010-04, issued in March 2010, posed the same inquiry about “friending” lawyers with regard to a judge’s judicial assistants or clerks.\textsuperscript{280} Here, the Committee recognized that keeping a judicial assistant from “friending” a lawyer presented First Amendment concerns.\textsuperscript{281} Moreover, the same fear of creating a public perception that such a lawyer “friend” would be in a position to influence the judge was absent, in the eyes of the Committee.\textsuperscript{282} As the Committee concluded,

\[\text{[a]s long as a judicial assistant utilizes the social networking site outside of the judicial assistant’s administrative responsibilities and independent of the judge, thereby making no reference to the judge or the judge’s office, this Committee believes that there is no prohibition for a judicial assistant to add lawyers who may appear before the judge as ‘friends’ on a social networking site.}\textsuperscript{283}

The third opinion, Judicial Ethics Advisory Committee Opinion No. 2010-06, also issued in 2010, presented a chance to scale back the draconian implications of the Committee’s 2009 opinion by addressing a scenario where a judge had taken certain steps to minimize, if not eliminate, public perception that being a “friend” of the judge carried with it implications of a special relationship or position of influence.\textsuperscript{284} In the scenario before the Committee, the judge offered to communicate with all “friends” who were attorneys and “post a permanent, prominent disclaimer on the judge’s Facebook profile” explaining that the Facebook “friend” status meant that the judge and the friend were merely acquaintances, not necessarily a “friend” in the “traditional sense.”\textsuperscript{285}

The Committee was not persuaded; even with such caveats, a judge still would not be permitted to “friend” an attorney who might appear before her.\textsuperscript{286} Even if it was the judge’s custom to “friend” all the lawyers who sent such a request, or all those whose names she recognizes or who have “friends” in common with her, the Committee held it would still not be permissible to have as a Facebook “friend” a lawyer who appeared before the judge.\textsuperscript{287} As close as the Committee was willing to

\textsuperscript{279} Id.
\textsuperscript{281} Id.
\textsuperscript{282} Id.
\textsuperscript{283} Id.
\textsuperscript{285} Id.
\textsuperscript{286} Id.
\textsuperscript{287} Id.
come was a pronouncement that a judge would not have to "un-friend" lawyers who were "friends" because they shared membership in a voluntary bar association with the judge and "use[d] Facebook to communicate among themselves about that organization and other non-legal matters." 288

The fourth opinion, Florida Judicial Ethics Advisory Committee Opinion No. 2012-12, issued in May 2012, represented one more chance for Florida to step back from its outlier status by considering judges' involvement with the considerably more professional, business-oriented, and presumably more "acceptable" social networking site, LinkedIn. 289 However, when the Committee considered the question of "whether a judge may add lawyers who may appear before the judge as 'connections' on the professional networking site, LinkedIn, or permit such lawyers to add the judge as their 'connection' on that site," the answer again was a curt "[n]o." 290 While the Committee made note of the inquiring judge's distinction between sites like Facebook and the more professional LinkedIn, it based its ruling on the unwieldiness of requiring "each judge who had accepted a lawyer as a friend or connection to constantly scan the cases assigned to the judge, and the lawyers appearing in each case, and 'defriend' or delist each lawyer upon a friend or connection making an appearance in a case assigned to the judge." 291 The Committee cited with approval California's approach, which allows a judge to "friend" lawyers based on the low likelihood of them having to appear before that judge (based on factors like the type of practice that lawyer has, or the court's jurisdiction), but does not allow judges to "friend" lawyers with cases pending before that court. 292 In the Committee's eyes, even with a site like LinkedIn, it seemed more feasible to "just say no" than to adopt an approach "that contemplates a judge constantly approving, deleting, and reapproving lawyers as 'friends' or 'connections' as their cases are assigned to, and thereafter concluded or removed from, a judge." 293 It is also worth noting that, like its 2009 opinion, there was a dissenting view as well. 294

In the fifth and most recent opinion, the Florida Supreme Court Judicial Ethics Advisory Committee addressed judicial activities on yet

288. Id.
290. Id.
291. Id.
293. Id.
294. Id.
WHY CAN'T WE BE FRIENDS?

another social networking platform, Twitter. In this opinion, the narrow questions confronted by the Committee were whether a judge seeking re-election would be allowed to “create a Twitter account with a privacy setting open so that anyone—including lawyers—would be able to follow” the judge and whether the campaign manager would be permitted to “create and maintain the Twitter account, instead of the judge” directly. The Committee’s answer to both questions was “yes,” noting the utility of Twitter for political campaigning as the Twitter account could share “tweets” about a candidate’s “judicial philosophy, campaign slogans, and blurbs about the candidate’s background,” as well as update followers about upcoming events.

However, the Florida Judicial Ethics Advisory Committee hearkened to its earlier opinions restricting judicial use of social media, noting that certain dimensions of Twitter could violate Canon 2B’s prohibition against conveying or permitting others “to convey the impression that [they are] in a special position to influence the judge.” The Committee noted that a Twitter user could block specific followers, mark certain tweets as “favorites,” create lists of followers, and subscribe to lists created by another user. These features, the Committee observed, posed the potential of violating Canon 2B:

- If a user posts a tweet that is complimentary or flattering to the judge, the judge could re-tweet it or mark it as a “favorite.” No matter how innocuous the tweet, this could convey or permit the tweeter to convey the impression that the tweeter is in a special position to influence the judge. [Twitter followers] could be perceived to be in a special position to influence the judicial candidate. The judge could avoid this appearance by not creating any lists of followers. Still, if the judge were to appear on another Twitter user’s list of followers, that follower could create the impression of being in a special position to influence the judge.

The Committee also expressed concern that “[a] judge’s Twitter account [could] create[ ] an avenue of opportunity for ex parte communication.” The Committee described how such a scenario would play out:

Assume a Twitter user is a party who has a case assigned to a judge with a Twitter account. The party could send the judge a tweet about

296. Id.
297. Id.
298. Id.
299. Id.
300. Id.
301. Id.
the case. The judge unwittingly would receive the tweet. The only way to avoid receiving the tweet would be if the judge knew the party’s Twitter account name, and exercised Twitter’s blocking option when the judge set up the judge’s Twitter account.\textsuperscript{302}

While the Committee ultimately opined that the safest course of action is simply to have the judge’s campaign manager create and maintain the Twitter account,\textsuperscript{303} the Committee’s reasoning is flawed and reflects the same limited grasp of social networking as its earlier opinions. First, the risk of ex parte contact by virtue of having a Twitter account is no greater than that created by having a publicly known email account, a direct-dial telephone number, or a physical address at the courthouse—all of which are readily ascertainable about most judges. A party determined to attempt an ex parte communication with a judge would be only temporarily frustrated by the lack of a Twitter account or by being blocked from a judge’s Twitter account before turning to more traditional avenues of communication. Second, the Committee mistakenly attributes greater significance to the act of following or being followed on Twitter, or of retweeting and being retweeted, than those more familiar with the social networking-microblogging site would accord such acts. Just as it mischaracterized the significance of “friend” status on Facebook, the Committee also places an inordinate importance on being a follower or someone who is followed on Twitter, especially in light of the fact that users have no say in who follows them.

\section*{L. Other States}

Other states have certainly considered, but have not yet issued decisions on, the issue of judges’ activity on social media. For example, Georgia’s Committee, chaired by Georgia Supreme Court Justice Hugh Thompson, began meeting in 2012 to consider a wide range of possible updates to the state’s judicial code of ethics, including judicial use of social media.\textsuperscript{304} The Utah Judicial Council has created a Social Media Subcommittee to examine the issue of judges using social media.\textsuperscript{305} Other jurisdictions, such as Indiana’s Delaware County, have adopted social media policies prohibiting county court employees from misuse of

\begin{footnotesize}
\begin{footnotes}
\item 302. Id.
\item 303. Id.
\end{footnotes}
\end{footnotesize}
social networking sites.³⁰⁶ Such misuse includes posting photos online of court employees "in an intoxicated condition" and discussing or revealing on a social networking site "any information related to a judge, co-workers, parties before the court, attorneys who appear before the Court, local law enforcement officials, and/or any information obtained through the employee's observation of and/or work with the Court."³⁰⁷ Commentators in states like Georgia and Pennslyvania have speculated about how a judicial ethics committee might decide with regard to judges and social media, but official pronouncements have yet to be issued.³⁰⁸ One commentator has even gone so far as to "unofficially" add Indiana and Wisconsin to the list of states weighing in on the topic of judges and social media.³⁰⁹ However, it is important to clarify that these "unofficial opinions" come from individual authors writing articles in local legal periodicals in which they theorize how state judicial ethics authorities might come down on the issue, and they are not official pronouncements from governing bodies.³¹⁰

VII. Cases Construing Judges' Activities on Social Media

To date, there have been two significant decisions discussing the limitations that can be placed on judges' interactions via social networking sites.³¹¹ The first, from Florida, interprets that state's highly restrictive stance on judges being Facebook "friends" with attorneys. The second, from Texas, addresses the issue of whether recusal is warranted when a judge’s Facebook "friends" happen to include someone affiliated with the victim(s) of a crime.

³⁰⁷. Id.
A. Domville v. State

In *Domville v. State*,312 Pierre Domville faced three charges of lewd and lascivious battery on a child.313 At the trial court level, Domville’s attorney filed a motion to disqualify the trial judge because he happened to be “friends” on Facebook with the prosecutor handling the case.314 Domville’s affidavit in support of the disqualification motion pointed out that he himself was a Facebook user and that his “friends” on that site were limited to his “closest friends and associates, persons whom [he] could not perceive with anything but favor, loyalty, and partiality.”315 His affidavit also “attributed [previous] adverse rulings to the judge’s Facebook relationship with the prosecutor. The trial judge denied the motion as ‘legally insufficient.’”316

On appeal, in a September 5, 2012 per curiam opinion, the Court of Appeals relied heavily on the Judicial Ethics Advisory Committee’s November 2009 ethics opinion prohibiting judges from being Facebook “friends” with attorneys.317 Reiterating the Committee’s conclusion that “a judge’s activity on a social networking site may undermine confidence in the judge’s neutrality,” and because it felt that Domville had “alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair trial,” the appellate court denied disqualification and remanded to the circuit court.318 Interestingly, the three elements that the Court of Appeals took from the 2009 ethics opinion in bringing judges’ social networking activities within the prohibition of Canon 2B were the following: (1) “[t]he judge must establish the social networking page”; (2) the site must give the judge discretion to accept or reject “friend” requests; and (3) “[t]he identity of the ‘friends’ . . . selected by the judge . . . must then be communicated to others.”319 The first two elements—having a Facebook profile and being able to accept or decline “friend” requests—have nothing to do with Canon 2B’s prohibition against conveying or allowing others to convey

314. *Domville*, 103 So. 3d at 185.
315. Id.
316. Id.
318. Id. at 186.
319. Id. at 185 (emphasis added).
WHY CAN'T WE BE FRIENDS?

the impression that they are in a special position to influence the judge.\textsuperscript{320} The third element, that the "friend" status must be communicated to others, is the only one of any bearing to the Committee's (and now the appellate court's) chief concern. Why, then, does Florida's Judicial Ethics Advisory Committee not simply elect a lesser prohibition? In other words, instead of banning judges from "friending" attorneys altogether, why not simply require judges to keep their "friends" private by implementing the appropriate privacy settings on their profiles?

It is a question that has not been answered by Florida authorities, or indeed any of the few states that restrict judges from "friending" attorneys who appear before them, such as California or Oklahoma. However, there are both practical concerns and policy reasons why this may not be a workable solution. From a practical standpoint, such a tactic would require judges to master their privacy settings and to be vigilant for changes made by Facebook and other social networking sites to their privacy policies, which have been revised repeatedly and are likely to be revised often in the future. It would also demand imposing a similar requirement on attorneys to keep all of their "friends" private, if this list of "friends" happened to include members of the judiciary. Not only would this involve a sweeping change affecting a population outside the jurisdiction of judicial ethics authorities, it would also present—on a grander scale—the same kind of practical challenge of requiring attorneys to implement and keep up with the ever-changing privacy functionality of Facebook and other sites.

From a public policy perspective, the idea of allowing judges to have a list of attorney "friends," as long as they keep it hidden from public view, is hardly likely to fulfill the goal of maintaining the public's confidence in the integrity of the legal system and the impartiality of the judiciary. If anything, such a policy is only likely to erode public confidence and generate distrust of both the process and the outcome of a particular proceeding. It is a fact of life that relationships exist between judges and lawyers that are not public knowledge, such as golfing, hunting, or other social relationships, but it is another thing entirely to have a policy or mandate to keep these relationships hidden.

In any event, in January 2013, the Florida Fourth District Court of Appeals ruled on the State's Motion for Rehearing and Motion for Certification.\textsuperscript{321} While the court denied the motion for rehearing, it did certify the following question to the Florida Supreme Court: "Where the presiding judge in a criminal case has accepted the prosecutor assigned to the

\textsuperscript{320} See FLA. CODE OF JUDICIAL CONDUCT Canon 2B (2008).

case as a Facebook 'friend,' would a reasonably prudent person fear that he could not get a fair and impartial trial, so that the defendant's motion for disqualification should be granted?" 322 While Judge Gross concurred in the certification of the question, his concurrence left no doubt as to his opinion regarding judges being active on social media:

Judges do not have the unfettered social freedom of teenagers. Central to the public's confidence in the courts is the belief that fair decisions are rendered by an impartial tribunal. Maintenance of the appearance of impartiality requires the avoidance of entanglements and relationships that compromise that appearance. Unlike face to face social interaction, an electronic blip on a social media site can become eternal in the electronic ether of the Internet. Posts on a Facebook page might be of a type that a judge should not consider in a given case. The existence of a judge's Facebook page might exert pressure on lawyers or litigants to take direct or indirect action to curry favor with the judge. As we recognized in the panel opinion, a person who accepts the responsibility of being a judge must also accept limitations on personal freedom. 323

Although both this appellate court and the Attorney General of the State of Florida considered this issue to be of "great public importance," 324 in February 2013, the Florida Supreme Court declined to hear the appeal and consider the question that had been certified to it, giving no reason for its decision. 325 Consequently, the 2009 Judicial Ethics Advisory Committee ethics ruling remains the prevailing law in Florida, if nowhere else.

B. Youkers v. State

Youkers v. State, 326 a criminal appellate case, dealt with a situation strikingly similar to the one before the New York Committee on Judicial Ethics, 327 with the only difference being a twist involving an actual communication on Facebook between the victim's father and the trial judge. 328 Youkers appealed the revocation of his eight-year prison sentence and community supervision following his conviction for assaulting his pregnant girlfriend. 329 Among his grounds for appeal was the contention that he did not receive a fair trial because trial judge lacked impar-

323. Id.
324. Id.
328. Youkers, 400 S.W.3d at 204.
329. Id. at 203.
WHY CAN’T WE BE FRIENDS?

The trial judge’s actions were a model of how to respond to any ex parte communication, whether received through Facebook or more traditional media:

The judge responded online formally[,] advising the father [that] the communication was in violation of rules precluding ex parte communications . . . [and] that any further communications from the father about the case or any other pending legal matter would result in the father being removed as one of the judge’s Facebook ‘friends.’ The judge’s online response also advised that the judge was placing a copy of the communications in the court’s file, disclosing the incident to the lawyers, and contacting the judicial conduct commission to determine if further steps were required.\(^{333}\)

The father responded and apologized “for breaking any ‘rules or laws’ and promising not to . . . make comments ‘relating to criminal cases’ in the future.”\(^{334}\) Per the testimony offered at the hearing on the motion for new trial, the trial judge followed through with all of the steps that he indicated would be taking.\(^{335}\)

In a thoughtful, thorough, and well-reasoned opinion, Justice Mary Murphy of Dallas’ Fifth District Court of Appeals first pointed out that this was a case of first impression in Texas: “No Texas court appear[ed] to have addressed the propriety of a judge’s use of social media websites such as Facebook. Nor [wa]s there a rule, canon of ethics, or judicial ethics opinion in Texas proscribing such use.”\(^{336}\) Justice Murphy went on to cite ABA Judicial Ethics Opinion 462 approvingly, both for the beneficial aspects of allowing judges to use Facebook (i.e., remaining active in the community) and for the proposition that the status of Facebook “friends” is not necessarily representative of “the degree or
intensity of a judge’s relationship with that person.” As the court pointed out, “the designation, standing alone, provides no insight into the nature of the relationship.” And in examining the record for further context, the court noted that there was nothing to indicate that the “Facebook friendship” between the judge and the girlfriend’s father—who was actually asking for leniency—was anything but a fleeting acquaintance.

Most importantly, the court pointed out, the judge fully complied with the state protocol for dealing with ex parte communications. And while the court noted that judges should, in using social media, remain mindful of their responsibilities under applicable judicial codes of conduct, everything about this judge’s actions was consistent with promoting public confidence in the integrity and impartiality of the judiciary.

Significantly, the court observed that while new technology may have ushered in new ways to communicate and share information, the same ethical rules apply: “[W]hile the [I]nternet and social media websites create new venues for communications, our analysis should not change because an ex parte communication occurs online or offline.”

VIII. CONCLUSION

Most states, and ABA Judicial Ethics Opinion 462, acknowledge that the use of social networking sites can benefit judges in both their personal and professional lives, including not just helping a judge stay in touch with the rest of the community, but also providing vital tools for raising both funds and voter awareness in states where judges are elected officials. In addition, most states view the mere existence of a Facebook “friendship,” without more, as signifying very little due to the realities of “friendship” in the digital age. However, as the examples discussed in this article illustrate, treatment of judges’ use of social media contains some variances from state to state. As existing rules of judicial ethics continue to be applied to scenarios involving technology never envisioned when those rules were created, some tension will no doubt continue to exist where technology and the law intersect.

Albert Einstein once said, “It has become appallingly obvious that our technology has exceeded our humanity.” This is particularly true

337. Id. at 205–06 (quoting ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 462, at 3 (2013)).
338. Id. at 206 (citation omitted).
339. Id.
340. Id. at 207.
341. Id.
342. Id. at 206.
343. This quotation is commonly, if not reliably, attributed to Albert Einstein.
in an age where “friendning” has become a verb, relationships are formed with the speed of a search engine, increasing numbers of people live more and more of their lives online, and digital intimacy has become the norm. And in a society that has become accustomed to politicians, entertainers, star athletes, and other celebrities being hoisted on their own digital petards and undone by social media miscues, it is only prudent to regard social media as something of an ethical minefield for judges. Even pop culture reminds us of this fact. The CBS legal drama The Good Wife aired an episode entitled What Went Wrong, in which the intrepid lawyers at Lockhart Gardner attempted to set aside a verdict in which an innocent defendant is convicted of murder. As they search for signs of juror misconduct, they learn that the judge—lauded as an expert on legal ethics—had inadvertently connected with one of the jurors via social media during the trial.

Perhaps appropriately in an era of Facebook’s hold over society, the issue of judges and social media can best be described with one of the social networking site’s contributions to our twenty-first century lexicon: “It’s complicated.” While a judge’s misuse of social media can certainly violate canons of ethics and negatively impact public perception of the judiciary, so can other, more traditional relationships formed or communications made by judges. As social networking continues its inexorable spread, and as young lawyers join the judicial ranks while older jurists cautiously embrace digital media, the issue of judges’ activities on social media will become increasingly prominent. An approach that is either overly restrictive or too cautious in its interpretation of modern communication platforms with existing principles of judicial ethics does no one a service—not the judiciary, not the legal profession, and certainly not the public itself. A more digitally enlightened and realistic approach, on the other hand, acknowledges the folly of either trying to come up with new rules every time technology threatens the status quo, or of ignoring or proscribing the use of such innovations. Isolating judges from something viewed as so vital by much of the community is hardly desirable, as is depriving judges of technological knowledge (or at least familiarity) that can inform their handling of cases.

While judges should proceed with caution when using social networking platforms—as they should with any communication platform—they should still proceed.

345. Id.
offense subject to prosecution under § 1546(a), paragraph one.

Accordingly, the Court grants Defendant’s Motion to Dismiss the Superseding Indictment.

CONCLUSION

For these reasons, the Court GRANTS Defendant’s Motion to Dismiss Indictment (# 21). For purposes of scheduling any further proceedings, the Court requests the government to inform the Court by December 21, 2007, if it is appropriate to enter a Judgment of Dismissal at this stage.

IT IS SO ORDERED.


United States District Court, W.D. Washington, at Seattle.


Background: Attorneys filed class action alleging that website, on which information about attorneys and comparative rating system appeared, violated Washington Consumer Protection Act (CPA). Website operator moved to dismiss.

Holdings: The District Court, Lasnik, J., held that:

(1) opinions expressed through website were absolutely protected by First Amendment;
(2) operator did not engage in “trade” or “commerce,” for CPA purposes; and
(3) damages alleged by attorney were too remote to support CPA claim.

Motion granted.

1. Constitutional Law ↔ 2151
Telecommunications ↔ 1340

Opinions expressed through website, on which information about attorneys and comparative rating system appeared, were absolutely protected by First Amendment, and could not serve as basis for liability under state law, where website contained numerous reminders that rating system was subjective, underlying data was weighted based on website operator’s subjective opinions regarding relative importance of various attributes, and rating itself could not be proved true or false. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ↔ 1622

In determining whether reasonable factfinder could conclude that offending statement implies assertion of objective fact, and thus is not opinion protected by First Amendment, court should consider: (1) whether general tenor of entire work negates impression that defendant was asserting objective fact, (2) whether defendant used figurative or hyperbolic language that negates that impression, and (3) whether statement in question is susceptible of being proved true or false. U.S.C.A. Const.Amend. 1.

3. Antitrust and Trade Regulation ↔ 290

Private cause of action exists under Washington Consumer Protection Act (CPA) if: (1) conduct is unfair or deceptive, (2) occurs in trade or commerce, (3) affects public interest, and (4) causes injury (5) to plaintiff’s business or property. West’s RCWA 19.86.020.
4. Antitrust and Trade Regulation  

   Website operator did not engage in “trade” or “commerce,” for purposes of Washington Consumer Protection Act (CPA), by providing information about attorneys and comparative rating system, even though operator offered to sell advertising space to attorneys, where no assets or services were sold to people who visited website in hopes of finding lawyer, no charge was levied against attorneys or references who chose to provide information, operator did not accept payment for inclusion of attorney on website, and advertising program was separate and distinct from attorney profiles. West’s RCWA 19.86.010(2).

   See publication Words and Phrases for other judicial constructions and definitions.

5. Antitrust and Trade Regulation  

   Private citizens can utilize Washington Consumer Protection Act (CPA) to protect public interest if defendant, by unfair or deceptive acts or practices, has induced plaintiff to act or refrain from acting. West’s RCWA 19.86.020.

6. Damages  

   Under Washington law, claim for damages will fail if damages are too remote from asserted cause.

7. Antitrust and Trade Regulation  

   Damages alleged by attorney as result of his allegedly unfair rating on website were too remote to support claim under Washington Consumer Protection Act (CPA); identifying consumers who went elsewhere, determining what, if any, role website played in their decision to hire another attorney, and establishing that consumer was in fact injured would be incredibly difficult, and calculating attorney’s expected revenues from “lost” client would be speculative. West’s RCWA 19.86.020.

---


Ambika K. Doran, Bruce E.H. Johnson, Stephen M. Rummage, Davis Wright Tremaine, Seattle, WA, for Defendants.

ORDER GRANTING DEFENDANTS’ MOTION TO DISMISS

ROBERT S. LASNIK, District Judge.

This matter comes before the Court on “Defendants’ Motion to Dismiss Class Action Complaint Under Fed.R.Civ.P. 12(c).” Dkt. # 6. Plaintiffs John Henry Browne and Alan J. Wenokur claim that defendants’ website, on which information about attorneys and a comparative rating system appears, violates the Washington Consumer Protection Act. Plaintiffs seek injunctive relief against defendants: plaintiff Browne also has an individual claim seeking an award of monetary damages. Defendants argue that the complaint should be dismissed because: (1) the allegations of the complaint are not pled with the required specificity; (2) defendants’ rating system and the republication of public records are protected by the First Amendment and cannot be the basis of a state law claim; (3) plaintiffs’ Consumer Protection Act claim fails as a matter of law; and (4) the Communications Decency Act bars liability for posting third-party content.

Where, as here, a motion under Fed. R.Civ.P. 12(c) is used to raise the defense of failure to state a claim, the Court’s review is the same as it would have been had the motion been filed under Fed. R.Civ.P. 12(b)(6). McGlinchey v. Shell
A. Pleading Standard

Defendants argue that the complaint in this matter fails to satisfy the heightened pleading standards set forth in Bell Atlantic Corp. v. Twombly, — U.S. —, 127 S.Ct. 1955, 167 L.Ed.2d 929 (May 21, 2007), and Flowers v. Carville, 310 F.3d 1118, 1130 (9th Cir. 2002). Motion at 6–7. Because defendants have made no attempt to identify any particular deficiency in plaintiffs’ allegations, the Court need not divine the Supreme Court’s intent in Twombly or determine whether a special pleading standard applies to a Consumer Protection Act claim based on protected speech. The complaint identifies the statements alleged to be unlawful, how and when they were made, and the type of damage caused. The factual allegations adequately state the grounds upon which plaintiffs’ claim rests and provide enough information for the Court to determine whether those claims are legally sufficient. Absent some assistance from defendants in identifying a claim that is based on nothing more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action” (Twombly, 127 S.Ct. at 1964–65), the Court finds that plaintiffs’ complaint satisfies the various pleading standards that may apply under Twombly and/or Flowers.

B. First Amendment

Plaintiffs’ primary challenge is to the accuracy and validity of the numerical rating system used by Avvo to compare attorneys. Defendants assert that the opinions expressed through the rating system, (i.e., that attorney X is a 3.5 and/or that an attorney with a higher rating is better able to handle a particular case than an attorney with a lower rating), are absolutely protected by the First Amendment and cannot serve as the basis for liability under state law. The Court agrees. The key issue is whether the challenged statement could “reasonably have been interpreted as stating actual facts” about plaintiff. Hustler Magazine v. Falwell, 485 U.S. 46, 50, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). In making this determination, the Court is to consider the work as a whole, including the context in which the statements were made. Using the standards set forth in Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), the Ninth Circuit has developed a three-part test for determining whether a reasonable factfinder could conclude that the offending statement implies an assertion of objective fact: “(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false.” Partington v. Bugliosi, 56 F.3d 1147, 1153 (9th Cir.1995) (citing Unel-
Avvo’s website contains numerous reminders that the Avvo rating system is subjective. The ratings are described as an “assessment” or “judgment,” two words that imply some sort of evaluative process. The underlying data is weighted based on Avvo’s subjective opinions regarding the relative importance of various attributes, such as experience, disciplinary proceedings, client evaluations, and self-promotion. How an attribute is scored and how it is weighed in comparison with other attributes is not disclosed, but a reasonable person would understand that two people looking at the same underlying data could come up with vastly different ratings depending on their subjective views of what is relevant and what is important. A potential client would expect that a system designed to rate the professional abilities of attorneys would incorporate the expertise and reflect the subjective opinions of the reviewer: the website even says as much. Neither the nature of the information provided nor the language used on the website would lead a reasonable person to believe that the ratings are a statement of actual fact.

This conclusion is bolstered by the fact that the Avvo rating system is an abstraction. A certain level of experience, for example, is assigned a value which is then crunched with the values assigned to the attorney’s disciplinary history, references, awards, etc. The product of this calculation is a number between one and ten, which consumers are invited to use to compare attorneys in the same field. No reasonable consumer would believe that Avvo is asserting that plaintiff Browne is a “5.5.” The rating is figurative: it represents in an abstracted form some panoply of attributes and the values Avvo has assigned them. A user of the Avvo site would understand that “5.5” is not a statement of fact. To the extent the numbers are tied to fuzzy descriptive phrases like “superb,” “good,” and “strong caution,” a reasonable reader would understand that these phrases и their application to a particular attorney are subjective and, as discussed below, not sufficiently factual to be proved or disproved.

The last part of the Partington test is “whether the statement in question is susceptible of being proved true or false.” Plaintiffs challenge the accuracy of the ratings in the abstract (plaintiff Browne maintains that he is not a 5.5 or otherwise “average”) as well as the implied comparison between attorneys (plaintiffs assert that Supreme Court Justice Ruth Bader Ginsburg should not have a lower rating than Avvo’s Chief Executive Officer). Defendants’ decision to assign plaintiff Browne a rating of 5.5 is debatable: one could argue, for example, that Browne’s thirty-five years of experience raise him above the “average.” Nevertheless, defendants’ rating is not only defensible, it is virtually impossible to prove wrong. Defendants fairly describe the nature of the information on which Avvo’s ratings are based and make it clear that (a) there may be other relevant data that the rating does not consider and (b) the conversion of the available information into a number involves judgment, interpretation, and assessment. It is apparently defendants’ view that a relatively recent admonition by the state disciplinary authority weighs heavily against Browne’s experience and a generic attorney endorsement. One may disagree with defendants’ evaluation of the underlying objective facts, but the rating itself cannot be proved true or false.  

1. Ratings and reviews are, by their very nature, subjective and debatable. See Aviation Charter, Inc. v. Aviation Research Group/US, 416 F.3d 864, 870 (8th Cir.2005) (noting that although defendant’s critique of plaintiff “relied in part on objectively verifiable data, the
comparison of two ratings may provide additional fodder for the debate, but even surprising results like the fact that a Supreme Court Justice had a lower rating than defendant Britton do not prove that the ratings are true or false. Consumers and the attorneys profiled have access to the underlying information and, while they may disagree with a particular rating and/or the implied comparisons drawn therefrom, “[t]here is no objective standard by which one can measure an advocate’s abilities with any certitude or determine conclusively the truth or falsity of [Avvo’s] statements . . . .” Partington, 56 F.3d at 1158.2

Rather than seeing the Avvo ratings for what they are—“that and $1.50 will get you a ride on Seattle’s new South Lake Union Streetcar”—plaintiffs Browne and Wenokur want to make a federal case out of the number assigned to them because (a) it could harm their reputation, (b) it could cost them customers/fees, or (c) it could mislead the lawyer-hiring public into retaining poor lawyers or bypassing better lawyers. To the extent that their lawsuit has focused a spotlight on how ludicrous the rating of attorneys (and judges) has become, more power to them. To the extent that they seek to prevent the dissemination of opinions regarding attorneys and judges, however, the First Amendment precludes their cause of action. In apparent recognition of the fact that Avvo’s rating system is protected speech under the First Amendment, plaintiffs’ responsive memorandum highlights three other practices which are said to violate the Washington Consumer Protection Act. Plaintiffs challenge the truthfulness of defendants’ assertion that the rating system is unbiased, the accuracy of some of the data included in the attorney profiles, and defendants’ overall business model because it forces attorneys to provide biographical

interpretation of those data was ultimately a subjective assessment, not an objectively verifiable fact”). Comparisons and comparative ratings are often based as much on the biases of the reviewer as on the merits of the reviewed: they should, therefore, be relied upon with caution. For example, in 2006, a new magazine called Lawdragon purported to identify the 500 leading judges in the United States. The undersigned was chosen to be one of the privileged 500 and was described as follows: “Seattle’s judicial star cites Bob Dylan in opinions while providing contraceptives and protecting orca whales.” The Leading Judges in America, Lawdragon, Winter 2006, at 72. What can one say about such nonsense? As my parents would tell me when I informed them of some of my amazing achievements as a child in Staten Island, NY, “that and five cents will get you a ride on the ferry.”

2. Ironically, plaintiff Browne relies on his designation as a “Super Lawyer” by Washington Law & Politics magazine as evidence that he could not possibly deserve an “average” rating from Avvo. Why one should assume that the attorney rating system developed by Washington Law & Politics is any better than that used by Avvo is not specified, and the Court is not inclined to make such an assumption. In 2004, the undersigned imposed sanctions of almost $40,000 against another supposedly “Super Lawyer” for engaging in unreasonable and vexatious litigation tactics. In its opinion affirming the decision, the Ninth Circuit said, “[t]he record supports the district court’s finding that [this Super Lawyer] knowingly pursued frivolous claims and engaged in obfuscatory litigation tactics.” Athearn v. Alaska Airlines, Inc., 118 Fed.Appx. 172, 2004 WL 2726045, at *2 (2004). Notwithstanding the fact that impartial decision-makers had recently found her conduct sanctionable, this counsel was re-elected a “Super Lawyer” in 2005 for the third year in a row.

3. Defendants’ argument regarding its right to republish information obtained from state bar associations misses the mark. Plaintiffs are not challenging defendants’ right to reprint public records or the disclosure of any particular disciplinary action. Rather, plaintiffs argue that some of the information disclosed does not accurately reflect the underlying bar association records and is therefore inaccurate.
information in order to avoid a poor rating. The merits of plaintiffs’ Consumer Protection Act claim are discussed below.

C. Consumer Protection Act

[3] The Washington Consumer Protection Act (“CPA”) prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. A private cause of action exists under the CPA if (1) the conduct is unfair or deceptive, (2) occurs in trade or commerce, (3) affects the public interest, and (4) causes injury (5) to plaintiff’s business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986). Defendants argue that plaintiffs are unable to satisfy the second and fourth elements of their CPA claim.

“Trade” and “commerce” are defined as “the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.010(2). Avvo collects data from public sources, attorneys, and references, rates attorneys (where appropriate), and provides both the underlying data and the ratings to consumers free of charge. No assets or services are sold to people who visit the site in the hopes of finding a lawyer and no charge is levied against attorneys or references who choose to provide information. It is hard to imagine how an information clearinghouse and/or ratings service could be considered “commerce,” and plaintiffs have offered no theory on this point.

[4] Instead, plaintiffs argue that Avvo’s offer to sell advertising space to attorneys transforms all of defendants’ activities into trade or commerce. The advertising program is separate and distinct from the attorney profiles that are the subject of plaintiffs’ complaint. Plaintiffs have not alleged any misstatements of fact or unfair methods of competition involving the advertising program and cannot simply assume that since some of defendants’ actions are entrepreneurial, all of them are. In *Fidelity Mortgage Corp. v. Seattle Times Co.*, 131 Wash.App. 462, 470, 128 P.3d 621 (2005), the court found that a newspaper’s publication of mortgage rates from various lenders was not, in the absence of payment from the lenders, trade or commerce. On the other hand, the same rate chart could be considered trade or commerce if the newspaper accepted an advertising fee in exchange for including a lender in the chart. As plaintiffs’ allege in their complaint and acknowledge in their response, defendants do not accept payment for the inclusion of an attorney on Avvo’s website and neither attorneys nor consumers pay to access the site. Avvo’s publication of information and ratings based on available data is not “trade or commerce” and cannot form the basis of a CPA claim.

[5] In addition, most, if not all, of the damages asserted in this case are either too remote to be recoverable or are not cognizable under the CPA. Private citizens can utilize the CPA to protect the public interest if defendant, by unfair or deceptive acts or practices, has induced plaintiff to act or refrain from acting. *Fidelity Mortgage*, 131 Wash.App. at 468–69, 128 P.3d 621 (citing *Anhold v. Daniels*, 94 Wash.2d 40, 46, 614 P.2d 184 (1980)). Except as noted below, Avvo did not induce plaintiffs to act or refrain from acting. Plaintiff Browne’s damage claim is based on his assertion that third-party consumers of legal services were misled by the information and ratings provided by Avvo. To the extent that some of these consumers may have refrained from hiring, or may even have fired, plaintiff Browne based on his attorney profile, he seeks damages associated with lost fees.
Despite the fact that a causal link can be alleged, a claim for damages will fail if the damages are too remote from the asserted cause. Washington courts have adopted the Ninth Circuit’s test for remoteness:

1. whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general;
2. whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and
3. whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Fidelity Mortgage, 131 Wash.App. at 470–71, 128 P.3d 621 (quoting Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc., 241 F.3d 696, 701 (9th Cir.2001)). All three evaluative criteria suggest that the damages claimed by plaintiff Browne are so remote that they were not proximately caused by defendants' publication of the offending attorney profiles. Consumers who were misled by the information and ratings provided by Avvo are the direct victims of the alleged wrongdoing. If, for example, a consumer hired a disbarred (and unethical) attorney based on inaccurate information generated by Avvo, the consumer would be in the best position to seek redress for payments made to the attorney and/or any losses resulting from the attorney's inability to provide legal services. Allowing attorneys who were not hired by consumers to seek damages would add unnecessary complexities to the claim. Identifying consumers who went elsewhere, determining what, if any, role Avvo's website played in their decision to hire another attorney, and establishing that the consumer was in fact injured would be incredibly difficult. Even if one were able to identify such a consumer, calculating plaintiffs' expected revenues from the “lost” client would be speculative at best. Finally, apportioning damages between Avvo and the providers of incorrect data and/or competing attorneys who “game” the system would be very complex. The damages alleged by plaintiff Browne are simply too remote to be proximately caused by defendants' conduct.4

C. Communications Decency Act

Defendant argues that Section 230 of the Communications Decency Act bars liability for posting third-party content. Plaintiffs have disavowed any claim based on content that Avvo obtained from a third-party (Response at 23) and the Court need not consider this defense further.

For all of the foregoing reasons, defendants' motion to dismiss is GRANTED. Plaintiffs' claim that the Avvo rating system is inaccurate and misleading is barred by the First Amendment. The various challenges highlighted in plaintiffs' responsive memorandum (namely, that defendants mischaracterized the rating system, that some of the data included in the attorney profiles is inaccurate, and that defendants' overall business model is coercive) do not state a cause of action under the Consumer Protection Act. Because no amendment of the complaint could cure the deficiencies identified above, plaintiffs' request for leave to amend is DENIED.

4. To the extent plaintiffs' complaint challenges defendants' overall business model, it could be argued that defendants induced plaintiffs to act (i.e., to provide biographical information) in order to avoid a poor rating. Plaintiffs have not, however, alleged that inputting data on Avvo's website has in any way injured them or caused damage cognizable under the CPA: plaintiffs' claims regarding defendants' business model must, therefore, fail.
In the Matter of Margrett A. Skinner.
No. S14Y0661.
Supreme Court of Georgia.
May 19, 2014.

Background: Disciplinary proceedings were brought against attorney. Attorney petitioned for voluntary discipline. A special master issued report and recommendation that attorney be reprimanded. The Supreme Court, 292 Ga. 640, 740 S.E.2d 171, rejected petition.

Holdings: Following evidentiary hearing and report and recommendation by special master, the Supreme Court held that:

1. Attorney and Client<td>1</td>
   Attorney who posted client's personal and confidential information on the Internet violated Rules of Professional Conduct (RPC), and
   (1) attorney who posted client's personal and confidential information on the Internet violated Rules of Professional Conduct (RPC), that required attorney to maintain in confidence all information gained in the professional relationship with a client. State Bar Rules and Regulations, Rule 4-102(d), Rule 1.6.

2. Attorney and Client<td>1</td>
   Attorney who failed for approximately four months to keep client reasonably informed about the status of her divorce, where disclosure was isolated and limited to a single client and did not threaten substantial harm to the client's interests. State Bar Rules and Regulations, Rule 4-102(d), Rules 1.4, 1.6.

3. Attorney and Client<td>1</td>
   Public reprimand was warranted for attorney who posted client's personal and confidential information on the Internet and failed for approximately four months to keep client reasonably informed about the status of her divorce, where disclosure was isolated and limited to a single client and did not threaten substantial harm to the client's interests. State Bar Rules and Regulations, Rule 4-102(d), Rules 1.4, 1.6.

PER CURIAM.

The State Bar of Georgia made a formal complaint against respondent Margrett A. Skinner (State Bar No. 630748), alleging violations of Rules 1.3, 1.4, 1.6, and 1.16 of the Georgia Rules of Professional Conduct. Prior to an evidentiary hearing on the formal complaint, Skinner filed a petition for voluntary discipline, admitting that she violated Rule 1.6 by improperly disclosing confidential information about a former client, and in which she agreed to accept a Review Panel reprimand for the violation. The special master and the State Bar recommended that we accept the petition for voluntary discipline. We rejected the petition, however, noting that a Review Panel reprimand is "the mildest form of public discipline authorized ... for the violation of Rule 1.6," In the Matter of Skinner, 292 Ga. 640, 642, 740 S.E.2d 171 (2013), and noting as well that the petition and accompanying record did not "reflect the nature of the disclosures (except that they concern [unspecified] personal and confidential information) or the actual or potential harm to the client as a result of the disclosures." Id. at 642, n. 6, 740 S.E.2d 171.

Following our rejection of the petition, the special master conducted an evidentiary hearing, and he made his report and recommendation on December 18, 2013, in which he found that Skinner violated Rules 1.4 and 1.6 but not Rules 1.3 and 1.16.1 Neither party

1. Joseph A. Boone was appointed as special master in this matter.
sought review of the report by the Review Panel, and the matter is again before this Court for decision.

In his report, the special master found that a client retained Skinner in July 2009 to represent her in an uncontested divorce, and she paid Skinner $900, including $150 for the filing fee. For six weeks, the client did not hear anything from Skinner, and after multiple attempts to contact Skinner, the client finally was able to reach Skinner again in October 2009. At that point, Skinner informed the client that Skinner had lost the paperwork that the client had given to Skinner in July. Skinner and the client then met again, and Skinner finally began to draft pleadings for the divorce. The initial drafts of the pleadings had multiple errors, and Skinner and the client exchanged several drafts and communicated by e-mail about the status of the case in October and early November 2009. Those communications concluded by mid-November, and Skinner and the client had no more communications until March 18, 2010, when the client reported to Skinner that her husband would not sign the divorce papers without changes. In April 2010, both the client and her husband signed the papers.

A disagreement developed about the fees and expenses of the divorce. Skinner asked the client for an additional $185 for certain travel expenses and the filing fee. In April and early May 2010, Skinner and the client exchanged several e-mails about the request for additional money. Then, on May 18, the client informed Skinner that she had hired another lawyer to complete her divorce, and she asked Skinner to deliver her file to new counsel and to refund $750. Skinner replied that she would not release the file unless she was paid. Although Skinner eventually refunded $650 to the client, Skinner never delivered the file to new counsel, contending that it only contained her “work product.”

2. About Rule 1.16, the special master reported his belief that Skinner technically violated the rule by failing to deliver the file of her client to successor counsel based on a mistaken belief that signed pleadings in the file belonged to her as “work product.” See Formal Advisory Opinion 87–5; Swift, Carrie, McGhee & Hiers v. Henry, 276 Ga. 571, 581 S.E.2d 37 (2003). But the special master did not actually find a violation nor recommend any discipline under Rule 1.16. The special master reported that he made no such finding or recommendation because there was no clear and convincing evidence of prejudice, insofar as the client already had the documents contained in the file. As to the retention of unearned fees, the special master found the issue moot in light of the refund of $650 to the client.

New counsel completed the divorce within three months of her engagement.

Around this time, the client posted negative reviews of Skinner on three consumer Internet pages. When Skinner learned of the negative reviews, she posted a response on the Internet, a response that contained personal and confidential information about her former client that Skinner had obtained in the course of her representation of the client. In particular, Skinner identified the client by name, identified the employer of the client, stated how much the client had paid Skinner, identified the county in which the divorce had been filed, and stated that the client had a boyfriend. The client filed a grievance against Skinner, and in response to the grievance, Skinner said in August 2011 that she would remove her posting from the Internet. It was not removed, however, until February 2012.

The special master found that Skinner violated Rule 1.4 when she failed between July and October 2010 to keep her client reasonably informed of the status of the divorce, and the special master found that Skinner violated Rule 1.6 when she disclosed confidential information about her client on the Internet. The special master found no violation of Rules 1.3 and 1.16.2 Turning to the appropriate discipline for these violations, the special master noted that Skinner had substantial experience as a practicing lawyer—she was admitted to the Bar in 1987—which is an aggravating circumstance. The special master also found, however, a number of mitigating circumstances, including that Skinner had no prior discipline, the absence of a dishonest or selfish motive for her improper conduct, that she refunded a substantial portion of her fee to the client even after doing work for the client, that she accepted responsibility for her misconduct by filing a petition for volun-
tary discipline, that she otherwise was cooperative in the disciplinary proceedings, and that she had expressed remorse for her misconduct. In addition, the special master found as mitigation that Skinner experienced a number of personal problems during her representation of the client and the subsequent time that she posted the confidential information about her client on the Internet, including colon surgery in April 2010, the diagnosis of both her mother and father with cancer (she was their primary caregiver), and the death of her father. For both violations, the special master recommended a public reprimand, with the additional condition that Skinner “be instructed to take advantage of the State Bar’s Law Practice Management services and recommendations with respect to internal office procedures, client files, and case tracking procedures.”

[3] We have reviewed carefully the record and the very detailed report of the special master, and we agree with his recommendation of a public reprimand, as well as the additional condition that Skinner be instructed to take advantage of the State Bar’s Law Practice Management services and recommendations with respect to internal office procedures, client files, and case tracking procedures. See In the Matter of Adams, 291 Ga. 173, 729 S.E.2d 313 (2012). Although other jurisdictions occasionally have disciplined lawyers more severely for improper disclosures of client confidences, we note that those cases involved numerous clients and violations of other rules, see Office of Lawyer Regulation v. Peshek, 334 Wis.2d 373, 798 N.W.2d 879 (2011) (60–day suspension), or the disclosure of especially sensitive information that posed serious harm or potential harm to the client, see In re Quillinan, 20 DB Rptr. 288 (Ore.Disp.Bd.2006) (90–day suspension), available at www.osbar.org/docs/dbreport/dbr20.pdf. In this case, the improper disclosure of confidential information was isolated and limited to a single client, it does not appear that the information worked or threatened substantial harm to the interests of the client, and there are significant mitigating circumstances. Accordingly, we hereby order that Skinner receive a public reprimand in accordance with Bar Rules 4–102(b)(3) and 4–220(c), and we order that she consult with the Law Practice Management Program of the State Bar as set forth above and implement its suggestions in her law practice.

Public reprimand.

All the Justices concur.

295 Ga. 185

WILLIAMSON

v.

The STATE.

No. S13G1133.

Supreme Court of Georgia.

May 19, 2014.

Background: Defendant was charged with driving under influence (DUI) and failure to maintain lane. The State Court, Fulton County, Brenda S. Cole, J., denied his motion for discharge on statutory speedy trial grounds, and defendant appealed. The Court of Appeals, 2014 WL 2025127, affirmed. Certiorari review was granted.

Holding: The Supreme Court, Hunstein, J., held that jurors were impaneled during last week of September court term, and thus, September court term counted for purposes of statutory speedy trial requirement that defendant be tried within court term during which speedy trial demand was made or within next succeeding term, regardless of whether jurors were serving in other trials, overruling Jones v. State, 305 Ga.App. 528, 699 S.E.2d 754 and MacInnis v. State, 235 Ga.App. 732, 510 S.E.2d 557.

Reversed and remanded.
Committee on Codes of Conduct Advisory Opinion
No. 112: Use of Electronic Social Media by Judges and Judicial Employees

This opinion provides the Committee’s guidance on an array of ethical issues that may arise from the use of social media by judges and judicial employees, particularly members of a judge’s personal staff. This guidance is intended to supplement information the Committee developed in 2011 to assist courts with the development of guidelines on the use of social media by judicial employees. See Resource Packet for Developing Guidelines on Use of Social Media for Judicial Employees. The Committee noted in the Resource Packet that “[t]he Code of Conduct for Judicial Employees applies to all online activities, including social media. The advent of social media does not broaden ethical restrictions; rather, the existing Code extends to the use of social media.” The Committee also recognizes that electronic social media may provide valuable new tools for the courts, and that some courts have begun to use social media for official court purposes. This opinion is not intended to discourage the official use of social media by the courts in a manner that does not otherwise raise ethics concerns. Nor is this opinion intended to supplant any social media policy enacted within each judge’s chambers which may govern that specific judge’s internal chambers’ operation. If an individual judge’s personal chambers’ policy is stricter than that set forth below, the individual judge’s policy should prevail.

I. Ethical Implications of Social Media

The use of social media by judges and judicial employees raises several ethical considerations, including: (1) confidentiality; (2) avoiding impropriety in all conduct; (3) not lending the prestige of the office; (4) not detracting from the dignity of the court or reflecting adversely on the court; (5) not demonstrating special access to the court or favoritism; (6) not commenting on pending matters; (7) remaining within restrictions on fundraising; (8) not engaging in prohibited political activity; and (9) avoiding association with certain social issues that may be litigated or with organizations that frequently litigate. These considerations implicate Canons 2, 3D, 4A, and 5 of the Code of Conduct for Judicial Employees, and Canons 2, 3A(6), 4, and 5 of the Code of Conduct for United States Judges. The Committee recognizes that due to the ever-broadening variety of social media forums and technologies available, different types of social media will implicate different Canons and to varying degrees. For that reason, many of the proscriptions set forth in this opinion, like those set forth in the Employees’ and Judges’ Code, are cast in general terms. The Committee’s advice is to be construed to further the objective of “[a]n independent and honorable judiciary.” Canon 1.

Social media include an array of different communication tools that can mimic interpersonal communication on the one hand, and act as a news broadcast to a larger audience on the other. For example, some social media sites can serve primarily as communication tools to connect families, friends, and colleagues and provide for sharing private and direct messages, posting of photos, comments, and articles in a tight-knit community limited by the user’s security preferences. The same media,
however, can serve to broadcast to a broader audience with fewer restrictions. Similarly, some social media sites can serve as semi-private communication media depending on how they are used, or can instantly serve as a connection to a large audience. Aside from social communication sites, users also have access to others’ sites where they may comment on everything from the posting of a photograph, to a legal or political argument, or to the quality of a meal at a restaurant. This type of media can implicate other concerns since the user is now validating or endorsing the image, person, product, or service. Finally, there are media where the user is personally publishing commentary in the form of blogs. The Committee recognizes that the Canons cover all aspects of communication, whatever form they may take, and therefore offers general advice that can be applied to the specific mode. In short, although the format may change, the considerations regarding impropriety, confidentiality, appearance of impropriety and security remain the same.

II. Appearance of Impropriety

Canon 2 of the Employees’ Code provides: “A judicial employee should not engage in any activities that would put into question the propriety of the judicial employee’s conduct in carrying out the duties of the office.” Similarly, Canon 2 of the Judges’ Code states that “a judge should avoid impropriety and the appearance of impropriety in all activities.” The Codes forbid judges and judicial employees from using, or appearing to use, the prestige of the office to advance the private interests of others. Canon 2 therefore is implicated when an employee or judge engages in the use of social media while also listing his or her affiliation with the court. For example, the Committee has advised that a law clerk who chooses to maintain a blog should remove all references to the clerk’s employment. The Committee concluded that such reference would implicate Canon 2 concerning the use of the prestige of the office and the appearance of impropriety. The same can be true for a judge if she is using the prestige of the office in some manner in social media that could be viewed as advancing the private interest of another. For example, if the judge is using the media to support a particular establishment known to be frequented by lawyers near the courthouse, and the judge identifies him/herself as a supporter, the judge has used the office to aid that establishment’s success. Similarly, if a judge comments on a blog that supports a particular cause or individual, the judge may be deemed as endorsing that position or individual. The Committee therefore cautions judges to analyze the post, comment, or blog in order to take into account the Canons that prohibit the judge from endorsing political views, engaging in dialogue that demeans the prestige of the office, commenting on issues that may arise before the court, or sending the impression that another has unique access to the Court.

III. Improper Communications with Lawyers or Others

Another example of social media activity that raises concerns under Canon 2 is the exchange of frequent messages, “wall posts,” or “tweets” between a judge or judicial employee and a “friend” on a social network who is also counsel in a case pending
before the court. In the Committee’s view, social media exchanges need not directly concern litigation to raise an appearance of impropriety issue; rather, any frequent interaction between a judge or judicial employee and a lawyer who appears before the court may “put into question the propriety of the judicial employee’s conduct in carrying out the duties of the office.” Employees’ Code, Canon 2. With respect to judges, communication of this nature may “convey or permit others to convey the impression that they are in a special position to influence the judge.” Judges’ Code, Canon 2B. A similar concern arises where a judge or judicial employee uses social media to comment—favorably or unfavorably—about the competence of a particular law firm or attorney. Of course, any comment or exchange between an attorney and the judge must also be scrutinized so as not to constitute an ex parte communication. At all times, the Court must be screening for potential conflicts with those she communicates with on social media, and the Canon 3C provisions which govern recusal situations may be implicated and may require analysis.

The connection with a litigant need not be so direct and obvious to raise ethics concerns. The same Canon 2 concern arises, for example, when a judge or judicial employee demonstrates on a social media site a comparatively weak but obvious affiliation with an organization that frequently litigates before the court (i.e., identifying oneself as a “fan” of an organization), or where a judge or judicial employee circulates a fundraising appeal to a large group of social network site “friends” that includes individuals who practice before the court.

IV. Extrajudicial Activities

Circumstances such as those described above also implicate Canon 4 of both the Employees’ and Judges’ Codes, which govern participation in outside activities. Canon 4 of the Employees’ Code provides that “[i]n engaging in outside activities, a judicial employee should avoid the risk of conflict with official duties, should avoid the appearance of impropriety, and should comply with disclosure requirements.” Canon 4 of the Judges’ Code states that a judge should not participate in extrajudicial activities that detract from the dignity of the judge’s office, interfere with the performance of the judge’s official duties, reflect adversely on the judge’s impartiality, or lead to frequent disqualification. Invoking Canon 4 of the Employees’ Code, the Committee has advised that maintaining a blog that expresses opinions on topics that are both politically sensitive and currently active, and which could potentially come before the employee’s own court, conflicts with Canon 4. Such opinions have the potential to reflect poorly upon the judiciary by suggesting that cases may not be impartially considered or decided. This advice would also apply to judges’ use of social media. A judge would be permitted to discuss and exchange ideas about outside activities that would not pose any conflict with official duties, (e.g., gardening, sports, cooking), yet the judge must always consider whether those outside activities invoke a potentially debatable issue that might present itself to the court, or an issue that involves a political position.
V. Identification of the Judge or Judicial Employee

Canons 2 and 4 are also implicated when a judge or judicial employee identifies him/herself as such on a social networking site. Through self-description or the use of a court email address, for example, the judge or employee highlights his or her affiliation with the federal judiciary in a manner that may lend the court’s prestige. The Committee has recommended that courts address in their social media policies whether judicial employees may identify themselves as employed by a specific court or judge. It is the Committee’s view that social media policies should, at the very least, restrict judicial employees from identifying themselves with a specific court or judge on social networking sites, except that judicial employees, with the permission of their court or judge, may state their association with the court or judge on professional networking sites like LinkedIn. The Committee also advises against any use of a judge’s or judicial employee’s court email address to engage in social media or professional social networking. The court employee or judge should consult the court’s policies on permitted and prohibited use of court email, and the court’s guidance on the employee’s conduct while using a court email server and court email address. Similarly, the court email address should not be used for forwarding “chain letter type” correspondences, the solicitation of donations, the posting of property for sale or rent, or the operation of a business enterprise. See Guide to Judiciary Policy, Vol. 15, § 525.50 (“Inappropriate personal use of government-owned equipment includes ... using equipment for commercial activities or in support of commercial activities or in support of outside employment or business activity....” This policy also prohibits use of the email system for “fund-raising activity, endorsing any product or service, participating in any lobbying activity, or engaging in any partisan political activity.”)

VI. Dignity of the Court

Furthermore, Canon 4A of the Employees’ Code provides that “[a] judicial employee’s activities outside of official duties should not detract from the dignity of the court, interfere with the performance of official duties, or adversely reflect on the operation and dignity of the court or office the judicial employee serves.” Certain uses of social media raise concerns under Canon 4A that are not within the ambit of Canon 2. For example, a judge or judicial employee may detract from the dignity of the court by posting inappropriate photos, videos, or comments on a social networking site. The Committee advises that all judges and judicial employees behave in a manner that avoids bringing embarrassment upon the court. Due to the ubiquitous nature of information transmitted through the use of social media, judges and employees should assume that virtually all communication through social media can be saved, electronically re-transmitted to others without the judge’s or employee’s knowledge or permission, or made available later for public consumption.
VII. Confidentiality

Canon 3D of the Employees’ Code provides in relevant part that a “judicial employee should avoid making public comment on the merits of a pending or impending action ….” Canon 3D further states that a judicial employee “should never disclose any confidential information received in the course of official duties except as required in performance of such duties, nor should a judicial employee employ such information for personal gain.” Canon 3A(6) of the Judges’ Code provides that “[a] judge should not make public comment on the merits of a matter pending or impending in any court.” Canon 4D(5) of the Judges’ Code provides that “a judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge’s official duties.” Most social media forums provide at least one—and often several—tools to communicate instantaneously with anywhere from a few to thousands of individuals. Any posting on a social networking site that, for example, broadly hints at the likely outcome in a pending case, divulges confidential case processing procedures, or reveals non-public information about the status of jury deliberations violates Canon 3D. Such communications need not be case-specific to implicate Canon 3; even commenting vaguely on a legal issue without directly mentioning a particular case may raise confidentiality concerns and impropriety concerns. Thus the Committee advises that in all online activities involving social media, the employee may not reveal any confidential, sensitive, or non-public information obtained through the court. The Committee further advises that judicial employees who are on the judge’s personal staff refrain from participating in any social media that relate to a matter likely to result in litigation or to any organization that frequently litigates in court. Lastly, the Committee reminds that former judicial employees should also observe the same restrictions on disclosure of confidential information that apply to a current judicial employee, except as modified by the appointing authority.

VIII. Political Activity

Canon 5 of the Employees’ Code specifically addresses political activity: “A judicial employee should refrain from inappropriate political activity.” Similarly, Canon 5 of the Judges’ Code states that a “judge should not … publicly endorse or oppose a candidate for public office” or “engage in any other political activity.” Judges’ Code, Canon 5A(2), 5(C). In the social media context, judges and judicial employees should avoid any activity that affiliates the judge or employee to any degree with political activity. This includes but is not limited to posting materials in support of or endorsing a candidate or issue, “liking” or becoming a “fan” of a political candidate or movement, circulating an online invitation for a partisan political event (regardless of whether the judge/employee plans to attend him/herself), and posting pictures on a social networking profile that affiliates the employee or judge with a political party or partisan political candidate. Furthermore, the Committee advises that while there is not an obligation for a judicial employee to search out and modify or delete endorsements or statements of political views that predate the judicial employment, the Committee recommends that if such endorsements or statements appear to be current, they be
modified to clarify that they predate the judicial employment. To the extent that it is impractical or impossible to modify such previous endorsements or statements, the Committee suggests posting the following statement on the applicable website: “I have taken a position that precludes me from making further public political comments or endorsements and this site will no longer be updated concerning these issues.” For example, on some social media it may be possible to remove one’s political affiliation, and replace it with the above statement, when it is impractical or impossible to remove all posts or likes that appear to be current political endorsements or statements. The Committee reminds that while Canon 5B of the Employees’ Code permits certain nonpartisan political activity for some judicial employees, the Codes specify that all judges, members of judges’ personal staffs, and high-level court officers must refrain from all political activity.

IX. Conclusion

In light of the reality that users of social media can control what they post but often lack control over what others post, judges and judicial employees should regularly screen the social media websites they participate in to ensure nothing is posted, whether by the employee him/herself or by others on the employee’s webpage, that may raise questions about the propriety of the employee’s conduct, suggest the presence of a conflict of interest, detract from the dignity of the court, or, depending upon the status of the judicial employee, suggest an improper political affiliation. We also note that the use of social media also raises significant security and privacy concerns for courts and court employees that must be considered by judges and judicial employees to ensure the safety and privacy of the court.

While the purpose of this opinion is to provide guidance with respect to ethical issues arising from the use of social media by judges and judicial employees, the Committee also notes that social media technology is subject to rapid change, which may lead to new or different ethics concerns. Each form of media and each factual situation involved may implicate numerous ethical Canons and may vary significantly depending on the unique factual scenario presented in this rapidly changing area of communication. There is no “one size fits all” approach to the ethical issues that may be presented. Judges and judicial employees who have questions related to the ethical use of social media may request informal advice from a Committee member or a confidential advisory opinion from the Committee.

Notes for Advisory Opinion No. 112

1 The Code of Conduct for Judicial Employees ("the Employees’ Code") defines a member of a judge’s personal staff as “a judge’s secretary, a judge’s law clerk, and a courtroom deputy clerk or court reporter whose assignment with a particular judge is reasonably perceived as being comparable to a member of the judge’s personal staff.” The term judicial employee also covers interns, externs, and other court volunteers.
April 2017
A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.1

In this opinion, the Committee discusses a judge’s participation in electronic social networking. The Committee will use the term “electronic social media” (“ESM”) to refer to internet-based electronic social networking sites that require an individual to affirmatively join and accept or reject connection with particular persons. 2

Judges and Electronic Social Media

In recent years, new and relatively easy-to-use technology and software have been introduced that allow users to share information about themselves and to post information on others' social networking sites. Such technology, which has become an everyday part of worldwide culture, is frequently updated, and different forms undoubtedly will emerge.

Social interactions of all kinds, including ESM, can be beneficial to judges to prevent them from being thought of as isolated or out of touch. This opinion examines to what extent a judge’s participation in ESM raises concerns under the Model Code of Judicial Conduct.

Upon assuming the bench, judges accept a duty to “respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.”3 Although judges are full-fledged members of their communities, nevertheless, they “should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens….”4 All of a judge’s social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner “that promotes public confidence in the independence, integrity, and impartiality of the judiciary,” and must “avoid impropriety and the appearance of impropriety.”5 This requires that the judge be sensitive to the appearance of relationships with others.

The Model Code requires judges to “maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives.”6 Thus judges must be very thoughtful in their interactions with others, particularly when using ESM. Judges must assume that comments posted to an ESM site will not remain within the circle of the judge’s connections. Comments, images, or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients. Such dissemination has the potential to compromise or appear to

---

1 This opinion is based on the ABA Model Code of Judicial Conduct as amended by the ABA House of Delegates through August 2012. The laws, court rules, regulations, rules of professional and judicial conduct, and opinions promulgated in individual jurisdictions are controlling.

2 This opinion does not address other activities such as blogging, participation on discussion boards or listserves, and interactive gaming.

3 Model Code, Preamble [1].

4 Model Code Rule 1.2 cmt. 2.

5 Model Code Rule 1.2. But see Dahlia Lithwick and Graham Vyse, "Tweet Justice," SLATE (April 30, 2010), (describing how state judge circumvents ethical rules prohibiting ex parte communications between judges and lawyers by asking lawyers to "de-friend" her from their ESM page when they're trying cases before her; judge also used her ESM account to monitor status updates by lawyers who appeared before her), article available at http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html.

6 Model Code, Preamble [2].
compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary.\footnote{See Model Code Rule 1.2 cmt. 3. Cf. New York Jud. Eth. Adv. Op. 08-176 (2009) (judge who uses ESM should exercise appropriate degree of discretion in how to use the social network and should stay abreast of features and new developments that may impact judicial duties). Regarding new ESM website developments, it should be noted that if judges do not log onto their ESM sites on a somewhat regular basis, they are at risk of not knowing the latest update in privacy settings or terms of service that affect how their personal information is shared. They can eliminate this risk by deactivating their accounts.}

There are obvious differences between in-person and digital social interactions. In contrast to fluid, face-to-face conversation that usually remains among the participants, messages, videos, or photographs posted to ESM may be disseminated to thousands of people without the consent or knowledge of the original poster. Such data have long, perhaps permanent, digital lives such that statements may be recovered, circulated or printed years after being sent. In addition, relations over the internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly.\footnote{Jeffrey Rosen, “The Web Means the End of Forgetting”, N.Y. TIMES MAGAZINE (July 21, 2010) accessible at http://www.nytimes.com/2010/07/25/magazine/25privacy-2.html?pagewanted=all.}

A judge who participates in ESM should be mindful of relevant provisions of the Model Code. For example, while sharing comments, photographs, and other information, a judge must keep in mind the requirements of Rule 1.2 that call upon the judge to act in a manner that promotes public confidence in the judiciary, as previously discussed. The judge should not form relationships with persons or organizations that may violate Rule 2.4(C) by conveying an impression that these persons or organizations are in a position to influence the judge. A judge must also take care to avoid comments and interactions that may be interpreted as \textit{ex parte} communications concerning pending or impending matters in violation of Rule 2.9(A), and avoid using any ESM site to obtain information regarding a matter before the judge in violation of Rule 2.9(C). Indeed, a judge should avoid comment about a pending or impending matter in any court to comply with Rule 2.10, and take care not to offer legal advice in violation of Rule 3.10.

There also may be disclosure or disqualification concerns regarding judges participating on ESM sites used by lawyers and others who may appear before the judge.\footnote{See, e.g., California Judges Ass’n Judicial Ethics Comm. Op. 66 (2010) (judges may not include in social network lawyers who have case pending before judge); Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2009-20 (2009) (judge may not include lawyers who may appear before judge in social network or permit such lawyers to add judge to their social network circle); Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (judges should be mindful of “whether on-line connections alone or in combination with other facts rise to the level of ‘a close social relationship’” that should be disclosed and/or require recusal); Ohio Sup. Ct. Bd. of Comm’rs on Grievances and Discipline Op. 2010-7 (2010) (judge may have ESM relationship with lawyer who appears as counsel in case before judge as long as relationship comports with ethics rules); South Carolina Jud. Dep’t Advisory Comm. on Standards of Jud. Conduct, Op. No. 17-2009 (magistrate judge may have ESM relationship with lawyers as long as they do not discuss anything related to judge’s judicial position). See also John Schwartz, “For Judges on Facebook, Friendship Has Limits,” N.Y. TIMES, Dec. 11, 2009, at A25. Cf. Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-04 (2010) (judge’s judicial assistant may add lawyers who may appear before judge to social networking site as long as the activity is conducted entirely independent of judge and without reference to judge or judge’s office).} These concerns have been addressed in judicial ethics advisory opinions in a number of states. The drafting committees have expressed a wide range of views as to whether a judge may “friend” lawyers and others who may appear before the judge, ranging from outright prohibition to permission with appropriate cautions.\footnote{See discussion in Geyh, Alfiniti, Lubet and Shamin, JUDICIAL CONDUCT AND ETHICS (5th Edition, forthcoming), Section 10.05E.} A judge who has an ESM connection with a lawyer or party who has a pending or impending matter before the court must evaluate that ESM connection to determine whether the judge should disclose the relationship prior to, or at the initial appearance of the person before the court.\footnote{California Judges Assn. Judicial Ethics Comm. Op. 66 (need for disclosure arises from peculiar nature of online social networking sites, where evidence of connection between lawyer and judge is widespread but nature of connection may not be readily apparent). See also New York Jud. Eth. Adv. Op. 08-176 (judge must consider whether any online connections, alone or in combination with other facts, rise to level of close social relationship requiring disclosure and/or recusal); Ohio Opinion 2010-7 (same).} In this regard, context is significant.\footnote{Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-06 (2010) (judge who is member of voluntary bar association not required to drop lawyers who are also members of that organization from organization’s ESM site; members use the site to communicate among themselves about organization and other non-legal matters). See also Raymond McKoski,
designated as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge’s relationship with a person. 13

Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed. When a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal. 14 The judge must remember that personal bias or prejudice concerning a party or lawyer is the sole basis for disqualification under Rule 2.11 that is not waivable by parties in a dispute being adjudicated by that judge. The judge should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally. 15 A judge should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification even if the judge believes there is no basis for the disqualification.16 For example, a judge may decide to disclose that the judge and a party, a party’s lawyer or a witness have an ESM connection, but that the judge believes the connection has not resulted in a relationship requiring disqualification. However, nothing requires a judge to search all of the judge’s ESM connections if a judge does not have specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual.

Judges’ Use of Electronic Social Media in Election Campaigns

Canon 4 of the Model Code permits a judge or judicial candidate to, with certain enumerated exceptions, engage in political or campaign activity. Comment [1] to Rule 4.1 states that, although the Rule imposes "narrowly tailored restrictions" on judges' political activities, "to the greatest extent possible," judges and judicial candidates must "be free and appear to be free from political influence and political pressure."

Rule 4.1(A)(8) prohibits a judge from personally soliciting or accepting campaign contributions other than through a campaign committee authorized by Rule 4.4. The Code does not address or restrict a judge’s or campaign committee’s method of communication. In jurisdictions where judges are elected, ESM has become a campaign tool to raise campaign funds and to provide information about the candidate. 17 Websites and ESM promoting the candidacy of a judge or judicial candidate may be

“Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from ‘Big Judge Davis’,” 99 Ky. L.J. 259, 291 (2010-11) (nineteenth century judge universally recognized as impartial despite off-bench alliances, especially with Abraham Lincoln); Schwartz, supra note 9 (“Judges do not drop out of society when they become judges.... The people who were their friends before they went on the bench remained their friends, and many of them were lawyers.”) (quoting New York University Prof. Stephen Gillers).
14 See, e.g., New York Judicial Ethics Advisory Opinion 08-176, supra n. 8. See also Ashby Jones, “Why You Shouldn’t Take It Hard If a Judge Rejects Your Friend Request,” WALL ST. J. LAW BLOG (Dec. 9, 2009) (“‘friending’ may be more than say an exchange of business cards but it is well short of any true friendship”); Jennifer Ellis, “Should Judges Recuse Themselves Because of a Facebook Friendship?” (Nov. 2011) (state attorney general requested that judge reverse decision to suppress evidence and recuse himself because he and defendant were ESM, but not actual, friends), available at http://www.jlellis.net/blog/should-judges-recuse-themselves-because-of-a-facebook-friendship/.
15 See Jeremy M. Miller, “Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance),” 33 PEPPERDINE L. REV. 575, 578 (2012) (“Judges should not, and are not, expected to live isolated lives separate from all potential lawyers and litigants who may appear before them.... However, it is also axiomatic that justice, to be justice, must have the appearance of justice, and it appears unjust when the opposing side shares an intimate (but not necessarily sexual) relationship with the judge”).
16 Rule 2.11 cmt. 5.
established and maintained by campaign committees to obtain public statements of support for the judge's campaign so long as these sites are not started or maintained by the judge or judicial candidate personally. 18

Sitting judges and judicial candidates are expressly prohibited from “publicly endorsing or opposing a candidate for any public office.” 19 Some ESM sites allow users to indicate approval by applying "like" labels to shared messages, photos, and other content. Judges should be aware that clicking such buttons on others' political campaign ESM sites could be perceived as a violation of judicial ethics rules that prohibit judges from publicly endorsing or opposing another candidate for any public office. 20 On the other hand, it is unlikely to raise an ethics issue for a judge if someone "likes" or becomes a “fan” of the judge through the judge's ESM political campaign site if the campaign is not required to accept or reject a request in order for a name to appear on the campaign's page.

Judges may privately express their views on judicial or other candidates for political office, but must take appropriate steps to ensure that their views do not become public. 21 This may require managing privacy settings on ESM sites by restricting the circle of those having access to the judge’s ESM page, limiting the ability of some connections to see others, limiting who can see the contact list, or blocking a connection altogether.

Conclusion

Judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.

21 See Nevada Comm’n on Jud. Disc. Op. JE98-006 (Oct. 20, 1998) ("In expressing his or her views about other candidates for judicial or other public office in letters or other recorded forms of communication, the judge should exercise reasonable caution and restraint to ensure that his private endorsement is not, in fact, used as a public endorsement.").
How Do You Rate Your Lawyer? Lawyers’ Responses to Online Reviews of Their Services

Abstract. With the proliferation of opportunities for consumers to review a variety of services on the Internet, it is only a matter of time until more clients review their attorneys’ services on the Internet. This raises a variety of potential ethical and public policy issues. First, what can attorneys do to try to control their online reputations? Second, if a client posts negative comments about an attorney’s services on a public Internet forum, can the attorney respond on that forum without breaching the duty of confidentiality and, if so, how? Finally, when settling a dispute with a client, may an attorney put a provision in a settlement agreement that prohibits a client from posting any reviews of the lawyer’s services on the Internet? This Article will address each of these questions in light of normative considerations, the rules governing lawyers’ conduct, clients’ interest in confidentiality and loyalty, lawyers’ reputational interests, and public policy concerns about consumers’ access to accurate information about legal services.

Author. Associate Professor, Northern Illinois University, College of Law; J.D. University of Minnesota. I want to thank the St. Mary’s Law Journal and the St. Mary’s Journal on Legal Malpractice & Ethics for inviting me to write this Article and to speak at their symposium. I would also like to thank the faculty at Northern Illinois University College of Law who listened to a presentation on an earlier draft of this Article and provided feedback, as well as my research assistants, Zachary Clark and Alex Van Maren.

Reprinted with permission from St. Mary’s Law Journal.
ARTICLE CONTENTS

Introduction ................................................... 244
I. The Interests at Stake ....................................... 244
II. Protecting Reputational Interests at the Formation of the Attorney–Client Relationship ............. 246
   A. Comparative Perspective: Physicians’ Attempts to Control the Patients’ Online Reviews of Health Care Services ........................................ 246
   B. Controlling Client Conduct at the Onset of the Attorney–Client Relationship ..................... 250
      1. Non-Disclosure Agreements ......................... 250
      2. Copyright Assignments ............................. 254
III. Responding to Negative Public Reviews of Attorney Services ................................................. 255
   A. Responding to Negative Reviews Without Revealing Client Specific Information ................. 256
      1. Analyzing Confidentiality ........................... 259
      2. Is the Information Confidential? ................. 260
      3. If the Information Is Confidential, Is It Subject to the Self-Defense Exception in Rule 1.6(b)(5)? ................................................................. 263
      4. Defamation Lawsuits ................................. 269
IV. Settlement of Disputes with Clients ...................... 272
V. Conclusion .................................................. 276
INTRODUCTION

With the proliferation of opportunities for consumers to review a variety of services on the Internet, clients are increasingly reviewing their attorneys' services on various online sites. The best ways for lawyers to minimize negative online reviews are to: (1) be careful to screen potential clients who may have unrealistic expectations, (2) to maintain good communication with clients, and (3) try to resolve any conflicts with clients early and amicably. However, prevention will not result in a 100% satisfaction rate and, at some point, most lawyers will probably be the subject of one or more negative online reviews that could affect their reputation. The reputation of lawyers is not only important to any individual lawyer, but it is also important to the profession as a whole.

As lawyers seek to defend their reputations, some of the possible means of controlling negative reviews raise potential ethical and public policy issues that will be discussed in this Article. Part I will briefly outline the various interests at stake when consumers review, or are restrained from reviewing, legal services. Part II will look at some efforts by doctors to prevent negative reviews by limiting their patients' conduct through contract law at the outset of the physician–patient relationship. This section will assess whether those efforts could be emulated by lawyers during the creation of the lawyer–client relationship, particularly in light of the unique ethical constrains on lawyers. Part III will assess options available to a lawyer if a client or former client posts negative comments about an attorney's services on a public online forum. Specifically, this section will address whether the attorney can post a public response to the negative review without breaching the duty of confidentiality and, if so, how. This section will also look briefly at defamation suits as a possible remedy. Finally, Part IV will examine whether, when settling a dispute with a client, an attorney can put a provision in a settlement agreement that prohibits a client from making any public statements or reviews about the lawyer's services.

I. THE INTERESTS AT STAKE

This Article examines the review of lawyers' services primarily from the perspective of lawyers who may be motivated to act in order to protect their professional reputations. However, the appropriateness of lawyers' actions in this regard cannot be assessed without considering the variety of
interests at stake and how those interests should inform the decision-making of both lawyers who act to protect their online professional reputations and courts who then have to rule on the measures. Other interests that are relevant include the clients’ interests in both confidentiality and in voicing their opinions about legal services they have received, consumers’ interest in learning about lawyers who they are thinking about hiring, and the legal profession’s interest in both its collective reputation and in providing information to the public in a manner that will help increase its ability to access suitable legal services.

Clients have an interest in the ability to share information with others about their experiences with their lawyers. Whether happy or dissatisfied, the ability to voice one’s opinion about the quality of services is important to consumers as evidenced by the explosion of online reviews. Clients of legal services, however, also have a stake in having their lawyers maintain the confidentiality of the information learned during the course of legal representation. This raises issues unique to lawyers and physicians—unlike other service providers, their ability to respond to online criticism is constrained by confidentiality and privacy obligations.

The public has an interest in learning information about lawyers whom they are considering hiring. In the absence of a word of mouth referral, it is quite difficult for the general public to learn information about lawyers whom they may want to hire, such as their ability to demonstrate responsiveness, empathy, competence, etc. “Traditionally, law firms and what their client interactions are like have been cloaked in mystery, and nobody really knows how good their service is . . . . That’s obviously disadvantageous to clients.” But an increase in access to information online may help empower clients to feel more in control of their decisions, such as when they need a lawyer and who they will hire. Such information, however, is not useful to consumers if it is false.


The legal profession has an interest in its reputation as a whole because its legitimacy and its status as a self-regulated profession rely heavily on the reputation and integrity of the profession.\(^4\) Disparaging remarks about lawyers could undermine the profession’s reputation and, if the remarks are unfounded, could create false perceptions among the public. However, the profession as a whole also has an interest in assisting the public in obtaining meaningful information about lawyers who they want to hire. Consumer reviews of services are of increasing importance to consumer purchasing decisions and the legal profession should be mindful of unnecessarily impeding this trend.\(^5\) Lastly, online reviews of lawyers’ services may aid the regulators of the legal profession in becoming aware of possible misconduct by individual lawyers as well as trends in clients’ perception of lawyers’ services that could inform the training of lawyers and/or drafting of disciplinary rules.

II. PROTECTING REPUTATIONAL INTERESTS AT THE FORMATION OF THE ATTORNEY–CLIENT RELATIONSHIP

Attorneys interested in controlling their online reputations may consider trying to control their clients’ online activities as part of the contractual ordering of affairs between the lawyer and the client at the outset of the relationship. Because doctors have been at the forefront of these efforts, this Article will first explain how doctors have tried to use non-disclosure agreements and mutual privacy agreements to constrain their patients’ online activity and then will assess whether similar efforts would be viable in the attorney–client context.

A. Comparative Perspective: Physicians’ Attempts to Control the Patients’ Online Reviews of Health Care Services

Physicians were confronted with the issue of online reviews earlier than lawyers, so it is instructive to look at some of their efforts to control their online reputations.\(^6\) Like lawyers, physicians have constraints on their ability to respond to negative reviews because of privacy and

\(^4\) See MODEL RULES OF PROF’L CONDUCT, Preamble, § 12 (2013) (stating that the legal profession has a responsibility toward self-governance).

\(^5\) See infra notes 49–57 and accompanying text.

confidentiality obligations. This has caused some physicians to try to control their online reputation by controlling the content of what their patients post online.

A new industry was created to aid physicians in the defense of their online reputations. One of these companies, Medical Justice Corporation, offers physicians a variety of services to help manage their online reputations. Medical Justice initially provided its physician members with contractual non-disclosure agreements to use at the inception of the physician–patient relationship, but those raised a variety of public policy and enforcement issues under general contract principles, such as unconscionability. They also raised practical issues regarding enforcement because many online reviews are posted anonymously and establishing damages for the breach of these contracts could be difficult.

Due to these problems, Medical Justice shifted its strategy to a creative use of intellectual property law. Medical Justice next provided its physician members with a form contract to use with their patients titled “Mutual Agreement to Maintain Privacy” (“Mutual Agreement”).

---


terms of this contract required the patient to assign to the treating physician "all intellectual property rights, including copyrights," in the patient's online reviews of the physician. The purported consideration for this agreement was the doctor's promise to maintain the confidentiality of the patient's medical information.

The Mutual Agreement was designed to circumvent section 230 of the Communications Decency Act, which protects Internet service providers from a variety of claims based on content posted by third parties, such as defamation claims, but which does not protect Internet service providers from violations of intellectual property law. Instead, the Digital Millennium Copyright Act ("DMCA") shields Internet service providers from liability for copyright violations only if they promptly comply with takedown requests. As a practical matter, if a physician owns the copyright to the online reviews of its services, and the physician does not like an online review, then the physician can send a takedown notice to the Internet service provider on whose site the review appears and the site is likely to immediately honor the takedown notice.

There are many questions about the validity of these agreements that range from the validity of the consideration—physicians already have a pre-existing duty to maintain the confidentiality of their patients' medical information—to whether they violate physicians' ethical rules. There have been several legal challenges to these Mutual Agreements, but no

---

15. See id. (explaining that the consideration given in this type of agreement is the confidentiality of the patient's information).
20. See id. at 396 (illustrating that a valid copyright owner can send a takedown notice to a website in order to have an unfavorable review removed).
21. See id. at 398–403 (explaining what the physician offers in consideration of the contract to obtain "the patient's anticipatory copyright assignment").
rulings regarding their validity. In 2011, the Center for Democracy & Technology filed a complaint with the Federal Trade Commission that alleged that the Mutual Agreements are a deceptive and unfair business practice under the Sherman Act.22 In response to that complaint, Medical Justice appears to have “retired” the Mutual Agreement contracts from the services that it provides its physician members.23 As a Forbes blog post has reported: “Indeed, Medical Justice has done a complete reversal on its customers. Having persuaded its customers that patient reviews should be suppressed, Medical Justice (under a new brand, eMerit) is now selling doctors and dentists a service to help them increase the number of online reviews from patients.”24

Some physicians and dentists, however, are reportedly still using the Mutual Agreement.25 One dentist’s patients have filed a class action lawsuit challenging the validity of the Mutual Agreement after the dentist attempted to enforce the agreement by claiming copyright to a negative review that the patient posted on Yelp.26 The district court has denied the dentist’s motion to dismiss the complaint, but there is no ruling yet on the merits of the case.27
B. **Controlling Client Conduct at the Onset of the Attorney–Client Relationship**

Lawyers who are interested in exercising control over their professional reputation may also be inclined to think about addressing this issue at the inception of the attorney–client relationship. Within the constraints set out in the rules of professional conduct, attorneys and clients have some latitude to contractually define the terms of their relationship. Accordingly, like physicians, lawyers might consider including a provision in the lawyer's engagement letter that would prohibit the client from publically commenting on the lawyers' services during or after the conclusion of the representation or that would assign the copyright of reviews to the lawyer.

1. **Non-Disclosure Agreements**

   As a practical matter, a broad contractual prohibition on publicly commenting about a lawyer's services would prohibit clients who are pleased with their lawyers' services from posting positive reviews just as much as it would prohibit disgruntled clients from posting negative comments. In the growing world of information on the Internet, from a marketing and business perspective, it may be unwise for a lawyer or law firm to constrain the development of any online reputation. Also, as a practical matter, the enforcement of such an agreement could pose significant challenges as many reviews are posted anonymously. It is also not difficult to imagine a variety of enforcement issues such as determining what qualifies as an online review of a lawyer's services. Would this

---

28. *See Model Rules of Prof'l Conduct R. 1.2 cmt. 6 (2013) (“The scope of services provided by a lawyer may be limited by agreement with the client or by terms under which the lawyer's services are made available to the client.”).*

29. *See Josh King, Your Business: Someone Online Hates You, THE RECORDER (Aug. 16, 2013, 4:40 PM) (reporting that “[a]ccording to the latest Nielsen survey data, consumer reviews posted online are now the second most trusted source of marketing information for consumers”); see also Maria Kantravelos, *Riding the DIY Wave*, I.L. B.J., Mar. 2013, at 128, 129 (Mar. 2013) (declaring the need for online marketing). Of course, lawyers can form online reputations in ways other than consumer reviews, such as creating their own content on websites, blogs, etc. See, e.g., Alfredo Sciascia, *Would-Be Clients Watching, Weighing Online Evaluations*, L. OFF. MGMT. & ADMIN. REP., June 2009, at 1, 15 (discussing how websites continue “to serve as an effective online platform for lawyers to showcase their credentials”).*

30. *See Robert D. Richards, *Compulsory Process in Cyberspace*, 36 HARV. J.L. & PUB. POL'Y 519, 535 (2013) (noting how anonymous posting has created significant challenges in the legal world); see also Jeffrey Segal, Michael J. Sacopoulos & Domingo Rivera, *Legal Remedies for Online Defamation of Physicians*, 30 J. LEGAL MED. 349, 349 (2009) (recognizing that “[p]hysicians and other health care providers are often criticized on the Internet”—often times anonymously—and at essentially no cost to the individual making the harsh review).*
include an e-mail to three friends? A post on Facebook? A post on a blog? Or, only posts on formats that potential consumers of legal services are likely to review, such as Avvo? Furthermore, many lawyers would welcome the positive feedback and are really just concerned about negative comments, particularly when considerations, such as the duty of confidentiality, may impair lawyers’ ability to respond to negative comments. A prohibition on any commentary about a lawyer’s services would encompass all types of reviews.

Setting aside the question of practical limitations arising from a contractual agreement, a more important inquiry is whether a contractual prohibition on the public dissemination of statements or opinions about a lawyer’s services would be permitted under ethical rules. As a matter of public policy, any prohibition on publicly communicating about a lawyer’s services would need to exclude any constraints on reporting misconduct to disciplinary authorities. There are also ethical constraints if this provision was construed to release the lawyer prospectively from liability for malpractice. Therefore, this Article is focusing on the enforceability of a provision that would prohibit comments about the lawyers’ services in non-adjudicative public forums such as the media and the Internet. Because the analysis of this question could vary depending on the rules in each state, this Article will focus on the American Bar Association (“ABA”) Model Rules of Professional Conduct to evaluate such an agreement.

Communication is a bedrock principle of the attorney–client relationship. As set out in Model Rule 1.4, “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” A lawyer, therefore, would need to explain to the client all of the implications of making an agreement to forego public comments about the lawyer’s services to the extent reasonably necessary for the client to make an informed decision about whether or not to agree to such a provision. This raises a few considerations. Initially, a client in need of legal assistance may not feel in a position to negotiate or refuse the inclusion of such a provision, which

31. See infra Section III.
32. See, e.g., ILL. RULES OF PROF’L CONDUCT R. 8.4(h) (2010) (“It is professional misconduct for a lawyer to . . . enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.”)
33. See MODEL RULES OF PROF’L CONDUCT R. 1.8(h)(1) (2013) (“A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement . . . .”)
34. Id. R. 1.4(b).
raises a question of whether the disparate bargaining power would impair the validity of such an agreement.\textsuperscript{35} Also, it is fair to question whether a lawyer can objectively explain the pros and cons of such a provision to the client when the provision would exist solely for the benefit of the lawyer. Model Rule 1.7 prohibits a lawyer from representing a client when there is a significant risk that the representation of the client will be materially limited by the lawyer's personal interests.\textsuperscript{36}

Furthermore, the inclusion of a self-protecting provision that is of no benefit to clients is in many respects inconsistent with the fiduciary nature of the attorney-client relationship and lawyers' duty of loyalty to their clients.\textsuperscript{37} Many of the Model Rules of Professional Conduct underscore the fiduciary nature of the attorney-client relationship and requiring a provision at the outset of the relationship that exists solely for the protection of the lawyer may undermine the spirit of these rules.\textsuperscript{38} However, the Model Rules do allow for some actions by lawyers during the formation of the relationship that are primarily motivated by the lawyer's self-interest, so this concern alone is not necessarily dispositive. For example, the Model Rules permit a lawyer to prospectively limit malpractice liability if "the client is independently represented in making the agreement."\textsuperscript{39} The Model Rules also permit a lawyer to seek an advanced conflict waiver in some circumstances.\textsuperscript{40}

An agreement that prohibits a client from expressing an opinion about a lawyer's services in a public forum is, however, distinguishable from the


\textsuperscript{36} See MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2013) (encouraging a lawyer to refrain from representing a client when such representation interferes with the lawyers personal interests).

\textsuperscript{37} See id. R. 1.7 cmt. 1 (explaining that independent judgment and loyalty are essential in an attorney–client relationship and that any conflicts of interest puts this in jeopardy).

\textsuperscript{38} Many rules and comments underscore the fiduciary nature of the attorney–client relationship. See, e.g., id. R. 1.7 (showing evidence that the attorney–client relationship is fiduciary in nature); id. R. 1.8 (implying the fiduciary nature of the attorney–client relationship); id. R. 1.15 (explaining that a lawyer must keep client funds separate from his own personal funds).

\textsuperscript{39} Id. R. 1.8(h)(1) (declaring that a client must be independently represented when making an agreement to prospectively waive liability of the representing attorney).

\textsuperscript{40} See id. R. 1.7(b) (stating the conditions under which a lawyer may represent a client without being subject to discipline when there is a concurrent conflict of interest); see also id. R. 1.7 cmt. 22 (explaining the conditions under which a lawyer may obtain a client waiver to avoid being subject to discipline).
preceding examples. Unlike limitations on malpractice liability, the Model Rules do not require a client who gives up the ability to publicly comment on a lawyer's services to be represented by independent counsel when making that agreement.\textsuperscript{41} Thus, there is no advocate who can advise the client about the terms of the relationship without any self-interest in those terms. Also, advanced conflict waivers are predominately, if not exclusively, used with fairly sophisticated consumers of legal services.\textsuperscript{42} A prohibition on public commentary about a lawyer's services would not be restricted by its nature to sophisticated purchasers of legal services. While the ABA Model Rules of Professional Conduct have some provisions that may guide the potential inclusion of a term in a retainer agreement that would prohibit public commentary about a lawyer's services, they do not explicitly prohibit it.\textsuperscript{43}

Courts should, however, consider whether such agreements would be void as a matter of public policy. There are some strong arguments to support this. First, as discussed, such agreements exist to serve the interest of lawyers, not the interests of clients. Therefore, they are inconsistent with the fiduciary nature of the attorney-client relationship.\textsuperscript{44} Furthermore, the public has difficulty finding meaningful information about lawyers whom they may be interested in hiring, and, therefore, consumers would benefit from access to more information about lawyers.\textsuperscript{45} From this perspective, as the regulators of legal services, courts

\textsuperscript{41} See, e.g., id. R. 1.7 cmt. 22 (omitting any mention of the need for a waiver when an attorney contractually limits the clients ability to comment regarding the lawyers services).

\textsuperscript{42} See Milan Markovic, The Sophisticates: Conflicted Representation and the Lehman Bankruptcy, 2012 UTAH L. REV. 903, 918–19 (2012) (discussing the complexity of advanced waiver conflicts and "[t]he rationale for treating sophisticated and unsophisticated clients differently in terms of waiving conflicts of interest"); see also MODEL RULES OF PROF'L CONDUcT R. 1.7 cmt. 22 (2013) ("[i]f the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to the type of conflict.").

\textsuperscript{43} But see Lucille M. Ponte, Mad Med Posing as Ordinary Consumers: The Essential Role of Self-Regulation and Industry Ethics on Decreasing Deceptive Online Consumer Ratings and Reviews, 12 J. MARSHALL REV. INTELL. PROP. L. 462, 501–02 (2013) ("Professional ethics codes should expressly prohibit these kinds of gag contracts as unethical conduct.").

\textsuperscript{44} See Jan L. Jacobowitz & Kelly Rains Jesson, Fidelity Diluted: Client Confidentiality Given Way to the First Amendment & Social Media, in Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter, 36 CAMPBELL L. REV. (forthcoming 2014) (manuscript at 6) ("[T]he relationship between an attorney and client is a fiduciary relationship of the very highest character. All dealings between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness." (citing Lee v. State Bar, 2 Cal. 3d 927, 939 (1970))).

\textsuperscript{45} See, e.g., Alfredo Sciascia, Would-be Clients Watching, Weighing Online Evaluations, LAW. OFF. MGMT. & ADMIN. REP., June 2009, at 1, 13 (discussing the impact of the Internet on the decision-making of purchasers of legal services).
should view non-disclosure as undermining the legal profession's responsibility to assist consumers in their quest for access to information about legal services.\textsuperscript{46}

In addition, getting information from consumers should be beneficial to the legal profession's interest in delivering competent legal services to consumers. A vice president of LexisNexis opined that:

\begin{quote}
[T]he prevalence and growing use of ratings systems should motivate lawyers to deliver better value and client service. The result of this pursuit will be a more informed potential buyer armed with better and more comprehensive information about lawyers under consideration. All of this contributes to better-qualified leads for the law firm and improved service and legal outcomes for the client.\textsuperscript{47}
\end{quote}

2. Copyright Assignments

It is also possible that some lawyers may consider including provisions in their contracts with clients that emulate the copyright assignments that physicians have used, particularly if courts hold that those provisions are enforceable. Such agreements would raise all of the issues discussed above with respect to non-disclosure agreements. Obtaining a legal interest in content created by a client would, however, also trigger a lawyer's obligations under Model Rule 1.8(a), which states that a lawyer "shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" unless a variety of factors are satisfied, such as ensuring that the terms are fair and reasonable to the client, advising the client of the desirability of seeking the advice of independent counsel for the transaction, and getting informed consent from the client.\textsuperscript{48} Therefore, an attorney would need to comply with this provision in order to obtain an ownership interest in the client's online reviews.

There is no evidence showing use of either non-disclosure agreements or assignments of copyright in the practice of law. It is possible that these issues will never arise. If, however, lawyers do try either method, they should consider the implications carefully.

\textsuperscript{46} See Ann Marie Marciarille, "How's My Doctoring?" Patient Feedback's Role in Assessing Physician Quality, 14 DePaul J. HEALTH CARE L. 361, 402 (2012) (analyzing similar agreements in the physician–patient context and concluding that "physicians who use medical gag orders to chill or suppress negative online reviews rob their peers of intelligence on patient needs and preferences as much as deprive past patients of a voice and prospective patients of useful patient experience data").

\textsuperscript{47} Alfredo Sciascia, Would-be Clients Watching, Weighing Online Evaluations, LAW. OFF. MGMT. & ADMIN. REP., June 2009, at 1, 15.

\textsuperscript{48} MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2013).
should be cognizant of the ethical rules that would govern their conduct. They should also recognize that there is a possibility that a court might find the provision unenforceable as a matter of public policy. From a normative perspective, courts should find them unenforceable. They are inconsistent with the fiduciary nature of the attorney-client relationship and are particularly inappropriate at the formation of that relationship. They also frustrate the public’s interest in finding out meaningful information about lawyers they might want to hire.

III. RESPONDING TO NEGATIVE PUBLIC REVIEWS OF ATTORNEY SERVICES

With the growth of online services lawyers “must recognize that they are being publicly evaluated by more parties than ever before and not just on their legal ability, but on price, perceived value, their ability to communicate with their clients, and many other factors.”

There are a variety of websites that review lawyers and specifically allow consumers to post reviews. These websites include, among others, martindale.com, legalexreviewz.com, and avvo.com. Consumer reviews of lawyers’ services can also appear on other sites such as yelp.com, yahoo.com, and google.com.

As online reviews of lawyers’ services become more common, the most pressing question for lawyers will be how, if at all, they can respond to negative reviews. As discussed below, there are fairly generic ways that lawyers can respond that do not raise issues such as client confidentiality. If, however, a lawyer wants to respond to specific criticisms regarding the handling of a matter, then there are two questions that the lawyer will need to answer. First, does the lawyer’s response contain any confidential client

49. Alfredo Sciascia, Would-be Clients Watching, Weighing Online Evaluations, LAW. OFF. MGMT. & ADMIN. REP., June 2009, at 1, 13; see Lucille M. Ponte, Mad Med Posing as Ordinary Consumers: The Essential Role of Self-Regulation and Industry Ethics on Decreasing Deceptive Online Consumer Ratings and Reviews, 12 J. MARSHALL REV. INTELL. PROP. L 462, 463–67 (2013) (discussing the decrease in traditional advertising and increase in peer assessment when consumers make purchasing decisions); see also Stephanie Francis Ward, Grade Anxiety, A.B.A. J., Feb. 2010 at 48, 53 (predicting that online reviews of lawyers will increase as the under-30 generation enters the workforce).


information and, second, if it does, are there any exceptions to the duty of confidentiality that would permit the lawyer to disclose that information?  

A. Responding to Negative Reviews Without Revealing Client Specific Information

The General Counsel of Avvo, a web site that profiles and rates lawyers, has given the following advice to lawyers who receive negative reviews:

Negative commentary can be a golden marketing opportunity. By posting a professional, meaningful response to negative commentary, an attorney sends a powerful message to any readers of that review. Done correctly, such a message communicates responsiveness, attention to feedback and strength of character. The trick is to not get defensive, petty, or feel the need to directly refute what you perceive is wrong with the review. . . . [A] poorly-handled response to a negative review is much worse than no response at all. It makes you look thin-skinned and defensive. Worse yet, if you argue and reveal client confidences (or even potential harmful non-confidences), you may be subject to discipline.  

This is good advice. Many service providers in a variety of industries respond to negative consumer reviews in a generic way that communicates that the provider cares about satisfying customers and wants to make things right. For example, responses to online reviews in a variety of service industries frequently say things like "We are sorry that you were not happy with our service. Customer satisfaction is very important to us." Some attorneys on Avvo and other similar sites are following this type of

---

54. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (b) (2013) (describing when an attorney is permitted to disclose confidential client information).


56. See, e.g., Martha Chan, Have You Googled Your Name Lately, FAM. ADVOC., Winter 2013, at 38, 39-40 (recommending a variety of ways to soften the impact of negative online reviews); accord Debra Bruce, How Lawyers Can Handle Bad Reviews and Complaints on Social Media, TEX. B.J., MAY 2012, at 402, 403 (supporting the notion of trying to generate as much positive content as possible to negate bad reviews).
advice.\textsuperscript{57}

There are, however, starting to be some cases where lawyers have found themselves subject to potential discipline by responding in a manner that reveals client confidences. In August 2013 the Illinois Attorney Registration and Disciplinary Commission ("ARDC") filed a disciplinary complaint against an attorney who posted a response to a former client's negative online review on Avvo.\textsuperscript{58} The complaint alleged that a former client wrote: "She only wants your money, claims ‘always on your side’ is a huge lie. Paid her to help me secure unemployment, she took my money knowing full well a certain law in Illinois would not let me collect unemployment. [N]ow is billing me for an additional $1500 for her time."\textsuperscript{59} Avvo removed the post sometime later, but then the client posted another similar review.\textsuperscript{60} In response to this second negative review, the complaint alleged that the lawyer posted the following reply:

This is simply false. The person did not reveal all the facts of his situation up front in our first and second meeting. . . . When I received his personnel file, I discussed the contents of it with him and informed him that he would likely lose unless the employer chose not to contest the unemployment (employers sometimes do . . .). Despite knowing that he would likely lose, he chose to go forward with a hearing to try to obtain benefits. 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 coworker are what caused the consequences he is now so upset about.\textsuperscript{61}

Paragraph 22 of the ARDC's complaint states:

By stating in her April 11, 2013 AVVO posting that Rinehart beat up a female coworker, Respondent revealed information that she had obtained from Rinehart about the termination of his employment. Respondent's statements in the posting were designed to intimidate and embarrass

---

\textsuperscript{57} See, e.g., Avvo, http://www.avvo.com/attorneys/60601-il-stephen-phillips-1126711/reviews.html (last visited Mar. 23, 2014) (showing an example of a statement made by a lawyer responding to a negative online review which stated, "We strive for the utmost in client satisfaction, and we're sorry to hear that you had this experience. Please contact us directly so we can address your specific concerns").

\textsuperscript{58} See, e.g., In the Matter of Tsamis, Ill. Att'y Registration and Disciplinary Comm'n, Comm. No. 2013PR00095 (2013), available at http://www.iardc.org/13PR0095CM.html (providing an example of a disciplinary complaint hearing after an attorney responded to a negative online review in Avvo).

\textsuperscript{59} Id. at 4.

\textsuperscript{60} See id. (alleging that although Avvo removed the post, the client posted a similar review sometime later).

\textsuperscript{61} Id. at 5.
Rinehart and to keep him from posting additional information about her on the AVVO website.\textsuperscript{62}

Paragraph 23 of the complaint concluded that the conduct constituted misconduct in three separate ways: it revealed confidential information in violation of Illinois Rule of Professional Conduct 1.6(a), it used means intended to embarrass, delay or burden a third person in violation of Illinois Rule of Professional Conduct 4.4, and it was prejudicial to the administration of justice.\textsuperscript{63}

Based on the wording of the first sentence in Paragraph 22 of the complaint, it is possible the ARDC was seeking to discipline the attorney based on the last sentence in the post and that the ARDC found the rest of the post permissible under Illinois Rule 1.6(b).\textsuperscript{64} It is somewhat ambiguous as to whether the complaint was only focused on the statement about the coworker or whether the ARDC found other parts of the post problematic because they were intended to embarrass or were prejudicial to the administration of justice. In a subsequent joint stipulation of the facts, the parties simply stipulated that this post “exceeded what was necessary to respond to Rinehart’s accusations.”\textsuperscript{65} The attorney was reprimanded.\textsuperscript{66}

Another lawyer faced similar disciplinary charges in Georgia.\textsuperscript{67} While fewer details are available about the exact comments posted, the decision rejecting the attorney’s petition for voluntary discipline stated:

Ms. Skinner admitted that, after the client had notified Ms. Skinner that the client had discharged Ms. Skinner and had obtained new counsel, Ms. Skinner posted on the [I]nternet personal and confidential information about the client that Ms. Skinner had gained in her professional relationship with the client. Ms. Skinner posted the information in response to negative

\textsuperscript{62} Id.

\textsuperscript{63} See id. at 6 (alleging that the attorney should be subject to discipline).

\textsuperscript{64} See also William Wernz, This Month’s Topic: Online Ratings of Lawyers, MINN. LAWYERING (Oct. 1, 2013), http://minnesotalawyer.com/2013/10/october-2013-minnesota-ethics-update/ (noting that disclosure of the specifics of the case was what likely subjected the attorney to disciplinary action).


\textsuperscript{67} See In re Skinner, 740 S.E.2d 171, 173 (Ga. 2013) (ruling that the attorney was required not to disclose confidential client information).
reviews of Ms. Skinner the client had posted on consumer websites.  

The court specifically noted that "the record does not reflect the nature of the disclosures (except that they concern personal and confidential information) or the actual or potential harm to the client as a result of the disclosures."  

1. Analyzing Confidentiality

These disciplinary complaints raise the basic confidentiality analysis that any lawyer must undertake before responding to an online review in a manner that contains specific information. First, does the response contain confidential information and second, if so, is the lawyer permitted to reveal it under any exceptions? For example, a client could give informed consent to a disclosure or the client could waive the right to confidentiality. However, the exception most likely to be considered in this situation is the self-defense provision of ABA Model Rule 1.6(b)(5). Model Rule 1.6(a) states, "[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)." The comments provide that the rule "applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source." One of the exceptions in subsection (b) permits a lawyer to reveal confidential information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . or to respond to allegations in any proceeding concerning the lawyer’s representation of the

---

68. Id. at 172.
69. Id. at 173 n.6.
70. For example, if the client’s review of the attorney’s services contains previously confidential information, that information may become generally known and no longer be considered confidential. See, e.g., RESTATEMENT OF THE LAW GOVERNING LAWYERS § 59 (2007) ("Confidential client information consists of information relating to representation of a client, other than information that is generally known.").
72. MODEL RULES OF PROF’L CONDUcT R. 1.6(a) (2013).
73. Id. R. 1.6(a) cmt. 3; see Jan L. Jacobowitz & Kelly Rains Jesson, Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter, 36 CAMPBELL L. REV. (forthcoming 2014) (discussing the ABA Model Rules’ very broad definition of confidential information, which has no exception for information that is in the public record).
An issue that may confront lawyers is whether their responses to clients' online reviews reveal confidential information and, if so, whether such revelations are permissible under Model Rule 1.6(b).

2. Is the Information Confidential?

A lawyer contemplating posting a response to an online review that contains information specific to the client's matter will obviously need to be familiar with the law of the governing jurisdiction regarding confidentiality. It is important to note one of the more controversial recent developments regarding the scope of confidential information—*Hunter v. Virginia State Bar.*

In *Hunter,* an attorney was disciplined for maintaining a blog that discussed a variety of legal issues and cases, but was mainly focused on discussing the specifics of favorable outcomes that attorney, Hunter, obtained for his clients. Hunter's blog specifically identified his clients' names and some of the facts regarding their cases. The Virginia State Bar ("VSB") launched an investigation into the blog and charged Hunter with violating the Virginia Rules of Professional Conduct that relate to advertising and confidential information.

During a hearing, one of Hunter's former clients "testified that he did not consent to information about his cases being posted on Hunter's blog and believed that the information posted was embarrassing or detrimental to him, despite the fact that all such information had previously been revealed in court." Hunter contended that he did not need to obtain his client's consent to discuss their cases on his blog "because all the information that he posted was public information." He also argued that his blog was political speech, not commercial speech, and that the

---

74. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2013).
76. See id. at 613 (evaluating the nature of Hunter's blog inasmuch as it was primarily a vehicle to promote his own litigation record).
77. See id. at 614 ("[T]he postings of Hunter's case wins on his webpage advertised cumulative case results.").
78. Id.; VA. RULES PROF'L CONDUCT R. 1.6(a) (2010):
A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . .

Id.
79. Hunter, 744 S.E.2d at 614.
80. Id.
VSB's position on the matter violated his First Amendment rights. 81

The VSB disagreed that Hunter was free to post public information about his clients and held that Hunter violated Virginia Rule 1.6. 82 The VSB also found that part of the purpose of the blog was to advertise Hunter's law firm and, therefore, it needed to comply with the Virginia Rules of Professional Conduct 7.1 and 7.2 that prohibit advertisements from being misleading and require them to contain certain disclaimers. 83

Hunter appealed to a three-judge panel of the circuit court, which ruled that the VSB's interpretation of Virginia Rule 1.6 violated the First Amendment, but that its interpretation of Virginia Rules 7.1 and 7.2 did not violate the First Amendment. 84 Hunter then appealed to the Virginia Supreme Court. 85 The Supreme Court of Virginia agreed with the circuit court that the blog was commercial speech even though it was intermingled with some political speech and, accordingly, it analyzed the restrictions and disclaimer requirements in Virginia Rule 7.1 and 7.2 under the Central Hudson test 86 that the Supreme Court of the United States has articulated for government restraints on commercial speech. 87

The Supreme Court of Virginia held that the VSB established a substantial government interest in protecting the public from potentially misleading advertising and, therefore, the advertising rules did not violate the First Amendment. 88

The Supreme Court of Virginia next turned to the question of whether Virginia Rule 1.6 violated Hunter's First Amendment rights. The VSB argued that Hunter violated Virginia Rule 1.6 "by disclosing potentially embarrassing information about his clients on his blog 'in order to advance his personal economic interests.'" 89 Hunter argued that his blog posts

81. See id. at 617 ("Hunter chose to comingle sporadic political statements within his self-promoting blog posts in an attempt to camouflage the true commercial nature of his blog.").
82. See id. at 614 ("Specifically, the VSB found that the information in Hunter's blog posts 'would be embarrassing or be likely to be detrimental' to clients and he did not receive consent from his clients to post such information.").
83. See id. at 617 (noting that Hunter's blog contained "self-promoting blog posts").
84. See id. at 613–14 (appealing to a three-judge panel of the circuit court, where the court subsequently heard Hunter's argument).
85. See id. at 615 (deciding to hear the question of whether "'[t]he Ruling of the Circuit Court finding a violation of Rules 7.1(a)(4) and 7.2(a)(3) conflicts with the First Amendment to the Constitution of the United States'").
87. See Hunter, 744 S.E.2d at 617–19 (discussing the four-prong analysis set forth in Central Hudson).
88. See id. at 619 ("These regulations directly advance [the VSB's] interest and are not more restrictive than necessary, unlike outright bans on advertising.").
89. Id.
were entitled to First Amendment protection because they only revealed information that had previously been disclosed in public judicial proceedings.\(^9\) The Supreme Court of Virginia framed the issue as "whether the state may prohibit an attorney from discussing information about a client or former client that is not protected by attorney–client privilege without express consent from that client."\(^9\)

The Supreme Court of Virginia agreed with Hunter and held that, as a general rule, the state may not prohibit a lawyer from discussing information about a client or former client that is not protected by the attorney–client privilege.\(^9\) The court reasoned that attorney speech may be regulated if it poses a substantial likelihood of materially prejudicing a pending case, but it may not be regulated regarding public information about criminal cases that have been tried in courts that were open to the public and have reached a conclusion.\(^9\) The court further reasoned that the "VSB concedes that all of the information that was contained within Hunter's blog was public information and would have been protected speech had the news media or others disseminated it."\(^9\) As one article concluded, the court's opinion essentially holds that "it is irrelevant whether an attorney's blog post is embarrassing or detrimental to his client, as long as the information in the blog is part of the public record."\(^9\)

Hunter is not, however, without its critics. Professor Peter Joy has opined:

In effect, the Virginia Supreme Court has created a public records or public knowledge exception to client confidentiality, which erodes the duty of loyalty lawyers owe current and former clients . . . . Now lawyers can embarrass and humiliate former clients with impunity as long as they use confidential information that is in the public records. The court's ruling is in direct contradiction with the rules of professional conduct.\(^9\)

---

90. See id. (arguing that the VSB's interpretation of Rule 1.6 is unconstitutional because the matters discussed in his blogs were public information).

91. Id.

92. See id. (holding in favor of Hunter's speech protections).

93. See id. at 619–20 (settling the question about whether public information from past cases is protected by the First Amendment).

94. Id. at 620.


Another article noted that *Hunter* is novel in its creation of an exception to the client confidentiality rule—"public record information when a case has concluded."97 "In fact, other state courts have expressly held that the rule of confidentiality is not nullified simply because the information has become part of the public record."98

The Supreme Court of the United States has denied a petition for a writ of certiorari in *Hunter*, so it is not clear how much impact this decision will have beyond Virginia until the Court is presented with the question of whether ethical rules that constrain lawyers from discussing publicly available information about their clients violate lawyers’ First Amendment rights.99 Until then, if other state courts follow the holding in *Hunter*, that reasoning would impact the analysis of an attorney’s response to a negative online review in that an attorney would be able to discuss the specifics of the client’s matter in the response to the online review as long as those specifics had become a matter of public record. Many states, however, have a much broader definition of confidential information; thus, any attorney contemplating a response to an online review that contains client specific information would be wise to be familiar with the law in the governing jurisdiction.100

3. If the Information Is Confidential, Is It Subject to the Self-Defense Exception in Rule 1.6(b)(5)?

If a lawyer wants to include information in a response to a negative online review that could be construed as confidential information, the lawyer should next assess whether the information could still be revealed as an exception to the general confidentiality rule. ABA Model Rule 1.6(5), which is frequently known as the self-defense exception, permits a lawyer

---


98. Id.


100. See, e.g., Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter, 36 CAMPBELL L. REV. (forthcoming 2014)* (manuscript at 30) (referencing *In re Skinner and Hunter* as cases involving the interpretation of when "confidential information" is revealed); Ellen Yankiver Suni, *Ethical Issues for Innocence Projects, 70 UMKC L. REV. 921, 938–39 (2002)* (noting the broad definition of confidential information according to the Restatement as "information relating to representation of a client, other than information that is generally known and discussing the import of the fact that "[c]onfidentiality duties continue after conclusion of the representation").
to reveal confidential information:

[T]o 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.101

The comments to the rule suggest that a lawyer may be able to make some responses prior to the actual commencement of a proceeding. Comment 10 states in part:

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. . . . The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.102

Any disclosures permitted under Rule 1.6(b) must be limited to those disclosures that the lawyer "reasonably believes necessary."103

As with all of these issues, any lawyer seeking to disclose confidential information in response to a negative online review will need to research the law of the governing jurisdiction regarding the scope of the self-defense exception. For example, there is a split in the authority as to whether a former client's claim of constitutionally ineffective assistance of counsel allows former counsel to reveal confidential information under the self-defense exception.104 The ABA Standing Committee on Ethics and Professional Responsibility issued an ethics opinion that found that the self-defense exception did not apply in this circumstance.105 Its reasoning may be informative about the application of the self-defense exception in response to negative online reviews because it limits the exception to circumstances where the lawyer needs to defend against charges that

101. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2013).
102. Id. R. 1.6(b) cmt. 10 (emphasis added).
103. Id. R. 1.6(b).
104. See generally RONALD ROTUNDA & JOHN DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §§ 1.6-12(a)-(h) (2013-2014 ed.) (recognizing and analyzing exceptions to the revelation of confidential client information).
imminently threaten the lawyer with serious consequences:

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil[,] or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so. For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory[,] or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception. Although the scope of the exception has expanded over time, the exception is a limited one, because it is contrary to the fundamental premise that client[-]lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation. Consequently, it has been said that '[a] lawyer may act in self-defense under [the exception] only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences . . . .\(^{106}\)

Similarly, the Restatement of the Law Governing Lawyers states that a lawyer may only reveal client confidences "to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions . . . .\(^{107}\) The Restatement further opines that the disclosure of confidential information in self-defense is warranted only when it constitutes a "proportionate and restrained response to the charges."\(^{108}\) Therefore, "[t]he concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others."\(^{109}\) This same comment, however, later states that "[w]hen a client has made a public charge of wrongdoing, a lawyer is warranted in making a proportionate and restrained public response."\(^{110}\)

The weight of the limited authority suggests that negative comments about a lawyer's services on an online forum would not trigger the self-defense exception under ABA Model Rule 1.6(5), if such comments

\(^{106}\) Id. (discussing the ABA Model Rule that allows for a self-defense exception giving lawyers the ability to reveal confidential client information in certain situations).

\(^{107}\) RESTATEMENT OF THE LAW GOVERNING LAWYERS § 64 cmt. c (2007).

\(^{108}\) Id. § 64 cmt. e.

\(^{109}\) Id.

\(^{110}\) Id.
amount to "mere criticism." Two recent California ethics opinions have specifically examined the issue of responding to a former client’s adverse public comments. California, however, has not adopted a self-defense provision similar to ABA Model Rule 1.6(5). The Los Angeles County Bar Association Professional Responsibility and Ethics Committee published an ethics opinion concluding that a lawyer may respond, but only if the response "does not disclose confidential or attorney–client privileged information . . . [and is not] in a manner that will injure [the former client] in a matter involving the former representation." This opinion is qualified by an assumption that the client’s post does not contain any confidential information and there is no litigation or arbitration pending between the attorney and former client.

The Bar Association of San Francisco wrote a similar ethics opinion that concluded:

While the online review could have an impact on the attorney’s reputation, absent a consent or waiver, disclosure of otherwise confidential information is not ethically permitted in California unless there is a formal complaint by the client, or an inquiry from a disciplinary authority based on a complaint by the client. Even in situations where disclosure is permitted, disclosure should occur only in the context of the formal proceeding or inquiry, and should be narrowly tailored to the issues raised by the former client. If the matter previously handled for the former client has not concluded, depending on the circumstances, it may be inappropriate for the attorney to provide any substantive response in the online forum, even one that does not disclose confidential information.

The opinion noted that California’s rules of professional conduct do not have a self-defense provision similar to the Model Rules, but that such an

111. ELLEN J. BENNETT, ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, § 1.6 (2011).
113. See MODEL RULES OF PROF’L CONDUCT R. 1.6(5) (2013) (discussing the “self-defense” exception to disclosing confidential client information); see also L.A. Cnty. Bar Ass’n, Formal Op. 525 (2012) (examining California’s lack of a self-defense exception similar to ABA Model Rule 1.6(5)).
115. See id. (qualifying the committee’s opinion with the requirements that: (1) any online comments be void of confidential information and (2) that there not be ongoing litigation “between the attorney and former client”).
exception can be found in its statutory and case law. However, the opinion looked at the interpretations of the Model Rules, as well as the Restatement, to conclude that a lawyer could provide a general response to an online review by a former client, but the attorney could not disclose confidential information absent the client’s informed consent or a waiver of confidentiality.

There is one ethics opinion by the Los Angeles County Bar Association Professional Responsibility and Ethics Committee that examines the issue of responding to a former client’s adverse public comments. California, however, has not adopted a self-defense provision similar to Model Rule 1.6(5). Thus, this ethics opinion concludes that a lawyer may respond but only if the response “does not disclose confidential or attorney-client privileged information . . . [and is not] in a manner that will injure [the former client] in a matter involving the former representation.” This opinion is qualified by an assumption that the client’s post does not contain any confidential information and there is no litigation or arbitration pending “between the attorney and former client.”

The weight of the limited authority suggests that negative comments about a lawyer’s services on an online forum would not trigger the self-defense exception under Model Rule 1.6(5), if such comments amount to “mere criticism.” For example, there is a formal ethics opinion that the New York County Lawyers’ Association Committee on Professional Ethics drafted in 1997 that concludes a lawyer could not reveal confidential information under the self-defense exception after the client complained to a neighbor about the lawyer’s services. This opinion reasoned:

117. Id.
118. Id.
120. See MODEL RULES OF PROF’L CONDUCT R. 1.6(5) (2013) (discussing the “self-defense” exception to disclosing confidential client information); see also L.A. Cnty. Bar Ass’n, Formal Op. 525 (2012) (examining California’s lack of a self-defense exception similar to ABA Model Rule 1.6(5)).
122. See id. (qualifying the committee’s opinion with the requirements that: (1) any online comments be void of confidential information and (2) that there not be ongoing litigation “between the attorney and former client”).
123. ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, § 1.6 (2011).
[I]t is the opinion of this Committee that [the self-defense exception] applies only to accusations of "wrongful conduct" that are actionable, involving the threat of an imminent proceeding, and not merely to negative references or gossip about the attorney. Thus, a lawyer may not reveal client confidences and secrets only to protect his or her reputation against unfavorable or unflattering characterizations regarding the lawyer or the lawyer's services unless such characterizations are subject to an impending charge or claim brought before a body empowered to rule on such matters. Indeed, an interpretation of the rule that would allow lawyers to divulge protected information based on disapproving references or depictions, without more, is inconsistent with the solemn duty . . . to preserve client confidences and secrets.¹²⁵

From the standpoint of lawyers and their rules of professional conduct, either refraining from responding to a negative online review or doing so in a way that does not reveal any client confidences is the safest course for lawyers. If a lawyer is going to include any client specific information in the response, the lawyer should consider whether the information would be considered confidential information and, if so, whether the self-defense exception could apply under the law of the governing jurisdiction. It is unlikely, however, that most courts would construe the self-defense exception to apply to responses to negative online reviews. To the extent that there is ambiguity in the rules of the various states about whether or not public criticism of a lawyer gives rise to the self-defense exception, the state supreme courts should consider revising their rules to remove any such ambiguity.

From the perspective of consumers and the reputation of the legal profession, it is probably helpful for consumers to see a non-defensive generic response that indicates that the lawyer takes seriously complaints by former clients, cares about client satisfaction and is professional in dealing with criticism. There is, however, a risk that the public will be deceived by online reviews that contain false information or that are otherwise misleading to which a lawyer may not be able to provide an adequate response due to confidentiality requirements. Because lawyers are constrained from providing their side of the story, however, the public does not benefit from one of the principles of free speech—"sunlight is the most powerful of all disinfectants."¹²⁶ In such instances, a lawyer might consider filing a suit for defamation.

¹²⁵. Id.
4. Defamation Lawsuits

A lawyer who believes that comments in an online review are defamatory false statements of fact could file a lawsuit for defamation against the client.\textsuperscript{127} A defamation suit, however, poses substantial hurdles as a remedy for controlling one's online reputation.\textsuperscript{128} As an initial matter, a defamation suit only covers false statements of defamatory fact.\textsuperscript{129} It does not cover opinions and many negative online reviews may only contain opinions.\textsuperscript{130} Satisfying the elements of the cause of action can also be difficult given the First Amendment protections for speech.\textsuperscript{131}

Furthermore, negative comments will remain online until there is a judgment.\textsuperscript{132} Courts will not order allegedly defamatory content to be removed during the pendency of a lawsuit because that is considered a prior restraint on speech that violates the First Amendment.\textsuperscript{133} Despite these hurdles, some lawyers have successfully brought defamation claims against prior clients thus making it a possible remedy to a false and defamatory online review of a lawyer's services.\textsuperscript{134}

\textsuperscript{127} See Restatement (Second) of Torts § 581A (1977) ("One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."); Id. § 566 (holding that an opinion "is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion"). See generally Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) (holding that private individuals may sue for defamation because states can "constitutionally allow private individuals to recover damages for defamation on the basis of any standard of care except liability without fault").

\textsuperscript{128} See, e.g., New York Times, 376 U.S. at 256-65 (examining some of the difficulties posed in order for one to prevail in a defamation suit); see also Carl Franzen, Critical Yelp Comments Allowed to Stand After Virginia Supreme Court Ruling, TALKING POINTS MEMO (Jan. 3, 2013, 7:35 PM), http://talkingpointsmemo.com/idealab/critical-yelp-comments-allowed-to-stand-after-virginia-supreme-court-ruling (illustrating the difficulties individuals face when the defaming statements are allowed to remain online).

\textsuperscript{129} See Lauren Guicheteau, What Is the Media in the Age of the Internet? Defamation Law and the Blogosphere, 8 WASH. J. L. TECH. & ARTS 573, 577 (2013) (stating that most actions for defamation require several factors, including a false statement published that causes harm to the individual due to the publisher's negligence).

\textsuperscript{130} See id. (explaining that the First Amendment protects opinions from defamation suits (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990))).

\textsuperscript{131} See Carl Franzen, Critical Yelp Comments Allowed to Stand after Virginia Supreme Court Ruling, TALKING POINTS MEMO (Jan. 3, 2013, 7:35 PM), http://talkingpointsmemo.com/idealab/critical-yelp-comments-allowed-to-stand-after-virginia-supreme-court-ruling (noting that an initial win—for keeping defamatory information online through the trial process—was a win for First Amendment rights).

\textsuperscript{132} See id. (stating that the Virginia courts decided that the defamatory material could remain online during the duration of the trial).

\textsuperscript{133} See, e.g., id. (describing how Virginia courts allowed the comments at issue to remain online during a defamation suit).

\textsuperscript{134} See, e.g., Afshari v. Barer, 769 N.Y.S.2d 687, 689 (N.Y. App. Term 2003) (affirming a claim for defamation regarding statements made during correspondence between the opposing
Any lawyer who files a defamation suit should be aware of the risk of being found liable for the defendant’s attorneys’ fees under state anti-SLAPP laws (SLAPP is an acronym for “Strategic Litigation Against Public Participation”). Anti-SLAPP laws exist in many states and are designed to prevent lawsuits that are filed to silence a voice of criticism. Not every state has an anti-SLAPP law and the states that do have them vary in terms of the scope and strength of the law.

California, for example, has a broad anti-SLAPP law that defines protected activities to include any “written or oral statements [or writing] made in a public forum in connection with an issue of public interest.” California courts have interpreted this provision to apply to anonymous comments on a website regarding a company’s business practices and parties; see also Debra Bruce, How Lawyers Can Handle Bad Reviews and Complaints on Social Media, TEX. B.J., May 2012, at 402, 403 (maintaining that a lawyer should avoid lashing out at a complaining client who states one’s grievances online (citing Wong v. Jing, 189 Cal. App. 4th 1354 (6th Dist. 2010))); Josh King, Your Business: Someone Online Hates You, THE RECORDER (Aug. 16, 2013, 4:40 PM), http://www.therecorder.com/management/id=1202614786352/Your%20Business%20Someone%20Online%20Hates%20You?slreturn=20140015105825# (illustrating how the lawyer does, however, risk the “Streisand Effect,” meaning that bringing attention to the negative review can result in it getting greater attention than it would have if the lawyer had ignored it).

California courts have interpreted this provision to apply to anonymous comments on a website regarding a company’s business practices and parties; see also Debra Bruce, How Lawyers Can Handle Bad Reviews and Complaints on Social Media, TEX. B.J., May 2012, at 402, 403 (maintaining that a lawyer should avoid lashing out at a complaining client who states one’s grievances online (citing Wong v. Jing, 189 Cal. App. 4th 1354 (6th Dist. 2010))); Josh King, Your Business: Someone Online Hates You, THE RECORDER (Aug. 16, 2013, 4:40 PM), http://www.therecorder.com/management/id=1202614786352/Your%20Business%20Someone%20Online%20Hates%20You?slreturn=20140015105825# (illustrating how the lawyer does, however, risk the “Streisand Effect,” meaning that bringing attention to the negative review can result in it getting greater attention than it would have if the lawyer had ignored it).

California, for example, has a broad anti-SLAPP law that defines protected activities to include any “written or oral statements [or writing] made in a public forum in connection with an issue of public interest.” California courts have interpreted this provision to apply to anonymous comments on a website regarding a company’s business practices and parties; see also Debra Bruce, How Lawyers Can Handle Bad Reviews and Complaints on Social Media, TEX. B.J., May 2012, at 402, 403 (maintaining that a lawyer should avoid lashing out at a complaining client who states one’s grievances online (citing Wong v. Jing, 189 Cal. App. 4th 1354 (6th Dist. 2010))); Josh King, Your Business: Someone Online Hates You, THE RECORDER (Aug. 16, 2013, 4:40 PM), http://www.therecorder.com/management/id=1202614786352/Your%20Business%20Someone%20Online%20Hates%20You?slreturn=20140015105825# (illustrating how the lawyer does, however, risk the “Streisand Effect,” meaning that bringing attention to the negative review can result in it getting greater attention than it would have if the lawyer had ignored it).

California, for example, has a broad anti-SLAPP law that defines protected activities to include any “written or oral statements [or writing] made in a public forum in connection with an issue of public interest.” California courts have interpreted this provision to apply to anonymous comments on a website regarding a company’s business practices and parties; see also Debra Bruce, How Lawyers Can Handle Bad Reviews and Complaints on Social Media, TEX. B.J., May 2012, at 402, 403 (maintaining that a lawyer should avoid lashing out at a complaining client who states one’s grievances online (citing Wong v. Jing, 189 Cal. App. 4th 1354 (6th Dist. 2010))); Josh King, Your Business: Someone Online Hates You, THE RECORDER (Aug. 16, 2013, 4:40 PM), http://www.therecorder.com/management/id=1202614786352/Your%20Business%20Someone%20Online%20Hates%20You?slreturn=20140015105825# (illustrating how the lawyer does, however, risk the “Streisand Effect,” meaning that bringing attention to the negative review can result in it getting greater attention than it would have if the lawyer had ignored it).

California, for example, has a broad anti-SLAPP law that defines protected activities to include any “written or oral statements [or writing] made in a public forum in connection with an issue of public interest.” California courts have interpreted this provision to apply to anonymous comments on a website regarding a company’s business practices and parties; see also Debra Bruce, How Lawyers Can Handle Bad Reviews and Complaints on Social Media, TEX. B.J., May 2012, at 402, 403 (maintaining that a lawyer should avoid lashing out at a complaining client who states one’s grievances online (citing Wong v. Jing, 189 Cal. App. 4th 1354 (6th Dist. 2010))); Josh King, Your Business: Someone Online Hates You, THE RECORDER (Aug. 16, 2013, 4:40 PM), http://www.therecorder.com/management/id=1202614786352/Your%20Business%20Someone%20Online%20Hates%20You?slreturn=20140015105825# (illustrating how the lawyer does, however, risk the “Streisand Effect,” meaning that bringing attention to the negative review can result in it getting greater attention than it would have if the lawyer had ignored it).
reasoned "that 'websites that are accessible free of charge to any member of the public where members of the public may read the views and information posted, and post their own opinions, meet the definition of a public forum . . . ."”140 If a defendant files a motion to strike a complaint under the anti-SLAPP statute, then the burden shifts to the plaintiff to demonstrate a likelihood of prevailing on the merits.141 If the court grants the defendant's motion to strike, the defendant is entitled to attorneys' fees and costs.142 Some anti-SLAPP statutes impose additional penalties.143

A recent dispute in an unreported decision highlights many of the foregoing issues in the attorney-client context.144 In Gwire v. Blumberg,145 an unhappy former client anonymously posted negative comments about attorney William Gwire on complaintsboard.com.146 The comments stated, in part, "Gwire committed a horrific fraud against me that has irreparably damaged every aspect of my life. I hope this partial summary of Gwire's incredibly unethical history may help other innocent people."147 Gwire posted a response on the forum:

In his rebuttal, Gwire called Blumberg "not only unreliable but a proven liar." The rebuttal referred to Blumberg as "a mentally unbalanced former client . . . who has a history of taking bizarre, and even criminal actions


141. See CAL. CIV. PROC. CODE § 425.16(b) (Deering Supp. 2014) (stating that causes of action that raise free speech rights regarding matters of public interest are "subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim").

142. See id. § 425.16(c) (permitting the court to award attorney's fees to the defendant if the defendant prevails on a special motion to strike).

143. Marc J. Randazza, Nevada's New Anti-SLAPP Law: The Silver State Sets the Gold Standard, NEV. LAW., OCT. 2013, at 7, 9-10 (discussing amendments to Nevada's anti-SLAPP law that make it one of the strongest protectors of speech and provides for additional penalties of up to $10,000 in addition to attorneys' fees and costs).


145. Id.

146. See id. at *1-2 (relating how the plaintiff (Gwire) had filed suit against the defendant (Blumberg), because Blumberg posted negative comments about him on the Internet).

147. Id. at *2.
against people he believes have hurt him.” Gwire claimed Blumberg had a
pattern of blaming others “for his failures.” According to Gwire, Blumberg
had “completely lost not one, but two fortunes entrusted to him . . . in his
attempt to be a hotshot hedge fund manager[.]” Gwire also stated
Blumberg’s “wife has divorced him and their divorce file is replete with
episodes of unstable behavior by him.” Finally, Gwire accused Blumberg of
“lashing out.”

Gwire has sued his former client, Blumberg, for defamation and trade
libel. Blumberg moved to dismiss the lawsuit under California’s Anti-
SLAPP statute, which the trial court granted in part but denied as to the
defamation claims, because the trial court found that Gwire had met his
burden of proving that he will probably prevail on his claims. The
court of appeals affirmed this holding. The appropriateness of Gwire’s
response to the online review, however, was not raised as an issue in the
court of appeals’ decision and it is difficult to analyze from the facts in the
decision whether any of the statements would be considered confidential
information under California law. This case does, however, illustrate
how all of the foregoing legal issues can arise in a dispute between a lawyer
and a former client.

IV. SETTLEMENT OF DISPUTES WITH CLIENTS

As illustrated above, sometimes the relationship between a lawyer and a
client ends poorly and may result in a variety of claims including a lawyer’s
breach of contract claim against a client who does not pay the lawyer’s
legal fees or a client’s malpractice claim against the lawyer. Any disputes
arising between a client and a lawyer may end in threatened litigation or
the actual commencement of an action. As with most disputes in the legal
system, these disputes will probably result in a settlement. This raises
the last question that this Article will explore: Can a confidentiality and

148. Id. at *3 n.3.
149. See id. at *1 (stating that after the defendant posted defamatory statements online, the
plaintiff sued his former clients).
150. See id. at *3–4 (noting that the court dismissed as to a portion of the plaintiff’s claim, but
holding that he could nonetheless prove defamation as to some of the defendant’s statements (citing
CAL. CIV. PROC. CODE § 425.16)).
151. See id. at *13 (agreeing with the previous court to affirm the holding (citing CAL. CIV.
PROC. CODE § 425.16)).
152. See generally id. at *3–4 (noting that after the plaintiff threatened to sue the defendant for
his online posting, the defendant revised his subsequent online statements).
153. See Marc Galanter & Mia Cahill, “Most Cases Settle”: Judicial Promotion and Regulation of
Settlements, 26 STAN. L. REV. 1339, 1339–40 (1994) (explaining the high rate of settlements of civil
cases in the United States).
non-disparagement provision in a settlement agreement between a lawyer and a client be drafted in a manner that would prevent the client from posting negative online reviews about a lawyer as a term of the settlement?

ABA Model Rule 1.8(h)(2) prohibits a lawyer from settling "a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith."154 As the comments to Model Rule 1.8 explain, there is a "danger that a lawyer will take unfair advantage of an unrepresented client or former client," which is why they must be advised of the desirability of seeking the advice of independent counsel.155 As long as the lawyer complies with this rule, there is nothing that prohibits a lawyer from settling a malpractice or other dispute with a client.156

A settlement agreement is, of course, a contract between private parties that will be enforced subject to the defenses available under contract law.157 If a settlement agreement contained a confidentiality provision that prohibited a former client from posting negative online reviews, a former client subject to such a provision could contend that agreement violates public policy and is unenforceable.158 The arguments here are similar to those raised in Section II with respect to non-disclosure agreements at the onset of the attorney-client relationship, but there are some differences with a confidentiality provision in a settlement agreement that could warrant a different treatment by the courts.

One key difference that may weigh in favor of enforcing a confidentiality agreement in a settlement agreement is Model Rule 1.8's requirement that the client be advised of obtaining independent counsel and the likelihood that the client will have independent counsel.159 Unlike the inception of the attorney-client relationship—which is based

155. Id. R. 1.8(h)(2), cmt. 15.
156. See id. ("Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule.").
157. See Sam McGee, Consequences of the Confidentiality Clause, 45 TRIAL, Jun. 2009, at 20, 21 ("[A] party who seeks to avoid a confidentiality agreement has to do so based on the principals of contract law by proving fraud, mutual mistake, or other applicable defenses.").
158. See Steven G. Mehta, Lasting Agreement, LOS ANGELES LAW., Sept. 2007, at 28, 28 ("A court will not enforce a settlement agreement provision that is illegal, contrary to public policy, or unjust." (citing Cal. State Auto Ass'n Inter-Ins. Bureau v. Superior Court, 50 Cal. 3d 658, 664 (1990); Timney v. Lin, 106 Cal. App. 3d 1121, 1127 (Ct. App. 2003))).
159. See MODEL RULES OF PROF'L CONDUCT R. 1.8 (2013) (stating that an attorney must notify the client in writing in order to seek independent counsel for advice).
on establishing trust, loyalty and the creation of a fiduciary relationship—the settlement of a dispute with a lawyer occurs at a time when all of those principles have eroded.\textsuperscript{160} The lawyer is no longer in the position of being a fiduciary who must put the client’s interests first. Therefore, from a client-centered perspective, enforcing a confidentiality provision that the lawyer and client agreed to after the deterioration of the attorney–client relationship does not raise the same issues as a similar agreement made at the time that the lawyer and client are creating the foundation of their relationship.

Another difference that may favor enforcing a confidentiality clause in a settlement agreement is a general policy favoring the settlement of disputes.\textsuperscript{161}

Courts have said that “honoring the parties’ express wish for confidentiality may facilitate settlement, which courts are bound to encourage,” and that “settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits.”\textsuperscript{161}

Courts have cited this policy when enforcing confidentiality agreements even when they restrict a party’s right to speak on matters of public concern.\textsuperscript{162}

However, another key difference here weighs against enforcing a confidentiality agreement in a settlement agreement. As discussed in Section II regarding non-disclosure agreements at the inception of the attorney–client relationship, a confidentiality agreement that prohibited a client from reporting misconduct to the appropriate disciplinary authority would violate public policy and be unenforceable.\textsuperscript{163} The rationale for not enforcing such a restriction is based on the need that disciplinary authorities have in discovering attorney misconduct and imposing the discipline necessary to protect the public from attorneys who have engaged

\textsuperscript{160.} See Jennifer L. Myers, David Sonenshein & David N. Hofstein, \textit{To Regulate or Not to Regulate Attorney–Client Sex? The Ethical Question}, 69 \textit{Temp. L. Rev.} 741, 786–87 (1996) (determining that an attorney has a fiduciary duty of loyalty and good faith, a duty of care, and a confidentiality duty when handling the client’s information).

\textsuperscript{161.} Sam McGee, \textit{Consequences of the Confidentiality Clause}, 45 \textit{Trial}, Jun. 2009, at 20, 21 (quoting Gamble v. Deutsche Bank, AG, 377 F.3d 133, 143 (2d Cir. 2004); D.H. Overmyer Co. v. Loflin, 440 F.2d 1213, 1215 (5th Cir. 2005)).

\textsuperscript{162.} See id. (describing how courts favor settlements and enforce confidentiality agreements).

\textsuperscript{163.} See, e.g., \textit{In re Himmel}, 533 N.E.2d 790, 794 (Ill. 1988) (holding that an attorney has a duty to protect the client’s information unless the client discloses this information to the attorney in the presence of a third party); \textit{see also Ill. Rules of Prof’l Conduct R. 8.4(h)} (2010) (prohibiting lawyers in Illinois from entering into any contract with a client that limits the client’s right to pursue any complaint with the Attorney Registration and Disciplinary Commission).
in professional misconduct.\textsuperscript{164} This public protection rationale could logically extend to a policy that favors the freedom of disgruntled former clients to be able to provide an account of their experience to other consumers who might find that information useful when deciding which lawyer to hire.\textsuperscript{165} Some attorney conduct may not warrant discipline, but it can still be relevant to others who are considering hiring a lawyer. The public has a legitimate interest in obtaining information about lawyers who hold the privilege of a law license and who may be handling their important legal matters.\textsuperscript{166} This rationale may have more force in agreements that settled a client's claim for malpractice than in agreements that settled other disputes, such as a client's refusal to pay a fee owed.

There are some areas where courts and legislatures have decided that confidentiality agreements should not be enforced as a matter of public policy. For example, The Florida Sunshine in Litigation Act\textsuperscript{167} prohibits agreements that conceal public hazards or the resolution of claims against state or municipal entities.\textsuperscript{168} Similarly, the California legislature has indicated that it disfavors confidential settlement agreements in civil suits that involve elder abuse.\textsuperscript{169} The Eleventh Circuit has also taken this approach with settlements of cases under the Fair Labor Standards Act\textsuperscript{170} because confidentiality would contravene Congress's intent and undermine regulatory efforts.\textsuperscript{171} These examples reflect the policy concerns about concealing certain information, which has also been described as follows:

\textsuperscript{164} See Himmel, 533 N.E.2d at 795–96 (discussing how the court decides the proper punishment for the disciplined attorney in light of protecting the public from such conduct).

\textsuperscript{165} See Ronald L. Burdge, Bad for Clients, Confidentiality in Settlement Agreements Is Bad for Lawyers, Bad for Justice, GP SOLO, Nov./Dec. 2012, at 25, 25–26 (arguing that no settlement agreements should be confidential because the legal system belongs to the public and the public has a right to know the resolution of disputes whether that occurs at trial or in a settlement agreement).

\textsuperscript{166} See Himmel, 533 N.E.2d at 795–96 (illustrating how sanctioning an attorney safeguards the public (citing In re LaPinska, 72 Ill.2d 461, 473 (1978))).

\textsuperscript{167} FLA. STAT. ANN. § 69.081 (West 2004).

\textsuperscript{168} See Jennifer Snyder Heis, Confidentiality of Settlement Agreements, FOR THE DEFENSE, Feb. 2007, at 35, 35–36 (explaining how Florida finds settlement contracts unenforceable when they hide public hazards or claims against the state or municipalities because these agreements are against public policy (citing FLA. STAT. § 69.081 (2004))).

\textsuperscript{169} See Steven G. Mehta, Lasting Agreement, LOS ANGELES LAW., Sept. 2007, at 28, 32–33 (noting that the California legislature disfavors confidential settlement agreements involving elder abuse (citing CAL. CODE CIV. PROC. § 2017.310(a))).

\textsuperscript{170} 29 U.S.C. § 201 (Supp. III 2010).

\textsuperscript{171} See Ronald L. Burdge, Confidentiality in Settlement Agreements Is Bad for Clients, Bad for Lawyers, Bad for Justice, GP SOLO, Nov./Dec. 2012, at 24, 26 (illustrating an example where confidentiality should not be enforced because it violates the intention of the legislature).
Confidentiality prevents the public from knowing about systemic wrongful conduct. It can also prevent regulators and government agencies from performing their duty to enforce the law and protect the public. When violations are hidden by confidentiality, the legal system itself is thwarted from fulfilling one of its fundamental purposes: to protect the citizenry from wrongful conduct.\footnote{172}

These concerns may weigh against enforcement of confidentiality or non-disparagement agreements between lawyers and former clients as a matter of public policy.

V. CONCLUSION

As consumers create and review more online reviews as part of their decision-making process about which lawyer to hire, lawyers will have a variety of issues arise regarding their online professional reputation. Lawyers may consider a variety of ways to control or repair their reputations, but they should be aware of a variety of ethical pitfalls that they may encounter. The upside of the expansion of online reviews is that many consumers may be able to access information about lawyers that was previously elusive—such as communication skills, empathy, diligence, price, etc.—and could inform their decision-making.

There is, however, a risk that consumers will get information that is not helpful because it is false or too one-sided. There is little oversight of consumer reviews and anonymous reviews mean that some reviews might not even be written by actual clients. As the regulators of the legal profession, the state supreme courts may want to consider taking up the role of providing a reliable, non-commercial location for clients to review their experiences with lawyers.\footnote{173} Like sites such as Angie’s List, the courts could increase the reliability of the ratings by prohibiting anonymous reviews.\footnote{174}

\footnote{172. \textit{Id.} at 25.}
\footnote{173. See Lucille M. Ponte, \textit{Mad Med Posing as Ordinary Consumers: The Essential Role of Self-Regulation and Industry Ethics on Decreasing Deceptive Online Consumer Ratings and Reviews}, 12 \textit{J. MARSHALL REV. INTELL. PROP.} 462, 502–03 (2013) (suggesting that professions collaborate with "independent third-party review organizations to police their professions and provide easy to understand rankings of fellow professionals").}
\footnote{174. See \textsc{ANGIE'S LIST}, http://www.angieslist.com/how-it-works.htm (last visited Mar. 23, 2014) (describing that the site does not allow anonymous reviews).}