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**ETHICS IN LAWYER ADVERTISING,
WEBSITES AND SOCIAL MEDIA**

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ETHICS IN LAWYER ADVERTISING, WEBSITES AND SOCIAL MEDIA*

I. INTRODUCTION

The Internet is a game changer for legal practitioners. Because franchising is a method of national and international expansion, lawyers in the franchise bar, just as lawyers in other practice areas, appreciate the visibility, immediacy and relatively inexpensive avenues of communication that cyberspace provides.

Both the content and the manner of a lawyer's electronic communication raise concerns under the ethics rules applicable in each state. The state ethics rules generally are based upon model rules proposed by the American Bar Association (the "ABA") and revised from time to time.¹ All states other than California have adopted professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct ("ABA Model Rules" or "Rules").² In discussing the use of new technologies generally and websites and social media in particular, we will address lawyers' ethical obligations related to both the ABA Model Rules and notable state rules, as well as related opinions.

Even though the technological benefits of cyberspace are recent, most of the ethical issues we will discuss are not new or unique to cyberspace. This paper will discuss how the existing rules apply to the new technologies and set forth resources for further assistance, most of which are available for free on the Internet.

Ethical issues can arise in many different ways. For example, a traditional telephone directory listing, newspaper print ad, radio commercial, Internet legal directory, firm website, blog, Facebook page, or Groupon offer can all constitute legal advertising that is governed under the ABA Model Rules and state ethics rules. Whether a multijurisdictional practice constitutes the unauthorized practice of law in a jurisdiction in which the lawyer is not admitted predates the Internet and does not fundamentally depend on how the lawyer made contact with the client, whether an old-fashioned way or through a certain platform of communication on the Internet. We have organized this paper by addressing a number of ethical issues separated using the categories of interactive social media platforms in Section II and more static forms in Section III, and then addressing certain other issues, multijurisdictional practice (Section IV), security and confidentiality (Section V), litigation (Section VI), and social media policies (Section VII). In reality, however, ethical issues do not always fall neatly into a particular category.

As we discuss below, the ethics rules require that if a lawyer takes advantage of the benefits of cyberspace, he or she must acquire a level of competence in the technical aspects of his or her actions. Law firms and in-house legal departments (or the enterprise generally) must

*The authors would like to acknowledge and thank Robert S. Burstein, a counsel in the Philadelphia office of Wiggin and Dana LLP, for his substantial assistance in the preparation of this paper.

¹ABA Model Rules, *available at* ABA Ctr. For Prof'l Responsibility, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited August 14, 2012).

²*Id.*

provide guidance to employees to avoid ethical lapses. One tool used to educate and advise employees is the adoption and distribution of a web and social media policy. We discuss web and social media policies in Section VII of this paper, and provide examples of actual law firm policies in Appendix 4.

A. What is Social Media?

We are bombarded by social media in our practices every day. Social media is communication of content and social interaction and comes in many forms. Most of us are acquainted with the major expressions of these technologies: Internet forums,³ blogs⁴ (websites comprised of online journals containing informal articles, comments, links, and information and opinions), chat rooms (real time online interactions among an open or closed member group), listserves (software that manages emails among a list of subscribers),⁵ podcasts,⁶ microblogs⁷ (e.g., Twitter), content communities (e.g., YouTube), social networking sites (e.g., Facebook), collaborative projects or wikis⁸ (e.g., Wikipedia). Further explanations of certain terms are available at Wikipedia, the online free encyclopedia, at the URLs provided in the footnotes.

Remember the word “social” is part of social media for a reason. It is personal and it means communicating in a “social” manner. Social media is primarily about networking with *other people* to build positive, mutually beneficial relationships. For lawyers, it is important to differentiate between personal and business “interactions” or “relationships.” Overlap is an inevitable function of social media, but it is critical to understand how to manage one’s online presence and presentation to be effective *and* ethical. This paper deals only with the ethical issues presented by lawyers’ use of social media, and not the effective use of social media.

Many of the social media services can be integrated via social network aggregation⁹ platforms such as HootSuite, TweetDeck and Seesmic which help the user manage multiple platforms. Social media network websites include sites like Facebook, Twitter, LinkedIn and Google Plus. They can be interactive, one directional, and/or static informational means of communication that offer something for everyone. The user can do as much or as little as he or she wants. All these forms of media include numerous ways the careless or naive lawyer can simultaneously expand a client base and commit various forms of misconduct and even malpractice.

Social media platforms are rapidly evolving as innovation outpaces labels, but for practical purposes, a recently released ABA publication identifies five types of social media¹⁰:

³WIKIPEDIA, http://en.wikipedia.org/wiki/Internet_forum (last visited August 14, 2012).

⁴WIKIPEDIA, <http://en.wikipedia.org/wiki/Blog> (last visited August 14, 2012).

⁵Martin Whittaker, *Ethical Considerations Related to Blogs, Chat Rooms and Listservs*, 21 *The Professional Lawyer* (ISSUE NO. 2) 3 (2012).

⁶WIKIPEDIA, <http://en.wikipedia.org/wiki/Podcast> (last visited August 14, 2012).

⁷WIKIPEDIA, <http://en.wikipedia.org/wiki/Microblogging> (last visited August 14, 2012).

⁸WIKIPEDIA, <http://en.wikipedia.org/wiki/Wiki> (last visited August 14, 2012).

⁹WIKIPEDIA, http://en.wikipedia.org/wiki/Social_network_aggregation (last visited August 14, 2012).

¹⁰Carole Elefant and Nicole Black, *Social Media for Lawyers: The Next Frontier*, at 26-27 (2012).

1. Directories and Profiles, e.g. Avvo, LinkedIn, Justia
2. Communication, e.g. Blogs, Podcasts, Twitter
3. Communities, e.g. Facebook, LinkedIn, Google Plus, Legal OnRamp, Ning, M-H Connected
4. Archiving and Sharing Sites, e.g., JD Supra, YouTube, SlideShare, Instagram, Pinterest
5. Online/Offline Hybrids, e.g. Biznik, Twitter (Tweet-ups), Meetup.com, EventBrite

Each of these five categories requires sensitivity to the particular vulnerabilities and ethical considerations that may apply to use by lawyers.

B. New Technologies and Ethics

The ABA Ethics 20/20 Commission, created in 2009 to review the impact of technological advances on ethical and regulatory challenges, released a report on May 7, 2012 (the “Ethics 20/20 Commission Report”), including a first set of six proposals to amend the ABA Model Rules for consideration by the ABA House of Delegates at its August 2012 annual meeting. The entire report, including the Introduction & Overview and the six separate proposed amendments and discussion of each, provides helpful background information and information to frame the issues and is available on the Ethics 20/20 Commission’s website.¹¹ We have attached as Appendix 1 to this paper portions of the Introduction & Overview.¹² The initial proposed amendments are summarized under the headings Technology and Confidentiality, Technology and Client Development, Lawyer Mobility, and Outsourcing. We have attached as Appendix 2 to this paper the summary chart of the proposed amendments.¹³ Because the proposed amendments will likely be adopted by the states in the future, we include highlights of the Ethics 20/20 Commission Report in our discussion below.

No matter how daunting it may be for some of us, technology is not only here to stay but will continue to advance rapidly. A lawyer cannot ignore how technology affects communications, in particular the promotion of his or her practice and client development. Awareness of the benefits and risks of technology, and taking reasonable precautions to minimize the risks, is a personal, non-delegable duty of every lawyer.

¹¹Commission on Ethics 20/20, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (follow hyperlinks under “House of Delegates Filings”) (last visited August 14, 2012).

¹²Commission on Ethics 20/20, Report to the House of Delegates, Introduction & Overview, May 7, 2012, *available at* http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (follow “Related Resources” hyperlink and then follow to “Introduction and Overview” hyperlink) (last visited August 14, 2012).

¹³Ethics 20/20 Commission Summary of Proposals *available at* <http://apps.americanbar.org/dch/committee.cfm?com=IC100123> (follow “Related Resources” hyperlink) (last visited August 14, 2012).

II. SOCIAL MEDIA ETHICS: THE OBVIOUS AND THE NOT SO OBVIOUS

In this section, we focus on interactive social media platforms and websites. In Section III of this paper, we address issues related to more static communications, mainly websites and one-way advertising. But as noted in the Introduction to this paper in Section I, many of the ethical issues overlap and can arise under both categories.

There are a number of pitfalls and traps for the unwary in connection with the use of interactive social media.

A. The Ethics Rules Apply to Any Form of Communication

ABA Model Rule 7.1 (Communications Concerning A Lawyer's Services) states the guiding principle for lawyer communications:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.¹⁴

Comment 1 to ABA Model Rule 7.1 makes it clear that Rule 7.1 applies to social media by stating that Rule 7.1 “governs all communications about a lawyer’s services,” then expressly referencing advertising “permitted by Rule 7.2” and adding that “[w]hatever means are used to make known a lawyer’s services, statements about them must be truthful.”¹⁵ The reference in Comment 1 to advertising permitted by Rule 7.2 refers to “written, recorded or electronic communication, including public media.”

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.¹⁶

The Ethics 20/20 Commission Report expands the reference to “new marketing services – such as law firm websites, blogs, social and professional networking sites, pay-per-click ads, pay-per-lead services, and online videos” leading to “a wide range of ethics-related issues.”¹⁷

¹⁴ABA Model Rule 7.1, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_1_communication_concerning_a_lawyer_s_services.html (last visited August 14, 2012).

¹⁵ABA Model Rules., R. 7.1, cmt. 1, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_1_communication_concerning_a_lawyer_s_services/comment_on_rule_7_1.html (last visited August 14, 2012).

¹⁶ABA Model Rule 7.2 *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising.html (last visited August 14, 2012).

¹⁷Commission on Ethics 20/20, Report to the House of Delegates, Introduction & Overview, May 7, 2012, at 9, *available at* http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited August 14, 2012).

Networking platforms and websites such as Facebook, LinkedIn, On Ramp, and Google Plus are therefore clearly subject to the ethics rules.

B. The Inadvertent Client: Conflicts and Confidences

Some forms of social media are potentially more dangerous than others. As a lawyer, it is easy to let down one's guard during the short bursts of communication that are typical of Facebook and Twitter exchanges. Attorneys may inadvertently create an attorney-client relationship when using social media through chats, emailing, and posting on blogs, listservs, Facebook, Twitter and similar forums, by responding to a participant's posting concerning a problem he or she is experiencing:

Virtually everyone is a potential client. If a lawyer isn't careful, someone may inadvertently become an actual client—or think he or she is—often with grave consequences.

While the ABA Model Rules of Professional Conduct are silent on the formation of a lawyer-client relationship, the Restatement (Third) of the Law Governing Lawyers provides in section 14 that the relationship is formed when a person manifests an intent that a lawyer provide legal services, and the lawyer either (a) manifests consent or (b) fails to manifest lack of consent and knows or reasonably should know the person reasonably relied on the lawyer to provide the services.

In other words, if a person asks a legal question, and a lawyer answers or says he or she will look into it, a lawyer-client relationship may result. There's no need to sign an agreement, shake hands, discuss rates or send an engagement letter.¹⁸

Whether an attorney-client relationship has been formed often depends on whether the lawyer is giving information or legal advice. This issue has been extensively discussed as the potential of the internet has unfolded.¹⁹ Discussing legal trends and information of general applicability is clearly not advice. However, when answers and comments morph into addressing or responding to specific circumstances, an attorney-client relationship can easily be created.²⁰

¹⁸Michael Downey, *THE WAY OUT: Don't be Vague, in Top 10 Ethics Traps*, ABA Journal, (Stephanie Francis Ward, ed. Nov. 1, 2007), available at http://www.abajournal.com/magazine/article/top_10_ethics_traps/ (last visited August 14, 2012).

¹⁹See, e.g., Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147 (1999), available at <http://scholarship.law.duke.edu/dlj/vol49/iss1/2> (last visited August 14, 2012).

²⁰See, e.g., S.C. Bar Ethics Advisory Op. 12-03 available at <http://www.scbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/679/Ethics-Advisory-Opinion-03-12.aspx> (2003) (last visited August 14, 2012).

The potential consequences of creating an attorney-client relationship include creating a conflict for the representation of another existing or potential client under ABA Model Rule 1.18(c)²¹ and a duty to hold information received in confidence under ABA Model Rule 1.18(b).²² (The obligation to hold information in confidence may arise in some circumstances even if an attorney-client relationship has not been created.²³)

Once a person becomes a client – even inadvertently – it triggers all the obligations of the attorney-client relationship: loyalty [no conflict], competency [ABA Model Rule 1.1²⁴], diligence [ABA Model Rule 1.3²⁵] and confidentiality. Further, under ABA Model Rule 1.10, an inadvertent client relationship imputes to the lawyer's firm, not just to the lawyer.²⁶

The issue of the inadvertent client is an important one and is further discussed below in Section III.B. in connection with law firm websites.

C. Prohibition Against Fees for a Recommendation

Internet-based client development tools create issues with respect to the prohibition against certain kinds of referral fees. ABA Model Rule 7.2 (Advertising) prohibits lawyers from paying others for a “recommendation” but permits certain exceptions, including referring clients to another lawyer or nonlawyer professional under a reciprocal referral agreement provided the

²¹“(c) A lawyer subject to paragraph (b) 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 that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).” ABA Model Rule 1.18(c), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_18_duties_of_prospective_client.html (last visited August 14, 2012).

²²“(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.” ABA Model Rule 1.18(b), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_18_duties_of_prospective_client.html (last visited August 14, 2012).

²³ABA Model Rule 1.18, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_18_duties_of_prospective_client.html (last visited August 14, 2012). See, e.g., Mass. Bar Ass'n Comm. on Prof'l Ethics, Op. 07-01 (May 23, 2007) and N.H. Rules of Prof'l Conduct, R. 1.18, cmts. 1 and 2 discussed below in this paper in Section III.B.3.

²⁴ABA Model Rule 1.1 states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” ABA Model Rule 1.1, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html (last visited August 24, 2012).

²⁵ABA Model Rule 1.3 states: “A lawyer shall act with reasonable diligence and promptness in representing a client.” ABA Model Rule 1.3, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence.html (last visited August 24, 2012).

²⁶Downey, *supra* note 18.

agreement is not exclusive and the client is informed of the existence and nature of the agreement. The Rule (which, as with each Rule has not been adopted by all states and is not uniform in the states in which it has been adopted)²⁷ provides:

Rule 7.2 Advertising

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.²⁸

The Ethics 20/20 Commission Report notes existing confusion with respect to Internet-based client development tools, such as pay-per-click (where the fee is based on the number of clicks or “hits” on the website link) and pay-per-lead (where the fee is based on the number of visitors actually contacting the lawyer after visiting the website link) services²⁹ that may be deemed to violate ABA Model Rule 7.2’s prohibition against paying others for a “recommendation.” To address the issue, the Ethics 20/20 Commission Report’s proposal amends Comment 5 to Rule 7.2 by adding language “clarifying that a recommendation occurs when someone endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional

²⁷ See ABA CPR Policy Implementation Comm., Variations of the ABA Model Rules of Professional Conduct, Rule 7.2 Advertising (As of Feb. 14, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_2.pdf-44k-2012-06-1 (last visited August 22, 2012). To research the status of a state’s adoption of any particular Model Rule and any state variations, see ABA CPR Policy Implementation Comm., Charts Comparing Individual Professional Conduct Model Rules as Adopted or Proposed by States to ABA Model Rules, *available at* http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html (last visited August 22, 2012).

²⁸ ABA Model Rule 7.2 *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising.html (last visited August 14, 2012).

²⁹ See, e.g., N.J. Sup. Ct. Comm. On Att’y Advertising Ethics Op. 43 (2011), *available at* http://lawlibrary.rutgers.edu/collections/ethics/caa/caa43_1.html (last visited August 22, 2012).

qualities,” and by adding an express statement that “a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e)³⁰ and 5.4³¹, and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.2, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral.”³²

³⁰(e) A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable. ABA Model Rule 7.2 *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees.html (last visited August 12, 2012).

³¹Rule 5.4 Professional Independence Of A Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
- (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

ABA Model Rule 5.4 *available at*

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_4_professional_independence_of_a_lawyer.html (last visited August 14, 2012).

³²Commission on Ethics 20/20, Report to the House of Delegates, Introduction & Overview, May 7, 2012, at 9-10, *available at* http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited August 14, 2012) and Commission on Ethics 20/20, Report to the House of Delegates, Resolution & Report: Technology and Client Development, Resolution at 4-5, *available at* http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited August 14, 2012).

The Ethics 20/20 Commission Report includes the following discussion of important new marketing tools:

Prior to the Internet, this dichotomy between advertising and lawyer referral services was not difficult to understand. For example, payments to television stations to run a commercial or payments to a phone book company to run a Yellow Pages advertisement were clearly permissible, whereas sharing fees with a for-profit referral service was clearly impermissible.

The Internet has blurred these lines, and it is highly likely that continued technological innovation will make the lines even less clear. For example, new marketing methods have emerged, such as those provided by Legal Match, Total Attorneys, Groupon, and Martindale-Hubbell's Lawyers.com that do not fit neatly into existing categories. Although the particular models vary, lawyers often pay these entities a fee for each client lead that is generated. An important question in this context is whether the lead generator is "recommending" the lawyer for whom the lead is generated. If so, any payments from the lawyer would violate Rule 7.2(b). The problem is that the existing version of Model Rule 7.2 does not clearly resolve this issue.

To address this ambiguity, the Commission examined the original purpose of the restrictions contained in Model Rule 7.2(b). One important goal was to prohibit payments to people (e.g., "runners" or "cappers") who might engage in conduct that the lawyer was not permitted to employ, such as engaging in in-person solicitations or using false or misleading tactics. *See also* Rule 8.4(a) (prohibiting the violation of the Rules of Professional Conduct "through the acts of another"). Another reason for the restriction is that nonlawyers typically do not have the expertise to know which lawyers are best able to handle a particular matter. A recommendation, therefore, can give the public a false impression about the appropriateness of using a specific lawyer. The Commission concluded that it should propose clarifying language regarding the scope of Model Rule 7.2 that is consistent with these rationales for the Rule, while not unreasonably limiting lawyers' ability to use new client development tools.³³

D. Prohibition Against Real Time Solicitation (fka the "Cold Call")

ABA Model Rule 7.3 (Direct Contact With Prospective Clients) prohibits "in-person, live telephone or real-time electronic contact" to solicit employment, unless the person contacted is a lawyer or someone with a close personal or prior professional relationship.³⁴ In other words,

³³Commission on Ethics 20/20, Report to the House of Delegates, Resolution & Report: Technology and Client Development, Report at 3-4, *available at* http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited August 14, 2012) (footnotes omitted).

³⁴Rule 7.3 Direct Contact With Prospective Clients

(a) 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, unless the person contacted:

(1) is a lawyer; or

don't reach out to a stranger asking for business or offering unsolicited representation. We usually think of prohibited third party solicitation, and many of the ethics opinions address the question solely in the context of ambulance-chasing types of situations, but the potential applications are much broader.

In Texas, uninvited solicitation by any means whether traditional or electronic (e.g. telephone, direct mail, third-party contact, "friending", tweeting, email) is an unauthorized contact which constitutes "barratry". Barratry is a third-degree felony in Texas. Although the barratry statute has been represented to the public as protecting the consumer from the unethical and overreaching practices of evil personal injury and criminal law attorneys, it is broadly worded and applies to all attorneys without exception. Barratry violations are also ethical violations in Texas.³⁵

Other states are more flexible. For example:

- California – allows use of online chat rooms to solicit clients³⁶

-
- (2) has a family, close personal, or prior professional relationship with the lawyer.
- (b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.
- (c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
- (d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

ABA Model Rule 7.3, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_3_direct_contact_with_prospective_clients.html (last visited August 14, 2012).

³⁵Texas Disciplinary Rule DR 8.04(a)(9), *available at* <http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct/VIII--MAINTAINING-THE-INTEGRITY-OF-THE-PROFESSION/8-04-Misconduct.aspx> (last visited August 12, 2012), provides that a lawyer shall not "engage in conduct that constitutes barratry as defined by the law of this state"; Section 38.12(a)(2) of Texas Penal Code defines barratry as follows:

§ 38.12. BARRATRY AND SOLICITATION OF PROFESSIONAL EMPLOYMENT.

- (a) A person commits an offense if, with intent to obtain an economic benefit the person:
- (2) solicits employment, either in person or by telephone, for himself or for another[.]

³⁶State Bar of Calif. Ethics Op. No. 2004-166, *available at* <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=flbdTW9Klf0%3D&tabid=838> (last visited August 12, 2012) (communication with prospective client in a mass disaster victims' chat room is not a prohibited solicitation but is a communication that intrudes or causes distress and which attorney knows is with a prospective client who may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel).

- Philadelphia – allows use of blogging, email or chat rooms to solicit clients³⁷
- Washington, DC – allows use of web pages and online chat rooms to solicit clients³⁸
- New York – allows listservs with general information; websites are “advertising” and copies must be retained for 1 year³⁹

Certain Internet-based communications may be deemed to violate the real-time electronic solicitation prohibition. The Ethics 20/20 Commission Report proposed, and on August 6, 2012 the ABA House of Delegates adopted, the following new Comment 1 to ABA Model Rule 7.3 to clarify when a communication constitutes a “solicitation:”

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer’s communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.⁴⁰

The Commission also notes, in expanding comment (3), that electronic communications are not necessarily always in real-time:

[3] [C]ommunications can be mailed or transmitted by email or other electronic means that **do not involve real-time contact and do not violate other laws** [emphasis added] governing solicitation.⁴¹

The Commission appears to be of the opinion that lawyers as a group apparently still require close supervision not to take advantage of the susceptible public. In comment (4), the Commission observes that online communications from lawyers may be misleading:

The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client contact can be disputed

³⁷Philadelphia Bar Ass’n Formal Op. 2010-06 (June 2010), *available at* <http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion%202010-6.pdf> (last visited August 14, 2012).

³⁸D.C. Bar Legal Ethics Comm. Ethics Op. 302 (2000) *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion302.cfm (last visited August 12, 2012) and D.C. Bar Legal Ethics Comm. Ethics Op. 316 (2002) *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm (last visited August 12, 2012).

³⁹N.Y. City Bar Ass’n Formal Op. 1998-2, *available at* <http://www.nycbar.org/ethics/ethics-opinions-local/1998-opinions/1054-formal-opinion-1998-2> (last visited August 14, 2012).

⁴⁰Commission on Ethics 20/20, Report to the House of Delegates, Resolution & Report: Technology and Client Development, Resolution at 6, *available at* http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited August 14, 2012).

⁴¹*Id.*

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.⁴²

So chats, tweets, hangouts and instant messaging should remain social and responses cautious. For example, if someone “tweets”:

OMG, insurance denied claim 2 replace roof after baseball hail. I m going 2 have 2 pay 4 it all.

And the lawyer tweets back:

I sue insurance companies & maybe can help. I can call u or u can call me.

Then, Model Rule 7.3 prohibiting uninvited real time solicitation, possibly barratry laws *and* state mandated advertising rules will come into play. Unless a lawyer already had a requisite prior relationship with the tweeter, the contact may violate ethical rules in a number of states. In some states, the prohibition only arises in the case of an accident or similar circumstance, where the potential client has not sought the lawyer’s advice.

E. Competency and Designation as a Specialist or Expert

ABA Model Rule 7.4 prohibits a lawyer from stating or claiming the lawyer is certified as a specialist in a particular field of law, except for the designations “Patent Attorney” or “Admiralty,” if applicable, or unless the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association and the name of the certifying organization is clearly identified in the communication:

Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty” or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

⁴²*Id.* at 7.

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.⁴³

As discussed below, certain social networking sites can invite lawyers to violate this restriction by allowing users to provide information under the heading “Specialties.”

Characterization as an expert is typically regulated by state bars, usually requiring certification in a specialty to qualify as an expert. This creates problems for lawyers who are not certified or who do not have an option for certification, but who participate in various directories and other sites that include or require personal profiles.

1. LinkedIn

A LinkedIn profile has a field for “specialties.” Unless a lawyer is certified as a specialist by a state bar accredited authority in his or her jurisdiction, the field should be left blank. ABA Model Rule 7.4(d) and most state rules prohibit a statement that a lawyer is a specialist without the particular sanctioned accreditation. Additionally, Tennessee has determined even the profile listing is advertising.⁴⁴

However, under ABA Model Rule 7.4(a) quoted above, a lawyer or law firm can state that the lawyer or firm limits his/her/its practice to certain areas of law. As a best practice, lawyers should use terms like “focus on,” “limited to” or “emphasis” to highlight practice areas on social media profiles and when otherwise describing their practices online.

The “Answers” section on the LinkedIn toolbar can also pose problems. When a member responds to questions there, the readers vote on the best responses posted. If a responding member accrues a number of best response votes, LinkedIn automatically designates the member as an “Expert” in that category. That designation probably violates most specialization rules.

2. Other Sites and Networking Platforms

There are other websites that claim to have a panel of “experts” available to answer visitors’ questions. One such website called “Just Answers” was the subject of a South Carolina ethics opinion.⁴⁵ The site was not limited to legal questions but included numerous industries and areas of expertise. Attorneys on the site were referred to as experts, and the disclaimers

⁴³ABA Model Rule 7.4, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_4_communication_of_fields_of_practice_specialization.html (last visited August 14, 2012).

⁴⁴Tenn. Formal Ethics Op. 2001-F-144(b) (2001) *available at* [http://www.tbpr.org/Attorneys/EthicsOpinions/pdfs/2001-f-144\(b\).pdf](http://www.tbpr.org/Attorneys/EthicsOpinions/pdfs/2001-f-144(b).pdf) (last visited August 14, 2012).

⁴⁵S.C. Ethics Adv. Op. 12-03 (2012) *available at* <http://www.scbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/1211/Ethics-Advisory-Opinion-12-03.aspx> (last visited August 14, 2012).

on the site were found to be inadequate in light of the specifics of the legal advice provided, however limited in scope. The designation as expert on the website was found to be a violation of the South Carolina Disciplinary Rules.

F. State Advertising Requirements That May Affect Social Media Activities

In general, the state ethics rules are guided by the ABA Model Rules, but there are state differences, including special requirements for lawyer advertising not found in the ABA Model Rules and not uniform among the states.⁴⁶ State bars are just starting to focus more on the consequences of using social networking. Lawyer advertising rules are subject to change through rule changes or opinions more often than other ethics rules, perhaps driven by the rapid changes in technology, so it is important to stay current. A helpful resource is a summary chart the ABA maintains on its website with links to the advertising, solicitation and marketing rules of all fifty state bars.⁴⁷

A threshold question is whether the social media activity constitutes “advertising” for purposes of state ethics rules or whether the activity is merely socializing.

Microblogging (usually meaning “tweeting”) can create other problems. A lawyer who “tweets” about winning a notable verdict or large award in a case may violate the prohibition in Model Rule 7.1 against advertising specific case results:

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.⁴⁸

The 140 character limitation on tweets makes it impossible to include the required disclaimer.

ABA Model Rule 7.3 (Direct Contact With Prospective Clients) provides “[e]very written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of

⁴⁶See Nia Marie Monroe, *The Need for Uniformity: Fifty Separate Voices Lead to Disunion in Attorney Internet Advertising*, 18 Geo. J. Legal Ethics 1005 (Summer 2005) and Connor Mullin, *Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers*, 20 Geo. J. Legal Ethics 835 (Summer 2007).

⁴⁷ABA, *Links to State Ethics Rules Governing Lawyer Advertising, Solicitation and Marketing*, available at <http://www.abanet.org/legalservices/clientdevelopment/adrules/states.html> (last visited August 14, 2012).

⁴⁸ABA Model Rules., R. 7.1, cmt. 3, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_1_communication_concerning_a_lawyer_s_services/comment_on_rule_7_1.html (last visited August 14, 2012).

any recorded or electronic communication” except to certain persons.⁴⁹ Comment 7 clarifies, however, that the requirement does not apply to communications sent in response to requests from potential clients or to general announcements, including changes in personnel or office location.⁵⁰

Comment 3A to Rule 7.2 (Advertising) of the Massachusetts Rules of Professional Conduct is an example of a state focusing on new technologies:

[3A] The advertising and solicitation rules can generally be applied to computer-accessed or other similar types of communications by analogizing the communication to its hard-copy form. Thus, because it is not a communication directed to a specific recipient, a web site or home page would generally be considered advertising subject to this rule, rather than solicitation subject to Rule 7.3. For example, when a targeted e-mail solicitation of a person known to be in need of legal services contains a hot-link to a home page, the e-mail message is subject to Rule 7.3, but the home page itself need not be because the recipient must make an affirmative decision to go to the sender’s home page. Depending upon the circumstances, posting of comments to a newsgroup, bulletin board or chat group may constitute targeted or direct contact with prospective clients known to be in need of legal services and may therefore be subject to Rule 7.3. Depending upon the topic or purpose of the newsgroup, bulletin board, or chat group, the posting might also constitute an association of lawyer or law firms name with a particular service, field, or area of law amounting to a claim of specialization under Rule 7.4 and would therefore be subject to the restrictions of that rule. In addition, if the lawyer or law firm used an interactive forum such as a chat group to solicit for a fee professional employment that the prospective client has not requested, this conduct may constitute prohibited personal solicitation under Rule 7.3(d).⁵¹

State lawyer advertising requirements typically include:⁵²

1. Filing with a reviewing authority prior to or shortly after public dissemination;
2. Inclusion of mandatory information, such as the address of the principal office of the law firm and the name of the person responsible for the content of the ad;

⁴⁹ABA Model Rule 7.3, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_3_direct_contact_with_prospective_clients.html (last visited August 14, 2012).

⁵⁰ABA Model Rules., R. 7.3, cmt. 7, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_3_direct_contact_with_prospective_clients/comment_on_rule_7_3.html (last visited August 14, 2012).

⁵¹Mass. Rules of Prof'l Conduct, R. 7.2, cmt. 3A, *available at* [http://www.mass.gov/obcbbbo/rpc7.htm#Rule 7.2](http://www.mass.gov/obcbbbo/rpc7.htm#Rule%207.2) (last visited August 14, 2012).

⁵²Debra Bruce, *12 Social Media Ethics Issues for Lawyers*, Solo Practice University Blog, March 11, 2010, <http://solopracticeuniversity.com/2010/03/11/a-dozen-social-media-ethics-issues-for-lawyers/>.

3. Labels such as “Attorney Advertising” or “Advertising Material” at the beginning and end of the message;
4. Inclusion of specified disclaimer language;
5. Retention of copies of each advertisement for a specified period of time; and
6. Prohibitions against actor portrayals in advertisements.

Some states waive filing of “tombstone” ads that are limited to a laundry list of basic information about the lawyer and the law office. Often a lawyer’s LinkedIn profile contains only the exempt information, so it doesn’t trigger the advertising rules. Generally speaking, information about the name, location, telephone number and general availability of lawyers to work on particular legal matters or listing various areas of practice, is exempt information and need not include a disclaimer or statement.⁵³ Texas Rule 7.07(e)(1), for example, provides a lengthy listing of exemption information.⁵⁴ Rule 7.07(e) does not, however, include educational

⁵³Tex. Disciplinary Rules of Prof’l Conduct, Part 7, cmt. 5, *available at* http://www.texasbar.com/AM/Template.cfm?Section=Rules_Comments_and_Opinions&Template=/CM/ContentDisplay.cfm&ContentID=13435 (last visited August 12, 2012).

⁵⁴Tex. Disciplinary Rules of Prof’l Conduct, R. 7.07(3), *available at* <http://www.legalethictexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct/VII--INFORMATION-ABOUT-LEGAL-SERVICES/7-07-Filing-Requirements-for-Public-Advertisement.aspx> (last visited August 14, 2012):

- (1) an advertisement in the public media that contains only part or all of the following information,
 - (i) the name of the lawyer or firm and lawyers associated with the firm, with office addresses, electronic addresses, telephone numbers, office and telephone service hours, telecopier numbers, and a designation of the profession such as "attorney," "lawyer," "law office," or "firm";
 - (ii) the particular areas of law in which the lawyer or firm specializes or possesses special competence;
 - (iii) the particular areas of law in which the lawyer or firm practices or concentrates or to which it limits its practice;
 - (iv) the date of admission of the lawyer or lawyers to the State Bar of Texas, to particular federal courts, and to the bars of other jurisdictions;
 - (v) technical and professional licenses granted by this state and other recognized licensing authorities;
 - (vi) foreign language ability;
 - (vii) fields of law in which one or more lawyers are certified or designated, provided the statement of this information is in compliance with Rule 7.02(a) through (c);
 - (viii) identification of prepaid or group legal service plans in which the lawyer participates;
 - (ix) the acceptance or nonacceptance of credit cards;
 - (x) any fee for initial consultation and fee schedule;
 - (xi) other publicly available information concerning legal issues, not prepared or paid for by the firm or any of its lawyers, such as news articles, legal articles, editorial opinions, or other legal developments or events, such as proposed or enacted rules, regulations, or legislation;
 - (xii) in the case of a website, links to other websites;
 - (xiii) that the lawyer or firm is a sponsor of a charitable, civic, or community program or event, or is a sponsor of a public service announcement;

history as exempt information. Social networking sites use educational history to suggest people that members might know and want to connect with, so that is important information to include in a profile.

Firm websites, blogs, and other forms of social media may either be used (a) to convey information, to build and enhance relationships and/or to engage in discussions about topics of interest, or (b) to secure paid professional employment. If the social networking site is not used to secure paid professional employment, then it is not considered to be advertising and is not subject to the requirements governing advertising, including filing copies of the materials with the state, retaining copies, providing disclosure, labels and disclaimers. In Texas, the official Comment 6 to Rule 7.07 reflects this distinction and reminds us that “communications need not be filed at all if they were not prepared to secure paid professional employment.”⁵⁵

Consistent with Comment 6 to Model Rule 7.07, the Advertising Review Department of the State Bar of Texas takes the position that LinkedIn and Facebook profiles do not need to be filed for advertising review.

By contrast, Philadelphia Bar Association Formal Opinion 2010-06 (June 2010) advised that the use of email, blogs and chat rooms was not prohibited by Pennsylvania Rule of Professional Conduct 7.3(a) pertaining to real-time electronic communication, but that their use constituted advertising and was subject to all of the requirements concerning advertising, including maintaining copies under Rule 7.2(b) for two years.⁵⁶

G. Different Rules May Apply to Social Networking Sites Focused on the Legal Community

Some states exempt advertisements in legal newspapers, legal directories and other media focused on or restricted to lawyers. In Texas, Rule 7.04(a)(3) permits lawyers to publicize their availability in legal directories and legal publications. As a result, lawyers have more latitude on Texas Bar Circle, the social networking site restricted to members of the State Bar of Texas, than on other social media. If a lawyer’s state has particularly restrictive policies about advertising that extend to social media, the lawyer should investigate whether the rules might be more lax with regard to Law Link, Legal On Ramp, Martindale-Hubbell Connected, or a state bar networking site.⁵⁷

(xiv) any disclosure or statement required by these rules; and

(xv) any other information specified from time to time in orders promulgated by the Supreme Court of Texas;

⁵⁵Tex. Disciplinary Rules of Prof'l Conduct, R. 7.07, cmt. 6, *available at* http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96 (last visited August 14, 2012).

⁵⁶Philadelphia Bar Ass'n Formal Op. 2010-06 (June 2010), *available at* <http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion%202010-6.pdf> (last visited August 14, 2012). *Accord, In re Hunter*, VSB No. 11-032-084907 (Va. State Bar, 3d Dist. Comm. Nov. 8, 2011) (legal issues blog on firm website constituted advertising and required advertising disclaimer).

⁵⁷Debra Bruce, *12 Social Media Ethics Issues for Lawyers*, Solo Practice University Blog, March 11, 2010, <http://solopracticeuniversity.com/2010/03/11/a-dozen-social-media-ethics-issues-for-lawyers/>.

H. Providing “Recommendations” or “Endorsements”

Some states prohibit the use of testimonials, or require certain restrictions or the insertion of disclaimers. LinkedIn permits a member’s connections to write testimonials about the member in the Recommendations section of the member’s profile. Lawyers can prescreen recommendations (even unsolicited and unexpected ones) before they are posted for public view, to make sure they comply with the disciplinary rules. Many states’ ethical rules prohibit comparisons to other lawyers’ services, unless substantiated by verifiable objective data. Therefore, if a client enthusiastically reports that a lawyer is “the best trial lawyer in town,” “the best lawyer in the country,” or that the lawyer is “a franchise law expert,” the lawyer may need to diplomatically ask for a revision before publication. A South Carolina ethics opinion holds that a lawyer may “claim” his or her listing on a third party website, including peer endorsements, client ratings, and attorney ratings, but must monitor and remove or edit non-compliant statements, recommendations, endorsements or ratings on the third party website, or withdraw from any participation.⁵⁸ If an endorsement or recommendation is unsolicited, opinions diverge on whether the lawyer can or should be held accountable.

Lawyers would be well-advised to avoid making reciprocal recommendations, where the lawyer agrees to post a recommendation in exchange for receiving one. Rule 7.2(b) of the ABA Model Rules prohibits giving anything of value in exchange for a recommendation. Also Texas Rule 7.03(b) prohibits giving anything of value to a non-lawyer for soliciting prospective clients.

But the question also arises when more traditional commercial and logical business relationships are examined. One of the murkier areas is that of the “strategic alliance”. Lawyers and accountants and knowledgeable business consultants and entrepreneurs may unite to offer services to clients to structure and document a franchise system, for example, and present themselves as a team or an alliance, particularly on websites and even indirectly through such media as “tweeting” and pay per click ads. Even if the participants do not split fees, can their presentation cross the line into prohibited reciprocal recommendations and endorsements? Could such an alliance morph into third-party marketing? If so, then the third party must conform its marketing activities that involve the attorney to comply with the ethical rules of *at least* the jurisdiction to which that attorney or firm is subject.⁵⁹

I. YouTube Videos

YouTube is a powerful and inexpensive way of marketing to generate new clients that is increasingly being used by both legal practitioners and legal educators. In general, the advertising rules that apply to broadcast media will apply to YouTube, websites with comparable functions, as well as videos embedded in other websites. Here again the pivotal question will be: Is the content informational, or is it directed to eliciting new client relationships and thus advertising subject to Model Rule 7.2 and state rules? The same restrictions imposed on television advertising will apply to videos. As a practical matter, however, the dangers of overstepping ethical boundaries are greater. The economics of television have constrained the

⁵⁸S.C. Bar Ethics Advisory Op. 09-10, *available at* <http://www.scbare.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/107/Ethics-Advisory-Opinion-09-10.aspx> (last visited August 14 2012).

⁵⁹ABA Model Rules., R. 7.2, cmt. 5 *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising/comment_on_rule_7_2.html (last visited August 14, 2012).

length of the message or communication broadcast to the public usually to 30 or 60 seconds. On YouTube, the length of the typical informational video which may include marketing content is 5 minutes! And there is no real limit to the length of video that can be uploaded. While the vast majority of traditional marketing formats are geographically self limiting if only by virtue of the expense, YouTube reaches the entire Cyber Universe at no extra charge. At least two states, Florida⁶⁰ and Texas⁶¹, have formally determined that YouTube videos will be deemed advertising. However, the Florida Supreme Court makes it clear that informational videos, if posted on video sharing sites like YouTube, are not advertising *unless* they are used to promote the lawyer or law firm's practice.⁶² So posting a video with a conspicuous link to the firm's website will lose its credibility as an information only posting.

Lawyer "infomercial" videos posted on YouTube are a form of communication in which the lines are often blurred between information and advertisement. Accordingly, a close reading of the advertising rules and use of appropriate and prominent notices and disclaimers is essential.

J. Social Networking Sites Terms and Conditions

The terms and conditions set forth in most social networking websites quite often will violate the Model Rules. Lawyers who use Facebook, Squared, Twitter, Gmail or Google Plus should monitor their settings, as well as updates and new developments with any networking platform they use to ensure that they do not inadvertently compromise client confidentiality. For example, geo-tagging a lawyer's whereabouts might inadvertently reveal a client. Twitter has the right to use any content that is generated using its services in whatever way it sees fit. Here is an excerpt:

You agree that this license includes the right for Twitter to make such Content available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use. Rules exist to enable an open ecosystem with your rights in mind. But what's yours is yours. You own your Content (and your photos are part of that Content)

Such additional uses by Twitter, or other companies, organizations or individuals who partner with Twitter, may be made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services. We may modify or adapt your Content in order to transmit, display or distribute it over computer networks and in various media and/or make changes to your Content as are necessary to conform and adapt

⁶⁰Fla. Rule 4-7.2 *available at* <http://www.floridabar.org/divexe/rrtftb.nsf/FV/805933D56732F188852573C6006D4167> (last visited August 14, 2012).

⁶¹Tex. Disciplinary Rules of Prof'l Conduct, Part VII, Interpretative Comment 17, *available at* http://www.texasbar.com/AM/Template.cfm?Section=Rules_Comments_and_Opinions&Template=/CM/ContentDisplay.cfm&ContentID=12093 (last visited August 14, 2012).

⁶²Guidelines for Video Sharing Sites, Fla. Standing Comm. on Advertising (rev. May 8, 2012), *available at* <http://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/23f90f97361bc5e9852576e30050ca2c!OpenDocument> (last visited August 14, 2012).

that Content to any requirements or limitations of any networks, devices, services or media.⁶³

Such terms make it possible for 140 harmless characters to land the lawyer (and the client) on the front page of whatever publication Twitter, the lawyer's followers or anyone else on the Internet chooses, including "Playboys R Us." Maintaining client confidences is a key lawyer responsibility under ABA Model Rule 1.6. Giving a website operator a license to use and distribute a lawyer's communication, and further, to edit the content, risks violation of the duty of confidentiality through unintended widespread distribution of client confidential information, and worse, the manipulation of the communication or placement in a forum that could be misleading and/or harm the integrity and reputation of the lawyer or the client.

K. Some Commonsense Basics in Marketing with Social Media

Cyberspace offers lawyers almost infinite opportunities to explore and add to their knowledge, skills, contacts and client base. But expanded ways to land in trouble come along with expanded opportunity. All the potential problems that can be created through thoughtless communications and aggressive marketing and chest beating in the real world increase exponentially in the virtual world.

Social media is a wild frontier and often fun for those who enjoy banter, casual exchanges, meeting new people, exploring ideas or just spouting off. It is also, however, incredibly time consuming even when the lawyer understands how to use the various social media platforms which are in constant metamorphosis not only as to form and function but even more importantly as to privacy and security. To use it effectively and minimize stumbling, before diving off the social media platform a lawyer should first:

1. Have a plan.
2. Know his or her objectives.
3. Be consistent.
4. Understand the tools he or she chooses to use.
5. Distinguish personal versus business uses and activities.
6. Set boundaries.
7. Know the ethics and advertising rules of the applicable jurisdiction(s).

⁶³Twitter Terms of Service, <http://twitter.com/tos/> (last visited August 14, 2012).

If a lawyer is licensed/practicing in more than one state, he or she may encounter conflicts between the applicable state rules and must decide which jurisdiction's ethics rules to follow. The safest although not necessarily most desirable course is naturally to comply with the most restrictive jurisdiction. This area is unsettled and as a fall back, it is has been suggested to use the Yellow Pages Advertising Rules.⁶⁴ But we do not believe the Yellow Pages Advertising Rules adequately address the potential ramifications. Nor does the Commission on Ethics 20/20, as noted throughout this paper. The Florida Supreme Court has made it clear that the medium does not change the nature of the conduct thus holding virtual activities and communications in cyberspace to the same advertising rules as conduct in the "real" world.⁶⁵

III. WEBSITE AND RELATED ISSUES: BLOGGING, ADVERTISING, AND MORE

A. Social Media Ethics Issues on Another Platform

As we previously noted, certain of the ethics issues discussed in Section II of this paper apply not only to interactive social media platforms, but may also arise in connection with the more passive social media platforms discussed in this Section III. Further complicating the ethics issue is the fact that there are hybrid platforms that are both passive and interactive (e.g., a website with a link to send an email to an attorney). The issues discussed in Section II, particularly the inadvertent client, competency and designation as a specialist or an expert, and state advertising requirements, should be considered in connection with passive social media platforms that are the focus of discussion in this Section III.

B. The Accidental Conflict - Communications from Prospective Clients Should Come with a Warning Label

As direct phone calls from prospective clients wane, the number of new clients initiating contact with attorneys by email has grown dramatically. Emails may come directly through a firm's website, by other types of email listings, such as bar association or other attorney directories, by other membership listings like the International Franchise Association or American Association of Franchisees and Dealers. Both state bar associations and the ABA have scrutinized the issues surrounding the presentation, content and "contact us" information on websites, including firm websites and blogsites, some of which is even pertinent to social networks like LinkedIn or Facebook or even a plain Google search.

1. Website Hazard

The "contact us" button on a firm website can result in unwanted conflicts, if not properly managed and sometimes even when appropriate precautions are taken. Inviting inquiries from prospective clients by an email form on the firm website can potentially result in receiving confidential information that may set up a conflict of interest, involving a current or a future matter. Depending on the jurisdiction the conflict could affect merely the attorney who reviews the inquiry, or it could affect the firm as a whole. The recently adopted revisions to the ABA

⁶⁴See, e.g., Dean R. Dietrich, *Rules for Marketing with Social Media*, Wisconsin Lawyer, May 2011, available at http://www.wisbar.org/am/template.cfm?section=wisconsin_lawyer&template=/cm/contentdisplay.cfm&contentid=102133 (last visited August 14, 2012).

⁶⁵Fla. Sup. Ct. Rev. Op. No. SC08-1181 (Nov. 19, 2009), available at <http://www.floridasupremecourt.org/decisions/2009/sc08-1181.pdf> (last visited August 14, 2012).

Model Rules limit the conflict to the receiving/reviewing attorney and individuals with access, but not the entire firm per se.⁶⁶

Even the use of a disclaimer may not prevent the formation of attorney-client relationships if the parties' subsequent conduct is inconsistent with the disclaimer.⁶⁷ Model Rule 1.18⁶⁸ and many state rules disqualify an attorney who has received confidential information from a prospective client unless certain steps are taken.

Communications from a prospective client often create an expectation that their communications will be held confidential. Even if no engagement results, if the client had a reasonable expectation of confidentiality, then it will be privileged communication.⁶⁹ Comment [3] to Model Rule 1.18 states that the duty to preserve the prospective client's confidential information will exist "regardless of how brief the initial conference may be."⁷⁰

⁶⁶ABA Model Rule 1.6, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html (last visited August 30, 2012) and ABA Comm. on Ethics 20/20 Report to ABA House of Delegates, Resolution 105A amending Comment 9 to Rule 1.0 (Terminology), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_authcheckdam.pdf, (last visited August 14, 2012); *Gilmore v. Goedecke*, 954 F. Supp. 187 (E.D. Mo. 1996) (entire firm disqualified because one lawyer learned information from contact with potential client who was ultimately opposing party).

⁶⁷D.C. Ethics Op. 316 (2002), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm (last visited August 14, 2012).

⁶⁸*E.g.*, Model Rule 1.18(c) and (d) state:

(c) A lawyer [who has had discussions with a prospective client even when no client-lawyer relationship ensues] 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 that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
- (2) 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
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

ABA Model Rule 1.18(c) and (d), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_18_duties_of_prospective_client.html (last visited August 14, 2012).

⁶⁹RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71; *Neitlich v. Peterson*, 15 Mass. App. Ct. 622, 624 (1983).

⁷⁰ABA Model Rules., R. 1.18, cmt. 3, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_18_duties_of_prospective_client/comment_on_rule_1_18_duties_of_prospective_client.html (last visited August 14, 2012).

2. Adequacy of Disclaimers to Prevent Creation of Inadvertent Client, Obligation to Maintain Confidentiality of Non-Client, or Conflict

If a lawyer maintains a website that contains a link allowing visitors to send emails directly to lawyers at the firm, the firm needs to have a conspicuous warning or disclaimer regarding the confidentiality of the information sent and the non-existence of an engagement. Otherwise, if a lawyer is sent an email regarding a possible legal action against Franchisor X and the firm represents Franchisor X, the lawyer and the firm face an ethical dilemma. The website must also have a second disclaimer that it is providing general information only and caution that it should not be understood as a substitute for personal legal advice.

Relying on disclaimers directed to prospective clients on the firm or third party website may not be enough without affirmative acknowledgment in some form by the individual. One opinion notes the option of requiring “click the box” acknowledgement format of software licenses could be used to obtain a knowing acknowledgment that the communication is not confidential nor will it create an attorney client relationship. Even that precaution may not be enough in some states. On August 6, 2012, the ABA House of Delegates adopted the Ethics 20/20 Commission’s proposed revisions intended to clarify the appropriate precautions a lawyer should take by expanding comment (2) to Rule 1.18 (Duties to Prospective Client) to include the following:

For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response.⁷¹

3. Recommendations for Best Practices in Website Disclaimers

Here are some suggestions for preventive measures to avoid receiving unwanted information and decreasing the potential for inadvertent conflicts.

- a. Be clear to website visitors that no client relationship is created unless the lawyer/firm affirmatively accept the representation.
- b. Be obvious. Disclaimers should be prominent and immediate, unavoidable at the point of contact by the visitor.
- c. All limitations and conditions that are disclaimed should be conspicuous and unavoidable.
- d. Disclaimers, limitations and conditions should be clear and plainly worded to avoid any unjustified expectation of confidentiality or creation of an attorney-client relationship.
- e. There are two kinds of disclaimers, one is to prevent unwanted representation but the other—and in some ways even more

⁷¹ABA Comm. on Ethics And Prof'l Responsibility, Formal Op. 10-457 (2010), *available at* <http://www.scribd.com/doc/76816247/ABA-Formal-Ethics-Opinion-10-457-Websites> (last visited August 14, 2012).

critical—is to avoid incurring a duty to keep information received by a visitor confidential. Be sure to include both.

- f. Disclaimers should be part of any contact link accessible at the site using a click box acknowledgment and generating an auto-response with disclaimers.⁷²

4. As it Now Stands

Even before the recently adopted resolution of the Ethics 20/20 Commission was drafted, the situation was extensively addressed in ABA Formal Opinion 10-457.⁷³ The opinion first acknowledges that firm websites allow a lawyer to provide anyone with Internet access a wide array of information about the law, legal institutions, and the value of legal services, and serves as a twenty-four hour marketing tool by providing the qualifications of the lawyer or the firm, and providing an electronic link to contact an individual lawyer. The opinion notes that this benefit can diminish or disappear if the website visitor misunderstands or is misled by the website information and relies on general legal information to answer a personal legal question or assumes that direct electronic access to a lawyer implies that the lawyer agrees to preserve the confidentiality of the information disclosed by the visitor.

To avoid misleading visitors, the opinion advises that lawyers have a duty to update the information about the firm and its lawyers on a regular basis and make sure legal information is accurate and current. And as noted above, the opinion also advises that managerial lawyers must make reasonable efforts to ensure the firm has in place measures giving reasonable assurance that all firm lawyers and nonlawyer assistants will comply with the rules of professional conduct.

ABA Formal Opinion 10-457 is detailed as to the two types of disclaimers that must be given. Regarding the first disclaimer, the opinion analogizes to a situation in which a lawyer is speaking to a group and notes that “our previous opinions have recommended that lawyers who provide general legal information include statements that characterize the information as general in nature and caution that it should not be understood as a substitute for personal legal advice.” Describing the first disclaimer specific to a website, the opinion states:

Such a warning is especially useful for website visitors who may be inexperienced in using legal services, and may believe that they can rely on general legal information to solve their specific problem. It would be prudent to avoid any misunderstanding by warning visitors that the legal information provided is general and should not be relied on as legal advice, and by explaining that legal advice cannot be given without full consideration of all relevant information relating to the visitor’s individual situation.

(footnotes omitted).

⁷²*Id.*; Randy Wilson, *Social Networking and Legal Ethics: How do They Coexist?*, April 1, 2011, available at <http://cclawyer.cccbba.org/2011/04/1054/> (last visited August 14, 2012).

⁷³ABA Comm. on Ethics And Prof'l Responsibility, Formal Op. 10-457 (2010), available at <http://www.scribd.com/doc/76816247/ABA-Formal-Ethics-Opinion-10-457-Websites> (last visited August 14, 2012).

ABA Formal Opinion 10-457 also addresses concerns under Rule 1.18 (Duties to Prospective Clients) regarding the confidentiality of prospective client communications and possible disqualification from representation of other clients in connection with an active inquiry made through the website. The opinion notes that a website may or may not specifically invite a visitor to submit information concerning a possible representation. If the website does invite submission of the information, then a discussion for purposes of Rule 1.18 will have resulted, but if the website does not invite the submission, then whether a discussion concerning representation has occurred depends on the lawyer's communications to the visitor. A lawyer should control the communications and the visitor's expectations:

Lawyers have a similar ability on their websites [as with a telephone, mail or e-mail exchange] to control features and content so as to invite, encourage, limit, or discourage the flow of information to and from website visitors. A particular website might facilitate a very direct and almost immediate bilateral communication in response to marketing information about a specific lawyer. It might, for example, specifically encourage a website visitor to submit a personal inquiry about a proposed representation on a conveniently-provided website electronic form which, when responded to, begins a "discussion" about a proposed representation and, absent any cautionary language, invites submission of confidential information. Another website might describe the work of the law firm and each of its lawyers, list only contact information such as a telephone number, e-mail or street address, or provide a website e-mail link to a lawyer. Providing such information alone does not create a reasonable expectation that the lawyer is willing to discuss a specific client-lawyer relationship. A lawyer's response to an inquiry submitted by a visitor who uses this contact information may, however, begin a "discussion" within the meaning of Rule 1.18.

ABA Formal Opinion 10-457 then goes on to discuss the consequences to the lawyer if the lawyer is deemed to have had a discussion with prospective client and how the lawyer may limit any obligation to maintain information as confidential and disqualification:

If a discussion with a prospective client has occurred, Rule 1.18(b) prohibits use or disclosure of information learned during such a discussion absent the prospective client's informed consent. When the discussion reveals a conflict of interest, the lawyer should decline the representation, and cannot disclose the information received without the informed consent of the prospective client. For various reasons, including the need for a conflicts check, the lawyer may have tried to limit the initial discussion and may have clearly expressed those limitations to the prospective client. If this has been done, any information given to the lawyer that exceeds those express limitations generally would not be protected under Rule 1.18(b).

Rule 1.18(c) disqualifies lawyers and their law firms who have received information that "could be significantly harmful" to the prospective client from representing others with adverse interests in the same or substantially related matters. For example, if a prospective client previously had disclosed only an intention to bring a particular lawsuit and has now retained a different lawyer to initiate the same suit, it is difficult to imagine any significant harm that could result from the law firm proceeding with the defense of the same matter. On the other hand, absent an appropriate warning, the prospective client's prior disclosure of more extensive facts about the matter may well be disqualifying.

(footnotes omitted).

ABA Formal Opinion 10-457 is not just an interesting hypothetical for discussion. The footnotes in the opinion include cautionary examples of what can go wrong without the disclaimers described in the opinion, including the loss of the right to represent an existing client in a suit brought by someone who had sent an email to the lawyer regarding a possible lawsuit against the existing client.

The Virginia Ethics Committee recommends the use of a “click-through” (or “click-wrap”) disclaimer, which requires the prospective client to assent to the terms of the disclaimer before being permitted to submit the information. There has subsequently been much discussion in articles and on the Internet regarding the emphasis on the recommendation that a general disclaimer on a website or even on the page with the email link must require an affirmative act (i.e. click to check the box) on the prospect’s part to acknowledge the lack of confidentiality and accept the conditions of communication.⁷⁴

Obviously, this can be a greater problem in a more “social” setting, where a lawyer who is known as such receives more information than the lawyer should from a communication from a “friend” (Facebook) or someone in the lawyer’s social circle (Google Plus). If a lawyer fails to provide necessary disclaimers, the lawyer who received the communication must maintain the confidentiality of the information furnished. Second, the firm may not continue representing Franchisor X if protecting the prospective client’s confidential information materially limits its ability to represent Franchisor Y.⁷⁵

New Hampshire, however, effective January 1, 2008, moved in the direction of providing greater protection to a person who, in good faith, unilaterally emails confidential information to a lawyer in seeking representation if the lawyer receives and reviews the information, by prohibiting the lawyer receiving the information from using it against the sender. Comments 1 and 2 to Rule 1.18 state:

1. The New Hampshire rule expands upon the ABA Model Rule in one area. The ABA Model Rule 1.18(a) defines a prospective client as one who “discusses” possible representation with an attorney. Similarly, ABA Model Rule 1.18(b) establishes a general rule for protection of information received in “discussions” or “consultations”.

In its version of these provisions, New Hampshire’s rule eliminates the terminology of “discussion” or “consultation” and extends the protections of the rule to persons who, in a good faith search for representation, provide information unilaterally to a lawyer who subsequently receives and reviews the information. This change recognizes that persons frequently initiate contact with an attorney in writing, by e-mail, or in other unilateral forms, and in the process disclose confidential information that warrants protection.

⁷⁴James M. McCauley, *Blogging & Social Networking For Lawyers: Ethical Pitfalls*, Jan. 20, 2010, <http://ethicsguru.blogspot.com/2010/01/blogging-social-networking-for-lawyers.html>.

⁷⁵See Mass. Bar Ass’n Op. 07-01, available at <http://www.massbar.org/publications/ethics-opinions/2000-2009/2007/opinion-07-01> (last visited August 14, 2012).

2. Not all persons who communicate information to an attorney unilaterally are entitled to protection under this Rule. 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 (see ABA Model Rule comment No. 2); or for the purpose of disqualifying an attorney from participation in a matter; or through contemporaneous contact with numerous attorneys; is not a “prospective client” within the meaning of paragraph (a).⁷⁶

C. Disclosure of Certain Identifying and Correct Information

The mundane rules of advertising continue to apply, regardless of medium or platform used on the Internet. Remember the basics, such as the requirement of ABA Model Rule 7.2 (Advertising) that all communications about a lawyer’s services include the name and office address of at least one lawyer or law firm responsible for its content.⁷⁷ Requirements such as this make the use of some social media tools difficult.

Keep the content honest and direct. ABA Model Rule 4.1 prohibits a lawyer from making a false statement of material fact to a third person.⁷⁸ Padding the lawyer’s online biography and exaggerating the level of experience in a special practice area are examples of making a false statement. It is also possible to make a false representation by stating the truth - just not the whole truth. There is an affirmative duty not to mislead which can occur if:

[T]here is a substantial likelihood that [a statement] will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.⁷⁹

Query: When can one claim to be experienced in franchise law? As litigator, how many cases? Is one or two enough? As a transactional attorney, how many franchise agreements and FDDs?

⁷⁶N.H. Rules of Prof’l Conduct, R. 1.18, cmts. 1 and 2, *available at* <http://www.courts.state.nh.us/supreme/orders/20072507.pdf> at 83-84 (last visited August 14, 2012).

⁷⁷ABA Model Rule 7.2(c) states: “(c) Any communication made pursuant to this rule [7.2 Advertising] shall include the name and office address of at least one lawyer or law firm responsible for its content.” ABA Model Rule 7.2(c), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising.html (last visited August 14, 2012).

⁷⁸ABA Model Rule 4.1 states: “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.” ABA Model Rule 4.1, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_1_truthfulness_in_statements_to_others.html (last visited August 14, 2012).

⁷⁹ABA Model Rules., R. 7.1, cmt. 2, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_1_communication_concerning_a_lawyer_s_services/comment_on_rule_7_1.html (last visited August 14, 2012).

D. Blogsites vs. Websites as Advertising

Blogsites and websites may not automatically be deemed advertising, but it is critical for a lawyer to check the rules and opinions in his or her jurisdiction(s) and to stay current. The usual inquiry is whether the content is informational (telling) or whether it is advertising intended to solicit business (selling). If the latter, then compliance with state bar advertising rules is likely required. As with most communications on the Internet, the side of the line on which a blogsite falls will turn on the nature and purpose of the content as well as the overall presentation of the landing page. Is the information general and educational? Is it intended to promote the lawyer and the law firm? Does it provide contact information and a link for the visitor to initiate contact?

State bar associations usually categorize websites as advertisements.⁸⁰ At the same time, many will treat legal blogs differently. In Texas, the Advertising Review Department does not consider blogs to be advertising, if they consist of commentary or educational information. Comment 1 to Texas Rule 7.02 clarifies that the advertising rules “are not intended to affect other forms of speech by lawyers, such as political advertisements or political commentary.” An opinion of the New York City Bar discussing websites and listservs suggests that a blog would be considered an advertisement in New York, however.⁸¹

Firm websites limited to a “tombstone” landing page are more likely to be deemed informational, but at present the state bars vary considerably in what falls within the scope of advertising.⁸² Some states, including Texas, consider personal or firm landing pages, where the landing page is generally available to the public like those on Facebook, Twitter, LinkedIn, etc., to be advertisements.⁸³ If access is limited to existing clients and personal friends, however, then it may not be treated as advertising since it is not accessible by the general public.

E. Groupon Offers for Legal Services

As noted above in connection with the discussion of ABA Model Rule 7.2, the Ethics 20/20 Commission Report considers Groupon an acceptable form of advertising.

New York State Bar Association Committee on Professional Ethics Opinion 897 (December 13, 2011)⁸⁴ advises that a lawyer may market legal services on a “deal of the day” or

⁸⁰See, e.g., Vt. Bar Ass’n Ethics Op. 2000-04, available at <http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Solicitation/00-04.pdf> (last visited August 14, 2012).

⁸¹N.Y. City Bar Ass’n Formal Op. 1998-2, available at <http://www.nycbar.org/ethics/ethics-opinions-local/1998-opinions/1054-formal-opinion-1998-2> (last visited August 14, 2012).

⁸²Nev. Advertising Comm. Rule (ACR) 2(o), available at <http://nvbar.org/sites/default/files/tombstone.pdf> (last visited August 14, 2012); Legal Marketing Ass’n, *Connecticut Attorney Advertising Rules “When In Doubt, File,”* at 3 (Summer 2010), available at <http://www.legalmarketing.org/portals/0/content/chapters/newengland/docs/CT%20Attorney%20Advertising%20Rules.pdf> (last visited August 14, 2012).

⁸³See, e.g., Utah Op. 02-02, available at http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_02_02.html (last visited August 14, 2012), and Ill. State Bar Ass’n Op. 96-10, available at <http://www.callyourlawyers.com/electroniccommunications.html> (last visited August 14, 2012).

⁸⁴N.Y. State Bar Ass’n Comm. on Prof’l Ethics Op. 897 (Dec. 13, 2011), available at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&ContentID=60251&template=/CM/ContentDisplay.cfm (last visited August 14, 2012).

“group coupon” website provided the advertisement is not misleading or otherwise violative of the rules regarding lawyer advertising under ABA Model Rule 7.1, and makes clear that no lawyer-client relationship will be formed until the lawyer can complete a conflicts check and determine competence to provide the requested services. Because under ABA Model Rule 1.5(a)⁸⁵ a lawyer may not charge excessive fees, if the lawyer cannot perform the services because of a conflict or competence issue, the opinion advises that, under the New York counterpart to ABA Model Rule 1.16(d),⁸⁶ the lawyer must give the coupon buyer a full refund, and if the coupon buyer terminates the engagement, the lawyer must provide a refund subject to the lawyer’s *quantum meruit* claim. Payment by the lawyer to the website company hosting the offer is not considered fee splitting under ABA Model Rule 7.2(b) even though it is calculated as a percentage of the coupon cost (the fee), provided the amount is reasonable. The opinion advises that payment is considered the reasonable cost of advertising. The opinion cautions that the coupon saving must not be illusory but must represent a true saving. Finally, the opinion advises that the advertisement is subject to the normal requirements for lawyer advertising and solicitation (if it is targeted), including the use of the words Attorney Advertising on the web page and in the subject line of any email.

The New York opinion referred to South Carolina Bar Ethics Advisory Opinion 11-05, which had previously advised that use of a “daily deal” website is permissible and did not violate the prohibition against fee sharing provided the lawyer attends to logistical requirements to comply with other ethical obligations, such as timely disclosure of the fee and escrowing unearned fees until used.⁸⁷ In North Carolina, if the coupon expires before it is used, the amount paid must be refunded.⁸⁸

IV. MULTIJURISDICTIONAL PRACTICE, CLAIMING “NATIONAL” PRACTICE AND JURISDICTIONAL COMPETENCY

The Internet offers attorneys a tremendous opportunity to market to great effect with minimal cost. In this new world of social media, it is easy to attract clients from across the country. This is however a slippery slope in several regards. Lawyers have innumerable opportunities to trip up against several of the Rules of Professional Conduct. While we touch on

⁸⁵ABA Model Rule 1.5(a) begins: “(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” ABA Model Rule 1.5(a), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees.html (last visited August 14, 2012).

⁸⁶ABA Model Rule 1.16(d) states: “(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.” ABA Model Rule 1.16(d), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation.html (last visited August 14, 2012); *see also* New York Rules of Professional Conduct Section 1.16(e) (July 1, 2012), *available at* http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional_Standards.htm (follow hyperlink under “New York Rules of Conduct with Comments”) at 87 (last visited August 14, 2012).

⁸⁷S.C. Bar Ethics Advisory Op. 11-05 *available at* <http://www.scbare.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/1012/Ethics-Advisory-Opinion-11-05.aspx> (last visited August 14, 2012).

⁸⁸N.C. 2011 Formal Ethics Op. 10 (Oct. 21, 2011) *available at* <http://www.ncbar.com/ethics/ethics.asp?id=850> (last visited August 14, 2012).

some types of multijurisdictional conduct below, our intention is to raise awareness to the types of issues that are developing and are in the process of being addressed.⁸⁹ On June 19, 2012, the Commission on Ethics 20/20 released an Issues Paper entitled “Issues Paper Concerning Model Rule of Professional Conduct 5.5 and the Limits of Virtual Presence in a Jurisdiction,”⁹⁰ soliciting comments to clarify when virtual presence is sufficiently systematic and continuous to require admission in the jurisdiction. Not surprisingly, the issues and no doubt at least the recommendations and comments under the ABA Model Rules are a work in progress.

A. Going Where You Have Never Gone Before. Does Claiming a National Practice Imply the Authorization to Practice Law in Every State?

“National” practice is a common claim on websites nowadays. The Internet is one big ad engine, which also has the potential to engage in indirect or cross marketing through non-lawyer internet activities. There is great variability in state advertising rules that may apply. Some universal rules however may apply in ways most lawyers do not anticipate. ABA Model Rule 5.5 (Unauthorized Practice Of Law; Multijurisdictional Practice Of Law) states:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

⁸⁹For a more detailed discussion on multijurisdictional practice, see John R.F. Baer and Rupert M. Barkoff, *Ethics Issues in a Multi-Jurisdictional Franchise Practice*, American Bar Association 31st Annual Forum on Franchising (2008).

⁹⁰Commission on Ethics 20/20, Issues Paper Concerning Model Rule of Professional Conduct 5.5 and the Limits of Virtual Presence in a Jurisdiction, June 19, 2012, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120619_draft_release_for_comment_rule_5_5_comment_4_virtual_practice.authcheckdam.pdf (last visited August 14, 2012).

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.⁹¹

A 2005 Maine ethics opinion presents a representative analysis of the issues and the application of Rule 5.5:

B's practice arrangement appears to presume that a lawyer, not licensed in Maine, may practice law in Maine so long as that lawyer's practice is limited to international, federal or multi-state issues. We believe such a presumption, taken alone, goes too far. We receive guidance, once again, from the Restatement and the ABA Model Rules. The Restatement recognizes an explicit exception to the unauthorized practice rule where the lawyer provides legal services "before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency." The Model Rules permit "services that the lawyer is authorized to provide by federal law" ABA Model Rule 5.5(d)(2). Accordingly, the otherwise unauthorized practice is permissible if it occurs "before" a tribunal or agency in compliance with its rules or if authorized by federal law. Comment 18 to Model Rule 5.5 makes it clear, however, that such authorization to practice will usually be derived from statute, court rule, regulation or judicial precedent.

We do not have sufficient facts to determine whether B's practice is limited to matters before federal or international tribunals or whether his authorization to practice is otherwise derived from any statute, court rule, regulation or judicial precedent. Accordingly, we cannot opine whether his practice squarely falls within any "federal law" exception to the unauthorized practice. We have

⁹¹ABA Model Rule 7.2(c), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law.html (last visited August 14, 2012).

concerns, however, as to whether B is appropriately limiting his practice, i.e., whether he is in a position where his legal services occasionally drift into other areas. We add that we do not believe Lawyer B insulates himself from unauthorized practice concerns by employing “licensed attorneys in Maine and other jurisdictions to complement his services when [his clients] require legal advice about the laws of other jurisdictions.” The real question is whether despite this, B’s practice extends outside the strict boundaries of any “federal law” exception to unauthorized practice. If so, then B is engaging in the unauthorized practice of law and is in violation of Maine Bar Rule 3.2(a)(1). Moreover, any lawyers who aid B in this regard stand in violation of Maine Bar Rule 3.2(a)(2).⁹²

B. Truth by Commission and Avoiding Omission

Lawyers are required to be truthful and not to misrepresent themselves. ABA Model Rule 5.5 is particularly applicable to lawyers and firms who maintain a cyberspace presence. It addresses several aspects of multijurisdictional practice and the effect of various ethical rules. ABA Model Rule 7.1 prohibits false or misleading statements. Many assume that the Rule is directed to advertising but it is intended to apply to all communications made by an attorney and his or her agents. Misrepresentation also includes material omission. In some cases, *not clearly stating where licensed and where not licensed can be material omissions*.

If a lawyer or a law firm claims to have a national practice without also qualifying that representation by stating the jurisdictions in which its lawyers are licensed to practice, the lawyer or firm will have problems. Most clients and non-lawyers, including business consultants and CPAs, seem to be very naïve about the restrictions under which lawyers practice law, especially with respect to the geographic limitations imposed by an attorney’s bar license and the lawyer’s duty to comply. North Carolina recognized this early on and has made it clear that “to avoid misleading a user of the Internet from another jurisdiction, a Website should list all jurisdictions in which the lawyers in a firm are licensed to practice law.”⁹³

C. Assisting in the Unauthorized Practice of Law

ABA Model Rule 5.5(a) prohibits licensed attorneys from assisting in the unauthorized practice of law (“UPL”). This has been found to include funneling legal work to out-of-state attorneys where the referring, properly licensed attorney was not genuinely active in the matter.⁹⁴ As it is a common practice for out-of-state litigators to engage local counsel to handle filings, or make routine court appearances, it would behoove the “local counsel” in those situations to examine carefully whether they will be sufficiently involved to avoid being found to have assisted out-of-state counsel to commit UPL by being a “mere conduit” for an unauthorized practitioner.

⁹²Me. Ethics Op. 189 (2005), *available at* http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=87369&v=article (last visited August 14, 2012).

⁹³N.C. Ethics Op. RCP (October 18, 1996), *available at* <http://www.ncbar.com/ethics/ethics.asp?page=1&keywords=internet> (last visited August 14, 2012).

⁹⁴*See, e.g., In re Lerner*, 124 Nev. 1232, 197 P.3d 1067 (2008).

See Appendix 3 which contains a chart indicating the form of Rule 5.5 that has been adopted - or not - in each state.⁹⁵

D. Jurisdiction and Virtual Presence

ABA Model Rule 5.5(b)(1) prohibits establishing an office or otherwise practicing law while maintaining "systematic and continuous presence," unless licensed by that state. In addition to specific comment 4 under Rule 5.5, several states have held that "presence" need not be physical to be deemed systematic and continuous. Websites, blogsites and social media platforms can create a murky environment with many unresolved and debatable questions. What is a "presence" for jurisdictional purposes? Just as the states are zeroing in on online sales to their citizens for purposes of collecting sales tax, state bar UPL committees around the country are beginning to focus on the practice of law by out of state attorneys who are retained by their citizens to advise and represent them although unlicensed where the clients reside.

The rules of engagement are more clearly outlined for litigators than for transactional attorneys. Some situations are obvious, where the attorney has a frequent and regular appearance to provide legal services within the jurisdiction. This first became a significant issue with the infamous (in lawyers' eyes) *Birbrower* case⁹⁶, which was one of the first cases to specifically note that a physical presence in the state was not required to be deemed practicing law within a jurisdiction in which the lawyers were not licensed. There have subsequently been other cases where attorneys have been found to be practicing law within a state by representing out-of-state clients with respect to matters affected by out-of-state law.⁹⁷

Lawyers should be aware that the ability to practice in an unlicensed jurisdiction is permissible only by specific state exception or by state or federal statute or regulation, unless fitting within the limited exceptions provided in Rule 5.5(c) quoted above because the services are temporary and (1) undertaken in association with a lawyer who is admitted in the jurisdiction who actively participates; (2) the lawyer is admitted pro hac vice to appear in a pending or potential proceeding before a tribunal; (3) in or reasonably related to an arbitration, mediation, or other alternative dispute resolution proceeding if the services arise out of or are reasonably related to the lawyer's practice where admitted and are not services for which the forum requires pro hac vice admission; or (4) if not covered above, arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. However, falling within an exception is not a license to freely advertise, or otherwise market and solicit clients:

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this

⁹⁵Commission on Multijurisdictional Practice, State Implementation of ABA Model Rule 5.5 (Multijurisdictional Practice of Law), September 27, 2011, *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf (last visited August 14, 2012).

⁹⁶*Birbrower, Montalbano, Condon and Frank PC v. Superior Court*, 17 Cal.4th 119, 70 Cal.Rptr.2d 304, 949 P.2d 1 (Cal. 1998), *cert. denied*, 525 U.S. 920 (1998).

⁹⁷See, e.g., *In re Tonwe*, 929 A.2d 774 (Del. 2007); *Iowa Supreme Court Att'y Disciplinary Bd. v. Olson*, 807 N.W.2d 268 (Iowa 2011).

jurisdiction is governed by Rules 7.1 to 7.5. [Information About Legal Services].⁹⁸

A multistate firm was allowed to advertise to Oregon clients the availability of firm lawyers not admitted to the Oregon bar, but required to make it clear that non-Oregon lawyers would be available to render legal services only as might be allowed by the exceptions of Rule 5.5(c) and (d).⁹⁹ This was recently reinforced by an article emphasizing the narrow interpretation that the Oregon State Bar makes of its equivalent Rule 5.5 exceptions.

Despite ... competing viewpoints, the [Oregon] bar interprets the plain language of RPC 5.5(b)(1) to prohibit out of state lawyers establishing an office in Oregon.¹⁰⁰

On June 19, 2012, the Commission on Ethics 20/20 released an "Issues Paper Concerning Model Rule of Professional Conduct 5.5 and the Limits on Virtual Presence in a Jurisdiction" seeking to further address and clarify ethical considerations in the legal services that lawyers offer and/or provide through the Internet and that may extend into unlicensed jurisdictions.¹⁰¹ The Commission is considering and has asked for comment on whether to amend the comments to Rule 5.5 by including a list of factors that will be weighed to determine whether a lawyer's contacts in a jurisdiction are "systematic and continuous." The factors currently under consideration include:

1. The nature and volume of communications directed to potential clients in the jurisdiction;
2. Whether the purpose of the communications is to obtain new clients in the jurisdiction;
3. The number of the lawyer's clients in the jurisdiction;
4. The proportion of the lawyer's clients in the jurisdiction;
5. The frequency of representing clients in the jurisdiction;
6. The extent to which the legal services have their predominant effect in the jurisdiction; and

⁹⁸ABA Model Rule 5.5, cmt. 21, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/comment_on_rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law.html (last visited August 14, 2012).

⁹⁹Or. Ethics Op. 2005–103 (2005), *available at* <http://www.osbar.org/docs/ethics/2005-103.pdf> (last visited August 14, 2012).

¹⁰⁰Amber Hollister, *The Many Faces of UPL*, Or. State Bar Bulletin (May 2012).

¹⁰¹Commission on Ethics 20/20, Issues Paper Concerning Model Rule of Professional Conduct 5.5 and the Limits of Virtual Presence in a Jurisdiction, June 19, 2012, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120619_draft_release_for_comment_rule_5_5_comment_4_virtual_practice.authcheckdam.pdf (last visited August 14, 2012).

7. The extent to which the representation of clients in the jurisdiction arises out of, or is reasonably related to, the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Of course, this leads to an obvious question that applies to many of these factors -- how much is too much? We are not sure that this list offers much clarity, as numerous state bar opinions have already considered similar factors. However, where multiple jurisdictions are involved, lawyers should welcome any guidance that will help determine where the line could be crossed. As clarified under ABA Model Rule 8.5(a),¹⁰² lawyers are not only subject to the authority of the jurisdictions in which they are licensed; they are also subject to the disciplinary authority of any jurisdiction where not licensed, if legal services are deemed to have been provided there.

E. Lawyers Who Commit Unauthorized Practice of Law Are Not Competent by Most State Laws

ABA Model Rule 7.1 makes it a duty not to be misleading or to misrepresent one's competency. At least one state has determined that a state bar license is an essential component of competency to practice within its jurisdiction, and the misrepresentation of one's status by implication ("national practice") or by direct statement ("we represent clients throughout the country") can be deemed an intentional misrepresentation of competency. This is reinforced by the prohibition against an improper representation in Rule 5.5.(b)(2)¹⁰³

According to the ABA Commission on Ethics 20/20, 44 United States jurisdictions (among the 50 states and the District of Columbia) have adopted some form of Rule 5.5. Identical rules have been adopted in 13 jurisdictions and similar rules adopted in 31 jurisdictions. There is significant variance among the 31 jurisdictions that have adopted similar rules in how the District of Columbia and state bars have addressed the question of multijurisdictional practice:

1. Eight jurisdictions (CT, ID, KY, ME, NJ, NC, SC, and TN) require that the temporary legal services be reasonably related to the representation of an existing client in the jurisdiction where the lawyer is licensed.
2. Six jurisdictions (DE, DC, FL, GA, PA, and VA) expressly allow temporary practice by foreign (non-U.S.) lawyers. In addition, North Carolina's rule appears to permit such temporary practice by omitting reference to the words "U.S. jurisdiction."

¹⁰²ABA Model Rule 8.5 (Disciplinary Authority; Choice of Law) states: "(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct." ABA Model Rule 8.5(a) *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_5_disciplinary_authority_choice_of_law.html (last visited August 14, 2012).

¹⁰³*Note:* To compare the MJP Rules to state rules, see the quick guide chart on status of states adoption of Model Rule 5.5 or similar rule attached as Appendix 2.

3. Four jurisdictions (CT, NV, NJ, and SC) require out-of state lawyers to register in the host jurisdiction and pay a fee.
4. Two jurisdictions (NM and ND) require the out-of-state lawyer to associate with an in-state lawyer in transactions involving issues specific to the host jurisdiction's law.
5. Two jurisdictions (MN and WI) provide that the lawyer would not be disciplined in the state in which the lawyer is licensed for engaging in conduct in the host jurisdiction that is permitted in the home jurisdiction.
6. One jurisdiction (SD) requires the out-of-state lawyer to obtain a sales tax license and to pay applicable taxes.¹⁰⁴

Of the seven jurisdictions that have not adopted some form of Rule 5.5:

7. Two states (MT and KS) have declined to adopt Rule 5.5.
8. One state (MS) has a recommendation pending to adopt a version of Rule 5.5 similar to Rule 5.5.
9. One state (WV) has a recommendation pending to adopt a version of Rule 5.5 that does not authorize multijurisdictional practice.
10. Three states (HI, NY and TX) are still studying whether to adopt a version of Rule 5.5 that authorizes multijurisdictional practice.

A lawyer should be wary of using third party services to meet the demands of active blogging and Twitter to create or maintain an online presence unless carefully monitored. In 140 characters, a tweeter is more likely to say "best franchise lawyer in the world" or "national franchise expert" with a tiny URL link to your website, than "attorney practicing franchise law in Arizona."

F. Firm Website Home Page, Firm Name and Firm Letterhead

ABA Model Rule 7.5 regulates law firm names, trade names and letterhead, and allows the use of the same name in multiple states, provided the identification of each lawyer clearly indicates the lawyer's jurisdictional limitations of practice. Because of the expansion of the number of firms through growth or merger having a multijurisdictional practice, combined with the Internet, which makes the firm's website and other Internet communications accessible anywhere, the requirements of this rule affect more lawyers.

¹⁰⁴ABA Comm. on Ethics 20/20 Working Group on Uniformity, Choice of Law, and Conflicts of Interest, Memorandum Re: For Comment: Issues Paper Concerning Multijurisdictional Practice, dated March 29, 2011, *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/mjp_issues_paper.authcheckdam.pdf (last visited August 14, 2012); *see also*, Commission on Multijurisdictional Practice, State Implementation of ABA Model Rule 5.5 (Multijurisdictional Practice of Law), September 27, 2011, *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf (last visited August 14, 2012) included as Appendix 3, and Summary of State Action on ABA MJP Recommendations 8 & 9, dated November 12, 2010, *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/8_and_9_status_chart.authcheckdam.pdf (last visited August 14, 2012).

V. SECURITY AND CONFIDENTIALITY ISSUES WITH USING THE TOOLS OF SOCIAL MEDIA ON THE NET, IN THE CLOUD AND WITH THE DEVICE

A. Protecting Confidentiality and Using the Tech Stuff

In the everyday practice of law, lawyers use many of technology's tools. Desktop computers, laptops, cell phones, and tablets are the means used to access clients, the Internet and social networks. Lawyers use many of these devices daily. Security in the use of these devices is critical not only as a good business practice to protect client data, but also to comply with legal ethics obligations. Client communications, client information, unsolicited information over the Internet, security in use of mobile devices, data storage, and cloud computing all raise the bar for lawyers to be competent using technology in order to maintain client confidentiality.

ABA Model Rule 1.1 (Competence) states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."¹⁰⁵

ABA Model Rule 1.6 (Confidentiality of Information) states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(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

¹⁰⁵ABA Model Rule 1.1, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html (last visited August 14, 2012).

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 with other law or a court order.¹⁰⁶

The Ethics 20/20 Commission Report cites existing Comment 16¹⁰⁷ and existing Comment 17¹⁰⁸ of ABA Model Rule 1.6, and existing Comment 6¹⁰⁹ of ABA Model Rule 1.1, set out in the footnotes below, as evidence of a duty for all attorneys to be savvy enough in the technology they use not only to take advantage of its benefits, but also to understand how to safeguard against inadvertent disclosure and to avoid allowing access to confidential information through inadequate security measures. Throughout its Report, the Commission emphasized the critical importance of expanding and clarifying the duty of competence under the ethics rules in place today:

Because new modes of communication create challenges as lawyers try to fulfill their obligation to protect client confidences, a new paragraph (c) in Model Rule 1.6 (Confidentiality of Information), as well as new language in Comment [16], would make clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used. This obligation is referenced in existing Comments [16] and [17], but we concluded that **technological change has so enhanced the importance of this duty that it should be identified in the black letter of Rule 1.6 and described in more detail through additional Comment language** [emphasis added].

¹⁰⁶ABA Model Rule 1.6, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html (last visited August 14, 2012).

¹⁰⁷"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. See Rules 1.1, 5.1 and 5.3." ABA Model Rules, R. 1.6, cmt. 16, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html (last visited August 14, 2012).

¹⁰⁸"When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality 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. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule." ABA Model Rules, R. 1.6, cmt. 17, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html (last visited August 14, 2012).

¹⁰⁹"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." ABA Model Rules, R. 1.6, cmt. 6, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html (last visited August 14, 2012).

The Commission recognizes that lawyers cannot guarantee electronic security any more than lawyers can guarantee the physical security of documents stored in a file cabinet or offsite storage facility. Our proposal would not impose upon lawyers a duty to achieve the unattainable. Instead, it identifies various factors that lawyers need to take into account when determining whether their precautions are reasonable. The factors, which include the cost of the safeguards and the sensitivity of the information, recognize that each client, lawyer or law firm has distinct needs and that no single approach should be or can be applied to the entire legal profession. The proposal makes clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.¹¹⁰

The ABA House of Delegates has adopted the Ethics 20/20 Commission recommendation to add a new paragraph (c) to Model Rule 1.6 which makes the obligation explicit:

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.¹¹¹

In addition, the ABA House of Delegates has adopted the Ethics 20/20 Commission recommendation to amend Comment 6 of ABA Model Rule 1.6 to make clear that “the benefits and risks associated with relevant technology” are included among the “changes in the law and its practice” with which the lawyer must keep abreast.¹¹²

The Ethics 20/20 Commission reports that this requirement for technical competence is not new, citing several ethics opinions relating to cloud computing in Ala. State Bar Office of Gen. Counsel, Formal Op. 2010-02 (2010); Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 09-04 (2009); and N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 842 (2010).¹¹³

B. Essential Technical Competency to Preserve Confidentiality

California does not follow the ABA Model Rule format, but it has reached conclusions similar to those of the Commission. In a 2010 California ethics opinion, it was found that under Rule 3-100 and Rule 3-110 of the California Rules of Professional Conduct pertaining to the duty of confidentiality and the duty of competence, there is a duty of competence relating to the use of technology generally (discussing an attorney's use of a firm laptop for research and client communication at home using a personal wireless system and in a local coffee shop using a

¹¹⁰Commission on Ethics 20/20, Report to the House of Delegates, Introduction & Overview at 8, May 7, 2012, available at http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited August 14, 2012) at 8.

¹¹¹Resolution 105A Revised, as approved by ABA House of Delegates on August 6, 2012, available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended_authcheckdam.pdf at 4 (last visited August 14, 2012).

¹¹²*Id.* at 3.

¹¹³ABA Comm. on Ethics 20/20, Report to the House of Delegates, Introduction & Overview, *supra.* at 8, n. 33.

public wireless network).¹¹⁴ The opinion cites the following factors an attorney should consider before using a specific technology: (a) the attorney's ability to assess the level of security afforded by the technology, including (i) how the technology differs from other media use; (ii) whether reasonable precautions may be taken to increase the level of security; and (iii) limitations on who is permitted the use of the technology, to what extent and what grounds; (b) legal ramifications [e.g., criminal or civil claims] to third parties intercepting, accessing or exceeding authorized use; (c) the degree of sensitivity of the information; (d) possible impact on the client of inadvertent disclosure of privileged or confidential information or work product, including possible waiver of the privileges; (e) the urgency of the situation; and (f) client instructions and circumstances.¹¹⁵

The Ethics 20/20 Commission Report also offers similar recommendations in its revisions to ABA Model Rule 1.6, Comment 16:

[16] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules].¹¹⁶

Practicing in a large firm does not make this duty delegable; it is not, at least not entirely. A lawyer has a personal duty to comply with ABA Model Rule 1.6. A lawyer must step squarely into the 21st century, or be accountable for any missteps on the lawyer's watch. A State Bar of Arizona Ethics Opinion has stated this duty with simple clarity:

¹¹⁴State Bar of Calif. Ethics Op. No. 2010-179, *available at* <http://ethics.calbar.ca.gov/Ethics/Opinions/2009176toPresent.aspx> (last visited August 14, 2012).

¹¹⁵*Id.* at 3-6.

¹¹⁶ABA Comm. on Ethics 20/20, Report to the House of Delegates, Resolution & Report: Technology and Confidentiality, Resolution, at 4-5, *available at* http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited August 14, 2012).

[A]n attorney must either have the competence to evaluate the nature of the potential threat to the client's electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end, or if the attorney lacks or cannot reasonably obtain that competence, to retain an expert consultant who does have such competence.¹¹⁷

C. Practicing Safe Tech

Faced with the non-delegable duty to understand the fundamentals of security for use of technology, including mobile devices, flash drives and other storage devices, cloud computing, and communications in various social media platforms, what must a lawyer do to protect communications and work product? We discuss below some of the common sense measures lawyers should take, as well as the technology.

Although every lawyer may not participate in or have responsibility for marketing, electronic discovery, or other specialized applications of technology, every lawyer will use technology to some degree. As the Ethics 20/20 Commission has observed:

Several developments are particularly notable. In the past, lawyers communicated with clients by telephone, in person, by facsimile or by letter. Lawyers typically stored client confidences in paper form, often inside locked file cabinets, behind locked office doors or in offsite storage facilities. Even when confidential client information was maintained electronically, the information was stored on desktop computers that remained within the firm or on servers typically located in the same office. Today, lawyers regularly communicate with clients electronically, and confidential information is stored on mobile devices, such as laptops, tablets, smart phones, and flash drives, as well as on law firm and third-party servers (i.e., in the “cloud”) that are accessible from anywhere. This shift has had many advantages for lawyers and their clients, both in terms of cost and convenience. However, because the duty to protect this information remains regardless of its location, new concerns have arisen about data security and lawyers’ ethical obligations to protect client confidences.¹¹⁸

If a lawyer uses technology, whether cyberspace or devices, in many jurisdictions the lawyer is responsible for the consequences of a confidentiality breach. To comply with the duty to exercise reasonable care, a lawyer must take reasonable precautions to prevent unauthorized access to the device and/or the information on, or transmitted to or from the device. Precautions include:

1. Ensuring the physical security of a desktop computer, laptop, smart phone, tablet, flash drive, CD-ROM/DVD, external hard drive, or other device to prevent someone from having physical access to the device.

¹¹⁷State Bar of Ariz. Op. No. 05-04 (July 2005), *available at* <http://www.myazbar.org/Ethics/opinionview.cfm?id=523> (last visited August 14, 2012).

¹¹⁸ABA Comm. on Ethics 20/20, Report to the House of Delegates, Resolution & Report: Introduction & Overview, at 4 (footnote omitted), *available at* http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited August 14, 2012).

2. Having a strong password (that is not written on the device or saved in a log book nearby). Numerous technology and ABA articles have noted that a 12 number/letter password will take 17,000 years to crack.¹¹⁹ No ethics determination has yet been made that a 12 number/letter password is the minimum required.
3. Inserting password protection to protect information from someone who may have physical or electronic access to the device or the lawyer's account. This is important not only for the obvious instances of when a device is lost or stolen, which can happen more easily the smaller and more portable the device, or left unattended, but also on shared office or home networks, unprotected wireless networks, and public devices at the airport, hotel, library, etc. Office files should not be accessible to family members.
4. Installing antivirus and firewall software.
5. Ensuring disaster protection such as offsite back up.
6. Speaking of offsite storage, ensuring the fundamental security of cloud storage, using reputable companies, and performing due diligence.
7. Regularly backing up data.
8. Encrypting data.
9. Planning for handling inadvertent disclosure.
10. Scrubbing metadata. If there is a possibility that metadata would be mined or used, a lawyer should ensure it is scrubbed. In fact, because it is a simple one or two click process, every lawyer should just make it standard procedure whenever disclosure of metadata might matter.
11. Training staff and enforcing policy.

Common sense of course plays an important role. For example, a lawyer should first log off and then turn off the computer or other device and not leave them vulnerable to unauthorized or overreaching individuals. A lawyer should turn off Bluetooth devices when not being used. Bluetooth vulnerability exists whether used for an earpiece, speakers or just a keyboard. Sometimes it is the simple and obvious that create the most costly vulnerabilities.

VI. LITIGATION AND SOCIAL NETWORKS

A. Ex Parte Communications

Social network communications should be made with extreme caution. There have been numerous instances in which lawyers have inadvertently engaged in unethical Facebook and LinkedIn activity during litigated proceedings. Do not "friend" the court or opposing counsel, or

¹¹⁹See, e.g., John D. Sutter, How to create a 'super password,' CNN Tech, August 20, 2010, *available at* [http://articles.cnn.com/2010-08-20/tech/super_passwords_1_passwords-character-Web sites?s=PM:TECH](http://articles.cnn.com/2010-08-20/tech/super_passwords_1_passwords-character-Web_sites?s=PM:TECH) (last visited August 14, 2012) (researchers at Georgia Institute of Technology cracked eight character password in less than two hours but found that 12-character passwords would take 17,134 years to crack).

discuss aspects of the case on Facebook. These acts could lead to confidentiality breaches and may constitute ex parte communications. A judge or neutral should avoid, and a jury should be instructed to avoid, ex parte online research about the parties and their counsel obtained by Googling and visiting their websites.

For attorneys, it has been pointed out that even researching the website of an opposing party represented by counsel may constitute a prohibited contact during litigation. The Oregon Bar differentiates allowable versus unethical by the level of interaction. Participation in an opposing party's chat room is probably over the line. It is the initiation of participation in an interactive communication that may constitute ex parte communication, whereas information derived from visiting a passive public website is not.¹²⁰

However, New York has taken the stricter view that it is possible to overreach even in more passive situations as subscribing to an RSS feed for a juror's blog or "following" a juror on Twitter. They noted that even visiting the juror's website, if the juror becomes aware of an attorney's efforts to see the juror's profiles on websites, could be deemed an impermissible communication possibly influencing the juror's conduct with respect to the trial.¹²¹

B. Jury Issues

Using the Internet to research jurors is accepted, and as noted below, probably ethically required to satisfy the lawyer's obligation of diligence. A New Jersey appellate court overruled a trial judge's ruling that the use of the Internet by a lawyer to research potential jurors during voir dire was an unfair practice.¹²²

But lawyers must be savvy about the technology to avoid unknowingly violating the ethics rules. Even if a lawyer is careful not to "friend" a person with whom the lawyer may not have ex parte communications, the social media site may notify the person that the lawyer has researched them. New York City Bar Association Committee on Professional Ethics Formal Opinion 2012-02 broadly discusses the topic of ethical restrictions that apply to a lawyer's use of social media to research potential or sitting jurors.¹²³ The opinion notes that the Internet and social media "have expanded an attorney's ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research[;] [i]ndeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case." The opinion offers the following guidance:

¹²⁰Or. State Bar Ass'n Op. No. 2001-164 (Jan. 2001), available at <http://ethicsandlawyering.com/Issues/files/oregon2001-164.pdf> (last visited August 14, 2012); see also, David Hricik, *Communication and the Internet: Facebook, E-mail and Beyond*, Mercer University School of Law, at 38 (December 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557033 (last visited August 14, 2012).

¹²¹N.Y. County Lawyer's Ass'n Comm. On Prof'l Ethics Formal Op. No. 743 (May 18, 2011), available at http://www.nycla.org/siteFiles/Publications/Publications1450_0.pdf (last visited August 14, 2012).

¹²²*Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071, at *4 (N.J. Super. Ct. App. Div. Aug. 30, 2010), cert. denied, 205 N.J. 100 (2011). See Duncan Stark, *Juror Investigation: Is In-Courtroom Internet Research Going Too Far?*, Washington Journal of Law, Technology & Arts, Vol. 7, Issue 2 (Fall 2011).

¹²³N.Y. City Bar Ass'n Formal Op. 2012-02, available at <http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02> (last visited August 14, 2012).

The Committee believes that the principal interpretive issue is what constitutes a “communication” under Rule 3.5. We conclude that if a juror were to (i) receive a “friend” request (or similar invitation to share information on a social network site) as a result of an attorney’s research, or (ii) otherwise to learn of the attorney’s viewing or attempted viewing of the juror’s pages, posts, or comments, that *would* constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We further conclude that the same attempts to research the juror *might* constitute a prohibited communication even if inadvertent or unintended. In addition, the attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable. Third parties working for the benefit of or on behalf of an attorney must comport with these same restrictions (as it is always unethical pursuant to Rule 8.4 for an attorney to attempt to avoid the Rule by having a non-lawyer do what she cannot). Finally, if a lawyer learns of juror misconduct through a juror’s social media activities, the lawyer must promptly reveal the improper conduct to the court.

The opinion is instructive on all the points discussed in its introductory paragraph quoted above, and is helpful to point out that when it comes to technology, we do not always know what we do not know; there are hidden ethical dangers that may exist (that will change over time) depending on the social media site’s functionality:

Although the text of Rule 3.5(a)(4) would appear to make any “communication”—even one made inadvertently or unknowingly—a violation, the Committee takes no position on whether such an inadvertent communication would in fact be a violation of the Rules. Rather, the Committee believes it is incumbent upon the attorney to understand the functionality of any social media service she intends to use for juror research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site, and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of Rule 3.5.

More specifically, and based on the Committee’s current understanding of relevant services, search engine websites may be used freely for juror research because there are no interactive functions that could allow jurors to learn of the attorney’s research or actions. However, other services may be more difficult to navigate depending on their functionality and each user’s particular privacy settings. Therefore, attorneys may be able to do some research on certain sites but cannot use all aspects of the sites’ social functionality. An attorney may not, for example, send a chat, message or “friend request” to a member of the jury or venire, or take any other action that will transmit information to the juror because, if the potential juror learns that the attorney seeks access to her personal information then she has received a communication. Similarly, an attorney may read any publicly-available postings of the juror but must not sign up to receive new postings as they are generated. Finally, research using services that may, even unbeknownst to the attorney, generate a message or allow a person to determine that their webpage has been visited may pose an ethical risk even if the attorney did not intend or know that such a “communication” would be generated by the website.

The Committee also emphasizes that the above applications of Rule 3.5 are meant as examples only. The technology, usage and privacy settings of various services will likely change, potentially dramatically, over time. The settings and policies may also be

partially under the control of the person being researched, and may not be apparent, or even capable of being ascertained. In order to comply with the Rules, an attorney must therefore be aware of how the relevant social media service works, and of the limitations of her knowledge. It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research, and to be aware of any changes in the platforms' settings or policies to ensure that no communication is received by a juror or venire member.

The use of Internet research is a two-way street. Jurors may be tempted to search for answers outside of the evidence presented in the courtroom. In March 2012, a juror was found in criminal contempt in New Jersey Superior Court for disobeying a judge's orders by using the Internet to research the potential punishment options for the defendant.¹²⁴

As a consequence of such juror activities, state courts are now taking steps attempting to control the flow of communications and postings during pending cases. For example, Texas has recently adopted amendments to its jury instructions to bar all Internet activity by jurors. Revised Rule 226a of the Texas Rules of Civil Procedure includes the following instructions:

1. Turn off all phones and other electronic devices. While you are in the courtroom and while you are deliberating, do not communicate with anyone through any electronic device. [For example, do not communicate by phone, text message, e-mail message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace.] [I will give you a number where others may contact you in case of an emergency.] Do not post information about the case on the Internet before these court proceedings end and you are released from jury duty. Do not record or photograph any part of these court proceedings, because it is prohibited by law.

...

4. Do not discuss this case with anyone, even your spouse or a friend, either in person or by any other means [including by phone, text message, e-mail message, chat room, blog, or social networking websites such as Facebook, Twitter, or Myspace]. Do not allow anyone to discuss the case with you or in your hearing. If anyone tries to discuss the case with you or in your hearing, tell me immediately. We do not want you to be influenced by something other than the evidence admitted in court.

...

6. Do not investigate this case on your own. For example, do not:

a. try to get information about the case, lawyers, witnesses, or issues from outside this courtroom;

...

e. look anything up on the Internet to try to learn more about the case; or

¹²⁴ *Juror Using Internet During Deliberations Held in Contempt – Why Lawyers Need to Pay Attention*, Studeo Legal, April 30, 2012, <http://studeolegal.typepad.com/blog/2012/04/juror-using-internet-during-deliberations-held-in-contempt-why-lawyers-need-to-pay-attention.html>.

- f. let anyone else do any of these things for you.¹²⁵

There is a counter-argument that Internet research by jurors is the new reality and should be allowed.¹²⁶

C. Pre-textual Friending (“Pretexting”)

Many lawyers find useful information about a litigation party or witness in their postings on social media sites. Due to privacy settings, sometimes valuable information would not be visible to the public in general, but would be visible to hundreds of “friends” of the target on Facebook or other media. Lawyers may be tempted to disguise their identity in order to friend the target, or to ask someone else to friend or shop the target and share what they see or say.

In March 2009, the Philadelphia Bar Association issued an opinion (Op. 2009-02) that such pretexting would involve dishonesty, fraud, deceit or misrepresentation on behalf of the lawyer, or the encouragement of such behavior, in violation of the Pennsylvania ethics rules.¹²⁷ “Deception is deception, regardless of the victim’s wariness in her interactions on the internet and susceptibility to being deceived.” The easy anonymity of the Internet allows little untruths and omissions to access personal or otherwise private information. As in all other interactions in a law practice, lawyers should as a general rule be guided by truthfulness and avoid misleading activities. This includes, as in the facts of the Philadelphia opinion, avoiding material omissions (e.g., “I am a private investigator hired by opposing counsel. Will you be my Friend?”). Other jurisdictions have issued similar opinions.¹²⁸

D. Lack of Candor Toward the Tribunal

In addition, ABA Model Rule 3.3¹²⁹ and most state bar rules prohibit lawyers from knowingly making a false statement of material fact to a tribunal. A judge could research a

¹²⁵Tex. Rule Civ. Pro. Section 226a, *available at* <http://www.supreme.courts.state.tx.us/rules/trcphome.asp> (last visited August 14, 2012).

¹²⁶*See, e.g.,* Julie Blackman, Ph.D. and Ellen Brickman, Ph.D., Let’s Talk: Addressing the Challenges of Internet-Era Jurors, *The Jury Expert*, March 30, 2011, <http://www.thejuryexpert.com/2011/03/lets-talk-addressing-the-challenges-of-internet-era-jurors/>.

¹²⁷Philadelphia Bar Ass’n Op. 2009-02, *available at* <http://www.philadelphiabar.org/page/Opinions20052009?appNum=2> (last visited August 14, 2012).

¹²⁸San Diego County Bar Ass’n Legal Ethics Op. 2011-2, *available at* <http://www.sdcba.org/index.cfm?pg=LEC2011-2> (last visited August 14, 2012); N.Y. State Bar Ass’n Comm. on Prof’l Ethics Op. 843 (Sept. 10, 2010), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=55951 (last visited August 14, 2012) (lawyer may access public social network pages, without the need to friend the person, since the information is publicly available); N.Y. City Bar Ass’n Formal Op. 2010-02 *available at* <http://www.nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites> (last visited August 14, 2012) (cannot use deception to gain access to social network site).

¹²⁹(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]” ABA Model Rule 3.3(a)(1), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal.html (last visited August 13, 2012).

lawyer's excuse/representation and, if false, report incidences where lawyers make statements in court that do not appear to align with their recent Facebook status updates.¹³⁰

VII. WEB AND SOCIAL MEDIA POLICIES

The technology and uses of social media are constantly evolving and expanding, with profound impacts on society generally, including the practice of law. Businesses of all types provide guidelines to their employees on proper use of the Internet and social media to protect the brand and comply with law. Lawyers should read and abide by their firm's web and social media policies, and if the firm does not have a policy, see that it adopts one. ABA Formal Opinion 10-457 discussed in more detail above in Section III.B. of this paper in connection with website disclaimers and the inadvertent client, advises that managerial lawyers have an obligation to make reasonable efforts to ensure the firm has in place measures giving reasonable assurance that all firm lawyers and nonlawyer assistants will comply with the rules of professional conduct.¹³¹ Web and social media policies are not an option but are considered an ethical obligation.

If a firm does not yet have a policy, it should. A well thought out policy will save time, money and aggravation later! We include sample policies from firms of different sizes and geographic locations in Appendix 4 to this paper. In addition, there are many articles discussing web and social media policies for businesses generally (i.e., not focused on law firms) and many sample policies available.¹³² One website in particular offers links to over 200 policies, including those of major corporations, banks, governmental organizations, and at least one law firm (Baker & Daniels).¹³³ We, the authors of this paper, have not read the hundreds of policies included or accessible from links contained in the sources referenced in the footnotes to this paragraph. We do not necessarily endorse these particular policies, including the samples provided in the appendix, or opine as to their sufficiency.

Web and social media policies should be directed to the employees of the law firm or in-house legal department, offering practical, easy to understand guidance on how to safely surf the web and participate in social media platforms without putting the firm at risk from a branding or systems security perspective or violating legal or ethical requirements. The elements of web and social media policies often include the following:

¹³⁰See McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, ABA Journal, July 31, 2009, available at <http://www.abajournal.com/news/article/facebooking-judge-catches-lawyers-in-lies-crossing-ethical-lines-abachic-ago/> (last visited August 14, 2012).

¹³¹ABA Comm. on Ethics And Prof'l Responsibility, Formal Op. 10-457 (2010), available at <http://www.scribd.com/doc/76816247/ABA-Formal-Ethics-Opinion-10-457-Websites> (last visited August 14, 2012).

¹³²See e.g. Corby C. Anderson and Carol Anne Been, *Protecting the Franchise Brand in the Age of Social Media*, American Bar Association 33rd Annual Forum on Franchising (2010); Olivia Maria Baratta, Michael Daigle, Elisa Edlund and Mindy Golde, *Getting Ahead of the Curve: Controlling the Risk of Social Media*, International Franchise Ass'n 45th Annual Legal Symposium (2012) (including four sample social media policies adopted by franchisors); Eric Schwartzman, *Social Media Policy Template*, available at <http://ericsschwartzman.com/pr/schwartzman/social-media-policy-template.aspx> (last visited August 14, 2012); and Sharlyn Lauby, *10 Must-Haves for Your Social Media Policy*, Mashable Social Media, June 2, 2009, <http://mashable.com/2009/06/02/social-media-policy-musts/>.

¹³³Chris Boudreaux, *Social Media Governance*, <http://socialmediagovernance.com/policies.php> (last visited August 14, 2012).

1. An introduction, with definitions and a description of social media platforms generally and a listing of specific platforms that are currently in use. The introductory portions may also set the tone for the firm's approach to social media, reflecting the firm's culture, ranging from fully embracing the new communication platforms to an acknowledgment that it is now a fact of life and must be addressed.
2. An explanation why the policy is important to the firm and the goals to be achieved from proper use of social media, including promoting the firm while avoiding ethical breaches and violations of law, protecting the firm's computer system, maintaining confidential information, and respecting third party intellectual property rights.
3. A code of behavior for use of social media, including use of proper language and manners and instruction to always use the employee's real name.
4. A limitation that employees can only speak/write in their own name and not on behalf of the firm unless they have been designated by the firm to do so. Blogs must be authorized and coordinated with the proper marketing and/or other departments in the firm.
5. Restrictions on topics of discussion, including the usual sensitive areas of politics and religion, and for a law firm, avoiding discussions that may be at odds with the firm's posture in a particular case or area of law.
6. Cautions to protect confidential information, both firm information and client confidences and matters, which may include a restriction against using social media platforms to communicate with clients on client matters.
7. Instructions to respect third parties' intellectual property rights.
8. A caution to limit the personal use of social media at work.
9. Instruction to avoid giving legal advice and creating an unintended attorney-client relationship.
10. Consequences for violation of the policy.

The Online Social Media Principles of The Coca-Cola Company,¹³⁴ while not providing specific provisions that would be applicable for a law firm, do provide examples of generally applicable provisions referenced in the outline above that would also apply to a law firm, in plain language. For example, the topic sentences from the five core values of the company in the online social media community are:

1. **Transparency** in every social media engagement.
2. **Protection** of our consumers' privacy.

¹³⁴ Available at Chris Boudreaux, *Social Media Governance*, <http://socialmediagovernance.com/policies.php> (last visited August 14, 2012).

3. **Respect** of copyrights, trademarks, rights of publicity, and other third - party rights in the online social media space, including with regard to user - generated content (UGC).
4. **Responsibility** in our use of technology.
5. **Utilization** of best practices, listening to the online community, and compliance with applicable regulations to ensure that these Online Social Media Principles remain current and reflect the most up - to - date and appropriate standards of behavior.

The 10 principles that guide how Certified Online Spokespeople of The Coca-Cola Company should represent the company online also provide generally applicable provisions referenced in the outline above, including common sense advice that is similar to advice regarding the use of email offered in this paper. The topic sentences from the 10 principles are:

1. Be Certified in the Social Media Certification Program.
2. Follow our Code of Business Conduct and all other Company policies.
3. Be mindful that you are representing the Company.
4. Fully disclose your affiliation with the Company.
5. Keep records.
6. When in doubt, do not post.
7. Give credit where credit is due and don't violate others' rights.
8. Be responsible to your work.
9. Remember that your local posts can have global significance.
10. Know that the Internet is permanent.

Web and social media policies are generally broad based and directed to employees of the firm as a whole. More specific guidance, for example, on the use of social media to research prospective or actual jurors and other persons, should be provided to the appropriate target audience, but it should be provided. A social media policy alone cannot cover all topics, nor should it, or the employee reading it will tune out and put it aside if the material is largely not relevant.

VIII. CONCLUSION

The Internet is forever (until it is replaced by the next great innovation). What happens there, stays there – forever. Missteps, faux pas, misconduct and malpractice leave a virtually indelible trail. The legal profession is by its nature traditional, attached to the past and established principles, but the extensive and thorough work of the ABA Commission on Ethics 20/20 demonstrates that times are indeed changing. Not only is it imperative for lawyers in practice today to get on board the technology train to thrive in the 21st century, it is critical that the tools of technology are used with understanding and a clear grasp of the potential pitfalls that can snare the most well intentioned lawyer.

Demonstrating how integral technology has become to our practices and the convenience and cost-saving it makes possible, there is a wealth of ethics resources available online, including ethics rules and opinions organized by state available at the following URL: http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html. State ethics rules on advertising and solicitation, as noted above, are available at <http://www.abanet.org/legalservices/clientdevelopment/adrules/states.html>. The Legal Information Institute also provides helpful information on state ethics rules and ethics cases and opinions available at <http://www.law.cornell.edu/ethics/comparative/>. The ABA's Center for Professional Responsibility is also an excellent resource offering reference material and assistance in researching specific ethics questions. The materials are available at: http://www.americanbar.org/groups/professional_responsibility/policy.html. Finally, another useful website with timely information on legal ethics opinions is <http://www.legaethics.com>.

When uncertain, it would be foolish not to take advantage of the vast resources now freely accessible on the Internet, using the most basic of tools: a few key words and your web browser.

APPENDIX 1

ABA Commission on Ethics 20/20 Introduction and Overview, May 7, 2012 (Selected Portions)

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Changes in How We Practice

The Commission's Resolutions and supporting Reports respond to two important trends. First, technology has irrevocably changed and continues to alter the practice of law in fundamental ways. Legal work can be, and is, more easily disaggregated; business development can be done with new tools; and new processes facilitate legal work and communication with clients.¹⁰ Lawyers must understand technology in order to provide clients with the competent and cost effective services that they expect and deserve. Second, coupled with technology, globalization continues to transform the legal marketplace, with more clients confronting legal problems that cross jurisdictional lines and more lawyers needing to respond to those client needs by crossing borders (including virtually) and relocating to new jurisdictions. Together, these trends have fueled and continue to spur dramatic changes to the legal profession and have given rise to new ethics issues that the Commission's proposals seek to address.¹¹

These trends are attended by economic forces, especially the movement of capital into new areas, e.g., investment in law firm equity in countries that permit such investment; alternative financing of litigation; and unbundling and outsourcing many of the services that once formed the pyramid of services performed by traditional law firms. The economic pressures are dynamic and varied. They amplify the challenges our profession must confront in a technologically advanced and globalized era. These trends and forces also foster uncertainty about where the profession is headed, and what opportunities lawyers, especially younger ones, will have to perform professional services and earn a livelihood.

Technology

Technology affects nearly every aspect of legal work, including how we store confidential information, communicate with clients, conduct discovery, engage in research, and market legal services. Even more fundamentally, technology has transformed the delivery of legal services by changing where and how those services are delivered (e.g., in an office, over the Internet or through virtual law offices), and it is having a related impact on the cost of, and the public's access to, these services.

¹⁰ See, e.g., Milton C. Regan, Jr. & Palmer T. Heenan, Supply Chains and Porous Boundaries: The Disaggregation of Legal Services, 78 Fordham L. Rev. 2137 (2010).

¹¹ See generally NEIL RICKMAN & JAMES M. ANDERSON, INNOVATIONS IN THE PROVISION OF LEGAL SERVICES IN THE UNITED STATES: AN OVERVIEW FOR POLICYMAKERS (Rand 2012).

Several developments are particularly notable. In the past, lawyers communicated with clients by telephone, in person, by facsimile or by letter. Lawyers typically stored client confidences in paper form, often inside locked file cabinets, behind locked office doors or in offsite storage facilities. Even when confidential client information was maintained electronically, the information was stored on desktop computers that remained within the firm or on servers typically located in the same office. Today, lawyers regularly communicate with clients electronically, and confidential information is stored on mobile devices, such as laptops, tablets, smartphones, and flash drives, as well as on law firm and third-party servers (i.e., in the “cloud”) that are accessible from anywhere.¹² This shift has had many advantages for lawyers and their clients, both in terms of cost and convenience. However, because the duty to protect this information remains regardless of its location, new concerns have arisen about data security and lawyers’ ethical obligations to protect client confidences.

Technology is also having a related impact on how lawyers conduct investigations, engage in legal research, advise their clients, and conduct discovery.¹³ These tasks now require lawyers to have a firm grasp on how electronic information is created, stored, and retrieved. For example, lawyers need to know how to make and respond to electronic discovery requests and to advise their clients regarding electronic discovery obligations.¹⁴ Legal research is now regularly and often more efficiently conducted online.¹⁵ These developments highlight the importance of keeping abreast of changes in relevant technology in order to ensure that clients receive competent and efficient legal services.

In some situations, a matter may require the use of technology that is beyond the ordinary lawyer’s expertise. For example, electronic discovery may require a sophisticated knowledge of how electronic information is stored and retrieved. Thus, another development associated with technology is that lawyers are increasingly disaggregating work by retaining other lawyers and nonlawyers outside the firm (i.e., outsourcing work to lawyers and nonlawyers) to perform critical tasks. Technology also permits the integration of these otherwise disaggregated workstreams, encouraging clients and lawyers to outsource elements of a representation.

Technology is changing the way that clients find lawyers. The Internet provides immediate access to information about lawyers through search engines, websites, blogs, and ratings and rankings services.¹⁶ Lawyers are using various Internet-based client development tools, such

¹² ABA, LEGAL TECHNOLOGY SURVEY REPORT: EXECUTIVE SUMMARY 18-22 (2011) (documenting lawyers’ usage of various devices and noting changes over time).

¹³ ABA, LEGAL TECHNOLOGY SURVEY REPORT Vol. III 52-56 (2011) (reporting the results of a survey documenting the pervasive need to use and respond to electronic discovery).

¹⁴ See, e.g., Fed. R. Civ. P. 26(b)(2)(B) & 26(f)(3)(C).

¹⁵ ABA, LEGAL TECHNOLOGY SURVEY REPORT: EXECUTIVE SUMMARY 81-89 (2011) (reporting the results of a survey of lawyers that found that nearly 80% of respondents start their legal research by going to online sources; and that fewer than half of respondents use print materials regularly).

¹⁶ See generally ABA Standing Comm. on the Delivery of Legal Services, Perspectives on Finding Personal Legal Services (2011), available at http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/20110228_aba_harris_survey_report.authcheckdam.pdf.

as pay-per-click and pay-per-lead services,¹⁷ as well as social and professional networking sites.

Technology continues to reshape the form of law offices and change how legal services are delivered. Some firms now exist solely online as virtual law practices.¹⁸ Other firms exist as continuously evolving collaborations of lawyers who come together to handle discrete legal matters for particular clients.¹⁹ Firms use online law practice management systems that are inexpensive and particularly useful to solo practitioners and lawyers in small firms.²⁰ The Internet also has enabled clients to access law-related services at a very low cost through websites that are not run by lawyers, creating new competitive pressures and potentially transformative consequences for the practice of law.²¹

Technology also has given rise to an increasing number of cross-jurisdictional issues. Lawyers can easily provide legal services to clients wherever they may be. This ability to provide services virtually has raised new ethical issues.

Globalization and Cross-Jurisdictional Practice

Technology has facilitated the increasing globalization of the economy generally and the legal services marketplace specifically.²² Clients regularly expect lawyers in firms of all sizes to handle matters that involve multiple jurisdictions, domestic and international.²³ For example, in family law matters, lawyers increasingly must address issues involving a spouse who is a citizen of another jurisdiction, domestic or foreign, or assets that are located in another U.S. jurisdiction or country.²⁴ Many business clients operate in multiple jurisdictions. An Internet-based company may encounter legal issues throughout the country or the world simply as a result of its online presence.

¹⁷ See, e.g., N.J. Sup. Ct. Comm. on Att’y Advertising, Internet Advertising, Misleading Content, and Impermissible Referral Services, Ethics Op. 43 (2011); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Advisory Op. 897 (2011).

¹⁸ See generally STEPHANIE L. KIMBRO, VIRTUAL LAW PRACTICE: HOW TO DELIVER LEGAL SERVICES ONLINE (2010).

¹⁹ See, e.g., Axiom Law, <http://www.axiomlaw.com/index.php/overview> (last visited April 26, 2012). See also Regan & Heenan, *supra* note 10.

²⁰ *Supra* note 18, at 3-4.

²¹ See generally RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES (2008) (describing how technology is revolutionizing the delivery of legal services and predicting how those changes will affect the legal profession in the future).

²² See generally THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE 21ST CENTURY (2005). See also Laurel S. Terry, The Legal World is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms, 28 Nw. J. Int’l L. & Bus. 527 (2008); Susskind, *supra* note 21.

²³ See, e.g., Emile Loza, Attorney Competence, Ethical Compliance, and Transnational Practice, 52 The Advocate, no. 10, 2009 at *28, available at <http://isb.idaho.gov/pdf/advocate/issues/adv09oct.pdf>.

²⁴ See, e.g., Linda D. Elrod & Robert G. Spector, A Review of the Year in Family Law: Working Toward More Uniformity in Laws Relating to Families, 44 Fam. L.Q. 4 (2011); Allison Maxim, International Parental Child Abduction: Essential Principles of the Hague Convention, Vol. LXIX Bench & Bar of Minnesota, no. IV (2012).

Globalization has not only affected the broader economy, producing more matters that impact multiple jurisdictions, but it also has affected legal employment and professional mobility. A decade ago, the MJP Commission found that, “The explosion of technology and the increasing complexity of legal practice have resulted in the need for lawyers to cross state borders to afford clients competent representation.”²⁵ In response to this practice reality, the MJP Commission proposed – and the ABA House of Delegates adopted – a regulatory framework that allowed lawyers, subject to certain limitations, to practice law on a temporary basis in jurisdictions in which they were not otherwise authorized to do so.²⁶ That framework included mechanisms that allowed lawyers, sometimes with limitations, to establish an ongoing practice in a jurisdiction in which they were not otherwise authorized to practice, without the necessity of sitting for a written bar examination.²⁷ This framework has been widely adopted²⁸ and has enabled lawyers to represent their clients more effectively and efficiently, provided clients with more freedom regarding their choice of counsel, and afforded lawyers more personal and professional flexibility.

We reviewed this framework in light of the accelerated pace of change and the growing proportion of legal work that involves more than one U.S. jurisdiction. Unsurprisingly, we found that the U.S. legal employment market has been affected by the same forces that have made employment throughout the broader economy more tenuous and unpredictable. As a result, both newer and more experienced lawyers regularly seek employment outside their original jurisdiction of licensure, sometimes because of personal needs, including the relocation of a spouse or the loss of a job, but also because of client demands.²⁹ Consequently, several ethical issues are arising with greater frequency, such as how conflicts of interest should be detected when lawyers seek new employment and how to better facilitate admission in a new jurisdiction while protecting clients and the public.

These same trends, and related demographic shifts within the U.S., also have produced more legal work that involves foreign law and foreign jurisdictions. In 2000, the foreign-born population in the U.S. was 31,107,899. Between 1990 and 2000, every jurisdiction except five

²⁵ See Report of the ABA Commission on Multijurisdictional Practice, Client Representation in the 21st Century (2002), http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_121702_2.authcheckdam.pdf.

²⁶ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.5(c) (2011) [hereinafter Model Rule XX]; ABA MODEL RULE FOR PRO HAC VICE ADMISSION.

²⁷ See, e.g., MODEL RULE 5.5(d); ABA MODEL RULE FOR ADMISSION BY MOTION.

²⁸ For example, since August 2002, forty-four jurisdictions have adopted some form of multijurisdictional practice that is similar to Model Rule 5.5. Chart, State Implementation of ABA Model Rule 5.5 (2010), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf. Forty jurisdictions have adopted a version of the ABA Model Rule on Admission by Motion. Chart, Comparison of ABA Model Rule on Admission by Motion With State Versions (2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_comp.authcheckdam.pdf. Thirty-one jurisdictions have adopted a version of the Model Rule for the Licensing and Practice of Foreign Legal Consultants. Chart, Foreign Legal Consultant Rules (2010) http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/for_legal_consultants.authcheckdam.pdf.

²⁹ See, e.g., Ronit Dinovitzer et al., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 54-60 (Am. Bar Found. & NALP Foundation for Law Career Research and Education 2009), <http://www.americanbarfoundation.org/publications/338>; ABA Resolution 108 (Feb. 2012), http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_108.doc.

had at least a 30% increase in the number of foreign born residents.³⁰ By 2009, the total U.S. foreign born population had risen to 36,750,000, approximately 12% of the U.S. population.³¹ Foreign-born residents have family law, estate planning, and business relationships in their countries of origin or the countries of origin of their spouses or business associates. Foreign owned companies are involved in multinational litigation that involves U.S. courts and in crossborder transactions and regulatory issues.

In light of these changes, we concluded that additional modifications to the Model Rules and other policies are necessary. These changes will help lawyers continue to ethically serve their clients, who rightfully expect their lawyers to respond nimbly to legal problems that arise in a 21st century marketplace.

SUMMARY OF COMMISSION PROPOSALS

The Commission on Ethics 20/20 believes that the principles underlying the Model Rules of Professional Conduct remain relevant and valid, so most of our recommendations are clarifications and expansions of the Model Rules as well as other existing Model Court Rules and policies.³² In developing these recommendations, the Commission sought to address the needs of clients and lawyers in a technology-driven global economy while protecting the public and our system of justice. The Commission is presenting the accompanying Resolutions by subject matter rather than by Rule because the context in which they were developed is crucial to understanding their substance.

Technology and Confidentiality

As noted above, technology has transformed how lawyers communicate with their clients and store their clients' confidences. This shift has created new concerns and questions about lawyers' obligations, including their duty to protect confidential information. The following proposals are intended to offer lawyers the guidance that they need.

Because new modes of communication create challenges as lawyers try to fulfill their obligation to protect client confidences, a new paragraph (c) in Model Rule 1.6 (Confidentiality of Information), as well as new language in Comment [16], would make clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used. This obligation is referenced in existing Comments [16] and [17], but we concluded that technological change has so enhanced the importance of this duty that it should be identified in the black letter of Rule 1.6 and described in more detail through additional Comment language.

³⁰ U.S. Census Bureau, Census 2000 Brief, The Foreign-Born Population: 2000, at 3 (Dec. 2003), <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf> & U.S. Census Bureau, Profile of Selected Social Characteristics: 2000 (2000), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF3_DP2&prodType=table.

³¹ See Table 40, Native and Foreign-Born Populations by Selected Characteristics: 2009, <http://www.census.gov/compendia/statab/2011edition.html>.

³² Also, because technology outpaces the process by which Resolutions are developed and brought to the House of Delegates, the Commission's recommendations include those described at page 2 above.

The Commission recognizes that lawyers cannot guarantee electronic security any more than lawyers can guarantee the physical security of documents stored in a file cabinet or offsite storage facility. Our proposal would not impose upon lawyers a duty to achieve the unattainable. Instead, it identifies various factors that lawyers need to take into account when determining whether their precautions are reasonable. The factors, which include the cost of the safeguards and the sensitivity of the information, recognize that each client, lawyer or law firm has distinct needs and that no single approach should be or can be applied to the entire legal profession. The proposal makes clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.

The Commission is also proposing that the ABA create and maintain a regularly updated user-friendly website to provide more specific and timely guidance than the Model Rules can provide regarding lawyers' use of commonly encountered technology. The Commission believes that the proposed amendments to Model Rule 1.6, along with the website, will ensure that lawyers understand their ethical obligations to protect client confidences in a digital age and give them sufficient guidance to fulfill that obligation.

Because of the sometimes bewildering pace of technological change, the Commission believes that it is important to make explicit that a lawyer's duty of competence, which requires the lawyer to stay abreast of changes in the law and its practice, includes understanding relevant technology's benefits and risks. Comment [6] of Model Rule 1.1 (Competence) implicitly encompasses that obligation, but it is important to make this duty explicit because technology is such an integral – and yet at times invisible – aspect of contemporary law practice. The phrase “including the benefits and risks associated with relevant technology” would offer greater clarity regarding this duty and emphasize the growing importance of technology to modern law practice. As noted in ethics opinions, such as those relating to cloud computing,³³ this obligation is not new. Rather, the proposed amendment emphasizes that a lawyer should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent in a digital age.

Model Rule 4.4 (Respect for Rights of Third Persons) and its Comments currently describes a lawyer's obligations when in receipt of inadvertently disclosed “documents,” a word that has left lawyers with limited guidance when they receive inadvertently sent electronic information. To address this important ambiguity, the Commission is proposing to add language to Model Rule 4.4 to make clear that electronically stored information, in addition to information existing in paper form, can trigger Rule 4.4(b)'s notification requirements if the lawyer concludes that the information was inadvertently sent. Moreover, the Commission is proposing to define the phrase “inadvertently sent” in Comment [2] to help lawyers understand when the notification obligations in Rule 4.4(b) arise, including when they receive metadata that was inadvertently sent in an electronic

³³ See, e.g., Ala. State Bar Office of Gen. Counsel, Formal Op. 2010-02 (2010); Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 09-04 (2009); and N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 842 (2010).

document. The Commission believes that these updates to the Rule will provide more guidance to lawyers who now regularly receive misdirected information, particularly information contained in electronic form.

The screening of individual lawyers from access to certain information in a firm must now address not only documents but also electronic information. Amendments to Comment [9] of Model Rule 1.0 (Terminology) would make clear that, when establishing screens to prevent the sharing of information within a firm, the screens should prevent the sharing of both tangible and electronic information. This proposal recognizes that advances in technology have made client information more accessible to the whole firm, so the process of limiting access to this information should require more than placing relevant physical documents in an inaccessible location; it necessarily requires appropriate treatment of electronically stored information as well.

The Commission also proposes to update the existing definition of a “writing” in paragraph (n) of Model Rule 1.0 (Terminology) by replacing the word “e-mail” with the phrase “electronic information.” This change will ensure that the definition more accurately reflects the various ways that a “writing” can occur, both today and in the future.

The last sentence of Comment [4] to Model Rule 1.4 – which currently says that, “[c]lient telephone calls should be promptly returned or acknowledged” – has become overtaken by technology. The Commission would replace that admonition with the following language: “Lawyers should promptly respond to or acknowledge client communications.”

Technology and Client Development

As lawyers use new marketing services – such as law firm websites, blogs, social and professional networking sites, pay-per-click ads, pay-per-lead services, and online videos – they are encountering a wide range of ethics-related issues. We examined these issues and concluded that the principles underlying the existing Rules – preventing false and misleading advertising, protecting the public from the undue influence of solicitations, and safeguarding the confidences of prospective clients – remain valid. However, specific language in the Rules should be updated to provide necessary guidance.

When a lawyer’s first substantive contact with a potential client was face-to-face, it was relatively easy to determine when a communication gave rise to a prospective client-lawyer relationship. Now such a relationship can arise in many different ways: a lawyer’s website might ask a person to send information about his injury; a lawyer might exchange information with someone on a blog; and a lawyer might use her social networking page to provide advice to “friends.”

The Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship through amendments to Model Rule 1.18 (Duties to Prospective Client) and its Comments, including a new Comment [3]. The current Rule requires a “discussion,” which implies a two-way verbal exchange (e.g., an in-person

meeting or telephone conversation), and does not capture the idea that Internet-based communications can, in some situations, give rise to a prospective client relationship.³⁴ We propose to replace “discusses” with “consults” and include new Comment language that identifies the circumstances under which a “consultation” triggers Rule 1.18’s duties. These amendments will help lawyers identify the precautions that they should take to prevent the inadvertent creation of a prospective client-lawyer relationship in a digital age and help the public understand the consequences of communicating electronically with a lawyer. The Comment would also make clear that a person who communicates with a lawyer to disqualify that lawyer from a matter is not a prospective client.

New marketing tools allow lawyers to pay to have their names listed in response to Internet based queries by people who use certain search terms as well as through other methodologies. Because the application of the Rules to these new forms of Internet-based client development is sometimes unclear, the Commission concluded that lawyers need better guidance.

For example, confusion arises out of the prohibition against paying others for a “recommendation.” Model Rule 7.2 (Advertising) was designed to prohibit a lawyer from paying others – such as “runners” or “cappers” – to recommend them. The Commission’s proposal explains how the prohibition applies to modern forms of client development, clarifying that a recommendation occurs when someone endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. This definition, along with additional language in Comment [5], is intended to ensure that the public is not misled when lawyers use tools such as pay-per-click and pay-per-lead services, and that the restrictions on fee sharing with nonlawyers are observed.

Amendments to the title and text of Model Rule 7.3 (Direct Contact with Prospective Clients) and its Comments would clarify when a lawyer’s online communications constitute the type of direct “solicitations” that are governed by the Rule. For example, proposed language in Comment [1] notes that advertisements automatically generated in response to a person’s Internet searches about legal issues are not “solicitations.”

...

³⁴ See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-457 (2010) at 4.

APPENDIX 2

[Available at <http://apps.americanbar.org/dch/committee.cfm?com=IC100123> (follow "Related Resources" hyperlink) (last visited August 14, 2012)]

ABA Commission on Ethics 20/20 August 2012 Proposals

[Click here for the Commission's website.](#)

Confidentiality When Using Technology. To help lawyers understand how to protect client confidences when using new technology – such as “cloud” computing, tablets, and smartphones – we propose to:

- clarify that lawyers should take reasonable precautions to protect client confidences from inadvertent or unauthorized access or disclosure. (Model Rule 1.6)
- identify the factors that lawyers should consider when determining whether they have taken reasonable precautions. (Model Rule 1.6)
- clarify a lawyer’s obligations upon receiving inadvertently disclosed confidential information, including information contained in electronic form. (Model Rule 4.4)
- emphasize a lawyer’s duty to keep abreast of changes in relevant technology, including the benefits and risks associated with its use. (Model Rule 1.1)

We also recommend that the ABA create a user-friendly, regularly updated website with answers to commonly asked questions about technology and confidentiality.

Using Technology for Marketing. To help lawyers understand how the principles of the advertising rules apply to new forms of Internet-based marketing, such as pay-per-click ads and social networking sites, we propose to:

- advise lawyers on how to use those forms of marketing without inadvertently creating a prospective client-lawyer relationship. (Model Rule 1.18)
- clarify how the prohibition against paying others for a “recommendation” applies to online lead generation services. (Model Rule 7.2)
- identify when a lawyer’s online communications constitute a “solicitation.” (Model Rule 7.3)

Outsourcing. Given the extent to which lawyers now outsource legal and law-related services, we propose to:

- advise lawyers that, when outsourcing work to other lawyers, they must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client. (Model Rule 1.1)
- advise lawyers that, when outsourcing work to nonlawyers, they must make reasonable efforts to ensure that the nonlawyers’ services are provided in a manner that is compatible with the lawyer’s professional obligations. (Model Rule 5.3)

Mobility. Given the increasing need for lawyers to change jobs and relocate to new jurisdictions, we propose to:

- explain the extent to which a lawyer can disclose information to another firm in order to ensure that conflicts of interest are detected before the lawyer is hired or two firms merge. (Model Rule 1.6)
- enable a lawyer to establish a practice in another jurisdiction while the lawyer pursues admission in that jurisdiction through one of the procedures that the jurisdiction authorizes (e.g., admission by motion). (New Model Court Rule on Practice Pending Admission)
- allow a lawyer to qualify for admission by motion after 3 years of practice (instead of 5). (Model Rule on Admission by Motion)

APPENDIX 3

STATE IMPLEMENTATION OF ABA MODEL RULE 5.5 (MULTIJURISDICTIONAL PRACTICE OF LAW)

[Available at
http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf (last visited August 14, 2012).

**STATE IMPLEMENTATION OF ABA MODEL RULE 5.5
 (MULTIJURISDICTIONAL PRACTICE OF LAW)**

	Highest Court has adopted a rule identical to ABA Model Rule 5.5 (13)	Highest Court has adopted a rule similar to ABA Model Rule 5.5 (31)	Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 5.5 (0)	Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 5.5 (1)	States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (0)	States whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 5.5 (0)	States that have created committees to study ABA MJP recommendations (3)
AL		X					
AK	X						
AZ		X					
AR	X						
CA		X					
CO		X					
CT		X					
DE		X					
DC		X (Rule 49, D.C. Ct. of Apps.)					
FL		X					
GA		X					

	Highest Court has adopted a rule identical to ABA Model Rule 5.5 (13)	Highest Court has adopted a rule similar to ABA Model Rule 5.5 (31)	Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 5.5 (0)	Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 5.5 (1)	States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (0)	States whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 5.5 (0)	States that have created committees to study ABA MJP recommendations (3)
HI							X
ID		X					
IL	X						
IN	X						
IA	X						
KS							
K							
LA		X					
ME		X					
MD	X						
MA	X						
MI		X					
MN		X					
MS				X			
MO		X					
MT							
NE	X						

	Highest Court has adopted a rule identical to ABA Model Rule 5.5 (13)	Highest Court has adopted a rule similar to ABA Model Rule 5.5 (31)	Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 5.5 (0)	Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 5.5 (1)	States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (0)	States whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 5.5 (0)	States that have created committees to study ABA MJP recommendations (3)
NV		X					
NH	X						
NJ		X					
NM		X					
NY							X
NC		X					
ND		X					
OH		X					
OK		X					
OR		X					
PA		X					
RI	X						
SC		X					
SD		X					

	Highest Court has adopted a rule identical to ABA Model Rule 5.5 (13)	Highest Court has adopted a rule similar to ABA Model Rule 5.5 (31)	Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 5.5 (0)	Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 5.5 (1)	States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (0)	States whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 5.5 (0)	States that have created committees to study ABA MJP recommendations (3)
TN		X					
TX							X
UT	X						
VT	X						
VA		X					
WA	X						
WV				Does not address MJP. http://www.state.wv.us/WVSCA/rules/ABA.pdf			
WI		X					
WY		X					

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APPENDIX 4

SAMPLE WEB AND SOCIAL MEDIA POLICIES

Sample #1

Use of Electronic Media & Social Media Policy

NO PRIVACY EXPECTATION: LAW FIRM reserves the right at all times and without prior notice to inspect and search any and all of LAW FIRM's electronic media. This includes various forms of electronic communication including, but not limited to, all computers (including desktop, laptops, phones and PDA's) e-mail, all online services paid for by LAW FIRM, including access to the Internet and World Wide Web, and software and hardware systems. Such inspections may be conducted during or after business hours, in the presence or absence of the employee, and without notice. Employees should NOT assume electronic communications are private. If an employee has sensitive or personal information to receive or transmit, it should be done through the employee's personal communication system and not through any communication system or electronic media owned or operated by LAW FIRM.

LAW FIRM uses various forms of electronic communication including, but not limited to computers, e-mail, telephones, and the Internet. All electronic communications, including all software, databases, hardware, and digital files, remain the sole property of LAW FIRM and are to be used only for LAW FIRM business and not for any personal use.

General Electronic Communication

1. Electronic communication and media may not be used in any manner that would be discriminatory, harassing, or obscene, or for any other purpose that is illegal, against LAW FIRM policy, or not in the best interest of LAW FIRM.
2. Employees who misuse electronic communications and engage in defamation, copyright or trademark infringement, misappropriation of trade secrets, discrimination, harassment, or related actions will be subject to discipline and/or immediate termination.
3. Messages on LAW FIRM's voice mail and e-mail systems are subject to the same policies regarding harassment and discrimination, as are any other workplace communications. Offensive, harassing or discriminatory content in such messages will not be tolerated.
4. Employees who use devices on which information may be received and/or stored, including but not limited to cell phones, cordless phones, portable computers, fax machines, PDA devices and voice mail communications are required to use these methods in strict compliance with the trade secrets and confidential communication policy established by LAW FIRM. Except for such uses, these communication tools should not be used for communicating confidential or sensitive information or any trade secrets.
5. No photo recording devices may be used without written consent of management

Company Computer Systems

6. Employees may not install personal software on LAW FIRM computer systems.
7. All electronic information created by any employee using any means of electronic communication is the property of LAW FIRM and remains the property of LAW FIRM. Personal passwords may be used for purposes of security, but the use of a personal password does not affect LAW FIRM's ownership of the electronic information or right of LAW FIRM's authorized management to access the information.
8. LAW FIRM may override all personal passwords if necessary for any reason.
9. LAW FIRM reserves the right to access and review electronic files, messages, mail, and other digital archives, and to monitor the use of electronic communications as necessary to ensure that no misuse or violation of LAW FIRM policy or any law occurs. Employees should have no expectation of privacy in any computer application, including email and Internet access.
10. Employees are prohibited from using the Internet for the purpose of accessing or downloading anything that may be offensive to others, including sexually explicit messages, cartoons, ethnic or racial slurs or the making of false statements about somebody with malicious intent. The computer network is subject to monitoring on a regular basis. If anything inappropriate is discovered on an employee's computer, it will result in disciplinary action up to and including termination.
11. **Employees are not permitted to forward any work-related emails to their personal email accounts.**
12. Employees are not permitted to access the electronic communications of other employees or third parties unless directed to do so by management.
13. No employee may install or use anonymous e-mail transmission programs or encryption of e-mail communications, except as specifically authorized by the LAW FIRM _____.
14. Access to the Internet, websites, and other types of company-paid computer access are to be used for company-related business only. Any information about LAW FIRM, its products or services, or other types of information that will appear in the electronic media about LAW FIRM must be approved by LAW FIRM _____ before the information is placed on an electronic information resource that is accessible to others.

Questions about access to electronic communications or issues relating to security should be addressed to the LAW FIRM _____.

Sample #2

Social Networking Policy

LAW FIRM recognizes the importance of the internet and social media sites in our business and our personal lives. The purpose of this policy is to help employees make appropriate decisions about their social media activity that may impact the workplace, including the contents of their blogs, personal websites, postings on social networking sites, wikis and other interactive sites, postings on video or picture-sharing sites, or in the comments that employees make online on any social media site or elsewhere on the public internet, and in responding to comments from posters either publicly or via email. Please note that this policy is meant to apply both in and out of the workplace, however, nothing in this policy is intended to interfere with employees' rights under Section 7 of the National Labor Relations Act regarding "protected" and "concerted" activity (e.g., where an employee acts together with or on the authority of other employees; seeks to initiate, induce, or prepare for group action; brings "truly group complaints" to the attention of management; or engages in activities if they are the logical outgrowth of work-related concerns expressed by employees collectively).

1. General Rules for Interaction that Involves the Company on the Internet

Unless it is part of an employee's job description, employees should not be using work time or company equipment (computer, PDA, network, etc.) to access or post information on social media sites. As beneficial as these sites may be to an employee's personal life, they can be a significant distraction in the workplace.

If an employee is, while off duty and on their own personal computer, accessing or posting to a blog, social media sites, or the internet, the general preference would be for the employee not to discuss anything work-related online, particularly if the employee is posting information on publicly-accessible sites.

If the employee is posting online and it is relevant to the discussion to mention LAW FIRM and/or its current and potential products, employees, partners, customers, and competitors, the employee should identify that he or she is an employee of LAW FIRM, and that the views expressed are the employee's views alone and do not represent the views of LAW FIRM.

Unless given express written permission by the President in advance, employees are not authorized to speak on behalf of LAW FIRM, or to represent that he or she has the authority to speak on behalf of LAW FIRM.

If an employee is developing a website, writing to a blog, or posting to a public site that will mention LAW FIRM and/or its current and potential products, employees, partners, customers, and competitors, LAW FIRM would appreciate it if the employee lets the Human Resources Director know. If there is any questionable content, it is far better to have sought permission in advance, than be forced to deal with the potential ramifications after the fact. Since violations of this policy can result in termination of employment, LAW FIRM will take all reasonable steps to assist employees in avoiding any breach of this policy.

2. Confidential Information May Never Be Disclosed

Employees may never share information that is confidential and proprietary about LAW FIRM and/or its clients without the express consent of LAW FIRM in advance. Confidential and proprietary information includes information about LAW FIRM's clients, trademarks, product releases, sales, finances, company strategy, and any other information that might be considered a trade secret or that has not been publicly released by LAW FIRM.

These are given as examples only and do not cover the range of what LAW FIRM considers confidential and proprietary. If an employee has any question about whether information can be released publicly, or doubts of any kind, speak with the Human Resources Director before releasing information that could potentially harm LAW FIRM, or its current and potential clients, products, employees, and partners. This obligation is not simply based on this policy. Disclosing confidential information may be a violation of state or federal law, in addition to being the basis for termination of employment.

Under no circumstances may LAW FIRM's logo and trademarks be used in any conduct that violates LAW FIRM's policies or is unlawful. If an employee desires to use a LAW FIRM logo or trademark in any social media or other communication that has not been approved by the President, the employee should consult with the Human Resources Director before using the logo or trademark to ensure that it will not constitute a violation of LAW FIRM policies. This is vitally important to prevent the appearance that you speak for or represent LAW FIRM officially.

3. Privacy Rights and Respectful Behavior

You should speak respectfully about LAW FIRM and its products, employees, customers, partners, and competitors. Do not engage in name calling or behavior that will reflect negatively the reputation of LAW FIRM or fellow employees. Employees are specifically prohibited from using social media to post or display comments about coworkers or supervisors or LAW FIRM that are vulgar, obscene, threatening, intimidating, harassing, or a violation of LAW FIRM's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic. Please note that the use of copyrighted materials, unfounded, derogatory or threatening statements, or misrepresentations are inappropriate, and may lead to disciplinary action up to and including termination of employment.

LAW FIRM expects that any public statements you make that relate to LAW FIRM, or its clients, products, employees, or partners or competitors will be well thought out, accurate and professional. Despite disclaimers, employee's posts and other web interaction can result in members of the public forming opinions about LAW FIRM and its clients, employees, partners, and/or products. Negatively impacting LAW FIRM's reputation, regardless of intent, can lead to disciplinary action, up to and including termination of employment.

Respect the privacy rights of employees by seeking their permission before writing about or displaying internal company happenings that the other employee may consider to be a breach of the his or her privacy or confidentiality.

4. Leave the Advertising to the Company

Unless it is part of your job description and done at work, do not attempt to create public interest in LAW FIRM or its products using social media. Do not encourage testimonials from the public and do not send messages to others that might be considered to be “spam” or unwanted solicitations.

LAW FIRM strives to ensure a consistent, controlled company message and, therefore, limits employee contact with the media only to the extent necessary to achieve its goal of a common message about its products and services. Media contacts about LAW FIRM and its current or potential products, employees, partners, customers, and competitors should be referred for coordination and guidance to the Human Resources Director. If your online activity generates contacts from third parties, you are not authorized to speak on LAW FIRM’s behalf.

5. Do Not Compete with the Company

Employees of LAW FIRM may not sell any product or service that would compete with any of LAW FIRM’s products or services without permission in writing from the President. This includes, but is not limited to training, books, products, and freelance writing. If in doubt, talk with the Human Resources Director.

6. You May Incur Legal Liability as well as Loss of Employment

Please be advised that employees may be legally liable for anything they write or present online. Employees can be disciplined by LAW FIRM for commentary, content, or images that are defamatory, pornographic, proprietary, harassing, libelous, or that can create a hostile work environment or otherwise violate company policies. Employees can also be sued by fellow employees, competitors, and any individual or company that views their commentary, content, or images as defamatory, pornographic, proprietary, harassing, libelous or creating a hostile work environment.

Acknowledgement and Agreement

I have received and reviewed a copy of the Use of Electronic Media & Social Media Policy and agree to abide by the policy; I further agree to bring any concerns or questions that I may have about the policy to the attention of the Human Resources Director.

By: _____

Date: _____

Printed Name: _____

Sample #3

Social Media and Social Networking

Social media encompasses a broad array of online activity including social networks such as Facebook and MySpace, professional networks such as LinkedIn and blogs and other similar online or Internet communications. The information posted to these various outlets can be traced and traced. New online tools and new advances will introduce new opportunities to build one's virtual footprint.

Because this form of communication is vast and growing, we feel it is important to communicate to you the Firm's position regarding an employee's use of social media or networking.

Use at Work or During Work Time – We do not permit employees to access social media and/or social networking sites while on Firm time or property. We have taken steps to block many of the social networking sites while on our network, but technology will undoubtedly work faster than our IT resources. Therefore, even if you are able to access such sites during working time or on Firm property, you should understand that your activities are in violation of our policy and may result in disciplinary action.

Use Outside of Work and Away from Firm Property – It is not our goal to regulate your personal online activities when not on Firm time or property. Please understand, however, that certain activities might impact your working relationships or Firm rights that we do reserve the right to regulate. All employees should ensure that they are familiar with the Firm conduct policies and confidentiality guidelines to avoid any online communications that might violate those policies. For example, you should ensure that your online activities do not violate the Firm's policy regarding harassment, discrimination, retaliation or other similar policies pertaining to how employees interact with each other. If you post or say something online that makes another employee feel uncomfortable at work, your activity may result in an investigation and possible discipline.

Similarly, employees are not permitted to use the Firm name, logo, trademark or service mark in online activities. Employees are not permitted to post photographs of the Firm, its locations, products, customers or employee-related activities online. Employees are not permitted to disclose any confidential information of the Firm, employees, products, processes or clients online.

You should be careful when considering posting recommendations for coworkers. The Firm's policy requires that all recommendations pertaining to employees come from the Office Administrator. Therefore, we ask that you clear all potential recommendations and comments with the Office Administrator for anyone who is or was ever associated with the Firm.

Your Identity Online – You are responsible for any of your online activity conducted with a Firm e-mail address, and/or which can be traced back to the Firm's domain, and/or which uses the Firm assets. What you publish on such personal online sites

should never be attributed to the Firm and should not appear to be endorsed by or originated from the Firm. If you choose to list your work affiliation on a social network, then you should regard all communication on that network as you would in a professional network.

Firm's Right to Inspect – The Firm reserves the right to inspect all electronic data and usage occurring over the Firm's network or on Firm property without prior notice. We also reserve the right to assess information in the public domain on the Internet and to discipline employees for any violation of these guidelines.

Questions and Clarification – If you have questions or need further clarification of any aspect of this policy, please contact your supervising attorney or the Office Administrator.

The Use of Social Networking Communications

Blogging, "tweeting," email, texting, and other social media, including but not limited to MySpace and Facebook, are also subject to restrictions. Employees may not use company property to create, maintain, amend, view, access, download, contribute to, or store a blog, "tweet" or post entries on the internet (whether through a social network such as MySpace or Facebook or using another method), unless you have written authorization from your supervising attorney, a Managing Partner, the Office Administrator or the Office Administrator. Employees may not blog, "tweet" or post entries on the internet (whether through a social network such as MySpace or Facebook or using another method) while at work, without written authorization from your supervising attorney, a Managing Partner, the Office Administrator or the Office Administrator. The Firm has access to all company-provided electronic equipment and property, and may from time to time, and without notice, inspect the condition of that equipment and the communications, content, data or imagery stored on it. If an employee accesses, views, creates or saves any communications, content, data or imagery in or on company-provided digital equipment, employees have no reasonable expectation of privacy as to such communications, content, data, and imagery and such information is subject to monitoring by the Firm. Employees must cooperate in such monitoring or it is grounds for discipline including but not limited to termination.

You may not post any material or information that (a) violates the privacy rights of another Firm employee; (b) intentionally or inadvertently disclose any Firm secret or confidential business information, including but not limited to names of clients or potential clients; (c) comments on future Firm performance, plans or prospects; (d) criticizes or disparages the clients, suppliers, competitors, or employees of the Firm; (e) includes copyrighted materials or other intellectual property of someone other than you; (f) constitutes the unauthorized use of trademarks, logos and other branding symbols; (g) uses or displays the logo, graphics, or trademarks of the Firm; (h) displays false or misleading information about the Firm, any employee of the Firm, or any client or potential client of the Firm; (i) displays any information that violates any other Firm policy; (j) displays any content that purports to represent the position, viewpoint, statements, opinions or conclusions of the Firm, employee, or client; or (k) violates any law, such as laws that prohibit defamation, harassment, discrimination, and retaliation. You may not use the Firm's name to endorse or promote any product,

commercial enterprise, opinion, cause or political candidate. If your post or entry identifies or mentions the Firm, you must also identify yourself by your real name and state in a prominent way that any entries or posts express your personal view and are not written by or on behalf of the Firm and do not represent the views of the Firm. Links to other websites or locations are also subject to this policy.

This policy applies to all blogs and other sites, without regard to whether it is accessible by the public or requires a password.

Employees are personally responsible for any posting that they make, or someone else makes on their social networking site. Employees can be held personally liable for any statements deemed to be defamatory, obscene, harassing, discriminating, retaliatory, violate privacy rights, or include confidential or copyrighted information (e.g., music, videos or text that belongs to someone else). The Firm is not responsible for protecting you from the consequences of any information that you post.

A violation of this policy can result in discipline, up to and including termination, as well as legal action against you for damages and injunctive relief.

Sample #4

LAW FIRM SOCIAL MEDIA POLICY

Introduction. Social networking is increasingly popular among lawyers, clients and the general public. While social networking can be useful, if done improperly, it can result in a variety of adverse consequences, such as unintended attorney-client relationships, contrary positions advocated against the firm or its clients, disclosure of sensitive or confidential information, copyright violations, violations of the rules of professional conduct, and potential damage to the firm's reputation. We recognize the vital importance of participating in these online conversations and are committed to ensure that the firm participate in online social media the right way.

Definition of Social Networking. As used in this policy, "social networking" means all forms of social media over the Internet. Typically, this interaction occurs on blogs and on sites like Facebook, Twitter, LinkedIn, Legal OnRamp, YouTube, and MySpace, but can also occur on "media sites" that are offered by television networks, newspapers, lists-servs and magazines, and permit readers to post comments.

Application of Policy. This policy applies to all types of social networking activity (a) using firm computers, mobile devices, or other technology, (b) using non-firm technology when linked to the firm's systems and (c) using non-firm technology that is not linked to the firm's systems. In addition, postings should never be attributed to the firm or imply they are endorsed or written by the firm. If work affiliation is listed, the posting should include the following disclaimer: "The statements and views expressed in this posting are my own and do not reflect those of my law firm."

Personal use of the firm's IT systems to access social networking sites is permitted, but should be limited, not interfere with or impact with the firm's normal business operations, not compromise the security or reputation of the firm or its clients, not burden the firm with incremental costs, and comply with all other provisions of this policy and all firm policies. All participation in social networking sites for work-related reasons, for example on LinkedIn, must be on sites specifically approved in advance by the firm's General Counsel.

Social Networking Site Terms of Use. Anyone participating in a social network for any reason is responsible for reading, understanding, and complying with the site's terms of use. Any concerns about the terms of use for a site should be reported to the firm's General Counsel.

Client Contact Information. Many networking sites permit users to search for or import contact information from the user's contact list. Due to confidentiality and privacy concerns, users are prohibited from importing or uploading any client contacts to any networking sites.

Content of Postings. Some social networking sites may provide an appropriate forum to keep current on matters of interest, to make professional connections, and to

locate links to other pertinent sources. Users must be careful, however, that their online postings do not adversely impact or create problems for the firm, its lawyers, or its clients. Users are personally responsible for all content they post on social networking sites, and should assume that they will be unable to delete content once posted to a site.

Users must follow these guidelines for all postings:

1. Do not provide legal advice or counsel, because doing so could create an attorney-client relationship, even if unintended;
2. Use the same judgment in writing your postings that you would in writing any formal letter. Post only content that you would be comfortable having your colleagues, and the general public read, hear, or see. Do not post anything that would potentially embarrass you or the firm, or call into question your or the firm's reputation, including photographs or other images;
3. Refrain from taking any position on a legal issue, because doing so could create a positional conflict with a firm client;
4. Refrain from posting any content that could be characterized as defamation, plagiarism, harassment, advertising, a copyright violation, or claims of special expertise or experience;
 - Do not discuss firm business or clients, unless the firm authorizes you to do so;
5. Identify all copyrighted or borrowed material with citations and links and obtain permissions when necessary;
6. Ensure that your posting is accurate, truthful, respectful, and is spelled correctly with appropriate grammar, language, and tone;
7. Be aware that the rules of professional conduct apply to your communications, including any advertising and solicitation rules;
8. Obtain approval from the firm's General Counsel or his/her designee before responding to an inaccurate, accusatory or negative comment about the firm, its lawyers, or its clients, inquiries from journalists on issues related to the firm, its lawyers, or its clients, or an inquiry about any other legal matter; and
9. Unless previously authorized by the Firm's Director of Marketing, do not use the firm's logo or suggest you are writing on behalf of the firm.

Prohibition on Client Communications. Due to privacy, confidentiality, and document preservation concerns, communicating with clients on social networking sites about legal matters is prohibited. If a client initiates such a communication, the lawyer should advise the client, in substance, that firm personnel cannot discuss legal matters on networking sites and request that the client call or send an e-mail.

Client and Third-Party Confidentiality. The firm is subject to confidentiality obligations imposed by Rules of Professional Conduct and users of social networking sites must adhere to those obligations. Accordingly, users should not include client-specific information in a posting unless they obtain advance written approval from the client. If a hypothetical based on a client situation is presented, it should not include information that would allow the client or any third party to identify the client or the matter involved. If there is any possibility that a client or a third party might recognize a client in a hypothetical, the user must obtain advance written approval from the firm's General Counsel and the client to use the hypothetical. In addition, users must avoid (a) communicating with another individual about a matter in which they know the individual is, or likely to be, represented by another lawyer; and (b) seeking or obtaining an opponent's privileged information.

Disclaimer Statement. Whenever the content or circumstances of a posting raises potential confusion whether a user is acting on the firm's behalf, postings should include the following disclaimer: "The statements and views expressed in this posting are my own and do not reflect those of my law firm."

Violations of This Policy. All firm personnel, including partners, associates, counsel, summer associates, paralegals, and staff are subject to disciplinary action up to and including termination of employment for violation of this policy.

CONSTANTINE T. FOURNARIS

Constantine (Dean) Fournaris is a partner in Wiggin and Dana LLP's Philadelphia office. Mr. Fournaris is a franchise and distribution lawyer who has represented public and private franchisors, licensors, manufacturers, pharmaceutical companies, distributors and developers in matters across the country.

As co-chair of the firm's Franchise and Distribution Practice Group, Mr. Fournaris focuses his practice on developing, structuring and maintaining franchise and distribution networks, transactions and contracts involving franchise and distribution systems, franchise registration and disclosure, manufacturing and operating systems and standards, and other related regulatory and transactional matters. In his practice, Mr. Fournaris regularly advises franchise and distribution system clients in connection with all aspects of their franchisee-distributor, customer, supplier and competitor relationships. Mr. Fournaris has also prosecuted and defended cases, including injunction actions, before state and federal courts and arbitration panels on behalf of franchisors, manufacturers and distributors.

A sought-after speaker, Mr. Fournaris often lectures about franchise and distribution matters and has authored numerous articles on these subjects in industry and legal publications. He has been listed in *The Best Lawyers in America* for franchise law since 2007. Mr. Fournaris was also featured by *Franchise Times Magazine* in an article entitled "Legal Hotshots Under 40" in July 2001. He is ranked by *Chambers USA* as one of the leading franchise lawyers in the United States.

Mr. Fournaris is a member of the American Bar Association's Forum on Franchising and serves currently on its Publications Committee. He is a founding member of the Franchise Law Committee of the Philadelphia Bar Association and served as its Chair from 2003-2007. In addition, Mr. Fournaris is a member of the Pennsylvania Bar Association's Franchise Law Committee of the Corporation, Banking and Business Law Section and the New Jersey Bar Association's Franchise Law Committee.

Mr. Fournaris graduated from Franklin & Marshall College with a Bachelor of Arts degree and earned his Juris Doctorate from Cornell Law School.

KAT TIDD

Kat Tidd founded her own firm in Dallas, Texas in 1994 (Law Offices – Kat Tidd, P.C.). She has worked in and with the franchise industry for more than thirty (30) years. For twelve (12) of those years, Kat served as vice president and general counsel. She has negotiated and structured franchise and license arrangements at the U.S. and international levels, as well as working with both start-ups and mature franchise systems.

Kat's practice is focused on franchise and licensing matters in which she advises small and medium sized businesses, franchisors and franchisees, dealers, and entrepreneurs on franchise and business opportunity matters. She is also engaged by other attorneys to serve as an expert witness and consultant on franchise matters.

Kat has been an active member of the American Bar Association's Forum on Franchising since its inception in 1981. She has previously presented at the annual conference, and been published in both the *Franchise Law Journal* and *The Franchise Lawyer*. Kat has also served on the Forum Nominating Committee, participated in the Women's Caucus, led the Solo and Small Firm Task Force, and organized the annual golf tournament for three of the Forums.

Kat is also active in her home state of Texas, participating in various capacities on state and local bar association committees. She is a past chair of the Franchise & Distribution Law Section of the Dallas Bar Association, and past co-chair of the International Business Committee of the North Dallas Chamber of Commerce. Licensed in Texas and Oregon, she obtained her B.A. with distinction from the Honors College, University of Oregon and her J.D. from University of Oregon Law School. Kat and her husband are also co-founders of the non-profit corporation, Screen Door Open Charity Golf, Inc. with the mission of raising funds for junior golf programs to make the integrity and principles of the game available to more young people.