

Proceed with Caution: The Ethical Issues
Lawyers and Judges Face When Using Social
Media

Julie C. Jackson-Bailey
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Professor Nathan M. Crystal

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I. INTRODUCTION

While social media is not exactly “new” anymore,¹ the use of social media by attorneys has rapidly increased over the last few years.² With the increasing number of attorneys and judges being active on social media sites,³ it may seem as though the ABA Model Rules of Professional Conduct need to be revised to reflect all these changes in technology. How can we ask attorneys to effectively navigate this new world of social networking without providing guidelines to follow? The answer to that question may, at first, seem like it should be – “we can’t.” However, there are those that rightly believe the Model Rules are, for the most part, sufficient.⁴

Even though social media is being widely used by their colleagues, attorneys should proceed with caution. Within the realm of the social media world, there is a balance that must be struck between taking advantage of social media tools and adhering to the ethical and professional standards required of lawyers. As long as attorneys thoroughly educate themselves on the ethical rules of their state, they should be able to effectively follow the rules and participate in this valuable networking tool. The ABA Model Rules of Professional Conduct provide substantial guidance on how attorneys should conduct themselves both online and offline. When using social media sites, attorneys should realize that these rules do not change and apply in the same way.

¹ See Samantha Murphy, *Facebook to Celebrate 8th Birthday on Heels of IPO Announcement*, MASHABLE, (Jan. 31, 2012), <http://mashable.com/2012/01/31/facebook-anniversary>. (stating that one such social media site, Facebook, has been in existence for eight years.)

² Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous*, A.B.A.J., (Feb. 1, 2011, 4:20 AM), http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous.

³ *Id.*

⁴ JOHN G. BROWNING, *THE LAWYER'S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA'S IMPACT ON THE LAW*, 154 (2010). (proposing that the “existing ethical standards are [...] perfectly fine for governing the online ethical lapses by attorneys.”)

This paper will define social media and review some of the more prominent social media sites. It will then discuss some of the issues attorneys experience when using social media sites, and review the rules that apply using opinions and incidents from a variety of states. Finally, it will discuss some of the recently proposed changes to the ABA Rules of Professional Conduct.

II. SOCIAL MEDIA DEFINED

Social media is defined as “any tool or service that uses the Internet to facilitate conversations.”⁵ Social media sites provide web-based forums for members to connect, communicate, and interact with other users through audio, words, pictures, or video.⁶ More simply, it is a place where family, friends, colleagues, and strangers can communicate and connect with each other.⁷ There are a number of social media sites online today including Facebook, Twitter, LinkedIn and blogs.⁸ Since these sites will be discussed in this paper, it is necessary to give a bit of background and general information on them first.

Facebook is by far the largest of the social networking sites out today.⁹ It is predicted that sometime in August 2012, Facebook will have reached one billion users.¹⁰ That makes up approximately fourteen percent of the world’s population.¹¹ What started as a limited program for Harvard University students has grown into a worldwide program.¹² Facebook’s mission is

⁵ Catherine Sanders Reach, *A Guided Tour of Social Media*, Am. Bar Ass’n Legal Tech. Res. Ctr., 2 (2010), http://apps.americanbar.org/legalservices/lpl/downloads/a_guided_tour_of_social_media.pdf.

⁶ Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It*, 41 U. MEM. L. REV. 355, 358 (2010).

⁷ David C. Hricik, *Communication and the Internet: Facebook, E-mail and Beyond*, 11 (Jan. 1, 2010). Available at SSRN: <http://ssrn.com/abstract=1557033> or <http://dx.doi.org/10.2139/ssrn.1557033>.

⁸ See List of Social Networking Sites, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_social_networking_websites (last visited Apr. 12, 2012).

⁹ Ramona Emerson, *Facebook Users Expected to Pass 1 Billion in August: iCrossing*, HUFFINGTON POST, (Jan. 14, 2012, 10:52 AM) http://www.huffingtonpost.com/2012/01/13/facebook-users-1-billion-icrossing_n_1204948.html.

¹⁰ *Id.*

¹¹ Shea Bennett, *Twitter On Track For 500 Million Total Users By March, 250 Million Active Users By End Of 2012*, ALL TWITTER, (Jan. 13, 2012, 6:00 AM) http://www.mediabistro.com/alltwitter/twitter-active-total-users_b17655.

¹² Murphy, *supra* note 1.

“to give people the power to share and make the world more open and connected” and it allows people to interact with friends, upload photos, post comments, and share videos and links.¹³

Another widely used social networking site is Twitter. Twitter is one of the more popular of the “microblog” sites.¹⁴ It is projected to have 250 million active users by the end of 2012.¹⁵ As a “microblog” site, Twitter allows users to post short messages, which are limited to 140 characters.¹⁶ These messages are generally public, however, the user can adjust his settings to limit the audience.¹⁷ The strict limit on the number of characters allowed alone can pose ethical problems for attorneys.¹⁸

LinkedIn is a website oriented toward professionals, like attorneys.¹⁹ It boasts the largest professional network with more than 150 million members.²⁰ LinkedIn attracts people from all industries and acts as a tool through which professionals can connect with one another.²¹ This is important for those times when a person needs a job or needs to find a contact within another company.²² Through its “connections” feature, LinkedIn allows its users to find a person and find out if they have any sort of connection with that person.²³ This site focuses on being more

¹³ About-Mission, FACEBOOK, <https://www.facebook.com/facebook/info> (last visited Apr. 16, 2012).

¹⁴ Hope A. Comisky & William M. Taylor, *Don't Be A Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas—Discovery, Communications with Judges and Jurors, and Marketing*, 20 TEMP. POL. & CIV. RTS. L. REV. 297, 300 (2011) (large number of users compared to other microblog sites such as Tumblr and Plurk).

¹⁵ Bennett, *supra* note 11. (Active users being defined as those users who log in at least once a month. Total users are estimated to be 500 million at the end of March 2012.)

¹⁶ Comisky & Taylor, *supra* note 14, at 300.

¹⁷ *Id.*

¹⁸ Nathan M. Crystal, *Ethical Issues in Using Social Networking Sites*, S.C. LAW., Nov. 2009, at 9. (being unable to send a disclaimer out with a tweet because of the limitation on characters could violate advertising rules).

¹⁹ Comisky & Taylor, *supra* note 14, at 298.

²⁰ About Us-LinkedIn Facts, LINKEDIN, <http://press.linkedin.com/about> (Last visited Apr. 16, 2012).

²¹ JAN VERMEIREN, HOW TO REALLY USE LINKEDIN 27 (2009).

²² *Id.*

²³ *Id.* at 28.

of a business network than social network.²⁴ However, just because it is a business network, does not mean an attorney is not in danger of committing ethical violations while using it.

A slightly different form of social media are blogs, which are basically online journals where attorneys are increasingly publishing blogs dedicated solely to legal topics.²⁵ Blogs, also known as “blawgs,” provide lawyers with the ability to communicate directly with the public and are simple, easy-to-use sites.²⁶ Unlike legal journals, there are no standard methods of peer review for legal blogs and are at greater risk of containing errors.²⁷ Like any other site, a blog can implicate ethical issues and can place an attorney in a bad position if the attorney does not put ample time and effort into the blog and is not fully aware of the ethical rules that govern.²⁸

One of the distinct advantages to using these social media sites, as opposed to some other media forms, is these sites give any person the ability to produce content, which lowers the costs communicating with the public.²⁹ Many social media sites allow people to create a functional, professional site for a free or low cost.³⁰ The ability to advertise free of charge is an invaluable tool and statistics show attorneys and firms are taking advantage. In 2010, 56 percent of attorneys in private practice had a presence on one of the many forms of social media.³¹ This is a drastic increase from only 15 percent in the 2008 survey and 43 percent in 2009.³²

III. SOCIAL MEDIA AND LAWYERS

The old adage “think before you speak,” also holds true for messages disseminated across social media sites. It is even more important when it comes to social media sites since what a

²⁴ *Id.* at 27.

²⁵ Comisky & Taylor, *supra* note 14, at 299.

²⁶ Adrienne E. Carter, *Blogger Beware: Ethical Considerations for Legal Blogs*, 14 RICH. J.L. & TECH. 5, 5 (2007).

²⁷ *Id.* at 7.

²⁸ *See id.*

²⁹ Reach, *supra* note 5.

³⁰ CAROLYN ELEFANT & NICOLE BLACK, SOCIAL MEDIA FOR LAWYERS: THE NEXT FRONTIER, 5 (Law Practice Mgmt. Section, ABA, ed., 2010).

³¹ Seidenberg, *supra* note 2.

³² *Id.*

person posts online may never disappear.³³ As one judicial committee stated, “[w]hile social networking sites may have an aura of private, one-on-one conversation, they are much more public than offline conversations, and *statements once made in that medium may never go away.*”³⁴ There are a number of stories about attorneys blogging about cases, posting derogatory comments about a judge, and expressing their thoughts on the Internet in a way, which is unbecoming of a lawyer.³⁵ As seen in the following sections, any of these actions can potentially lead to violations of the Rules of Professional Conduct.

A. Attorney Comments about the Judiciary

One attorney found out the hard way that the things you post on the Internet can come back to haunt you.³⁶ In 2006, Sean W. Conway, a Florida attorney, posted a number of times on JAABlog, a blog where attorneys discussed issues concerning the county court.³⁷ In his posts, Conway made allegations that the a judge was trying “to make defendants waive their right to a speedy trial.”³⁸ He went even further to allege the judge was an “evil, unfair witch,” “seemingly mentally ill,” and “unfit for her position.”³⁹ The Florida Bar found that Conway had violated five ethics rules, including making statements that were false or with disregard to the truth regarding the qualifications or integrity of a judge.⁴⁰ After his argument that his actions were

³³ MICHELLE GOLDEN, SOCIAL MEDIA STRATEGIES FOR PROFESSIONALS & THEIR FIRMS: THE GUIDE TO ESTABLISHING CREDIBILITY AND ACCELERATING RELATIONSHIPS, 295 (2010).

³⁴ Ky. Judicial Ethics Comm., Formal Op. JE-119, (2010). (*emphasis added*).

³⁵ BROWNING, *supra* note 4, 149.

³⁶ Seidenberg, *supra* note 2.

³⁷ *Id.*

³⁸ *Id.* (internal quotations omitted)

³⁹ *Id.* (internal quotations omitted)

⁴⁰ Complaint at 6, 8-14, Fla. Bar v. Sean William Conway, Fla. Sup. Ct. (2008) (2007-51,308(17B)), <http://www.floridabar.org/DIVADM/ME/MPDisAct.nsf/DisActFS?OpenFrameSet&Frame=DisActToC&Src=%2FDIVADM%2FME%2FMPDisAct.nsf%2FdaToC!OpenForm%26AutoFramed%26MFL%3DSean%2520William%2520Conway%26ICN%3D200751308%26DAD%3DPublic%2520Reprimand> (click on Formal Complaint). (found to be in violation of Rule 3-4.2, 3-4.3 (committing an act which is unlawful or contrary to honesty and justice), 4-8.2(a) (making false or reckless statements about the qualifications or integrity of a judge), 4-8.4(a) (lawyer shall not violate of the Rules of Professional Conduct), and 4.8.4(d) (lawyer shall not conduct himself in a way which is prejudicial to the administration of justice)).

protected by the First Amendment failed, Conway submitted to a public reprimand for his actions.⁴¹

B. Diligence

In addition to being cautious about posting comments about judges and fellow lawyers, attorneys should also be cautious about posting comments about their own activities outside of work. In 2009, a Texas judge granted a weeklong continuance based on an attorney's request because the attorney had a funeral to attend.⁴² However, the judge was able to see the attorney's postings online, which included pictures of her drinking, riding motorcycles, and other activities during that week.⁴³ After the attorney returned, the judge denied a request by another attorney from that same office for another continuance and chided the lawyer "on her rather unconventional 'mourning period.'"⁴⁴ Here, the attorney could have arguably violated Rule 1.3 on diligence.⁴⁵ Every lawyer has a duty to "act with reasonable diligence and promptness in representing a client."⁴⁶ The comments to that rule also point out that the passing of time can adversely affect a client's interest in a case.⁴⁷ The attorney's actions request for a continuance (if it was not needed or appropriate) could have caused problems for the client's case, or, if nothing else, could have diminished the attorney's credibility in front of the judge.⁴⁸

C. Client Confidentiality

Under the Model Rules of Professional Conduct 1.6, a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent" or

⁴¹ Seidenberg, *supra* note 2.

⁴² BROWNING, *supra* note 4, 152.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Angela O'Brien, Comment, *Are Attorneys and Judges One Tweet, Blog or Friend Request Away From Facing a Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511, 516 (Spring, 2010).

⁴⁶ MODEL RULES OF PROF'L CONDUCT R. 1.3 (2006).

⁴⁷ MODEL RULES OF PROF'L CONDUCT R. 1.3, cmt. 3 (2006).

⁴⁸ O'Brien, *supra* note 45, at 517.

an exception applies.⁴⁹ In states that have adopted the ABA Model Rule on confidentiality of information essentially verbatim, just the client's identity is considered confidential, and revealing that information is a violation of this rule.⁵⁰ A simple post or a tweet about where the attorney is or what the attorney is doing could potentially violate this rule.⁵¹

While it seems obvious that an attorney should not post confidential information on a blog or social media site, there are times when attorneys may advertently or inadvertently do so. A sixty-day suspension was the punishment for an assistant public defender who revealed too much information on her blog.⁵² Kristine Ann Peshek maintained a blog where she discussed confidential client information.⁵³ In an effort to hide the client's identities, she used jail identification numbers and only first names, but it was still possible to identify the clients.⁵⁴ She used her blog to vent about the actions of her clients, including one client who tested positive for cocaine and another who was taking the fall for an older brother.⁵⁵ After her "blogging" was discovered, she promptly lost her job in addition to her sixty-day suspension.⁵⁶

When it comes to posting online about cases, an attorney can attempt to avoid violation of Rule 1.6 by keeping the information vague, or even limit the messages to public information.⁵⁷ Attorneys can also attempt to obtain consent from their clients to post; however, it is nearly impossible for a client to give informed consent at the beginning of representation.⁵⁸ It is possible to learn new information throughout representation, which means advanced consent

⁴⁹ MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

⁵⁰ James M. McCauley, *Blogging and Social Networking for Lawyers: Ethical Pitfalls*, VA. LAW., Feb. 2010, at 24.

⁵¹ *Id.*

⁵² BROWNING, *supra* note 4, 151.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (In addition, Peshek also made comments on her blog about judges, calling one "a total asshole" and one "Judge Clueless.")

⁵⁶ *Id.*

⁵⁷ Crystal, *supra* note 18, 8.

⁵⁸ McCauley, *supra* note 50.

may not equate to informed consent.⁵⁹ If a client is not happy with newly learned information being broadcast, then the attorney could be found to have violated confidentiality because the client had not given informed consent.⁶⁰

D. Marketing and Advertising

Arguably, one of the greatest benefits of social networking for professionals come from the ability to market and advertise on the Internet at little to no cost.⁶¹ In addition, social media can provide the means for “building up a network of contacts and promoting one’s practice to the public.”⁶² The fact that attorneys can advertise at a reasonable cost makes social media all that more appealing, however, attorneys must remember that all attorney advertisements must follow their state’s version of the ABA Model Rules on advertising.

i. In General

The Model Rules of Professional Conduct require attorneys follow strict rules in regards to marketing and advertising. Recently, the South Carolina Supreme Court issued a public reprimand for an attorney whose information contained on his websites violated a number of ethics rules.⁶³ The attorney admitted to violation of South Carolina Rules of Professional Conduct Rule 7.1(a), which says:

[a] lawyer shall not make false, misleading, or deceptive communications about the lawyer or the lawyer's services; a communication violates this rule 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.⁶⁴

In this case, the website contained material misrepresentations of fact which exaggerated the attorney’s experience, including stating that he had handled legal matters in federal court and

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ ELEFANT & BLACK, *supra* note 30, at 5.

⁶² BROWNING, *supra* note 4, at 161.

⁶³ In the Matter of Dannitte Mays Dickey, 722 S.E.2d 522, 522 (S.C. 2012).

⁶⁴ *Id.* at 523.

that he had graduated from law school in 2005, when in actuality he graduated in 2008.⁶⁵ He further made statements that violated Rule 7.1(b) (violation occurs when the communication is likely to create unjustified expectations of the results an attorney can achieve) and Rule 7.1(c) (lawyer shall not make false statements about himself or his service).⁶⁶

ii. Specialties

Some social media sites, like LinkedIn, allow attorneys to designate their practice areas and their specialties.⁶⁷ Under Rule 7.4(d) of the ABA Model Rules of Professional Conduct, a lawyer is not permitted to say he is “certified as a specialist” in a particular area of law, unless the attorney has been certified by an approved organization.⁶⁸ For states that require the attorney be certified as a specialist through the state’s specialized certification program in order to hold himself out as a specialist, the use of a site, such as LinkedIn, creates a unique problem.⁶⁹

In South Carolina, for example, a lawyer is not allowed to hold himself out to be a specialist unless he has gone through a certification program approved by the Supreme Court of South Carolina.⁷⁰ If an attorney wishes to relay the message that he accepts cases in certain fields and has experience in those fields, he may do so if the statements are factual and do not contain the words “certified,” “specialist,” “expert,” or “authority.”⁷¹ In the case mentioned in the previous section, the attorney was also found to have used a form of the word “specialist” on his website and in violation of Rule 7.4.⁷² On the other hand, some states, such as Virginia, do

⁶⁵ *Id.* at 522.

⁶⁶ *Id.* at 523.

⁶⁷ Correy Stephenson, *Social Media Creates Ethical Pitfalls for Attorneys*, NEW ORLEANS CITY BUSINESS, (July 28, 2010, 7:34 AM) <http://neworleanscitybusiness.com/blog/2010/07/28/social-media-creates-ethical-pitfalls-for-attorneys>.

⁶⁸ MODEL RULES OF PROF’L CONDUCT R. 7.4(d) cmt. 3 (2006).

⁶⁹ McCauley, *supra* note 50, at 26.

⁷⁰ S.C. RULES OF PROF’L CONDUCT R. 7.4 (2011).

⁷¹ *Id.*

⁷² *In re Dickey*, 722 S.E.2d 522, 523.

not have state specialization certification programs.⁷³ Virginia, for example, does not prohibit an attorney from holding himself out to be an expert so long as his claim can be verified, and requires the communication to contain a disclaimer, which indicates that the State of Virginia has no procedures for approving or certifying specializations.⁷⁴

While it may seem unlikely a potential client may assume an attorney is specialized based solely off of a LinkedIn profile, some practice management experts disagree.⁷⁵ One expert advises lawyers to include on their profile a statement explaining that the areas listed are only areas of focus and “are not intended to suggest specialization, which the bar does not allow.”⁷⁶ While this may seem overly cautious to some,⁷⁷ it is wise for attorneys to take precautions in social media settings. If a simple statement on a profile helps insulate an attorney from possibly violating rules of professional conduct, then the attorney would be wise to take a few seconds to make that addition to the profile.

iii. Testimonials and Endorsements.

One especially difficult area to manage for attorneys comes in the form of testimonials and endorsements. The main difference between a testimonial and an endorsement is that “a testimonial is a statement by a client or former client about an experience with the lawyer, whereas an endorsement is a more general recommendation or statement of approval of the lawyer.”⁷⁸ Social media sites, such as LinkedIn and Avvo, allow both lawyers and clients to leave recommendations and endorsements.⁷⁹ Since attorneys cannot control what other people

⁷³ McCauley, *supra* note 50, at 26.

⁷⁴ *Id.*

⁷⁵ ELEFANT & BLACK, *supra* note 30, at 178.

⁷⁶ *Id.* at 178; *see also*, Crystal, *supra* note 18, at 9. (“A lawyer could list that the lawyer practices in certain areas, but should include a disclaimer stating that the lawyer is not certified as a specialist by the S.C. Supreme Court.”)

⁷⁷ ELEFANT & BLACK, *supra* note 30, at 178. (One author does not agree that a disclaimer in the profile is necessary.)

⁷⁸ S.C. Bar Ethics Advisory Comm., Op. 09-10 (2009).

⁷⁹ ELEFANT & BLACK, *supra* note 30, at 176.

put on these sites, the issue becomes whether or not those testimonials must follow the ethical rules on advertising.⁸⁰ In addition, there is disagreement about whether, once an attorney “claims” their profile on a site like Avvo, have they essentially ratified later comments or become a “kind of de facto sponsor”.⁸¹

In some states, the use of testimonials can in some circumstances be a violation of the state’s rules of professional conduct.⁸² In South Carolina, the rules have recently been changed from completely prohibiting testimonials to more reasonable restrictions.⁸³ Under the amended rules in South Carolina, client testimonials are allowed in certain situations, but they require the attorney to clearly state that the communication is a testimonial or endorsement; whether there was payment made in exchange for the testimonial; if the person providing the endorsement was not a client, it must be disclosed; and a blanket statement notifying future clients that the results achieved for one client do not necessarily reflect the results that can be obtained for them.⁸⁴

If a state allows the use of testimonials, the next question becomes whether the attorney is responsible for the content of the testimonials. In a 2009 Ethics Opinion, the South Carolina Bar Ethics Advisory Committee emphasized that “[l]awyers are responsible for all communications they place or disseminate, or ask to be placed or disseminated for them, regarding their law practice, and all such communications are governed by Rule 7.1 of the Rules of Professional Conduct.”⁸⁵ However, the committee found that an attorney is not responsible for information

⁸⁰ Stephanie Francis Ward (Host), *Can My Client Say That? Guests Discuss Lawyer Ethics and Testimonials on Ratings Sites*, A.B.A.J. (Apr. 4, 2011), http://www.abajournal.com/news/article/podcast_monthly_episode_13.

⁸¹ *Id.*

⁸² McCauley, *supra* note 50, at 26.

⁸³ See Amendments to the S.C. Rules of Prof'l Conduct, Rule 407 of the S.C. Appellate Court Rules, Order Aug. 22, 2011 (last visited Apr. 12, 2012) available at <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2011-08-22-01>.

⁸⁴ *Id.* Amended Rule 7.1(a-d)

⁸⁵ S.C. Bar Ethics Advisory Comm., *supra* note 78.

disseminated by the website and not the lawyer.⁸⁶ At the same time, the committee determined that once the site has been claimed, the attorney has effectively taken responsibility for its content and must ensure the site conforms with all ethical rules.⁸⁷ Additionally, the committee cautioned attorneys that if a client testimonial or endorsement contained such words as “the best” or contained information as to the results obtained, those comments may violate Rule 8.4 on misleading statements, since such statements cannot be substantiated.⁸⁸

E. Attorney-Client Relationships

Another area in which attorneys need to be cautious is the area of inadvertently forming attorney-client relationships through social media sites. Section 14 of the Restatement (3rd) of the Law Governing Lawyers provides that a relationship between a lawyer and a client “arises when a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person” and the lawyer either consents to do so or fails to express his lack of consent to do so.⁸⁹ The ABA and the courts have addressed this issue of the formation of attorney-client relationships on the Internet.

In Barton v. United States District Court, the issue addressed was whether or not the questionnaire posted online by the law firm fell under attorney-client privilege.⁹⁰ The court examined the fact that prior to the questionnaire being sent to the firm, a box must be checked that stated no attorney-client relationship was being formed.⁹¹ Even with this disclaimer, the court found the determinative factor was not what the law firm intended by the questionnaire, but what the potential clients thought was meant by the questionnaire.⁹² The court explained that an

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ RST. (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

⁹⁰ *Barton v. U.S. Dist. Ct.*, 410 F.3d 1104, 1107 (9th Cir. 2005).

⁹¹ *Id.*

⁹² *Id.*

attorney-client relationship could arise when a person consults a lawyer with the intention of retaining the lawyer, not just when the attorney takes the person on as a client.⁹³ While the questionnaire was part of a website instead of social media site, this decision is instructive on when an attorney-client relationship and the duty of confidentiality may arise in online situations.⁹⁴

In its opinion on the formation of an attorney-client relationship, the ABA focused on whether a “discussion” had commenced.⁹⁵ Websites that encourage submission or inquiry “about a proposed representation on a conveniently-provided website electronic form which, when responded to, begins a ‘discussion’ about a proposed representation” can implicate Rule 1.18.⁹⁶ If no cautionary language is provided, these forms may encourage a person to submit confidential information over the electronic form.⁹⁷ On the other hand, a website that contains only general information about contacting a law firm, such as phone number or email address, “alone does not create a reasonable expectation that the lawyer is willing to discuss a specific client-lawyer relationship.”⁹⁸ A disclaimer or warning is an effective way for an attorney to prevent the inadvertent formation of an attorney-client relationship if it is written in a way which is “reasonably understandable” to the website visitor.⁹⁹

On social media networks, what attorneys are more likely to run into are situations where friends are asking for legal advice. One attorney ran into that exact issue when a friend asked

⁹³ *Id.* at 1111.

⁹⁴ Kelcey Nichols, *Client Confidentiality, Professional Privilege & Online Communication: Potential Implications of the Barton Decision*, 3 SHIDLER J. L. COM. & TECH. 10, 22 (Winter, 2007).

⁹⁵ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010).

⁹⁶ *Id.*

⁹⁷ *Id.*; see generally MODEL RULES OF PROF'L CONDUCT R. 1.18 (duties to prospective clients).

⁹⁸ ABA Comm., *supra* note 95.

⁹⁹ *Id.*

questions about labor law.¹⁰⁰ After giving a detailed description of her situation, the friend wanted to know if she was correct in her interpretation of the law and whether her employer owed her for unpaid wages.¹⁰¹ Since the attorney did not know anything about labor law, he recognized it was not wise for him to advise her.¹⁰² Advising his friend could have formed an attorney-client relationship because by answering, she could have taken that to be “a representation of her interests.”¹⁰³ By referring her to other legal counsel, he was able to ensure he did not run afoul of any ethical rules by accidentally forming an attorney-client relationship.¹⁰⁴

Lawyers using social media sites to provide general information about a particular subject or issue are not giving out “legal advice,” and therefore, an attorney-client relationship should not arise.¹⁰⁵ In order to properly protect oneself, a lawyer should use a disclaimer on any social media site stating that no attorney-client relationship is formed without express consent of both parties.¹⁰⁶ However, if a lawyer, through exchanges, obtains information about a person’s particular legal issue and gives advice to that person, then there is a risk that an attorney-client relationship has been formed.¹⁰⁷

¹⁰⁰ Jack Zemlicka, *Lawyers Reticent To Share Opinions, Advice on Facebook*, WISCONSIN LAW JOURNAL, (Apr. 29, 2011, 2:03 PM) <http://wislawjournal.com/2011/04/29/lawyers-reticent-to-share-opinions-advice-on-facebook>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ McCauley, *supra* note 50, at 26.

¹⁰⁶ Ross L. Kodner, *Social Media Isn’t a Fad: Facebook, Twitter, Google+, LinkedIn and YouTube and How to Use Them Responsibly and Ethically in Your New Practice*, 13 (March 14, 2012) <http://www.microlaw.com/cle/CSOL/Kodner%20-%20Charleston%20School%20of%20Law%20Lawyering%20Series%20-%20Social%20Media%20in%20Your%20Practice%203-14-2012.pdf>.

¹⁰⁷ McCauley, *supra* note 50, at 26.

F. Solicitation

Rule 7.3 deals with the direct contact with prospective clients.¹⁰⁸ It provides that “[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain,” unless the prospective client is a lawyer, a family member, or has a close personal or professional relationship with the lawyer.¹⁰⁹ The issue, when applied to social networking, becomes whether or not social media communications are “real-time electronic” communications constituting solicitation, and therefore, fall under Rule 7.3.¹¹⁰

There has been some confusion and uncertainty as to whether new social media sites fall within Rule 7.3.¹¹¹ Blogs that are non-interactive are likely not considered solicitations, but rather just considered advertisements.¹¹² On the other hand, some social or networking pages allow real-time communications and allow attorneys to dictate the viewers, and these may be considered solicitations depending on what things are “said” and how the communication occurs.¹¹³ Based on this, lawyers should be cautious about whether their actions online could be interpreted as a solicitation.

IV. SOCIAL MEDIA AND JUDGES

Lawyers are not the only ones faced with ethical issues when using social media. A 2010 survey showed that about forty percent of the judges surveyed use social media and a majority of

¹⁰⁸ MODEL RULES OF PROF'L CONDUCT R. 7.3 (2006).

¹⁰⁹ MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2006).

¹¹⁰ Steve C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 132 (2009).

¹¹¹ ABA Comm. on Ethics 20/20, *Revised Draft Report for Comment Technology and Client Development*, ABA 1 (of Report) (2012) http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_technology_and_client_development_posting.pdf.

¹¹² Bennett, *supra* note 110.

¹¹³ See ABA Comm. on Ethics 20/20, *supra* note 111.

those are using Facebook.¹¹⁴ Like attorneys, judges have to be careful what they say and do on social media sites, however judges have their own set of issues that arise with the use of these sites.

A. Being “friends”

While attorneys do not have restrictions on who they can be “friends” with on social media sites, there are differing views on whether judges can be “friends” with attorneys appearing before them.¹¹⁵ One of the main issues that arises with a judge with being friends on Facebook with other attorneys is whether the judge is violating Rule 2.4(c) of the ABA Model Code of Judicial Conduct, which provides that a judge cannot do things that erode the confidence in the judge’s ability to make independent judicial decisions.¹¹⁶ There are numerous ethics opinions on this issue and states vary as to their opinion on whether a judge violates ethics rules by being friends with an attorney.

A Kentucky ethics opinion issued in January 2010 noted how being a “friend” on Facebook is more a term of art and the term friend is more akin to terms like “fan” or “follower.”¹¹⁷ The Ethics Committee went further to find that being a “friend” on Facebook “does not, in and of itself, indicate the degree or intensity of a judge’s relationship with the person who is the friend.”¹¹⁸ While stressing that social media could be “fraught with peril for

¹¹⁴ Christopher Davey, *et al.*, *New Media and the Courts: The Current Status and a Look at the Future*, 65 (Aug. 26, 2010), available at <http://www.ccpio.org/documents/newmediaproject/New-Media-and-the-Courts-Report.pdf> or http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666332&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666332.

¹¹⁵ BROWNING, *supra* note 4, 170.

¹¹⁶ MODEL RULES OF JUDICIAL CONDUCT R. 2.4 (2007).

¹¹⁷ BROWNING, *supra* note 4, at 171.

¹¹⁸ Ky. Judicial Ethics Comm., *supra* note 34.

judges,”¹¹⁹ they found that judges could participate in social media because elected judges (like those in Kentucky) should not be isolated from their community.¹²⁰

In December 2010, the Ohio Board of Commissioners on Grievances and Discipline issued an opinion on whether a judge may be “friends” on a social networking site with lawyers that appear before him.¹²¹ The Committee found that there was no rule in the Ohio Code of Judicial Conduct that prohibited a judge from being friends with lawyers that appear before the judge and they reasoned that this includes online “friendships”.¹²² While the Committee found that a judge could be “friends” with an attorney appearing before him, it emphasized that a judge should at all times apply the Rules of Judicial Conduct to his actions online.¹²³ The Committee provided guidelines and a good overview to remind judges which rules may apply to these situations and of how they should act at all times, even when online.¹²⁴ The judge must at all times maintain and promote the “*independence, integrity, and impartiality* of the judiciary, and shall avoid *impropriety* and the appearance of *impropriety*.”¹²⁵ Along the same line, Rule 2.4(c) says “[a] judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.”¹²⁶ In addition, a judge should not make comments on any matters that are pending or impending before the judge (ex-parte communications).¹²⁷ Under Judicial Conduct Rule 2.9(c), a judge should not use social networking to research on a matter in front of him.¹²⁸ This includes not looking at social

¹¹⁹ *Id.*

¹²⁰ BROWNING, *supra* note 4, at 171.

¹²¹ Ohio Bd. of Comm. on Grievances & Discipline, Op. 2010-7, 2 (2010).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* (emphasis supplied).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 3.

networking sites of a party or witness.¹²⁹ Likewise, a judge is prohibited from making public comments about a pending matter before the judge that may affect the outcome of the matter.¹³⁰ Finally, if a “friendship” on social networking site impedes a judge’s ability to be unbiased and impartial, then the judge should recuse himself.¹³¹

On the opposite side of the issue, the Florida Judicial Ethics Advisory Committee found that judges can post information on social media sites so long as it does not violate the Code of Judicial Conduct.¹³² This is allowed because it is merely a method of publication – the substance could violate the Code of Judicial Conduct, but merely using a social media site as a means to publish information is not, in and of itself, a violation.¹³³ However, judges may not be friends with attorneys that appear before them because it violates Canon 2B.¹³⁴ Canon 2B states “a judge [shall not] convey or permit others to convey the impression that they are in a special position to influence the judge.”¹³⁵ The Committee found that this could erode public confidence in the judiciary to be impartial.¹³⁶ It may not be that the attorneys are actually favored, but being “friends” on a social networking site could give others the impression that the lawyers are in a special position with the judge.¹³⁷

In 2010, the Florida Committee reaffirmed its decision in the 2009 opinion. They again found that judges should not be friends with attorneys who appear before them.¹³⁸ In addition,

¹²⁹ Ohio Bd. of Comm. on Grievances & Discipline, *supra* note 122, at 3. *See also*, Pub. Reprimand of B. Carlton Terry, Jr., District Court Judge, (Judicial District 22), Before the Judicial Standards Comm. of N.C., Inquiry No. 08-234, 3 (2009) available at www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf (judge researched a party in the case before him and quoted a poem from the party’s site).

¹³⁰ Ohio Bd. of Comm. on Grievances & Discipline, *supra* note 122, at 3.

¹³¹ *Id.*

¹³² Fla. Judicial Ethics Advisory Comm., Op. 2009-20, 2 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2009/2009-20.html>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 3.

¹³⁶ *Id.* at 3.

¹³⁷ *Id.* at 4.

¹³⁸ Fla. Judicial Ethics Advisory Comm., Op. 2010-06, 3 (2010), available at <http://www.jud6.org/LegalCommunity/>

the Committee found that if being “friends” on a social networking site means that there is a violation of Canon 2B, then a disclaimer on the judge’s Facebook page would not be effective in dispelling the impression given by being “friends.”¹³⁹ On the other hand, the minority argued that social networking has a different definition of the term “friend” and is viewed as more of a contact or an acquaintance rather than your typical definition of “friend.”¹⁴⁰ The minority concluded that since a substantial portion of the public uses social networking and would understand what is meant by the term “friend” in respect to social networking, “identifying a lawyer as a ‘friend’ on a judge’s internet social networking site would not create the perception that a lawyer is in a special position to influence the judge.”¹⁴¹

A more recent opinion out of Massachusetts agreed with and cited the Florida opinions.¹⁴² The Committee stated that judges are not prohibited from being part of social networking sites in general so long as their actions on the social networking site conform to the Code.¹⁴³ However, the Committee was clear in their opinion that judges should not be friends with attorneys who may appear before them because it would be a violation of the Code.¹⁴⁴ The Committee recognized a judge’s conduct may be more restricted than the average person due to the judicial code, but that, they reasoned, was just something that had to be accepted by a judge.¹⁴⁵

LegalPractice/opinions/jeacopinions/2010/2010-06.html.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.* at 6.

¹⁴² M.A. Sup. Jud. Ct. Comm. Jud. Eth., *Facebook: Using Social Networking Web Site*, CJE Op. 2011-6, 2011 WL 7110317, 1 (2011).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2.

¹⁴⁵ *Id.* at 3.

B. Ex-parte Communications

Similar to the rule applied to lawyers, judges are prohibited from ex parte communications. Under Rule 2.9(A) of the ABA Model Code of Judicial Conduct, “[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter.”¹⁴⁶ The prohibition of ex parte communications obviously extends to communications over social networking sites,¹⁴⁷ but not all judges may realize or think about it.

In 2009, a North Carolina state district court judge received a public reprimand for his actions in a child custody hearing before him.¹⁴⁸ While presiding the hearing, Judge Terry became “friends” on Facebook with Charles A. Schieck, attorney for the defendant in the proceeding.¹⁴⁹ After some discussion in chambers regarding a possible affair by one of the parties in the case, Schieck made a statement referencing the fact he would have to “prove a negative.”¹⁵⁰ That day, Judge Terry, viewed Schieck’s Facebook profile and responded to a post by Schieck asking, “how do I prove a negative.”¹⁵¹ A day later, Judge Terry and Schieck had an exchange on their Facebook pages regarding that day being the last day of trial.¹⁵² In addition, Judge Terry “conducted independent ex parte online research” about the plaintiff in violation of Canon 3(A)(4).¹⁵³ Even though ex parte independent research and ex parte communications had occurred, Judge Terry continued to preside over the hearing and entered a ruling.¹⁵⁴ After the

¹⁴⁶ MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A) (2007).

¹⁴⁷ *See id.* (rule applies to communications).

¹⁴⁸ Pub. Reprimand of B. Carlton Terry, Jr., District Court Judge, (Judicial District 22), Before the Judicial Standards Comm. of N.C., Inquiry No. 08-234, 3 (2009) available at www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 4.

¹⁵⁴ *Id.* at 3.

hearing was concluded, Judge Terry admitted to the attorneys that he had conducted independent online research during the trial.¹⁵⁵

While this case is probably not how most judges would behave, it is illustrative of how judges can fall into some of the same traps as attorneys. Judges may be best protected by not becoming friends with attorneys that appear before them, thereby eliminating any possibility of ex parte communications via social media avenues.

V. PROPOSED CHANGES

Due to the explosion of social media and changes in technology, the American Bar Association took notice, and in 2009, formed its “Commission on Ethics 20/20.”¹⁵⁶ The ABA gave the Commission on Ethics 20/20 the task of determining whether the “existing ethics rules [were] adequate to address the foibles of social media use by attorneys.”¹⁵⁷ The Commission released a report on February 21, 2012 with its proposed changes to rules dealing with technology and client development. The Commission recognized that lawyers are now using the Internet to both provide the public with information about the law and to gather new clients.¹⁵⁸ The goal of the Commission was to “ensure that lawyers continue to provide this valuable information in a manner that is consistent with their ethical obligations.”¹⁵⁹

In their report, the ABA Commission on Ethics 20/20 suggested an amendment to the Model Rule 1.18, in which prospective clients would include any persons having a “reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship.”¹⁶⁰ The Commission reasoned that this addition to the definition of a prospective client “more accurately

¹⁵⁵ *Id.* 3.

¹⁵⁶ Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking, and Blogging*, 28 *TOURO L. REV.* 149, 154 (2012).

¹⁵⁷ BROWNING, *supra* note 4, at 154.

¹⁵⁸ ABA Comm. on Ethics 20/20, *supra* 111.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

characterizes the applicable standard and is more capable of application to electronic communications.”¹⁶¹ Additionally, the Commission proposes a change from a person who “discusses” to a person who “communicates” with a lawyer.¹⁶² This change would broaden the definition of who can be a prospective client by not limiting it only those who have had an oral discussion with the attorney, which may be implied by the current choice of word.¹⁶³ It goes on to suggest a change in the language in part (b) of Rule 1.18 so as to have the same effect.¹⁶⁴ The Commission also proposed an additional comment to provide factors for determining whether a person has become a prospective client and to give attorneys a better understanding of what may or may not constitute a prospective client to avoid the inadvertent creation of attorney-client relationships.¹⁶⁵

The Commission found that no new restrictions were needed on lawyer advertising under Rule 7.1.¹⁶⁶ It stated that prohibiting “false and misleading communications [was] applicable to online advertising and other forms of electronic communications.”¹⁶⁷ However, it noted that attorneys would benefit from some clarification on Rule 7.3, dealing with solicitation.¹⁶⁸ The Commission proposed a new comment, which defines solicitation as, “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 of legal services.”¹⁶⁹ These changes are meant to ensure

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ ABA Comm. on Ethics 20/20, *supra* note 111.

¹⁶⁴ *Id.* (discussing change in language from “a lawyer who has had discussions with” to “a lawyer who has learned information from.”)

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

attorneys are governed by the rule even when they are not making a formal offer for services, but a reasonable person would understand the intended message was to do so.¹⁷⁰

VI. CONCLUSION

The issue that remains is whether new technology and the increase in social media requires that the Rules of Professional Conduct be updated to reflect these changes to our society. On one hand, not to recognize the rapid changes in technology and communication is acting in denial.¹⁷¹ On the other hand, updating the Rules of Professional Conduct based on new technology would be essentially impossible as technology changes and progresses at such a rapid speed.¹⁷² In its opinion on Facebook and social networking, the Massachusetts Committee stated:

[t]he Code's drafters observed that “it is not practicable to list all prohibited acts” in the Code, thereby enabling the Code to adapt not only to unprecedented advances in technology, but also to unanticipated changes to fundamental notions of communication.¹⁷³

Drawing on that statement, it is impossible to list and spell out every possible violation that could occur online based on our present technology. A few changes to use more encompassing words may be necessary, but overall, the Rules are adequate and properly guide lawyers as they are.

The one thing that attorneys and judges need to remember is the rules have not changed - only the environment has changed. The rules are there, in black and white, the problem is everyone, not just attorneys and judges, seem to be “lulled into this false sense of security and anonymity” by the Internet and social networking sites.¹⁷⁴ Attorneys cannot forget that

¹⁷⁰ *Id.*

¹⁷¹ GOLDEN *supra*, note 33, at 295.

¹⁷² BROWNING, *supra* note 4, at 154.

¹⁷³ M.A. Sup. Jud. Ct. Comm. Jud. Eth., Op., CJE Op. 2011-6, *supra* note 143, at 2.

¹⁷⁴ BROWNING, *supra* note 4, at 154.

statements and actions online are subject to the same rules and regulations as their actions offline. Attorneys need to be vigilant about making sure their online conduct conforms to the ethical rules by continually educating themselves, not only on the ethical rules and any updates to those rules, but on how those rules relate to their online activities.