

ETHICS OF LAWYER SOCIAL NETWORKING

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Social networking via the internet (sometimes called “Web 2.0”) can be a low-cost way to connect with friends, family and old acquaintances, and form new relationships.¹ For lawyers, social networking can make business development “faster, better and cheaper.”² As a result, it has become a topic of interest for many in the legal profession.³ In a 2009 survey conducted by the American Bar Association, forty-three percent of lawyers surveyed said that they are members of at least one online social network (this compared to only fifteen percent in 2008).⁴ Twelve percent of

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¹ For an analysis of the strengths and limitations of various social networking tools, see generally G.M. Filisko, *Social Promotion: Social Network Sites Work for You, But Only if You Work at Them*, 94 A.B.A. J. 48, 48 (2008). See also ADRIAN DAYTON, SOCIAL MEDIA FOR LAWYERS: TWITTER EDITION vii (2009), available at <http://www.ark-group.com/downloads/TwitterTOC.pdf> (summarizing use of social networking tools by lawyers); Robert Ambrogi, Why Bother with Online Networking? (Mar. 31, 2009), <http://www.legaline.com/2009/03/why-bother-with-online-networking.html> (summarizing potential value of social networking to lawyers); Larry Bodine, Twitter Not Effective for Law Firm Marketing (May 23, 2009), <http://www.lawmarketing.com> (search “Twitter not effective”).

² Paul Lippe, Would Henry V Have Used Web 2.0 at Agincourt? Pt. II (Feb. 9, 2009), <http://www.law.com/jsp/tal/index.jsp> (search “Law.com network” for “Paul Lippe & Henry V”); see also Paul Lippe, The Role Of Social Networking in Law, (July 30, 2009), <http://www.law.com/jsp/tal/index.jsp> (search “Law.com network” for “Paul Lippe & role of social networking”) (“For my money, social networking will prove to be a powerful tool in law, because its structure reflects the distributed nature of the legal profession, so it has the potential to help improve quality and reduce costs at a time when these are more at the top of clients’ priorities than ever before.”).

³ At its recent annual meeting, the ABA featured a session on “Social Networks, Blawgs and Podcasts: Business Development Tools for the Internet Age.” See Press Release, Am. Bar Ass’n, Ethical Implications of Web 2.0 Technology, Green Marketing, Rainmaking in a Recession Among Law Practice Topics to be Explored at ABA Annual Meeting in Chicago (July 20, 2009), http://www.abanet.org/abanet/media/release/news_release_list.cfm. For a summary of the discussion, see Leora Maccabee, Legal Marketing Ethics in a Web 2.0 World (July 17, 2009), <http://lawyerist.com/legal-marketing-ethics-web-2-0/>.

⁴ Reginald F. Davis, *Getting Personal: Social Networks Appeal, but Not to the Firm*, 95 A.B.A. J. 30, 30 (2009).

respondents reported that their firms are also members of at least one online social network.⁵ Online social networking thus may play an increasing part in the legal community, and will continue to evolve as developers produce new innovations to increase the number and quality of services offered.⁶

This technology and the frequency of its use has already outpaced established legal practices. Existing ethics guidelines generally do not focus on technology issues, and state bar associations have been slow to fill in the gaps with opinions and best practice guides.⁷ Yet lawyers require at least a basic understanding of how social networking works and some awareness of the ethical implications of using such technologies.⁸ This article briefly addresses some of the ethics issues lawyers may face when they use social networking tools.⁹

⁵ *Id.* Another recent survey reported that “nearly 50 percent of lawyers are members of online social networks and more than 40 percent of attorneys believe professional networking has the potential to change the business and practice of law over the next five years.” Kathleen Delaney, *Introducing a Blogger Series on Online Networking for Lawyers* (Mar. 30, 2009), <http://blog.martindale.com/Introducing-a-Blogger-Series-on-Online-Networking-for-Lawyers>. More generally, some surveys suggest that in excess of a billion users, world-wide, are connected to one or more social networking sites. See Christian Kreutz, *The Next Billion—The Rise of Social Network Sites in Developing Countries* (June 19, 2009), <http://www.web2fordev.net> (search “The Next Billion”).

⁶ The development of “Web 2.0” applications, coupled with the expansion of wi-fi/mobile communications, may mean that the benefits of “Moore’s Law” (regarding expansion of computer power) will continue to yield new services for years to come. See Om Malik, *Moore’s Law Reconsidered*, *BUS. 2.0*, Apr. 3, 2007, <http://money.cnn.com> (search “Om Malik & Moore’s Law”) (“[W]hile the PC itself might be disappearing, mobile devices such as the iPhone are the new beneficiaries of Moore’s Law.”).

⁷ The American Bar Association recently announced formation of a “Commission on Ethics 20/20,” with the recognition that

[t]echnological advances and globalization have changed our profession in ways not yet reflected in our ethics codes and regulatory structure. Technologies such as e-mail, the Internet and smart phones are transforming the way we practice law and our relationships with clients, just as they have compressed our world and expanded international business opportunities for our clients.

See Press Release, Am. Bar. Ass’n, ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers (Aug. 4, 2009), <http://www.abanet.org/abanet/media/release/news-release-list.cfm> (quoting Carolyn B. Lamm, ABA President).

⁸ Micah U. Buchdahl, *Facing Facebook and Tweeting with Twitter: GCs Come Up Against Social Networking Sites, Like It or Not*, *GC MID-ATLANTIC*, June 2009, <http://www.gcmidatlantic.com/article.php?id=115>.

⁹ This Article does not address the separate questions of propriety that may arise from use of social networking tools by the judiciary. See generally Miriam Rozen, *Social Networks Help Judges Do Their Duty*, *TEX. LAW.*, Aug. 25, 2009, <http://www.law.com/jsp/legaltechnology/index.jsp> (search “Rozen”); Debra Cassens Weiss, *Dozens of Judges Are Getting LinkedIn*, *Blogger Notes* (Aug. 20, 2009) http://www.abajournal.com/news/blogger_finds_dozens_of_judges_with_linkedin_profiles; Am. Bar. Ass’n, *Judges All Atwitter Over New Media* (Aug. 6, 2009),

I. WHAT IS SOCIAL NETWORKING?

Social networking Web sites allow registered users to upload profiles, post comments, join “networks,” and add “friends.”¹⁰ They give registered users the opportunity to form “links” between each other, based on friendships, hobbies, personal interests, and business sector or academic affiliations.¹¹ Social networking sites can be used both personally, to contact friends and find old classmates, and professionally, to look for employment or find someone with whom to collaborate. Most social networking systems are available to all users. Some are available by invitation (or special qualification) only. Most begin with a personal focus on linking “friends,” but many now are used both for business and personal networking purposes. Some directly solicit participation by lawyers.¹²

These sites have received significant media attention.¹³ Employers now search social networking sites before hiring employees;¹⁴ consumers worry about protecting themselves from identity theft;¹⁵ and parents seek to keep their children safe from online predators.¹⁶ Advertisers, moreover, increasingly seek ways to exploit social networking systems to entice users into commercial relationships.¹⁷ These kinds of concerns are multiplied when legal

<http://www.abanow.org/2009/08/judges-all-atwitter-over-new-media/>.

¹⁰ Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 845–46 (W.D. Tex. 2007) (“The idea of online social networking is that members will use their online profiles to become part of an online community of people with common interests.”).

¹¹ See generally PENNY EDWARDS & LEE BRYANT, SOCIAL NETWORKING FOR THE LEGAL PROFESSION 7 (2009).

¹² See Doug Cornelius, The State of Legal Social Networking (July 20, 2009), <http://www.lawmarketing.com> (search “Cornelius”) (listing available social networking sites meant for use by lawyers).

¹³ The Journal of Computer-Mediated Communication recently dedicated an entire issue to the subject of social networks, their history and potential influence. See Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210 (2007), available at <http://jcmc.indiana.edu/vol13/issue1>.

¹⁴ See Michael Jones, Adam Schuckman & Kelly Watson, *The Ethics Of Pre-Employment Screening Through the Use of the Internet*, in THE ETHICAL IMPERATIVE IN THE CONTEXT OF EVOLVING TECHNOLOGIES (Dan McIntosh et al. eds., 2004), available at <http://www.ethicapublishing.com/ethical/3CH4.pdf>.

¹⁵ See Leyla Bilge et al., *All Your Contacts Are Belong to Us: Automated Identity Theft Attacks on Social Networks*, WWW 2009, Apr. 20–24, 2009, <http://www2009.org/proceedings/pdf/p551.pdf>.

¹⁶ See Janis Wolak et al., *Online “Predators” and Their Victims: Myths, Realities, and Implications for Prevention and Treatment*, 63 AM. PSYCHOLOGIST 111, 111 (2008), available at <http://www.apa.org/journals/releases/amp632111.pdf>.

¹⁷ See Raghuram Iyengar, Sangman Han & Sunil Gupta, *Do Friends Influence Purchases in a Social Network?* 1 (Harvard Bus. Sch. Working Paper No. 09-123), available at www.hbs.edu/research/pdf/09-123.pdf; Jure Leskovec, Lada A. Adamic & Bernardo A.

professionals use social networking tools.

II. ETHICAL CONSIDERATIONS: A SURVEY

As suggested below, the ABA Model Rules of Professional Conduct (“Rules”) do not directly address all of the ethics concerns associated with social networking.¹⁸ The Rules, however, point to potential issues in a number of areas. The following survey of some of the essential ethical considerations associated with lawyer use of social networking examines the terms of the Rules and reviews some interpretations of the Rules provided by bar ethics opinions, cases, and commentaries.¹⁹

A. Competence, Diligence and Supervision

Rule 1.1 requires that lawyers provide “competent representation to a client.”²⁰ Competent representation requires the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”²¹ Because “[a] lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation,” it is difficult for a law to meet the competency threshold in more technical or complex matters.²² In accordance with these basic principles, lawyers who use social networking tools must at least have a working understanding of the

Huberman, *The Dynamics of Viral Marketing*, ACM TRANSACTIONS ON THE WEB, Apr. 20, 2007, at 1, available at <http://www-personal.umich.edu/~ladamic/papers/viral/viralTWeb.pdf>.

¹⁸ See generally A.B.A. CTR. FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005 (2006); see also A.B.A. Model Rules Of Professional Conduct (Pre-2002): History, www.law.cornell.edu/ethics/aba/2001/history.htm (last visited Nov. 13, 2009) (summarizing significant changes in individual rules).

¹⁹ States have not uniformly adopted the Model Rules. Instead, many states have implemented modifications of the Rules, to suit their particular needs. See ABA/ BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT § 81:551 (2005). Recently, for example, Kentucky, New York, and Wisconsin adopted versions of the Rules, with modifications. See Hinshaw & Culbertson LLP, *Kentucky Overhauls Ethical Rules* (July 30, 2009), <http://www.hinshawlaw.com/kentucky-overhauls-ethical-rules-07-21-2009/> (“Although Kentucky has generally adopted the Model Rules, its rules still contain many unique provisions, some of which have yet to be interpreted.”); Joel Stashenko, *New Lawyer Conduct Rules Adopted: Standards Aligned With ABA Model*, N.Y. L.J., Dec. 17, 2008, at 1, 1 (explaining that New York version of Rules represents “fine tuning” of state’s prior rules); Posting of Roy Simon to LEGAL ETHICS FORUM, <http://www.legalethicsforum.com/blog/2009/07/wisconsin-adopts-slightly-modified-aba-model-rules-38gh-effective-july-1-2009-.html> (July 8, 2009, 15:55 EST).

²⁰ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009).

²¹ *Id.*

²² See *id.* at R. 1.1 cmt. 4.

technology.²³ As the technology is new, and ethics rules and opinions are still developing, lawyers must also keep track of new professional responsibility pronouncements in the area.²⁴

Lawyers cannot “pass the buck” regarding use of these tools. Rule 1.3 requires that lawyers “act with reasonable diligence and promptness in representing a client.”²⁵ Further, Rules 5.1 through 5.3 make clear that lawyers must take responsibility to supervise the paraprofessionals and administrative staff that work under their direction.²⁶ In short, lawyers and law firms must develop policies and procedures for the use of (or preventing the use of) social networking, and must take affirmative steps to enforce such rules.²⁷

B. Confidentiality and Privilege

Rule 1.6(a) proscribes lawyers revealing information “relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted” under one of several enumerated exceptions.²⁸ Comment 16 to Rule 1.6 notes

²³ See generally Steven C. Bennett, *Ethics Guidance Needed*, NAT'L L.J., Nov. 25, 2009, at 31.

²⁴ One excellent source of information on new technologies is the ABA Legal Technology Resource Center. See A.B.A. Legal Technology Resource Center: Homepage, <http://www.abanet.org/tech/ltrc> (last visited Nov. 13, 2009).

²⁵ MODEL RULES R. 1.3.

²⁶ This issue has arisen recently in the context of “outsourcing” of legal services to vendors and part-time professionals. In that context, recent ethics opinions stress that the principal counsel involved in a matter retain ultimate responsibility for supervision of all work. See Steven C. Bennett, *The Ethics of Legal Outsourcing*, 36 N. KY. L. REV. 479, 482 (2009).

²⁷ See Doug Cornelius, *Online Social Networking: Is It a Productivity Bust or Boon for Law Firms?*, LAW PRAC., Mar. 2009, at 28, 29–30, available at www.abanet.org/lpm/magazine/articles/v35/is2/pg28.shtml (stating that misuses of social networking technology “is not a technology problem—it is a people problem”).

²⁸ MODEL RULES R. 1.6(a). Exceptions to the confidentiality requirement appear in Rule 1.6(b):

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (6) to comply

that lawyers “must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”²⁹ The lawyer’s duty requires choosing a means of communication for which the lawyer has a reasonable expectation of confidentiality.³⁰ Comment 17 lists factors for determining the reasonableness of a lawyer’s expectation of confidentiality, which include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.³¹

An ABA ethics committee has opined that it is not reasonable to require that a mode of communication, such as email, be avoided simply because interception is technologically possible, especially when unauthorized interception of the information is a violation of law.³² Nonetheless, lawyers “may be required to keep abreast of technological advances in security, as well as the technological advances being developed by hackers who are seeking to steal secrets from third parties.”³³ Ultimately, a client may require that the lawyer implement special security measures, for certain confidential communications, in addition to what may be required by the Rules.³⁴

Social networking presents many new ways for lawyers to reveal client information, sometimes inadvertently. Lapses in

with other law or a court order.

Id. at R. 1.6.

²⁹ *Id.* at R. 1.6 cmt. 16.

³⁰ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999).

³¹ MODEL RULES R. 1.6 cmt. 17; *see also* Christopher J. Wesser, *Ethical Considerations and the Use of Email*, FOR THE DEFENSE, Feb. 2007, at 68, 68 (“Model Rule of Professional Conduct 1.16 . . . make[s] clear that [lawyers] have a duty to prevent our confidential communications from being misdirected or otherwise revealed to third-parties.”).

³² *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999); *see also* D.C. Bar Legal Ethics Comm., Op. 281 (1998) *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion281.cfm; Ill. State Bar Ass'n Advisory Opinion on Prof'l Conduct, Op. 96-10 (1996), *available at* <http://www.isba.org/membergate/gate.asp?filename=%2Fethicsopinions%2F96%2D10%2Easp>; Mass. Bar Ass'n on Prof'l Ethics, Op. 00-1 (2002), *available at* <http://www.massbar.org/for-attorneys/publications/ethics-opinions/2000-2009/2000/opinion-no-00-1>; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 709 (1998), *available at* <http://www.nysba.org> (follow “For Attorneys” hyperlink; then follow “Ethics Opinions” hyperlink).

³³ J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 301 (2004).

³⁴ MODEL RULES R. 1.6 cmt. 17; *see also* Frederick L. Whitmer & Benjamin D. Goldberg, *Ethical Issues of the 21st Century (Part One)*, L. FIRM PARTNERSHIP & BENEFITS REP., Oct. 2008, at 1, 4 (warning that practitioners “should assure themselves about the safeguards present” in their communication systems).

confidentiality can occur on a firm's Web site and client intake forms, in emails and attachments, on lawyer blogs, bulletin boards, chat rooms, and listservs, and in many other communication forms.³⁵ Simply making a list of contacts public on a networking site, for example, could disclose a confidential relationship.³⁶ Additionally, lawyers may reveal information related to the representation of a client by linking to other Web sites.³⁷ Indeed, some social networking sites require that the user grant the site developer access to all information placed on the site. That arrangement could effectively destroy any claims of privilege or confidentiality regarding social networking communications.³⁸

The lawyer's confidentiality protection duty extends to persons providing service to the client at the lawyer's direction. Thus, commentary to the Rules states: "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."³⁹ Lawyers must ensure that paraprofessionals and administrative staff who may use social networking services are made aware of limits on confidentiality associated with such services.

Finally, lawyers may need to discuss means of communications with their clients. Where, for example, a client uses an employer's computer system to communicate with a lawyer, claims of privilege may be lost because the employee may lack privacy rights in the system.⁴⁰ Lawyers may need to remind their clients of these and

³⁵ See generally Cydney Tune & Marley Degner, *Blogging and Social Networking: Current Legal Issues*, in INFORMATION TECHNOLOGY LAW INSTITUTE 2009: WEB 2.0 AND THE FUTURE OF MOBILE COMPUTING 113, 130 (2009) ("[C]ourts are generally unwilling to recognize a reasonable expectation of privacy in material that people both willingly post on the Internet and take no steps to limit access to or otherwise protect.").

³⁶ See Robert F. Chapski, *Embracing New Technology and Avoiding Its Pitfalls*, FOR THE DEFENSE, Oct. 2008 at 60, 62 ("Conversations among friends are often easily discerned by navigating links to the profile pages of a collection of friends in a social network.").

³⁷ See Westermeier, *supra* note 33, at 308.

³⁸ See Thomas R. McLean, *EMR Metadata Uses and E-Discovery*, 18 ANNALS HEALTH L. 75, 104 (2009) ("After the [social networking] program is installed, any material that passes through [the Web site networks] may no longer be considered confidential because of the grant of information access that was given to the site owner.").

³⁹ See MODEL RULES R. 1.6 cmt. 16 (2009).

⁴⁰ See *Long v. Marubeni Am. Corp.*, No. 05Civ.639, 2006 WL 2998671, at *3 (S.D.N.Y. Oct. 19, 2006) (finding employee emails not privileged, due to employer's clear email use policy); *Scott v. Beth Israel Med. Ctr.*, 847 N.Y.S.2d 436, 444 (Sup. Ct. 2007) (finding emails to counsel not privileged where communicated through computers owned by hospital); see also *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005) (finding that attorney-client privilege in email communication depends on the company's email policies

other threats to the confidentiality of their communications.⁴¹

C. Creation of Unintended Attorney-Client Relationships

An attorney-client relationship arises when “a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person,” and the lawyer either manifests “consent to do so,” or “fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.”⁴² Under this standard, even if a client never executes an engagement letter, an attorney-client relationship may be implied from the conduct of the parties.⁴³ Thus, a lawyer who provides casual advice, or solicits confidential information from an acquaintance, risks a claim that an attorney-client relationship has developed.⁴⁴

Rule 1.18, moreover, specifies the duties of a lawyer to a “prospective client,” that is, “[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.”⁴⁵ According to the rule, “[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the

regarding use and monitoring, company access to email system, and employee notification of policy); *but see* Stengart v. Loving Care Agency, Inc., 973 A.2d 390, 402 (N.J. Super. Ct. App. Div. 2009) (granting review of appellate decision holding that attorney-client privilege was preserved, despite fact that employee emailed counsel from employer’s computer system).

⁴¹ See Catherine Sanders Reach, *Enjoy Email Responsibly*, ARK. LAW., Summer 2009, at 30, available at http://www.arkbar.com/publications/pdf/Reach_article_Summer_2009.pdf (citing ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 99-413 (1999)) (explaining that a lawyer should “consult the client” regarding confidentiality issues, especially where highly sensitive information is involved).

⁴² RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 14 (2000).

⁴³ See, e.g., *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980) (finding attorney-client relationship sufficient to support malpractice claim established where lawyer told prospective client that she did not have a case and failed to refer her to another attorney); *In re Petrie*, 742 P.2d 796, 800 (Ariz. 1987) (explaining that attorney-client relationship may be implied from conduct of the parties).

⁴⁴ James M. McCauley, *Legal Ethics in Cyberspace*, VA. LAW. REG., May 2000, at 10, 11 (2000) (“Even where no fee is paid and no agreement to undertake representation is entered, a lawyer-client relationship will be presumed [as a result of an interaction]. . . . “A lawyer who casually gives legal advice to or obtains confidential information from a friend or acquaintance in a casual, social setting such as a cocktail party may have inadvertently created an attorney-client relationship.”). *But see* *Knigge ex rel. Corvese v. Corvese*, No. 01 CIV 5743(DLC), 2001 WL 830669, at *3 (S.D.N.Y. July 23, 2001) (“A party’s ‘unilateral belief that he is represented by counsel ‘does not confer upon him the status of client unless there is a reasonable basis for his belief.’” (quoting *Catizone v. Wolff*, 71 F. Supp. 2d 365, 371 (S.D.N.Y. 1999))).

⁴⁵ MODEL RULES OF PROF’L CONDUCT R. 1.18(a) (2009).

consultation,” except in limited circumstances.⁴⁶ Rule 1.18, moreover, advises that a lawyer “shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful” to the prospective client.⁴⁷ If a lawyer is disqualified for violating Rule 1.18, no other lawyer in the same firm may conduct the representation, except if both the affected client and the prospective client consent, or if the lawyer who received the information “took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client,” and the disqualified lawyer is “timely screened” from the representation, and the prospective client receives prompt written notice.⁴⁸

Comment 2 to Rule 1.18 states that “[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship” should not be considered a “prospective client” within the meaning of the Rule.⁴⁹ Further, comment 5 to Rule 1.18 states that “[a] lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.”⁵⁰ In accordance with these rules, commentators suggest that Web sites inviting potential clients to communicate with lawyers should disclaim the existence of an attorney-client relationship, except on express agreement from the lawyer, and caution prospective clients not to send a lawyer confidential information, without confirmation of an agreement to undertake representation.⁵¹

In the virtual world, the establishment of electronic means of communication with potential clients risks establishment of

⁴⁶ *Id.* at R. 1.18(b). Rule 1.6(b) permits revelation of confidential information, for specific, limited purposes. Rule 1.9 applies the same rule to former clients.

⁴⁷ *Id.* at R. 1.18(c).

⁴⁸ *Id.* at R. 1.18(d)(2).

⁴⁹ *Id.* at R. 1.18 cmt. 2; see Melissa Blades & Sarah Vermylen, *Virtual Ethics for a New Age: The Internet and the Ethical Lawyer*, 17 GEO. J. LEGAL ETHICS 637, 647 (2004) (“Because the Model Rules contemplate a discussion between client and lawyer before the attorney-client relationship can attach, unsolicited e-mails with detailed information about the client most likely do not create such a relationship.” (citation omitted)).

⁵⁰ MODEL RULES R. 1.18 cmt. 5.

⁵¹ David Hricik, *To Whom it May Concern: Using Disclaimers to Avoid Disqualification by Receipt of Unsolicited E-mail from Prospective Clients*, PROF’L LAW., Fall 2005, at 1, 3–4.

attorney-client relationships, if the lawyer does not “exercise caution and vigilance.”⁵² The key, in general, is the degree to which the potential client may interact with the lawyer, especially with regard to the exchange of confidential information. Thus, conventional law firm Web sites, which principally provide information about lawyers and their firms, may essentially operate as passive advertising.⁵³ Yet where such sites invite email contacts with lawyers, the potential for interactions grows. As a result, many firms adopt restrictions on interactions through their Web sites.⁵⁴

The speed of social networking, moreover, may facilitate referrals, advice, and the formation of apparent attorney-client relationships, all with a few clicks of a mouse.⁵⁵ In social networking, casual interactions sometimes cannot be distinguished from more formal relationships. Thus, extreme caution must be exercised.

To avoid creating implied attorney-client relationships, lawyers must refrain from giving fact specific legal advice in social interactions.⁵⁶ Some jurisdictions have crafted ethics rules

⁵² Ass’n of the Bar of the City of New York, Comm. on Prof’l and Judicial Ethics, Formal Op. 1998-2 (1998), available at <http://www.abcny.org/Ethics/eth1998-2.htm>; see generally ANTHONY E. DAVIS & DAVID J. ELKANICH, A LAWYER’S GUIDE TO MANAGING E-LAWYERING RISKS 5 (2006), available at <http://www.chubb.com/businesses/csi/chubb5904.pdf> (“The greatest risk to lawyers and law firms with an Internet presence is that they may not always know who their clients are. . . . [Web site interactions] pose great risks in that attorney-client relationships may be created before any evaluation for appropriateness, such as checking for conflicts of interest, has been completed.”).

⁵³ See Vt. Bar Ass’n, Advisory Ethics Op. 97-05 (1997), available at https://vtbar.org/intus/cms/Display_Page.asp?PageID=5 (follow “Advisory Ethic Opinions” hyperlink; then follow “Advertising” hyperlink) (explaining that a Web site not “directed to a specific recipient” is similar to a telephone book or yellow pages); Ill. State Bar Ass’n Advisory Opinion on Prof’l Conduct, Op. 96-10 (1996), available at <http://www.isba.org/membergate/gate.asp?filename=%2Fethicsopinions%2F96%2D10%2Easp> (same).

⁵⁴ See Micah Buchdahl, Potential Ethical Issues and Ways to Avoid Pitfalls for the Law Firm Web Site, <http://www.internetmarketingattorney.com/archives/000032.htm> (search “Potential ethical issues & Micah Buchdahl”) (last visited Nov. 13, 2009). One state ethics opinion, however, suggests that lawyers “cannot avoid” some risk associated with the availability of an email system that allows potential clients to contact a law firm. See Mo. Bar Ass’n, Informal Advisory Op. 20000179 (2000), available at www.mobar.org/mobarforms/opinions/asp (“[An] attorney can reduce these risks with a disclaimer, but [he or she] cannot avoid them.”).

⁵⁵ See Filisko, *supra* note 1, at 50.

⁵⁶ See Dean R. Dietrich, *Online Chat: Be Careful What You Say*, WIS. LAW., May 2009, at 21, 22, available at <http://www.wisbar.org> (search “Dietrich & online”) (“Lawyers should limit their discussion to explaining general principles or trends in the law or laying out the majority and minority viewpoints on particular legal issues. Lawyers . . . should advise individuals to obtain legal counsel to determine what law would be applicable to their unique circumstances and indicate that the discussion . . . should not substitute for specific legal advice.”).

specifically governing advice provided over the internet.⁵⁷ Ethics opinions generally distinguish between general and specific legal advice. “Providing legal *advice* . . . involves offering recommendations tailored to the unique facts of a particular person’s circumstances [L]awyers wishing to avoid formation of attorney-client relationships through chat room or similar Internet communications should limit themselves to providing legal information.”⁵⁸ A lawyer may write on general legal topics (in articles and blog postings) so long as there is no communication of individual advice.⁵⁹

A clear and conspicuous disclaimer of attorney-client relationships can help prevent misunderstandings.⁶⁰ Another useful tool is a “click-wrap” disclaimer acknowledgement, which requires readers to manifest their understanding that the communication does not form an attorney-client relationship by clicking “accept” prior to gaining access to Web site contents.⁶¹ Such a disclaimer (or click-wrap acknowledgement) may also clarify that the lawyer does not intend to solicit confidential information from a

⁵⁷ See State Bar of Ariz., Formal Ethics Op. 97-04 (1997), *available at* <http://www.myazbar.org/Ethics/opinionview.cfm?id=480> (“[L]awyers should not answer specific legal questions from lay people through the Internet unless the question presented is of a general nature and the advice given is not fact-specific.”); Ass’n of the Bar of the City of New York, Comm. on Prof’l and Judicial Ethics, Formal Op. 1998-2 (1998), *available at* <http://www.abcnyc.org/Ethics/eth1998-2.htm> (“A lawyer . . . should carefully refrain from giving . . . a general solution applicable to all apparently similar individual problems since slight changes in fact situations may require a material variance in the applicable advice”).

⁵⁸ D.C. Bar Legal Ethics Comm., Op. 316, (2002), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm (emphasis added).

⁵⁹ See *id.* (“Providing legal information [which is permissible] involves discussion of . . . the kind of information one might give in a speech or newspaper article.”).

⁶⁰ The following is one example of a disclaimer:

No information or materials posted here are intended to constitute legal advice, nor can we guarantee the accuracy of posted information, especially as to each individual situation. LawTek does not independently check the information contained herein and does not refer or endorse any product, service, or firm. This site does not constitute an attorney-client relationship; local counsel should always be consulted.

Divorce Net Legal Disclaimer, <http://www.divorcenet.com/disclaimer> (last visited Nov. 13, 2009).

⁶¹ Hricik, *supra* note 51, at 5. The following is one example of a “click-wrap” acknowledgement:

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

Id. at 5–6.

prospective client.⁶² For shorter messages, a reference to a Web site with the complete disclaimer may be all that is possible.⁶³

In addition to disclaimers and click-wrap acknowledgment forms, lawyers may need to take steps to ensure that they do not accept confidential information from their internet correspondents. Receipt of such information may be one marker of an attorney-client relationship. For example, the Ninth Circuit ruled that an online questionnaire gathering information for potential class members in a class action lawsuit created an attorney-client relationship even though users acknowledged that the questionnaire “[did] not constitute a request for legal advice and that [the user was] not forming an attorney client relationship by submitting this information.”⁶⁴

D. Conflicts

The inadvertent creation of attorney-client relationships sometimes creates conflicts for an entire firm. Under Rule 1.7, a lawyer generally cannot represent a client if the representation involves a conflict of interest.⁶⁵ Conflicts rules are more complicated than this simple principle suggests. Under the Rules, for example, a lawyer may represent a client, despite a potential conflict, where the lawyer believes that competent representation is possible, the representation is not prohibited by law, the representation does not involve “assertion of a claim by one client against another client,” and each affected client gives informed consent.⁶⁶ The representation, however, must not involve the “assertion of a claim by one client against another client.”⁶⁷ The conflicts of one lawyer in a law firm, moreover, may be attributed to

⁶² See Nicole Lindquist, Ethical Duties to Prospective Clients Who Send Unsolicited Emails, SHIDLER J. L. COMMERCE & TECH., Fall 2008, at 8, available at <http://www.lctjournal.washington.edu/Vol5/a08Lindquist.html> (“Online disclaimers present a unique challenge because viewers can easily ignore, skip or misunderstand them. . . . “[D]isclaimers should require some sort of assent.”).

⁶³ See Steven C. Bennett, *Look Who’s Talking: Legal Implications of Twitter Social Networking Technology*, N.Y. ST. B. ASS’N J., May 2009, at 12 n.9 (summarizing technology, which limits number of characters in a message).

⁶⁴ *Barton v. U.S. Dist. Court*, 410 F.3d 1104, 1107 (9th Cir. 2005) (citation omitted).

⁶⁵ Where a conflict is apparent from the outset of an encounter with a prospective client, the lawyer must decline the representation. See MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 3 (2009). (“A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client . . .”).

⁶⁶ See *id.* at R. 1.7(b)(1)–(4).

⁶⁷ See *id.* at R. 1.7(b)(3).

other lawyers in the firm.⁶⁸ Due to these kinds of complexities, most U.S. law firms have rigorous systems of “conflict clearance” before any legal engagement is accepted.⁶⁹ Failure to follow these conflict clearance systems, in the context of social networking communications that may be characterized as forming relationships with clients, could cause considerable difficulty for a lawyer.

Under Rule 1.7, moreover, conflicts may arise where representation of a client may be “materially limited” by a “personal interest of the lawyer.”⁷⁰ Thus, in theory, if a lawyer were to take a definitive legal position, in a blog or other posting, such position could “materially limit” the lawyer’s ability to represent clients for whom the opposite legal position is dominant.⁷¹ Yet, the notion of positional inconsistency does not prevent a lawyer from taking different sides in different cases.⁷² Indeed, some ethics opinions suggest that a lawyer may take “antagonistic positions on a legal question” that arises in different cases.⁷³ Further, even where an

⁶⁸ See *id.* at R. 1.10(a) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so.”). The precise application of this rule is a matter of some subtlety. Law firms may, for example, build “Chinese Walls,” to avoid potential conflicts due to imputed knowledge of the affairs of two clients in potential conflict. See Robert E. Ware, *The Conflict Virus: When Are Lawyer Conflicts Imputed to the Firm?*, CLEVELAND B. J., Jan. 2005, at 16–17 (outlining requirements for an “ethical screen” or “Chinese Wall”).

⁶⁹ See MODEL RULES R. 1.7 cmt. 3 (“To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved.”). The effectiveness of even sophisticated conflict clearance systems has been questioned by some commentators. See SUSAN P. SHAPIRO, *TANGLED LOYALTIES: CONFLICT OF INTEREST ON LEGAL PRACTICE* 198 (2002) (suggesting that lawyers may develop conflicts in subtle ways, including social relationships).

⁷⁰ MODEL RULES R. 1.7(a)(2).

⁷¹ See WILLIAM FREIVOGEL, *LEGAL ETHICS AND TECHNOLOGY* 1 (2002), <http://www.abanet.org/buslaw/newsletter/0002/materials/oops.pdf> (“Taking positions on legal issues online could undermine the position a lawyer is taking, or may have to take, on behalf of a client.”).

⁷² See Noreen L. Slank, *Positional Conflicts: Is It Ethical To Simultaneously Represent Clients with Opposing Legal Positions?*, MICH. B. J., May 2002, at 15, 15 available at <http://www.michbar.org/journal/pdf/pdf4article427.pdf> (“[Positional conflicts] have generally been tolerated except under the most sensitive of ethical barometers. . . . [Lawyers] can speak with as many voices as there are clients with positions to advance.”).

⁷³ See Prof'l Ethics Comm. of the Maine Bd. of Overseers of the Bar, Op. 155 (1997), available at <http://www.mebaroverseers.org/Ethics%20Opinions/Opinion%20/55.htm> (explaining that an “issue conflict . . . is not a conflict of interest,” but noting the duty of a lawyer to employ “best judgment” to ensure that advocacy in a different case will not “impair her effectiveness”); D.C. Bar Legal Ethics Comm., Op. 265 (1996), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion265.cfm (“A traditional notion in the law of legal ethics holds that there is nothing unseemly about a lawyer’s taking directly opposing views in different cases so long as the lawyer does not do so simultaneously.” For example, a prosecutor may become a criminal defense lawyer after public service; a lawyer for plaintiff may represent defendants in other cases).

individual lawyer might be prohibited from taking such antagonistic positions, other lawyers in the firm may not be so precluded.⁷⁴

At a minimum, however, public statements of a definitive legal position adverse to an existing client may cause embarrassment for a lawyer, or a law firm.⁷⁵ Even if lawyers do not entirely eschew social networking for fear of causing such problems, some form of restraint may be appropriate.⁷⁶ Some law firms, for example, require screening by a committee of all publications. Moreover, often firms require that individual publications be labeled as representing the opinion of the individual author only, such that the opinion should not be attributed to the firm or its clients.

E. Unauthorized Practice of Law

Generally, under Rule 5.5, a lawyer who is not admitted to practice in a jurisdiction must not “establish an office or other systematic and continuous presence” in the jurisdiction for the practice of law; or “hold out to the public or otherwise represent that the lawyer is admitted to practice law in [that] jurisdiction.”⁷⁷ A non-lawyer who falsely offers legal services under the guise of being a lawyer is guilty of the unauthorized practice of law. And, because licensing of the practice of law is a state matter, a lawyer authorized to practice law in one state cannot, without admission to the other state’s bar, or *pro hac vice* admission for purposes of a specific matter, perform unlicensed legal services in a foreign

⁷⁴ In its Formal Opinion 2007-177, the Oregon Bar noted that there is “no way for everyone in a multilawyer firm to know every current or potential issue that may arise in every case the firm is handling.” Further, “there is no safeguard that a lawyer or firm can reasonably take to avoid issue conflicts in the same manner that a lawyer or firm can avoid traditional conflicts by keeping lists of the names of current and former clients.” The Rules, moreover, “are intended [to] [sic] be construed in a practicable manner that does not create unavoidable traps.” In light of these concerns, the opinion concluded, “it would be inappropriate to hold that on pain of discipline, all lawyers at a firm are chargeable with the full ‘issue conflict’ knowledge of every other lawyer at the firm.” Rather, “[a]ctual knowledge, or at least negligence in not knowing, [about the positional conflict] must first be proved.” Or. State Bar, Formal Ethics Op. 2007-177 (2007), available at http://www.osbar.org/_docs/ethics/2007-177.pdf.

⁷⁵ See Posting of David Luban to Balkinization, <http://www.balkin.blogspot.com/2007/01/stimsons-attack-on-gitmo-lawyers.html> (Jan. 14, 2007, 11:43 EST) (noting circumstances of “business conflicts” where law firm seeks to avoid “annoying a client” with its positions in another matter).

⁷⁶ See Arthur D. Burger, *Spotting Firm Conflicts: The Reach—and Limits—of Using a Database to Root Out Trouble*, LEGAL TIMES, Apr. 2, 2001, at 20, 20, available at http://www.jackscamp.com/publications/ADB_%20040201.pdf (suggesting that “a human eye and brain are clearly needed” to spot potential positional conflicts).

⁷⁷ MODEL RULES OF PROF'L CONDUCT R. 5.5(b)(1)–(2) (2009).

jurisdiction.⁷⁸ The precise contours of these rules are somewhat ill-defined.⁷⁹ Increasingly, moreover, lawyers need to operate in more than one state (and perhaps more than one country) to be effective.⁸⁰ In 2002, to address this issue, the ABA expanded its rules on multi-disciplinary practice to permit limited forms of multi-jurisdictional practice.⁸¹

Rule 8.5 provides, however, that a lawyer not admitted in a particular jurisdiction is subject to disciplinary authority in that jurisdiction, “if the lawyer provides or offers to provide any legal services in [that] jurisdiction.”⁸² Comment 5 to Rule 8.5 states that a lawyer’s conduct must “conform[] to the rules of [the] jurisdiction in which the lawyer reasonably believes the predominant effect [of the lawyer’s conduct] will occur.”⁸³

A lawyer may use disclaimers to reduce problems involving unauthorized practice of law. The language of the disclaimer should indicate the state (or states) in which the attorney is admitted.⁸⁴ Attorneys may take the additional step of asking potential clients about their residence before answering any questions or sending any messages.

Because a lawyer may not “establish an office or other systematic and continuous presence” in a jurisdiction in which the lawyer is not admitted,⁸⁵ maintaining a blog or social networking profile may

⁷⁸ See generally STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 731–36 (Richard A. Epstein et al. eds., 6th ed. 2002) (summarizing operation and history of unauthorized practice rules).

⁷⁹ See GEOFFREY C. HAZARD, JR. & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 273 (2004) (noting that unauthorized practice rules have been “especially vexed” in the United States).

⁸⁰ See Richard L. Marcus, *The Electronic Lawyer*, 58 DEPAUL L. REV. 263, 291 (2009) (“Law firms increasingly provide services across multiple venues using lawyers from multiple places to provide those services.”).

⁸¹ Under the new ABA Rule, a lawyer may practice law in jurisdictions where he or she is not admitted if the lawyer associates with local counsel; if the work is related to a litigation or ADR proceeding in which the lawyer is appearing; if the client is the lawyer’s employer; or if federal law permits the representation. See MODEL RULES R. 5.5(c)–(d).

⁸² *Id.* at R. 8.5.

⁸³ *Id.* at R. 8.5 cmt. 5.

⁸⁴ See, e.g., S.C. Bar Ethics Advisory Comm., Advisory Ethics Op. 94-27 (1994), available at http://www.sbar.org/member_resources/ethics_advisory_opinions/&id=413 (“[A lawyer should] clearly identify the geographic limitations of the lawyer’s practice, so that it is clear that he may not practice law except in those states in which is he [sic] admitted to practice.”); State Bar of Cal. Standing Comm. on Prof’l Responsibility and Conduct, Formal Op. 2001-155 (2001), available at http://www.calbar.ca.gov/calbar/html_unclassified/ca2001-155.html (recommending that attorneys explain where they are licensed to practice law, where they maintain offices, and the courts in which they regularly appear).

⁸⁵ MODEL RULES R. 5.5(b)(1). Rule 5.5(c) permits a lawyer to practice law, on a temporary basis and in limited circumstances, in jurisdictions in which the lawyer is not formally admitted. *Id.* at R. 5.5(c). Similarly, Rule 5.5(d) permits a lawyer licensed in one jurisdiction

expose lawyers to unauthorized practice rules in many jurisdictions.⁸⁶ One commentator has noted that, where a law firm “maintains an interactive website and purposefully avails itself of a jurisdiction, it is reasonable to conclude that the law firm will be subject to the ethical rules applicable in such jurisdiction.”⁸⁷

Although courts have not found that operating a Web site alone constitutes the practice of law, some courts have held that maintaining an online presence can contribute to liability.⁸⁸ A Maine ethics opinion provides that a lawyer who is not licensed to practice in Maine, but has an office in Maine and maintains a Web site holding himself out as able to provide legal services in Maine, engages in the unauthorized practice of law.⁸⁹ In California, a court held that, although not physically present, an out-of-state lawyer’s use of “telephone, fax, computer, or other modern technological means” could constitute unauthorized practice of law.⁹⁰ Although the court declined to rule that a lawyer’s virtual presence in California automatically amounted to practicing law, the holding is a reminder that courts pay attention to an online presence.⁹¹ A prudent lawyer should research jurisdictional restrictions on cross-border practice before creating Web sites or profiles on the Internet.⁹²

to practice, on either a temporary or continuous basis, in another jurisdiction if the lawyer is providing legal services solely for the lawyer’s employer or its affiliates, or is engaging in activities authorized by federal or other law. *Id.* at R. 5.5(d).

⁸⁶ See Daniel Backer, *Choice of Law in Online Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet*, 70 *FORDHAM L. REV.* 2409, 2410, 2417 (2002) (explaining that lawyers engaging clients via the internet may be subject to conflicting rules); Louise L. Hill, *Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards*, 75 *WASH. L. REV.* 785, 854–56 (2000) (suggesting the need for “national standards,” rather than individual state rules, due to technological changes that render state-by-state regulation of attorney communications “ineffective and obsolete”).

⁸⁷ Westermeier, *supra* note 33, at 288.

⁸⁸ For a discussion of recent decisions, see *id.* at 284–88.

⁸⁹ Prof'l Ethics Comm. of the Maine Bd. of Overseers of the Bar, Op. 189 (2005), *available at* <http://www.mebaroverseers.org/Ethics%20Opinions/Opinion%20189.htm>.

⁹⁰ *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 6 (Cal. 1998).

⁹¹ *Id.*; see also *Florida Bar v. Kaiser*, 397 So.2d 1132, 1133 (Fla. 1981) (finding a New York lawyer engaged in unauthorized practice of law when he advertised his law firm in Miami telephone books and on television, creating the impression that lawyer was licensed to practice in Florida).

⁹² N.C. State Bar, Formal Ethics Op. 10 (2006), *available at* <http://www.ncbar.gov/ethics/index.asp> (describing various concerns for lawyers engaging in the virtual practice of law).

F. Advertising

In *Bates v. State Bar of Arizona*,⁹³ the Supreme Court ruled that to preserve the “free flow” of commercial information, states cannot wholly ban lawyer advertising, but can regulate false, deceptive, or misleading advertisements.⁹⁴ The Court in *Bates* noted the possibility that lawyer advertising might not provide a consumer with all of the relevant information needed to make an informed decision about counsel. Nevertheless, the Court observed, “[t]he alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers.”⁹⁵ Consistent with that ruling, Rule 7.2 permits a lawyer to advertise services through written, recorded, or electronic communications, “including public media.”⁹⁶ Comment 2 to Rule 7.2 provides that the 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.⁹⁷

Various states, applying these general rules, have prepared more detailed guidelines for appropriate attorney advertising.⁹⁸ Several states’ ethics opinions, moreover, have attempted to apply these guidelines to specific aspects of lawyering in cyberspace.⁹⁹ The

⁹³ 433 U.S. 350 (1977).

⁹⁴ *Id.* at 383–84. Beyond “commercial speech,” lawyers also have rights to express their beliefs or participate in political discourse. Distinguishing between such forms of speech may be difficult, in the context of social networking. See Will Hornsby, *Lawyers Shouldn’t Have To Guess on Ethics of Online Marketing*, MICH. LAW. WKLY., Aug. 18, 2008, available at 2008 WLNR 25703029 (noting that regulation in this area amounts to “unchartered territory”).

⁹⁵ *Id.* at 374.

⁹⁶ See MODEL RULES OF PROF’L CONDUCT R. 7.2(a) & cmt. 3 (2009). (“[E]lectronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.”).

⁹⁷ *Id.* at R. 7.2 cmt. 2.

⁹⁸ See AM. BAR ASS’N, DIFFERENCES BETWEEN STATE ADVERTISING AND SOLICITATION RULES AND THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (2009), <http://www.abanet.org/cpr/professionalism/state-advertising.pdf> (surveying state rules); see also Am. Bar Ass’n, *Five Tips for Lawyer Advertising: From Billboards to Blogs* (Mar. 2008), <http://www.abanet.org/media/youraba/200803/article03.html> (listing principal limitations in state advertising rules).

⁹⁹ See, e.g., Ala. State Bar, *Ethics Op. RO-96-07* (1996), available at <http://www.alabar.org/ogc/fopdisplay.cfm?oneId=346>; State Bar of Ariz., *Formal Ethics Op.*

guidelines do not, however, deal specifically with social networking as a means of advertisement.¹⁰⁰ Nevertheless, certain essential principles appear in the guidelines and related opinions.

Law firm Web sites may be labeled a form of advertising.¹⁰¹ In general, lawyers may use Web sites and blogs to advertise their services.¹⁰² They may also use profiles on social networking sites.¹⁰³ Such communications over the internet may be subject to state regulations on advertising.¹⁰⁴

No. 97-04 (1997), *available at* <http://www.myazbar.org/Ethics/opinionview.cfm?id=480>; The State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2001-155 (2001), *available at* http://www.calbar.ca.gov/calbar/html_unclassified/ca2001-155.html; Haw. Office of Disciplinary Counsel, Formal Ethics Op. 41 (2001), *available at* http://64.29.92.27/legal_research/hawaii/disc/formalopinion41.pdf; Ill. State Bar Ass'n Advisory Opinion on Prof'l Conduct, Op. 96-10 (1996), *available at* <http://www.isba.org/ethicsopinions/96arc.asp>; Iowa Supreme Court Bd. of Prof'l Ethics and Conduct, Op. 00-01 (2000), *available at* <http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492!OpenView>; State Bar of Mich., Ethics Op. RI-276 (1996), *available at* <http://www.michbar.org/opinions/ethics/search/cfm>; Mo. Bar, Informal Advisory Op. 970161 (1997), *available at* <http://www.mobar.org/mobarfrms/opinions.aspx>; N.C. State Bar, Op. RPC 239 (1996), *available at* <http://www.ncbar.gov/ethics/index.asp>; N.J. Comm. on Attorney Adver., Op. 36 (2005), *available at* http://www.lawlibrary.rutgers.edu/ethics/caa/caa36_1.html; N.Y. County Lawyers Assoc., Ethics Op. 721 (1997), *available at* http://www.nycla.org/siteFiles/Publications/Publications499_0.pdf; Pa. Bar Ass'n, Informal Op. 96-17 (1996), *available at* 1996 WL 928126; S.C. Bar, Ethics Advisory Op. 97-08 (1997), *available at* http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=469; Utah State Bar Ethics Advisory Opinion Comm., Op. 97-10 (1997), *available at* http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_97_10.html; Vt. Bar Ass'n, Advisory Ethics Op. 97-05 (1997), *available at* https://vtbar.org/intus/cms/Display_Page.asp?PageID=5 (follow "Advisory Ethic Opinions" hyperlink; then follow "Advertising" hyperlink).

¹⁰⁰ Comment 3 to Rule 7.2, however, recognizes that "electronic media, such as the Internet, can be an important source of information about legal services." MODEL RULES R. 7.2 cmt. 3.

¹⁰¹ See Susan Corts Hill, *Living in a Virtual World: Ethical Considerations for Attorneys Recruiting New Clients in Online Virtual Communities*, 21 GEO. J. LEGAL ETHICS 753, 757 n.21 (2008) ("[L]aw firm and lawyer websites are widely considered to be a form of advertising." (citation omitted)); J.T. Westermeier, *Ethical Issues for Lawyers on the Internet and World Wide Web*, 6 RICH. J.L. & TECH. 5 (1999) ("Many jurisdictions have determined that the advertising rules adopted by local bar associations apply to websites.").

¹⁰² Frederick L. Whitmer & Benjamin D. Goldberg, *Ethical Issues of the 21st Century (Part Two)*, L. FIRM PARTNERSHIP & BENEFITS REP., Nov. 2008, at 3, 3. Lawyers also may advertise via the Internet, provided the advertisements comply with ethics rules. See *supra* notes 98–100 and accompanying text.

¹⁰³ Whitmer & Goldberg, *supra* note 102, at 8 ("[T]he prudent approach is to conclude that the [advertising] rule applies to social network sites and blogs because much of the same information is often included on both. Indeed, it would appear imprudent to conclude otherwise.").

¹⁰⁴ Some commentators suggest that the advertising rules "presumptively" govern lawyer communications on blogs and social networking sites. See Sarah Hale, *Lawyers at the Keyboard: Is Blogging Advertising and If So, How Should It Be Regulated?*, 20 GEO. J. LEGAL ETHICS 669, 671 (2007) ("[Rule 7.2] was intended to cover any 'new public-communication

Some states require submission of all attorney advertisements to a state bar committee for approval.¹⁰⁵ Yet because social networking profiles and posts can be (and often are) updated daily, materials submitted may not reflect current content.¹⁰⁶ At the very least, lawyers should keep periodic records, such as hard copies of Web site “screen shots,” in case state regulators ask to review their advertising.¹⁰⁷

Lawyers must also take care regarding the types of information they post on Web sites and social networking sites. Testimonials about a lawyer’s accomplishments may be prohibited, absent an express disclaimer.¹⁰⁸ Excessive testimonials from “friends,” moreover, could in some instances create “unjustified expectation[s]” about the outcome a lawyer can obtain for other clients.¹⁰⁹

G. Solicitation

Rule 7.3 provides that “[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”¹¹⁰ Under Rule 7.3, a lawyer may not solicit professional employment unless the person contacted is a lawyer or has a familial, personal, or prior

technology,’ including blogs . . .”).

¹⁰⁵ See Charles F. Luce Jr., *Ethics in Attorney Advertising & Solicitation* (1997), <http://www.mgovg.com/ethics/11advert.htm> (“The conservative approach is for those lawyers licensed in more than one state to follow the advertising rules of the most restrictive state in which they are licensed.”).

¹⁰⁶ See C.C. Holland, *Mind the Ethics of Online Networking* (Nov. 6, 2007), <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1194257030032> (explaining that pre-approval of content may be “just about impossible” where social networking materials “can reflect daily or even real-time changes that are outside the user’s control”).

¹⁰⁷ Arizona requires attorneys to retain copies of Web sites when they appear in a retrievable format. Massachusetts requires attorneys to keep copies of the content of Web sites for two years. New York and Virginia require attorneys to keep a copy of the Web site for at least one year. North Carolina requires copies of the Web pages to be retained for two years along with notations of when the pages were used. For a list of state requirements, see Am. Bar Ass’n, *Legal Ethics and Technology: Advertising and Solicitation: States*, <http://www.abanet.org/tech/ltrc/research/ethics/adsstates.html> [hereinafter *Advertising and Solicitation*] (last visited Nov. 13, 2009).

¹⁰⁸ See Holland, *supra* note 106.

¹⁰⁹ See Will Hornsby, *When Testimonials Meet Tweets: Thoughts on the Ethics of Web 2.0*, *LAW PRAC.*, Jan.-Feb. 2009, at 37, available at <http://www.abanet.org/lpm/magazine/articles/v35/is1/pg37.html>.

¹¹⁰ MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2009); see RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 7.3–1, at 1146 (2009) (explaining the background and purpose of the solicitation ban).

professional relationship with the lawyer.¹¹¹ Further, a lawyer may not solicit employment from a prospective client by electronic communication if “the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or the solicitation involves coercion, duress or harassment.”¹¹² Comment 1 to the Rule notes the “potential for abuse” in such solicitations.¹¹³

The question becomes whether social networking communications constitute “real-time electronic contact[s]” or merely “general advertising,” the latter of which is not prohibited as solicitation.¹¹⁴ At one end of the spectrum, passive Web sites and non-interactive blogs, although perhaps advertising, generally do not constitute prohibited solicitation.¹¹⁵ At the other end, “chat room” communications, wherein lawyers may importune potential clients to hire them, just as they might through a telephone call or in person, generally are considered to be solicitations.¹¹⁶ Although a

¹¹¹ MODEL RULES R. 7.3(a).

¹¹² *Id.* at R. 7.3(b).

¹¹³ *See id.* at R. 7.3 cmt. 1 (“The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.”). In-person solicitations, moreover, are more difficult to record, in order to ensure that the communications made were not false or misleading. *See also* Christopher Hurd, *Untangling the Wicked Web: The Marketing of Legal Services on the Internet and the Model Rules*, 17 GEO. J. LEGAL ETHICS 827, 840–41 (2004).

¹¹⁴ *See* MODEL RULES R. 7.3(a) cmt. 3 (“The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.”).

¹¹⁵ *See* Ass’n of the Bar of the City of New York, Comm. on Prof’l and Judicial Ethics, Formal Op. 1998-2 (1998), available at <http://www.abcnyc.org/Ethics/eth1998-2.htm> (addressing law firm internet Web sites); Joel Michael Schwarz, *Practicing Law over the Internet: Sometimes Practice Doesn’t Make Perfect*, 14 HARV. J.L. & TECH. 657, 669 (2001) (suggesting a “sliding scale” standard to determine whether operating a Web site constitutes solicitation; opining that “merely hosting a passive website” should not constitute solicitation).

¹¹⁶ *See* The State Bar of Cal. Standing Comm. on Prof’l Responsibility and Conduct, Formal Op. 2004-166 (2004), available at http://www.calbar.ca.gov/calbar/pdfs/ethics/2004-166_02-0002.pdf (explaining that attorney communication with potential client in a mass-disaster victim chat room is prohibited); Va. State Bar, Lawyer Adver. Op. A-0110, available at <http://www.vsb.org/committees/standing/advertising/a110.htm> (explaining that

chat room discussion “provides less opportunity for an attorney to pressure or coerce a potential client than do telephone or in-person solicitations, real-time communication is potentially more immediate, more intrusive and more persuasive than e-mail or other forms of writing.”¹¹⁷

The degree of “interactivity and immediacy” of social networking tools can vary greatly.¹¹⁸ For example, a lawyer who posts a profile on a social networking site identifying the individual as a lawyer probably does not invoke the interactivity and immediacy of a solicitation, although such a posting may be considered an advertisement.¹¹⁹ The Twitter system (and its many clones), by contrast, essentially amounts to broadcast e-mails, to recipients who agree to “follow” a particular Twitter broadcaster.¹²⁰ The choice to follow a particular “friend” is the user’s alone, although often threads of conversations with other “friends of friends” can produce new connections.¹²¹ The messages, moreover, are extremely short, and do not typically invite an immediate response.¹²²

Other forms of social networking are designed to deepen relationships with family, friends, and acquaintances, through shared interactions.¹²³ A profile (or “wall”) on a social networking Web site, for example, typically offers participants the opportunity to post photographs and comments surrounding a shared interest.¹²⁴

communication in “real time” chat room falls under restrictions on solicitation); Darren Franklin, *Hanging a Shingle on the Information Superhighway: Legal Advice on the Internet and the Problems of Prohibited Client Solicitation and Unintended Attorney-Client Relationships*, 2001 STAN. TECH. L. REV. 2, 10 (2001), available at <http://stlr.stanford.edu/pdf/franklin-hanging-a-shingle.pdf> (“The potential for undue influence is probably greatest in legal chat rooms.”).

¹¹⁷ W. Va. Lawyer Disciplinary Bd., Legal Ethics Inquiry 98-03 (1998), available at <http://www.wvbar.org>.

¹¹⁸ See Am. Bar Ass’n., Ethics 2000 Comm. Report on the Model Rules of Prof’l Conduct, R. 7.3 Reporter’s Explanation Memo (2000), <http://www.abanet.org/cpr/e2k/e2k-rule73rem.html> (“[I]nteractivity and immediacy of response in real-time electronic communication presents the same dangers as those involved in live telephone contact.”).

¹¹⁹ See Holland, *supra* note 106; see Margaret Hensler Nicholls, *A Quagmire of Internet Ethics Law and the ABA Guidelines for Legal Website Providers*, 18 GEO. J. LEGAL ETHICS 1021, 1028 (2005).

¹²⁰ See Bennett, *supra* note 63, at 11.

¹²¹ Educause Learning Initiative, *7 Things You Should Know About . . . Twitter* (July 2007), <http://net.educause.edu/ir/library/pdf/ELI7027.pdf>.

¹²² See *id.* (“The experience of using Twitter has been described as walking into a room of conversations and looking for a ‘hook’ to decide if and when to jump in.”).

¹²³ See NEVER ENDING FRIENDING: A JOURNEY INTO SOCIAL NETWORKING 17 (2007), <http://creative.myspacecdn.com/Client/MySpace/Sales/pdf/NeverEndingFriending.pdf> (“[M]ost social networking users rely on the medium to deepen their existing relationships, whether with their favorite bands, brands, or people.”).

¹²⁴ See Danah M. Boyd, *Social Network Sites: Public, Private, or What?*, KNOWLEDGE TREE, May 13, 2007, at 28, 29, <http://www.danah.org/papers/KnowledgeTree.pdf>.

Users may connect to specific groups, already formed within the social network, and generally interact freely after admission to the group.¹²⁵ The immediacy of the interactions, however, depends on the individual users.¹²⁶

The degree to which users may already have “personal” relationships, as defined in Rule 7.3, may vary greatly. A “friend of a friend” or a stranger encountered in a networking user group probably could not qualify as a “personal” relationship sufficient to permit a solicitation.¹²⁷ But many other social networking users connect precisely because they already have long-standing relationships. With such relationships, solicitation or referrals may be entirely appropriate and appreciated.¹²⁸ Thus, a flat prohibition or approval of any particular type of social networking solicitation may not be feasible.¹²⁹

Rule 7.3 requires that any “electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services . . . shall include the words

¹²⁵ *Id.* (“[The public commenting feature] allows individuals to comment on their Friends’ profiles. These comments are displayed prominently and visible for anyone who has access to that profile.”); Monica S. Flores, 20 Tips for Social Networking Using Facebook (Apr. 3, 2009), <http://www.womensmedia.com/work/106-20-tips-for-social-networking-using-facebook.pdf> (“A group [on a social networking site] is just like a group in real life—a gathering of people interested in a particular idea, issue, or cause. . . . [There are] thousands of different groups that have been set up for different interests.”).

¹²⁶ See Educause Learning Initiative, *supra* note 121. One set of California commentators suggests that “[t]o the extent a lawyer makes contact with a prospective client on [a social networking] site, the advertising and solicitation rules would almost certainly apply.” PAUL W. VAPNEK ET. AL., CALIFORNIA PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY ¶ 2:539 (2008), available at WL CAPROFR CH 2-G. The question of “Internet communications and ‘in person’ solicitation,” however, is under review in California. See *id.* ¶ 2:592.5.

¹²⁷ See MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2009).

¹²⁸ See Martin A. Cole, *Friends and Family*, BENCH & B. MINN., Feb. 2007, at 12, 13, available at WL 64-FEB BBMN 12 (“Individuals who have such a relationship with the lawyer may well turn to the attorney naturally to handle their legal affairs. Thus, the need for time to reflect or seek independent advice does not seem as essential in this situation.”).

¹²⁹ Broadcasting of “spam” solicitations to multiple users may produce disciplinary sanctions, no matter the lack of immediacy and interactivity of the medium. See Tenn. Bar Ass’n, *Actions from the Board of Professional Responsibility*, TENN. B. J., July–Aug. 1997, http://tba2.org/Journal_TBArchives/jul97/tbj-jul97-news7.html (“[A lawyer was disbarred for, among other things, placing] an advertisement that appeared on more than 5,000 . . . Internet[] news groups and 10,000 e-mail lists. . . . The hearing panel found that the posting . . . was an improper intrusion into the recipients’ privacy.”); Utah State Bar Ethics Advisory Opinion Comm., Op. 02-02 (2002), available at http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_02_02.html (explaining that emails that encourage recipient to engage firm’s services and extol firm’s expertise are “solicitations” for purposes of ethics rules); see also Matthew T. Rollins, *Examination of the Model Rules of Professional Conduct Pertaining to the Marketing of Legal Services in Cyberspace*, 22 J. MARSHALL J. COMPUTER & INFO. L. 113, 128–29 (2003) (discussing application of spam rules to lawyer advertising).

‘Advertising Material’ . . . at the beginning and ending of any . . . electronic communication, unless the recipient of the communication” is a lawyer or has a prior relationship with the lawyer.¹³⁰ Solicitations on Web sites, blogs, and social networking sites must be clearly marked in accordance with this requirement.¹³¹

H. Honesty in Communications

Rule 7.1 prohibits lawyers from making “a false or misleading communication about the lawyer or the lawyer’s services.”¹³² Under the Rule, “[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.”¹³³ A lawyer’s Web site, blog, or social networking profile necessarily concerns the lawyer and his or her services, and such informational platforms must be true and not misleading.¹³⁴ For example, a law firm cannot imply, by using the word “bar” in its domain name, that it is associated with a bar organization; nor may it use “org” as a top level suffix, which might imply that it is a not-for-profit organization.¹³⁵

Professional qualifications listed on social networking sites should correspond to official records and descriptions on firm Web sites.¹³⁶ Lawyers not yet admitted to a state bar should so note in their user profiles and other materials on social networking sites.

Rule 8.4, more generally, prohibits lawyers from engaging in any

¹³⁰ MODEL RULES R. 7.3(c).

¹³¹ For a list of state requirements, see Advertising and Soliciting, *supra* note 107.

¹³² MODEL RULES R. 7.1.

¹³³ *Id.*

¹³⁴ Tune & Degner, *supra* note 35, at 132.

¹³⁵ See State Bar of Ariz., Formal Ethics Op. 01-05 (2001), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=273>; see also Ass’n of the Bar of the City of New York, Comm. on Prof’l and Judicial Ethics, Formal Op. 2003-01 (2003), available at <http://www.nycbar.org/Ethics/eth2003-1.htm> (explaining that domain names may not imply expected results, such as “bigverdict.com” or include “puffery,” such as “personalinjuryexpert.com”); N.C. State Bar, Formal Ethics Op. 14 (2006), available at <http://www.ncbar.gov/ethics/index.asp> (explaining that domain name need not specifically identify law firm, so long as name is not otherwise misleading); The Supreme Court of Ohio, Board of Comm’rs on Grievances and Discipline, Advisory Op. 99-4 (1999), available at http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/display.asp (explaining that it is “preferable” for a law firm to use its name as a domain name on its Web site, but other names may be used, so long as they are not deceptive).

¹³⁶ See MODEL RULES R. 7.4(a). A lawyer may also list areas of specialty. Rule 7.4(a) allows a lawyer to “communicate the fact that the lawyer does or does not practice in particular fields of law.” *Id.*

conduct that involves any “dishonesty, fraud, deceit or misrepresentation.”¹³⁷ Applying that Rule, a Philadelphia bar ethics committee held that a lawyer could not use a third party to “friend” an adverse witness, in an attempt to find evidence to impeach the witness, on a social networking site.¹³⁸ The committee concluded that such communication was “deceptive” because it omitted the material connection between the third party and the lawyer and the intent to gain information for purposes of litigation.¹³⁹

Finally, under Rule 3.6(a), trial lawyers cannot “make extrajudicial statements that . . . will be disseminated by means of public communication,” where such communications may “have a substantial likelihood of materially prejudicing” a legal proceeding.¹⁴⁰ Attorneys who blog about ongoing litigation might, therefore, be subject to professional discipline.¹⁴¹

III. CONCLUSION

In 2003, the American Bar Association’s Law Practice Management “eLawyering Task Force” created a set of “Best Practice Guidelines For Legal Information Web Site Providers.”¹⁴² The Guidelines, among other things, suggested that Web sites should:

provide full and accurate information on the identity and contact details of the provider of the site. . . . [I]nclude information about the dates on which the substantive content on [the site] was prepared or last reviewed. . . . [A]void misleading users about the jurisdiction

¹³⁷ *Id.* at R. 8.4.

¹³⁸ See Philadelphia Bar Ass’n, Prof’l Guidance Comm., Op. 2009-02 (2009), available at www.philadelphiabar.org/page/opinions2005Present?appNum=4.

¹³⁹ *Id.* Some commentators, however, suggest that such “deception” may be justified, in circumstances where essential evidence otherwise would not become available. See Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 780–81 (2006); see also Elizabeth Stull, *Ethics Evolving with Technology*, DAILY REC. (Rochester, N.Y.), May 14, 2009, available at 2009 WLNR 9278552 (noting that some ethics opinions permit “dissemblance” when there is an “overarching public issue being pursued,” such as “housing discrimination”).

¹⁴⁰ MODEL RULES R. 3.6.

¹⁴⁰ MODEL RULES R. 3.6.

¹⁴¹ See Richard Raysman & Peter Brown, *The Effects of Blogging on Legal Proceedings*, N.Y. L.J., May 12, 2009, at 3, 3 (noting a case where the court reprimanded a prosecutor for blogging about ongoing trial).

¹⁴² Am. Bar Ass’n, Best Practice Guidelines for Legal Information Web Site Providers, (Feb. 10, 2003), <http://www.abanet.org/elawyering/tool/practices.shtml>.

to which the site's content relates. . . . [And] give users conspicuous notice that legal information does not constitute legal advice.¹⁴³

Today, just a few years later, these general ABA Guidelines remain apt. But the constant addition of social networking tools to the array of communications methods that lawyers use every day has already made these guidelines incomplete. With these new networking tools, the practice of law is changing, and rapidly.¹⁴⁴ Social networking requires concerted thinking about adaptation of legal ethics rules to a dynamic world, where interactions between attorneys, clients, and communities of social network users can become quite complicated. In this dynamic environment, the best approach for the responsible lawyer is to become educated on new technologies and new methods of practice, to remain alert to potential ethical issues involved in the use of these technologies and methods of practice, and to encourage candid discussion among lawyers, clients, IT specialists, and law firm managers about the best means both to serve client interests and to uphold the high standards of the profession.¹⁴⁵

¹⁴³ *Id.*

¹⁴⁴ See Nicole L. Black, *Five Responses To Technology*, DAILY REC. (Rochester, N.Y.), Aug. 10, 2009, available at 2009 WLNR 15575757 (explaining that most of the legal profession is "stuck in the middle of the process" of adjusting to technological developments); Steven C. Bennett, *Teaching Technology Skills To Lawyers*, NAT'L L. J., Jan. 20, 2006, available at <http://www.law.com/jsp/article.jsp?id=1137665109054> (outlining the need for technology training).

¹⁴⁵ This Article has not addressed the separate technical and legal questions that may surround privacy, data security, virus protection and other concerns associated with electronic communications used in the practice of law. See generally Faith M. Heikkila, *Data Privacy in the Law Firm: How to Protect Client Data*, MICH. B. J., July 2009, at 33, available at www.michbar.org/journal/pdf/pdf4article1535.pdf; Justin Rebello, *Protecting Your Law Firm's Online Data*, WIS. L. J., Aug. 24, 2009, <http://www.wislawjournal.com/article.cfm/2009/08/24/Protecting-your-law-firms-online-data>. These kinds of concerns certainly should be accounted for in a law firm's policies and procedures. Furthermore, stressing common sense in social networking, such as pointing out that everyone should avoid making defamatory communications, is vital in training lawyers and staff. See, e.g., Posting of Adrianos Facchetti to Twitip, <http://www.twitip.com/10-ways-to-avoid-being-sued-on-twitter/> (Aug. 21, 2009) (advising, among other things, to "lay off the booze" when communicating on social networks). Finally, social networking information may be discoverable, in the event of litigation. See *Ledbetter v. Wal-Mart Stores, Inc.*, No. 06-cv-01958, 2009 WL 1067018, at *1 (D. Colo. Apr. 21, 2009) (ordering production of Web site information in response to subpoenas).