



Ethical Lawyering in the Digital Age

David B. Rubin

David B. Rubin, P.C.

Metuchen, New Jersey

April 7 - 9, 2011

Hilton San Francisco Union Square, San Francisco, California



Abstract:

Computer technology and digital communication have greatly transformed the legal profession in recent years. Examine how the ethics rules are being reshaped to keep pace with the digital age, without sacrificing the time-honored values they were designed to protect.

ETHICAL LAWYERING IN THE DIGITAL AGE

David B. Rubin¹
David B. Rubin, P.C.
Metuchen, New Jersey

Computer technology and digital communication have greatly transformed the legal profession in recent years. This article will examine how attorney ethics rules are being adapted and applied to the online world of websites and social networking in cyberspace.

WEBSITES

In 2009, the American Bar Association's Commission on Ethics 20/20 embarked on a three-year project to study regulation of the American legal profession in light of advances in technology and multi-jurisdictional practice, including the use of Internet websites, blogs, and social networking sites. The Commission recently called for input from the profession on whether the Model Rules of Professional Conduct and their Comments should be updated to address which types of websites should be subject to attorney advertising regulation, when communications through a website trigger a lawyer's ethical duties to "prospective clients" under Model Rule 1.18, and related matters.² In the meanwhile, the ABA and ethics authorities in some states have already begun to speak to these issues.

Advertising

ABA Formal Opinion 10-457³ addresses the advertising implications of attorney websites. Biographical information, areas of practice, representative clients, and verdicts secured are all "communication[s] about the lawyer or the lawyer's services." They are subject to Model Rule 7.1, as well as the prohibitions against false and misleading statements in Rules 8.4(c)(generally) and 4.1(a)(when representing clients). The opinion distinguishes between "legal information," discussing general legal principles, and "legal advice," focusing on specific solutions to individualized legal problems. Because visitors to websites may be unsophisticated in terms of their use of legal services, the opinion suggests that viewers be cautioned that the information displayed on the website is intended only as general legal information and is no substitute for specific legal advice.

Some states have amended their attorney advertising rules to focus on websites. Florida, for example, has adopted a rule amendment explicitly addressing attorneys' "Internet presence," and subjecting

¹ The author gratefully acknowledges the research assistance of Rutgers School of Law – Newark student Jordan Rubin.

² Memorandum from the ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies to ABA Entities, Courts, Bar Associations Law Schools, Individuals, and Entities (Sept. 20, 2010), *available at* http://www.abanet.org/ethics2020/pdfs/clientdevelopment_issuespaper.pdf.

³ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010), *available at* <http://www.abanet.org/cpr/pdfs/10-457.pdf>.

websites and unsolicited e-mails of prospective clients to the substantive rules governing attorney advertising generally.⁴ Attorneys should consult their local rules to assure compliance.

Unintended Lawyer-Client Relationships

The formation of unintended lawyer-client relationships should be a concern for any law firm launching a website. A lawyer-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.”⁵ In times gone by, when a lawyer’s first contact with a prospective client usually was a face-to-face consultation by appointment in the lawyer’s office, it was not difficult to determine if and when a lawyer-client relationship was formed. Today, that contact may be an unsolicited e-mail from someone in another jurisdiction who was impressed by the attorney’s website, and the lines can be blurry.

ABA Model Rule 1.18 addresses an attorney’s duty to “prospective clients.” Rule 1.18(a) provides that a “prospective client” is “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship.” Comment [2] to the rule 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, is not a prospective client.” If a website expressly or by fair implication invites viewers to submit information that could lead to the formation of an attorney-client relationship, then a “discussion” under Rule 1.18 may be underway once that information is sent. Absent such an invitation, the lawyer’s response to an unsolicited inquiry will determine whether that “discussion” has begun. The client’s reasonable expectations also may be affected by the existence of a prior professional or social relationship with the attorney.⁶ Ethics authorities in New York, New Jersey, California, Iowa, Arizona, and New Hampshire have addressed the applicability of those states’ versions of Rule 1.18 to inquiries from website visitors.⁷

⁴ See *In re: Amendments to the Rules Regulating the Florida Bar – Rule 4-7.6, Computer Accessed Communications*, No. SC08-1181 (Fla. Nov. 19, 2009), available at <http://www.floridasupremecourt.org/decisions/2009/sc08-1181.pdf>.

⁵ CHARLES W. WOLFRAM, RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 14 (2000).

⁶ See Oregon Ethics Op. 2005-146, 2005 WL 5679570 (Or. State Bar Ass’n Aug. 2005) (sending periodic reminders to former clients may instill expectation that they are current clients).

⁷ See, e.g., Ass’n of the Bar of the City of New York, Formal Op. 2001-1 (2001) (opinion about obligations of law firm receiving unsolicited e-mail communications from prospective client stating that absent a specific warning that unsolicited information will not be treated as confidential, the firm has a duty not to disclose such information), available at <http://www.abcnyc.org/Ethics/eth2001-01.html>; New Jersey Ethics Op. 695, 2004 WL 833032 (N.J. Advisory Comm. on Professional Ethics Mar. 29, 2004) (firm has a duty to keep information received from a prospective client confidential); California Ethics Op. 2001-155, 2001 WL 34029609 (Cal. State Bar Comm. on Professional Responsibility 2001) (a clear disclaimer is required to prevent a duty of confidentiality to inquirers); Iowa Bar Ass’n Ethics Op. 07-02 (2007), available at [http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492/cb0a70672d69d8c1862573380013fb9d/\\$FILE/ISBA%20Ethics%20Opinion%2007-02%20Prospective%20Client%20Comment%202.pdf](http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492/cb0a70672d69d8c1862573380013fb9d/$FILE/ISBA%20Ethics%20Opinion%2007-02%20Prospective%20Client%20Comment%202.pdf) (website information inviting more than contact information from inquirers could create a duty of confidentiality); Arizona State Bar Op. 02-04 (2002),

Lawyers need not leave the commencement of a Rule 1.18 “discussion” to the vagaries of a website visitor’s subjective expectations, given the features available on most websites to dictate the ground rules for interaction with the firm.⁸ If a website provides a handy electronic form plainly intended for inquirers to send specific information about a particular type of claim, that may well be sufficient to open a Rule 1.18 “discussion.”⁹ On the other hand, a website that merely describes the firm’s practice areas and provides contact information likely would not be viewed as the initiation of a “discussion.”¹⁰ An especially useful tool is a “click-wrap” disclaimer acknowledgment, which requires readers to affirm their understanding that the communication does not form an attorney-client relationship by clicking “accept” prior to gaining access to website content. Disclaimers generally will not be enforceable unless they are conspicuous and in language reasonably understandable to the average person.¹¹

Unauthorized Practice of Law

The evolving rules governing multi-jurisdictional practice and the unauthorized practice of law are beyond the scope of this article. However, it bears noting in passing that, under Model 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.” One commentator has observed 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.”¹²

available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=288> (no duty of confidentiality is owed to senders of unsolicited e-mail inquiries); New Hampshire Bar Ass'n Ethics Comm. Op. 2009-2010/1 (2009), available at <http://www.nhbar.org/uploads/pdf/EthicsOpinion2009-10-1.pdf> (invitation to e-mail the firm risks creation of a duty of confidentiality).

⁸ See, e.g., Arizona State Bar Op. 02-04 (2002), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=288> (e-mail links should feature disclaimers advising whether e-mailed information will be held in confidence); Massachusetts Bar Ass'n Op. 07-01 (2007), available at <http://www.massbar.org/publications/ethics-opinions/2000-2009/2007/opinion-07-01> (since firm can set conditions on its receipt of information, it must keep information confidential absent an effective disclaimer); New Mexico Bar Op. 2001-1 (2001), available at <http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html> (clear disclaimer should accompany responses to listserve message board); North Carolina Formal Ethics Op. 2000-3, 2000 WL 33300702 (N.C. State Bar July 21, 2000) (clear disclaimers should be used when responding to inquirers on law firm message boards).

⁹ See, e.g., Iowa State Bar Ass'n Ethics Op. 07-02 (2007) (communication from and with potential clients). See also Virginia Legal Eth. Op. 1842 (2008), available at <http://www.vacle.org/opinions/1842.htm>.

¹⁰ Iowa State Bar Ass'n Ethics Op. 07-02 (2007). See also San Diego County Bar Ass'n Op. 2006-1, available at <http://www.sdcba.org/index.cfm?Pg=ethicsopinion06-1>.

¹¹ See, e.g., District of Columbia Bar Ethics Op. 302 (2000), available at http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion302.cfm; Virginia Legal Ethics Op. 1842 (2008), (addressing efficacy of “click through” disclaimers); California Ethics. Op. 2005-168, 2005 WL 3068090 (Cal. State Bar Comm. on Professional Responsibility 2005) (merely stating that no “confidential relationship” would be formed was insufficient to avoid a duty of confidentiality as to information provided).

¹² J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 288 (2004).

SOCIAL NETWORKING SITES

Like attorney-owned websites, social networking sites such as Facebook and MySpace also raise issues of attorney advertising regulation and creation of unwanted lawyer-client relationships.¹³ Their real time interactivity and the attorney's inability to control the flow of information to the same extent as an attorney-owned website present additional concerns.

Advertising

Information disseminated by attorneys on social networking sites may constitute advertising subject to regulation by state ethics authorities, to the same extent as attorney-owned websites. The ABA 20/20 Working Group on the Implications of New Technologies is presently reviewing whether to make new recommendations on how lawyers should be regulated in their use of Facebook accounts, blogs, and online discussion forums. One of the issues under study is the line between personal communications and lawyer advertising. A recent request for comments¹⁴ frames the issue as follows:

Because lawyers frequently use these websites and services for both personal and professional reasons, the legal ethics issues in this context are more complicated than they have been for more traditional client development tools. For example, a lawyer might create a Facebook profile that is accessible to family and prospective clients at the same time. The lawyer might then post professional announcements that are shared with all of those people, raising the question of whether such announcements are subject to the usual ethical restrictions on lawyer advertising and solicitation.

The Commission seeks to determine what guidance it should offer to lawyers regarding their use of social and professional networking sites, especially when lawyers use those sites for both personal and professional purposes. The Commission's guidance could take the form of a policy statement that could be submitted to the House of Delegates for its adoption or a white paper that explains the extent to which lawyers' use of networking sites should be considered a form of lawyer advertising. Alternatively, or in addition, the Commission could propose amendments to the Model Rules in Article 7 or their Comments in order to clarify when communications on networking sites are subject to the Rules of Professional Conduct as well as the difference between advertising and solicitations in this context. The Commission invites comments on whether it should, in fact, offer guidance in this area, and if so, what type of guidance the Commission should offer.

¹³ Maintaining a blog or social networking profile may expose lawyers to the unauthorized practice rules in many jurisdictions. 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); Louise L. Hill, *Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards*, 75 *WASH. L. REV.* 785, 854-56 (2000).

¹⁴ Memorandum from the ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies to ABA Entities, Courts, Bar Associations Law Schools, Individuals, and Entities (Sept. 20, 2010).

Some states have addressed how their prior review and record retention requirements apply to social networking sites. For example, the Advertising Review Committee of the State Bar of Texas generally requires that websites be submitted for review and approval, but holds that LinkedIn and Facebook profiles need not be filed.¹⁵ As of this writing, the Kentucky Bar Association has proposed an amendment that would bring within that state’s attorney advertising rules for any communications “of a legal nature” on social networking sites such as Facebook or MySpace.¹⁶

Unintended Lawyer-Client Relationships

The real time conversational environment of social networking presents a heightened risk of inadvertently forming lawyer-client relationships. Attorneys always have had to be on guard for this in their social interactions outside of work, but the ability to redirect or clarify the nature of the conversation is greater in a face-to-face discussion than an on-line one, where the attorney is less in control of the flow of information. A District of Columbia Bar ethics opinion addressing chat room discussions reminds us that “[p]roviding legal information involves discussion of legal principles, trends, and considerations—the kind of information one might give in a speech or newspaper article, for example. Providing legal advice, on the other hand, involves offering recommendations tailored to the unique facts of a particular person’s circumstances.”¹⁷ The considerations discussed above regarding websites apply with even greater force here.

Solicitation

Many attorneys now use social networking sites as a vehicle to expand their practices, but attention must be paid to the ethical constraints on client solicitation. Model 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.” Under Rule 7.3, a lawyer may not solicit professional employment unless the person contacted is a lawyer or has a personal or prior professional relationship with the lawyer. Comment [3] to Rule 7.3 suggests that, in the online world, communicating with prospective clients via advertising may avoid some of the risks of real time conversation:

The use of general advertising and written, recorded or electronic communications to transmit information from the 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

¹⁵ See Gene Major, *The Effective Use of Social Media within the Texas Advertising Rules*, TEXAS BAR JOURNAL, July 2010, available at http://www.texasbar.com/AM/Template.cfm?Section=Search§ion=July_2010&template=/CM/ContentDisplay.cfm&ContentFileID=738.

¹⁶ See *Proposed Amendment, Deletion, and Addition to the Regulations of the Attorneys’ Advertising Commission, Pursuant to SCR 3.130(7.03)(5)(A)*, BENCH & BAR, Sept. 2010, at 45, available at http://www.kybar.org/documents/benchbar/2010/bb_0910_14.pdf.

¹⁷ District of Columbia Bar Op. 316, available at http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm.

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.

A lawyer who merely posts a profile on a social networking site may avoid the restrictions on solicitation, although the profile may be regulated as an advertisement in that jurisdiction.¹⁸

Virtual worlds like Second Life pose additional concerns. Second Life (www.secondlife.com) is a 3-D virtual universe where participants select avatars as their online identities, and engage in the full gamut of real time human activity, including business and legal transactions.¹⁹ The site has become so popular in legal circles that Seventh Circuit Judge Richard Posner paid a visit—through an avatar, of course—to discuss one of his books.²⁰ Lawyers represent clients in resolving disputes arising in the virtual world, and may receive real world compensation for their services. Legal activity is so intense that Second Life has its own bar association. How the precepts discussed above will be applied in cyberworlds such as this remains to be seen,²¹ but ethics opinions addressing conduct in online chat rooms may well provide the most useful

standards until more definitive guidance is available.²²

Preserving Client Confidentiality

The informality and spontaneity of blogs and social networking sites may tempt us to engage in mindless disclosures of confidential information about our clients, and the results can be disastrous. One notable example is the case of Kristine Peshek, an Illinois assistant county public defender, who published statements about her clients on a personal blog. She referred to one defendant she was representing on a drug charge by his jail identification number, and announced that he was not guilty but was pleading to the charge to protect his older brother, whom the attorney knew from prior dealings involving drug and weapons charges. Peshek referred to another client by his first name, and stated that he had lied to the court about his

¹⁸ 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).

¹⁹ See Stephanie Francis Ward, *Fantasy Life, Real Law*, ABA JOURNAL, available at http://www.abajournal.com/magazine/article/fantasy_life_real_law; Attila Barry, *Lawyers Find Real Revenue in Virtual World*, LEGAL TIMES, July 31, 2007, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1185820702695>.

²⁰ Ward, *supra* note 19.

²¹ See Susan Cortis Hill, *Living in a Virtual World: Ethical Considerations for Attorneys Recruiting Clients in Online Virtual Communities*, 21 GEO. J. LEGAL ETHICS 3, at 753 (Summer 2008).

²² Hill, *supra* note 21.

drug use, which she and others involved in the case discovered when his drug test came back positive for cocaine. She further stated that the client had been under the influence of cocaine when she appeared in court. Peshek was suspended for 60 days for this behavior,²³ and her case is a cautionary tale for attorneys who reveal confidential client information into the public domain.²⁴

Candor Toward the Tribunal

Courts are now checking attorneys' online postings to verify representations made to the court. In one highly-publicized case, a Texas judge, who had granted an attorney's request for a continuance due to a death in the family, viewed pictures of the attorney on his Facebook page out carousing while he was supposed to be grieving. Not surprisingly, his next request for a continuance was denied.²⁵

In another case from California,²⁶ an attorney had recently closed down his private practice and taken a position as a project manager with a communication technology company. Part of his duties in his new position included practicing law, and he maintained an active bar membership. Shortly afterward, he was summoned for jury duty and assigned to a burglary case. When asked about his occupation during *voir dire*, he stated that he was a project manager for a technology company, but did not disclose that he was an attorney by profession, or an active member of the California bar. During the course of the trial, he posted the following on his personal blog:

[T]oday I was impaneled along with 12 others from the voter rolls of San Diego County in a felony theft and burglary trial in Department 37 of the old downtown courthouse, in the courtroom of the Honorable Laura Palmer Hammes, a stern, attentive woman with thin red hair and long, spidery fingers that as a grandkid you probably wouldn't want snapped at you. Nowhere do I recall the jury instructions mandating I can't post comments in my blog about the trial. (Ha. Sorry, will do.) So, being careful to not prejudice the rights of the defendant-a stout, unhappy man by the first name of Donald

The attorney was suspended for violating California's rules concerning maintenance of respect for the courts, and communication of information about the trial to others.

“Friending” on Facebook

Ethics authorities in several jurisdictions have focused on the implications of judges and lawyers “friending” each other on Facebook. One case from North Carolina dealt with a trial judge, B. Carlton Terry,

²³ *In re Peshek*. M.R. 23794 (Ill. Disciplinary Commission 2010), available at <http://www.state.il.us/court/SupremeCourt/Announce/2010/051810.pdf>.

²⁴ Although not germane to the confidentiality issue, the attorney's reference to one judge as “a total asshole,” and another as “Judge Clueless” surely did nothing to curry the sympathy of the disciplinary authorities.

²⁵ John Schwartz, *A Legal Battle: Online Attitude vs. Rules of the Bar*, N.Y. TIMES, Sept. 13, 2009, at A1.

²⁶ *In re Wilson*, No. 06-0-13019 (State Bar Ct. of Cal. 2008), available at <http://members.calbar.ca.gov/courtDocs/06-O-13019-1.pdf>.

who engaged in *ex parte* communications with an attorney on Facebook during a hearing involving child support and custody.²⁷ During a conference in chambers, the judge struck up a conversation with the husband's attorney about Facebook, and they "friended" each other while the hearing was still in progress. In a later conference on another day, the husband's attorney asked the judge if he thought the husband was guilty of having an affair. When the judge said he thought so, the husband's attorney replied, "I will have to see if I can prove a negative." That evening, in response to a posting on that attorney's Facebook page, "how do I prove a negative," the judge commented that he had "two good parents to choose from," and "Terry feels that he will be back in court" referring to the case not being settled. The husband's attorney answered, "I have a wise Judge."

The next day, the judge told the wife's attorney about the Facebook exchanges between himself and the husband's attorney. Later that day, the judge wrote on his Facebook page that "he was in his last day of trial." The husband's attorney then wrote "I hope I'm in my last day of trial." Judge Terry responded that "you are in your last day of trial." He also googled the wife, viewed examples of her photography work on her website, as well as poems she had posted there, one of which he recited in court. The judge was publicly reprimanded for his behavior.

To prevent such occurrences, the Judicial Ethics Advisory Committee of the Florida Supreme Court issued an opinion prohibiting judges from "friending" lawyers who may appear before them and vice versa.²⁸

The Committee believes that listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge. This is not to say, of course, that simply because a lawyer is listed as a "friend" on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, means that this lawyer is, in fact, in a special position to influence the judge. The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.

The Ethics Committee of the Kentucky Judiciary has declined to impose a *per se* ban on such "friending" stating: "While the nomenclature of a social networking site may designate certain participants as 'friends,' the view of the Committee is that such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence the judge."²⁹ The Committee

²⁷ In re Terry, No. 08-234 (North Carolina Judicial Standards Commission 2009), available at <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>.

²⁸ Florida Judicial Ethics Advisory Comm., Op. 2009-20 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>.

²⁹ Ethics Comm. of the Kentucky Judiciary, Formal Judicial Ethics Op. JE-119 (2010).

nevertheless cautioned judges that their behavior on these sites still must conform to the standards expected of the judiciary generally.

New York’s Advisory Committee on Judicial Ethics also declined to impose a blanket prohibition on judges’ participation in social networking sites, including “friending” lawyers who may appear before them,³⁰ but encouraged the same sort of prudence and discretion that judges ordinarily would exercise in their social interactions with members of the bar and the community at large. Similarly, South Carolina’s Advisory Committee on Standards of Judicial Conduct has concluded that “[a magistrate] 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,”³¹ reasoning that “[a]llowing a Magistrate to be a member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge. Thus, a judge may be a member of a social networking site such as Facebook.”

In step with the weight of authority across the country, the Ohio Supreme Court’s Board of Commissioners on Grievances and Discipline has recently permitted judges to “friend” lawyers who appear before them,³² provided that they adhere to the standards of dignity and discretion that otherwise govern their behavior with members of the bar.³³

Misrepresentations and Other Unprofessional Statements

Model Rule 8.2(a) provides: “A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.” Attorneys also must be careful in their social network postings not to make misrepresentations or other inappropriate comments that may violate their states’ professionalism standards. Two examples should make this point.

A Florida attorney was reprimanded for violating that state’s version of the rule by using his blog to blast a judge he regularly appeared before.³⁴ His comments included referring to her as an “evil unfair

³⁰ New York, Advisory Comm. on Judicial Ethics, Op. 08-176 (Jan. 29, 2009), *available at* <http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm>.

³¹ South Carolina, Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009 (Oct. 2009), *available at* <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>.

³² Supreme Court of Ohio, Bd. of Commissioners on Grievances and Discipline, Op. 2010-7 (Dec. 3, 2010), *available at* https://www.supremecourtofohio.gov/Boards/BOC/Advisory_Opinions/2010/op_10-007.doc.

³³ *See id.*

³⁴ *The Florida Bar v. Conway*, 996 So.2d 213 (Fla. 2008), *available at* http://www.floridasupremecourt.org/clerk/briefs/2008/201-400/08-326_ROR.pdf#xml=http://www.floridasupremecourt.org/SCRIPTS/texis.exe/webinator/search/pdfhi.txt?query=Conway+and+SC08326&pr=SupremeCourt&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&sufs=0&order=r&cq=&id=49a5e6023f, <http://www.floridasupremecourt.org/clerk/dispositions/2008/10/08-326.pdf>.

witch,” that she was “seemingly mentally ill,” had an “ugly, condescending attitude,” that “she is clearly unfit for her position and knows not what it means to be a neutral arbitrator,” and that “there’s nothing honorable about that malcontent.”

In a case from Oregon,³⁵ an attorney posted the following message on Classmates.com, falsely identifying himself as a teacher at a local high school, and implying that he was having sexual relations with students: “Hey all! How is it going. I am married to an incredibly beautiful woman, AND I get to hang out with high school chicks all day (and some evenings too). I have even been lucky with a few. It just doesn't get better than this.” He was reprimanded for violating Oregon’s version of Model Rule 8.4(c).

Researching Parties, Witnesses, and Jurors

Postings on social networking sites can be a goldmine of valuable information for attorneys seeking to learn more about parties, witnesses, adversaries, judges, and jurors, and ethics authorities are now turning their attention to the ground rules for accessing this information.³⁶ One issue that has garnered attention from several states’ ethics authorities is whether it is permissible for an attorney to “friend” an adverse party on Facebook, or to have a third party do so on his or her behalf.

The Philadelphia Bar Association’s Professional Guidance Committee has addressed the propriety of arranging for a third party to “friend” an unrepresented adverse witness on Facebook or MySpace to obtain impeachment material in a pending lawsuit.³⁷ The Committee concluded that this behavior would violate Pennsylvania’s version of Model Rule 8.4(c) because the third party, acting under the attorney’s supervision, would be omitting a material fact in seeking the witness’s acceptance of “friend” status, namely that the sole purpose of the request was to dig up dirt on the individual. The Committee was satisfied that this behavior involved “dishonesty, fraud, deceit or misrepresentation,” in violation of the Rule.

The Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York addressed a similar issue,³⁸ framing the problem as follows:

Using publicly-available information, an attorney or her investigator could easily create a false Facebook profile listing schools, hobbies, interests, or other background information likely to be of interest to a targeted witness. After creating the profile, the attorney or investigator could use it to make a “friend request” falsely portraying the attorney or investigator as the witness's long lost classmate, prospective employer, or friend of a friend. Many casual social network users might accept such a “friend request” or even one less tailored to the background and interests of the witness. Similarly, an investigator could e-mail a YouTube account holder, falsely touting a recent digital posting of potential interest as

³⁵ In re Carpenter, 95 P.3d 203 (Or. 2004).

³⁶ See Nicole D. Galli, et al., *Social Media Symposium: Litigation Considerations Involving Social Media*, 81 PA. BAR ASS’N QUARTERLY 59 (Apr. 2010).

³⁷ See Philadelphia Bar Op. 2009-02 (Mar. 2009).

³⁸ New York City Bar, Formal Op. 2010-02 (Sept. 2010), available at <http://www.nycbar.org/Ethics/eth2010.htm>.

a hook to ask to subscribe to the account holder’s “channel” and view all of her digital postings. By making the “friend request” or a request for access to a YouTube “channel,” the investigator could obtain instant access to everything the user has posted and will post in the future. In each of these instances, the “virtual” inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions. The protocol on-line, however, is more limited both in substance and in practice. Despite the common sense admonition not to “open the door” to strangers, social networking users often do just that with a click of the mouse.

The Committee concluded that, “rather than engage in ‘trickery,’ lawyers can—and should—seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful ‘friending’ of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual’s social networking page.”

The New York State Bar Association Committee on Professional Ethics distinguished the Philadelphia Bar opinion in an opinion addressing whether an attorney may view and access the Facebook or MySpace pages of an adverse party in pending litigation to secure information, if the lawyer limits the search to publicly accessible pages, and does not attempt to “friend” the party.³⁹ In that case, the Committee found that Rule 8.4 would not be implicated because the lawyer is not engaging in any deception by accessing a public website that is available to anyone in the network. According to the Committee: “Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, that that is plainly permitted.”

Although not squarely raised by the attorney’s inquiry, the New York Committee mentioned in passing the additional analysis required under Rules 4.2 and 4.3 when an attorney attempts to “friend” an adverse party or witness:

If a lawyer attempts to “friend” a *represented* party in a pending litigation, then the lawyer’s conduct is governed by Rule 4.2 (the “no-contact” rule), which prohibits a lawyer from communicating with the represented party about the subject of the representation absent prior consent from the represented party’s lawyer. If the lawyer attempts to “friend” an *unrepresented* party, then the lawyer’s conduct is governed by Rule 4.3, which prohibits a lawyer from stating or implying that he or she is disinterested, requires the lawyer to correct any misunderstanding as to the lawyer’s role, and prohibits the lawyer from giving legal advice other than the advice to secure counsel if the other party’s interests are likely to conflict with those of the lawyer’s client.

³⁹ New York State Bar Ass’n Op. 843 (Sept. 10, 2010), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=43208> (September 10, 2010).

There would seem to be no ethical problem in accessing publicly available information on potential jurors, and some attorneys routinely do so right in the courtroom while jury selection is underway, though counsel are well advised to familiarize themselves with local practice first. In a recent New Jersey medical malpractice case,⁴⁰ an appellate court criticized a trial judge's refusal to permit plaintiff's counsel to use his laptop in open court during jury selection to roam the Internet for information. The trial judge made this ruling on grounds of unfairness because plaintiff's counsel had not given his adversary advance notice of his intention to research potential jurors. The appellate court responded:

In making his ruling, the trial judge cited no authority for his requirement that trial counsel must notify an adversary and the court in advance of using internet access during jury selection or any other part of a trial. The issue is not addressed in the *Rules of Court*.

We note, however, that . . . the trial court administrator . . . [had] issued a press release announcing that “wireless internet access” had become available throughout the Morris County Courthouse to “maximize productivity for attorneys” and other court users. The press release quotes the assignment judge as stating that the “courthouse enhancement allows court users” to “access online databases.” There is nothing in the press release, or elsewhere as far as we can determine, that requires attorneys to notify the court or opposing counsel in advance of their intention to take advantage of the internet access made available by the Judiciary.

Despite the deference we normally show a judge's discretion in controlling the courtroom, we are constrained in this case to conclude that the judge acted unreasonably in preventing use of the internet by [plaintiff's] counsel. There was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of “fairness” or maintaining “a level playing field.” The “playing field” was, in fact, already “level” because internet access was open to both counsel, even if only one of them chose to utilize it.

Attorneys would do well to police jurors' own use of the internet during legal proceedings, to assure that extrinsic evidence has not found its way into the jury room, or that some disqualifying bias has not revealed itself. Today Show meteorologist Al Roker sparked controversy by snapping photos of the jury assembly room on his iPhone and uploading them to Twitter when called for jury duty in 2009.⁴¹ Roker was not selected as a juror, and no harm was done in that case, but jurors' disturbing behavior in other cases has affected the course of the proceedings. A recent Reuters legal study, monitoring Twitter over a three-week period, tracked tweets responding to the phrase “jury duty” and found that individuals claiming to be prospective or sitting jurors appeared at the rate of

⁴⁰ See *Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071 (N.J. Super, App. Div. Aug. 30, 2010).

⁴¹ See Draeh Gregorian, *OH WHAT A TWIT! Tweeting Roker Sorry for Taking Juror Pix*, NEW YORK POST, May 28, 2009, available at http://www.nypost.com/p/news/regional/oh_what_twit_orPeW3RKHabFGbsbXOYCXI.

one nearly every three minutes.⁴² A New York federal court recently cited juror access to the internet as “a recurring problem,” citing numerous recent examples.⁴³

In response to this problem, the Judicial Conference Committee on Court Administration and Case Management has recommended the following charge:

Before Trial:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the Internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the Internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website,

⁴² Brian Gow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS LEGAL, Dec. 8, 2010, available at <http://www.reuters.com/article/idUSTRE6B74Z820101208>.

⁴³ *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, Nos. 00 Civ. 1898 (SAS), 04 Civ. 3417 (SAS), 2010 WL 3720406, at *20 n. 215 (S.D.N.Y. Sept. 7, 2010). See, e.g., Christina Hall, *Facebook Juror Gets Homework Assignment*, DETROIT FREE PRESS, Sept. 2, 2010 (reporting that a Michigan juror who posted on Facebook that a defendant was guilty before the completion of trial was dismissed from the jury, held in contempt of court, ordered to pay a \$250 fine, and required to write a five page essay on the defendant's Sixth Amendment right to a jury trial); Noeleen G. Walter, *Access to Internet, Social Media by Jurors Pose Challenges for Bench*, N.Y. L.J., Mar. 3, 2010 (reporting that a state trial court in the Bronx determined that a woman breached her obligations as a juror by sending a Facebook “friend” request to a government witness but rejected the defense's argument that this act had tainted the jury's guilty verdict); Andrea F. Siegel, *Judges Confounded by Jury's Access to Cyberspace: Panelists Can Do Own Research on Web, Confer Outside of Courthouse*, BALTIMORE SUN, Dec. 13, 2009 (discussing the increasing trend in Maryland courts of defendants seeking a mistrial on the ground that one or more of the jurors conducted internet research about the defendant's case while the trial was ongoing); Debra C. Weiss, *Juror Whose Revelation Forced a Mistrial Will Pay \$1,200*, A.B.A. J., Oct. 13, 2009 (reporting that a New Hampshire juror charged with contempt of court for revealing during deliberations that the defendant was a convicted child molester pleaded guilty to a reduced charge and agreed to pay \$1,200 to reimburse the county for expenses related to two days of deliberations); Daniel A. Ross, *Juror Abuse of the Internet*, N.Y. L.J., Sept. 8, 2009 (examining the problem of “internet-tainted” juries across the United States and abroad); John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009 (“It might be called a Google mistrial. The use of BlackBerry's and iPhones by jurors gathering and sending out information about cases is wreaking havoc on trials around the country, upending deliberations and infuriating judges.”).

through any Internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

At the Close of the Case:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the Internet, any Internet service, or any text or instant messaging service; or any Internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.⁴⁴

CONCLUSION

Whether as a vehicle for marketing one's services, or a tool for investigating personal information, the internet has become an indispensable fixture in the practice of law, and not just for the tech-savvy among us. Some level of online presence is essential to survive in the competitive environment in which we practice and, as one commentator has observed, "[i]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites."⁴⁵ The rules of ethics will evolve to meet the challenges of the digital age, but, until clear guidance is forthcoming from our state ethics authorities, practitioners who remain faithful to the time honored values of loyalty, confidentiality, candor, and professionalism surely will not go wrong.

⁴⁴ Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case (Dec. 2009).

⁴⁵ Sharon Nelson et al., *Legal Implications of Social Networking*, 22 REGENT U. L. REV. 1, 13 (2009/2010). See also Seth P. Berman et al., *Web 2.0: What's Evidence between "Friends"?* 53 B.B. J. 5,6 (Jan./Feb. 2009) (social networking sites "may record people's thought processes and impressions in unguarded moments, exactly the sort of evidence that can be invaluable during litigation"); Kathrine Minotti, *Evidence: The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession*, 60 S.C. L. Rev. 1057, 1059-61, 1066-68, 1071-73 (2009).

David B. Rubin is in private practice in Metuchen, New Jersey. He is general counsel to numerous school districts throughout the state and has handled several landmark cases in the field of education law including *Piscataway Township Board of Education v. Taxman*. Mr. Rubin is Past Chair of the NSBA Council of School Attorneys and Past President of the New Jersey Association of School Attorneys. He received his law degree from Rutgers School of Law.